13 December 2024

ACA New South Wales

Ms Anna Booth
Fair Work Ombudsman
GPO Box 9887
SYDNEY NSW 2000

Dear Ombudsman Booth,

Re: Request assistance with an appropriate awareness campaign and the publication of a template inspector's identity card and authentication process

The Australian Childcare Alliance (ACA) NSW is the peak body for over 1,600 privately-owned predominantly small-to-medium-sized family-owned and operated businesses who provide early childhood education and care services across New South Wales. ACA NSW members employ over 25,000 employees and are committed to providing excellence in early childhood education and care for more than 125,000 children and their families.

Last week, one of our members had a visit from a Fair Work Ombudsman Inspector who apparently explained that he was conducting a random compliance visit in the local area.

Although our member (who runs an early childhood education and care service) invited the Inspector and assisted him with his requests, this was the first time any Fair Work Ombudsman Inspector has ever presented themself, let alone without any prior notice.

Notwithstanding the cooperation that was rendered, our member's concerns were as follows:

(a) not knowing what a Fair Work Ombudsman Inspector was and their powers;
(b) being unaware of their legal rights and obligations for such a visit, especially one that was without any prior notice;
(c) inability to verify or authenticate the Inspector's identity; and
(d) unaware of their post-visit options, obligations and expectations.

We have since familiarised ourselves with Section 702 of the *Fair Work Act 2009,* the Fair Work Ombudsman's factsheet "*Powers of Fair Work Inspectors*" and your *Compliance and Enforcement Policy*.

That said, as you can imagine, given the unexpected nature of that Fair Work Ombudsman Inspector's visit, our member is concerned that that visit can possibly infer that as an employer she may be harbouring workplace irregularities.

Moreover, in light of ever-increasing identity fraud, ACA NSW and that member employer are concerned that without a process to anticipate and verify your Inspectors' identity cards, the confidentiality of employees' information could have been compromised to unauthorised personnel.

Australia's early childhood education and care sector (particularly in New South Wales), has for the last four years been experiencing severe labour shortages. Hence, good employers have been working above and beyond to ensure their employees are properly accommodated while being legally in compliance.

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ACA NSW requests that future unexpected visits conducting random compliance be harmonised with those employers' positive efforts to create, maintain and enhance positive and legally compliant workplaces.

Toward such potentially mutually agreed aims, would you please direct me toward the appropriate person(s) within your organisation whom ACA NSW can work with to address the abovementioned concerns?

Thanking you in anticipation.

Yours sincerely,

Chiang Lim
CEO

encl Section 702 of the Fair Work Act 2009
Copy of the Fair Work Ombudsman's Powers of Fair Work Inspectors factsheet
Copy of the Fair Work Ombudsman's Compliance and Enforcement Policy

Subdivision C—Appointment of Fair Work Inspectors

700 Appointment of Fair Work Inspectors

(1) The Fair Work Ombudsman may, in writing, appoint as a Fair Work Inspector:
  (a) a person who has been appointed, or who is employed, by the Commonwealth; or
  (b) a person who is employed by a State or Territory.

(2) The Fair Work Ombudsman may appoint a person as a Fair Work Inspector only if the Fair Work Ombudsman is satisfied that the person is of good character.

(3) A Fair Work Inspector is appointed for the period specified in the instrument of appointment. The period must not exceed 4 years.

Note: A Fair Work Inspector is eligible for reappointment (see subsection 33(4A) of the *Acts Interpretation Act 1901*).

701 Fair Work Ombudsman is a Fair Work Inspector

The Fair Work Ombudsman is a Fair Work Inspector by force of this section.

702 Identity cards

(1) The Fair Work Ombudsman must issue an identity card to an inspector appointed under section 700.

(2) The Minister must issue an identity card to the Fair Work Ombudsman.

Form of identity card

(3) The identity card must:
  (a) be in the form approved by the Fair Work Ombudsman; and
  (b) contain a recent photograph of the inspector.

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Inspector must carry card

(4) An inspector must carry the identity card at all times when performing functions or exercising powers as an inspector.

Offence

(5) A person commits an offence if:
  (a) the person ceases to be an inspector; and
  (b) the person does not, within 14 days of so ceasing, return the person's identity card to the Fair Work Ombudsman or the Minister (as the case may be).

Penalty: 1 penalty unit.

(6) Subsection (5) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

Defence—card lost or destroyed

(7) Subsection (5) does not apply if the identity card was lost or destroyed.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

Subdivision D—Functions and powers of Fair Work Inspectors—general

703 Conditions and restrictions on functions and powers

(1) The functions, and powers (***compliance powers***), conferred on an inspector are subject to such conditions and restrictions as are specified in his or her instrument of appointment.

(2) To avoid doubt, the power to apply for the issue of an FWO notice under section 712AA and the power to give an FWO notice under section 712AD are not compliance powers.

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Powers of Fair Work Inspectors

Summary

Fair Work Inspectors investigate possible contraventions of workplace laws. They have the power to:

- enter premises
- conduct interviews
- ask for a person's name and address
- require a person to produce records or documents
- issue compliance notices.

You can face significant penalties for intentionally hindering or obstructing a Fair Work Inspector, or for providing false or misleading information.

Who are Fair Work Inspectors?

Fair Work Inspectors are government officials appointed by the Fair Work Ombudsman under the Fair Work Act (FW Act). The FW Act gives Fair Work Inspectors certain powers to perform their role to promote and monitor compliance with relevant Commonwealth workplace laws.

A Fair Work Inspector's role includes:

- investigating suspected contraventions of relevant Commonwealth workplace laws and Fair Work instruments (for example, an award or industrial agreement)
- conducting compliance audits
- investigating workplace complaints
- taking steps to enforce relevant Commonwealth workplace laws and Fair Work instruments through the court system (where necessary)
- conducting targeted education campaigns in industries and regions.

All Fair Work Inspectors are issued with an identity card that they must carry with them at all times when performing functions or exercising their powers. You can ask to see a Fair Work Inspector's identity card to confirm their identity.

What are their powers?

Powers to enter premises

A Fair Work Inspector may enter certain premises for compliance purposes if they reasonably believe either:

- the FW Act, or a Fair Work instrument applies to the workplace, or
- records or documents relevant to compliance are on business premises (including documents on a computer).

Before entering premises, a Fair Work Inspector must show their identity card to the occupier of the premises or their representative. If this isn't possible, the Fair Work Inspector must show their identity card as soon as practicable after entering.

In entering premises, a Fair Work Inspector must not use force but does not need permission from the occupier. However, they must not enter a part of a premises that is used for residential purposes unless they reasonably believe that work is being performed on that part of the premises.

A Fair Work Inspector may enter premises at any time during working hours, or at any other time they believe is necessary for compliance purposes.

Powers while on the premises

A Fair Work Inspector may exercise one or more of the following powers while on the premises:

- inspect any work, process or object
- interview anyone (with their consent)
- require a person to tell them who has or who can access a record or document
- require the person with access to a record or document to hand it over while the inspector is on the premises or within a specific time frame
- inspect and make copies of any record or document kept on the premises (including in hardcopy or accessible from a computer)
- take samples of any goods or substances after informing the owner or other relevant person in charge of the goods or substances.

To assist an investigation, a suitably qualified and experienced person may accompany a Fair Work Inspector onto the premises. For example, assistants may include information technology specialists, forensic accountants, or interpreters. Such assistants can attend the premises with a Fair Work Inspector only if the Fair Work Ombudsman is satisfied that the assistance is necessary and reasonable.

Intentionally hindering or obstructing a Fair Work Inspector

The FW Act prohibits a person from intentionally hindering or obstructing a Fair Work Inspector (or a person assisting a Fair Work Inspector on premises) in the course of performing functions or exercising powers. This includes denying entry to a premise or intentionally withholding documents.

A person will not contravene this obligation if:

- there was a reasonable excuse for the hindrance or obstruction, or
- the inspector is required to show their identity card, and the inspector either:
  - didn't show their identity card, or
  - didn't tell the person they may be contravening the FW Act if they intentionally hinder or obstruct the inspector in performing their functions or exercising their powers.

Powers to ask for a person's name and address

If a Fair Work Inspector reasonably believes that a person has contravened the FW Act, or a Fair Work instrument, and the contravention may attract a monetary penalty, the Fair Work Inspector can require that person to tell them their name and address.

The Fair Work Inspector may also require a person to provide evidence (for example, a driver's licence) that the name and address they provided are correct.

The Fair Work Inspector must show their identity card and tell the person that they may be liable to a civil penalty should they not comply.

The person must comply with the requirement to provide evidence of their name and address unless they have a reasonable excuse (for example, if they are asked to provide evidence and they do not have a form of identification available).

Powers to require a person to produce records or documents

In the course of an investigation, a Fair Work Inspector can issue a written Notice to Produce Records or Documents, requiring a person to provide records or documents at a particular location, within a specified time period of at least 14 days.

It is a contravention of the FW Act if a person fails to comply with a written Notice to Produce Records or Documents and has no reasonable excuse. A person cannot refuse to comply with a Notice to Produce Records or Documents on the grounds that providing the requested records or documents may incriminate them.

Where a person has failed to comply with a written Notice to Produce Records or Documents, the Fair Work Inspector may recommend litigation against the person for civil penalties.

A Fair Work Inspector can keep any records or documents they are provided for any period that is considered necessary. A Fair Work Inspector must make the records or documents available at all reasonable times to the person who produced them (or another person they authorise), or anyone else entitled to their possession, for inspection or to copy.

Providing false or misleading information or documents

The FW Act prohibits a person from knowingly or recklessly providing false or misleading information or documents to a Fair Work Inspector exercising powers or performing functions under a Commonwealth law.

The Fair Work Inspector must take reasonable steps to tell the person that they may be liable to a civil remedy for providing false or misleading information or documents.

Knowingly providing false or misleading information or documents to a Commonwealth official may also be a criminal offence under the Criminal Code Act 1995.

Powers to issue compliance notices

A Fair Work Inspector can issue a compliance notice where they hold a reasonable belief that a person has contravened certain provisions of the FW Act or certain Fair Work instruments (for example, modern awards, enterprise agreements or the national minimum wage order).

A compliance notice will include information about:

- how the person has breached a workplace law
- what the person needs to do to fix the issue (for example, pay an amount to one or more employees and/or give evidence to show the issue has been fixed)
- the time the person has to fix the issue (for example, that payment is made within 28 days)
- how the person can apply to have the notice reviewed by a court
- what happens if a person doesn't comply with the notice.

The Fair Work Ombudsman cannot initiate legal proceedings for breaches set out in the compliance notice if the person complies with it.

Our Compliance notices online course can help employers understand what a compliance notice is and how to respond if they get one. Complete the course at any time at fairwork.gov.au/cncourse.

Potential consequences of not complying with obligations

Civil penalties under the FW Act may be sought by the Fair Work Ombudsman where a person has:

- failed to comply with a compliance notice
- failed to comply with a notice to produce records or documents
- intentionally hindered or obstructed a Fair Work Inspector
- knowingly or recklessly provided false or misleading information or documents to a Fair Work Inspector.

A court can impose penalties for these contraventions of up to:

- $19,800 per breach for an individual
- $99,000 per breach for a company
- $495,000 per breach for certain contraventions by a company with 15 or more employees.

Penalty amounts may change. You can check the current maximum penalty amounts at fairwork.gov.au/litigation.

Employers found to have seriously, deliberately or repeatedly broken the law involving migrant workers may be prohibited from employing additional migrant workers for a period of time, depending on the nature and severity of the breach. For more information, visit the Australian Border Force website at abf.gov.au.

What can their powers be used for?

A Fair Work Inspector may use their powers in order to determine whether the rights and obligations under relevant Commonwealth workplace laws are being complied with.

A Fair Work Inspector may investigate matters such as:

- underpayments of wages and entitlements, including entitlements related to termination of employment
- pay slip, time and wages, and record-keeping obligations
- freedom of association
- right of entry by trade unions
- undue influence or pressure in relation to individual flexibility arrangements, guarantees of annual earnings, and deductions from wages
- contraventions of general protections provisions including adverse action, coercion and misrepresentations in relation to a person's workplace rights
- an employer's obligations under the Paid Parental Leave Scheme for matters referred to the Fair Work Ombudsman by the Department of Human Services
- transfer of business arrangements
- sham contracting arrangements
- unprotected industrial action
- unlawful discrimination.

The Fair Work Ombudsman can ask a court to make orders in relation to contraventions of relevant Commonwealth workplace laws. This can include orders for the imposition of financial penalties, payment of compensation (for example, payment of outstanding monies to employees), injunctions, or that a person or business undertake training or an audit.

For more information, please see the Fair Work Ombudsman's Compliance & Enforcement policy at fairwork.gov.au/compliancepolicy.

Fair Work Inspector functions and powers are provided for by sections 703–717 of the FW Act. Find the current version of the FW Act at fairwork.gov.au/legislation.

CONTACT US

Fair Work online: fairwork.gov.au

Fair Work Infoline: **13 13 94**

Need language help?

Contact the Translating and Interpreting Service (TIS) on **13 14 50**

Help for people who are deaf or have hearing or speech difficulties

You can contact us through the National Relay Service (NRS).

Select your preferred access option and give our phone number: **13 13 94**

The Fair Work Ombudsman is committed to providing you with advice that you can rely on. The information contained in this fact sheet is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or a workplace relations professional.

Last updated: November 2024
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Australian Government

Fair Work OMBUDSMAN

Compliance and Enforcement Policy

Date of publication July 2020

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Purpose

The Fair Work Ombudsman (**FWO**) is an independent statutory agency created by the *Fair Work Act 2009* (Cth) (**FW Act**). The purpose of the Compliance and Enforcement Policy (**Policy**) is to provide simple and clear information about how the FWO performs its statutory compliance and enforcement functions under section 682 of the FW Act. These functions include:

- promoting harmonious, productive and cooperative workplace relations and compliance with the FW Act and fair work instruments[1] including through the provision of education, assistance and advice;
- monitoring compliance with the FW Act and fair work instruments;
- inquiring into and investigating any act or practice that may be contrary to the FW Act, a fair work instrument or a safety net contractual entitlement;[2]
- commencing proceedings in a Court (or in limited circumstances making an application to the Fair Work Commission) to enforce the FW Act, a fair work instrument or a safety net contractual entitlement; and
- referring matters to other relevant authorities where appropriate.

[1] A "fair work instrument" is defined as a modern award, an enterprise agreement, a workplace determination or a Fair Work Commission order: See FW Act s.12.

[2] A "safety net contractual entitlement" is defined as an entitlement under a contract between an employee and an employer that relates to any of the subject matters described in s.61(2) (which deals with the National Employment Standards) or s.139(1) (which deals with modern awards): See FW Act s.12.

Assessment

When the FWO becomes aware of allegations of non-compliance with the FW Act and/or a fair work instrument, we assess each matter to decide how we will respond.

Before any investigation or inquiry is commenced, a case assessment process is undertaken first to determine, amongst other things, whether the FWO has jurisdiction, and whether the use of our investigative powers is in the public interest (which involves an assessment of whether any proposed compliance activity would be an efficient, effective and ethical use of public resources).

As part of this process, the FWO considers its strategic priorities. Further information about Our Priorities can be found here.[3]

Additional public interest factors taken into account as part of the assessment process include:

- whether the matter involves vulnerable workers;
- whether the matter demonstrates a blatant disregard of laws or repeat offending;
- whether the matter is of significant scale or impact on workers or the community;
- whether the employment relationship is ongoing, or how long ago the employment ended;
- whether there is likely to be reliable evidence available to support a finding or view that a contravention has occurred; and
- confidentiality (where the employee does not want us to advise the employer that they have raised allegations of potential non-compliance with the FW Act and/or fair work instruments).

Assistance

In response to requests for assistance involving a workplace dispute, the FWO may provide education, advice and various dispute resolution tools to assist parties resolve instances of potential non-compliance.

Investigation and Inquiries

Where the FWO becomes aware of potential non-compliance with the FW Act, a fair work instrument or a safety net contractual entitlement, a Fair Work Inspector may commence an investigation or an inquiry into the potential non-compliance.

An inquiry may also be commenced where the FWO is seeking to monitor compliance with the FW Act or a fair work instrument. This may occur without the FWO receiving allegations of non-compliance.

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[3] https://www.fairwork.gov.au/about-us/our-purpose/our-priorities

Fair Work Inspectors have access to a number of statutory compliance powers to assist them in their functions.

All investigations and inquiries are impartial. Fair Work Inspectors will seek evidence from parties and other sources and will make decisions based on the available evidence.

Compliance Powers

Fair Work Inspectors are able to use statutory compliance powers for a 'compliance purpose', which includes determining whether a person is complying with the FW Act or a fair work instrument, or, in certain circumstances, whether a safety net contractual entitlement has been contravened.[4]

Where a provision of the *Fair Work Regulations 2009* (Cth) (**FW Regulations**) or another Act confers powers on Fair Work Inspectors, compliance powers can also be used for the purposes of that provision or Act.[5]

Entering Premises

A Fair Work Inspector may enter:

- premises if they reasonably believe that the FW Act or a fair work instrument applies (or applied) to work that is (or was) performed there; or
- business premises if they reasonably believe that records or documents relevant to a compliance purpose are on, or are accessible from, the premises.[6]

Before entering premises, a Fair Work Inspector must show their identity card to the occupier of the premises or their representative. If this isn't possible, the Fair Work Inspector must show their identity card as soon as practicable after entering.[7]

Fair Work Inspectors are not able to enter any area of a workplace that is used for residential purposes unless they reasonably believe that work is being performed in that area.[8]

While on the premises Fair Work Inspectors may:[9]

- inspect any work, process or object;
- conduct interviews;
- require a person to tell them who has, or has access to, a record or document;
- require the person with, or with access to, a record or document to produce the document, either while they are on the premises or by a particular date;

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[4] FW Act s.706(1)(a) & (b) and s.706(2).
[5] FW Act s.706(1)(c) & (d).
[6] FW Act s.708(1).
[7] FW Act s.708(3).
[8] FW Act s.708(2).
[9] FW Act s.709.

- make copies of any document kept on the premises or accessible from a computer on the premises; and
- in certain circumstances, take samples of goods or substances.[10]

In certain circumstances when entering premises, the Fair Work Inspector may be accompanied by a suitably qualified person to assist them in exercising their compliance powers.[11] By way of example, a Fair Work Inspector may be accompanied by an interpreter to assist with translating, or a forensic accountant to assist with copying and interpreting digital records.

Notice to produce records or documents

A Fair Work Inspector may require a person or entity to produce to them any record or document relevant to a compliance purpose by issuing a notice to produce records or documents (**NTP**). An NTP is a formal notice that requires specific documents to be produced to a Fair Work Inspector within a specified timeframe at a specified place.[12] An NTP must on its face, demonstrate that it is issued in accordance with a compliance purpose and must sufficiently identify the nature of the suspected contravention or contraventions.[13]

Unless a person has a reasonable excuse for not complying with the NTP, failure to comply is a contravention of the FW Act, and may result in enforcement action, including litigation. If a person fails to comply with an NTP, a Court may order penalties of up to $18,780 for an individual, $93,900 for a body corporate that is a small business employer (with less than 15 employees)[14] or $469,500 for a body corporate that is not a small business employer (with 15 or more employees).[15]

FWO Notices

The FWO has the power under section 712AA of the FW Act to apply to the Administrative Appeals Tribunal (**AAT**) for a FWO Notice. A FWO Notice may require a person to provide information, produce documents or attend and answer questions.

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[10] See FW Regulations reg. 5.06 for further information regarding a Fair Work Inspector's power to take a sample of a good or substance.
[11] FW Act s.710.
[12] FW Act s.712.
[13] *Construction, Forestry, Maritime, Mining & Energy Union v Fair Work Inspector Lam* [2018] FCA 1379 at [26] and [30] (per Bromberg J).
[14] Section 23 of the FW Act defines a small business employer as employing fewer than 15 employees.
[15] FW Act s.539: a failure to comply with s.712(3) can result in a maximum penalty equal to 60 penalty units and a body corporate may face a pecuniary penalty of up to five times 60 penalty units (FW Act s.546(2)). Pursuant to section 124 of the FW Act, section 712(3) is a selected civil remedy provision. Pursuant to section 546(2AA) of the FW Act, a body corporate that contravenes a selected civil remedy provision and that is not a small business employer when the application is made faces pecuniary penalties of up to five times the 300 penalty units calculated pursuant to section 546(2), totalling 1500 penalty units. A penalty unit is $313 (as at 1 July 2023): *Crimes Act 1914* (Cth) (Crimes Act) s.4AA.

Failure to comply with a FWO Notice may result in a Court ordering penalties of up to $187,800 against an individual.[16]

The FWO will only request that the AAT issue a FWO Notice if we reasonably believe a person:

- can give information relevant to an investigation;
- can produce documents relevant to an investigation;
- is capable of answering questions relevant to an investigation;
- all evidence gathering means have been exhausted or are not appropriate.

If a person receives a FWO Notice, it means we consider that person is capable of assisting and providing material relevant to an investigation.

Further information about FWO Notices can be found here.[17]

Enforcement Outcomes: Compliance Notices and Enforceable Undertakings

The FW Act provides the FWO with simple enforcement mechanisms to deal with possible contraventions of the FW Act quickly and efficiently.

Compliance Notice[18]

Compliance Notices are a non-punitive mechanism for the FWO to address alleged contraventions of the FW Act instead of commencing Court proceedings.[19]

If at any stage while undertaking their functions a Fair Work Inspector forms a reasonable belief that a person or other entity has contravened:

- a provision of the National Employment Standards;
- a term of a modern award;
- a term of an enterprise agreement;
- a term of a workplace determination;
- a term of a national minimum wage order; or
- a term of an equal remuneration order,

then, a Fair Work Inspector can issue the person with a Compliance Notice.

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[16] FW Act s.539: Failure to comply with s.712B(1) can result in a maximum penalty of equal to 600 penalty units. A penalty unit is $313 (as at 1 July 2023): Crimes Act s.4AA.

[17] https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/about-us/fwo-notices

[18] FW Act s.716.

[19] *Hindu Society of Victoria (Australia) Inc v FWO* [2016] FCCA 221 (**Hindu Society**) at [30] (per Judge Riethmuller). See also, *FWO v Darna Pty Ltd & Anor* [2015] FCCA 709 at [11] (per Judge Hartnett).

This may occur in parallel with other matters which are investigated and addressed using other enforcement mechanisms.

A Compliance Notice will require that the person take specified action to remedy the direct effects of the identified contraventions and/or require the person to produce reasonable evidence of compliance.[20] A person who complies with a Compliance Notice is not taken to have admitted the contraventions or to have been found to have committed the contraventions.[21]

Where a person complies with a Compliance Notice the FWO is unable to commence Court proceedings against that person for the particular contraventions that are the subject of the Compliance Notice.[22]

If a person fails to comply with the Compliance Notice and does not have a reasonable excuse,[23] that person has contravened the FW Act and a Court may impose penalties of up to $18,780 for an individual, $93,900 for a body corporate that is a small business employer (with less than 15 employees)[24] or $469,500 for a body corporate that is not a small business employer (with 15 or more employees).[25] It is open to the FWO to commence litigation for non-compliance with a Compliance Notice, as well as for any other contraventions identified, including the underlying contraventions referred to in the Compliance Notice.

A person may apply to the Court to have a Compliance Notice reviewed if they have not committed a contravention set out in the Compliance Notice, or if the Compliance Notice does not comply with the necessary requirements under the FW Act.[26]

<u>Enforceable Undertaking</u>[27]

If at any stage while undertaking their functions, the FWO forms a reasonable belief that a person has contravened the FW Act, the FWO may accept a written undertaking from the person in relation to the contravention. Enforceable Undertakings are a simple mechanism for the FWO to deal with contraventions of the FW Act while "*[t]he benefits to the recipients of the preparedness of the FWO to accept an*

[20] FW Act s.716(2).
[21] FW Act s.716(4B).
[22] FW Act s.716(4A).
[23] FW Act s.716(6).
[24] Section 23 of the FW Act defines a small business employer as employing fewer than 15 employees.
[25] FW Act s.539: a failure to comply with s.716(5) can result in a maximum penalty equal to 60 penalty units and a body corporate may face a pecuniary penalty of up to five times 60 penalty units (FW Act s.546(2)). Pursuant to section 124 of the FW Act, section716(5) is a selected civil remedy provision. Pursuant to section 546(2AA) of the FW Act, a body corporate that contravenes a selected civil remedy provision and that is not a small business employer when the application is made faces pecuniary penalties of up to five times the 300 penalty units calculated pursuant to section 546(2), totalling 1500 penalty units. A penalty unit is $313 (as at 1 July 2023): Crimes Act s.4AA.
[26] FW Act s.717.
[27] FW Act s.715.

undertaking is the avoidance of the considerable costs involved in court proceedings and the avoidance of the payment of a penalty".[28]

Where the FWO has accepted an undertaking from a person the FWO cannot commence proceedings against the person in respect of the particular contraventions the undertaking has been given in relation to.[29]

If a person fails to comply with the undertaking (i.e. the steps agreed to in the Enforceable Undertaking), the FWO may commence proceedings in Court to seek orders directing the person to comply, for compensation, or any other appropriate order.[30]

The FWO will generally only accept Enforceable Undertakings in limited circumstances. These may include matters involving self-disclosure and where a person has demonstrated a willingness to rectify underpayments, address any other impact of their contraventions and fully cooperate with the FWO.

In some matters, the FWO may determine it will only accept an Enforceable Undertaking where an appropriate contrition payment is offered. Decisions about the amount of such payments are made on a case-by-case basis. FWO considers a number of factors, including:

- the nature and extent of the contraventions;
- rectification of underpayments and other remedial steps taken; and
- proportionality to any penalties that a court may impose if the matter were litigated.

Enforcement Outcomes: Outcomes of Investigations or Inquiries

There are a range of outcomes that may occur as a result of an investigation or inquiry by a Fair Work Inspector. While this may include a Compliance Notice or an Enforceable Undertaking, the FWO may also determine a different enforcement outcome is appropriate. The enforcement action taken will depend upon the assessment made.

Assessment Letter - notification at the end of an investigation or inquiry

Where a Fair Work Inspector has completed an investigation or inquiry, the FWO will notify a party of the outcome of that assessment. The notification may state that no contraventions were identified in relation to the specific investigation or inquiry. In some instances, the notification may state that the Fair Work Inspector determined that there was insufficient evidence to sustain the finding that a contravention occurred, but may caution or recommend a party take steps in order to ensure that they are compliant; for

[28] *Hindu Society* at [18] (per Judge Riethmuller).
[29] FW Act s.715(4).
[30] FW Act s.715(6)&(7).

example, seeking independent legal advice. Where specified contraventions are identified, a Contravention Letter may be issued (as set out below).

Contravention Letter – notification of failure to observe requirements[31]

If a Fair Work Inspector is satisfied that a person has failed to observe a requirement imposed by the FW Act, the FW Regulations or a fair work instrument, the Fair Work Inspector may issue a person with a written notification which:

- informs the person of the failure;
- requires the person to take specified action, within a specified period, to rectify the failure;
- requires the person to notify the Fair Work Inspector of any action taken to comply with the notice; and
- advises the person of the actions the Fair Work Inspector may take if the person fails to comply with the notice.

Depending on the nature of the contraventions and the person's response to the Contravention Letter, the FWO may decide to pursue one of the other available enforcement mechanisms.

Infringement Notice

If a Fair Work Inspector reasonably believes there has been one or more contraventions of particular provisions of the FW Act or the FW Regulations in relation to record keeping, pay slip or job advertisement obligations, the Fair Work Inspector may issue an Infringement Notice.[32] An Infringement Notice requires the person to pay a penalty for committing the contravention. The maximum penalties that a person can be required to pay under an Infringement Notice are:

- $1,878 for an individual or $9,390 for a body corporate for contraventions of the FW Act; and
- $626 for an individual or $3,130 for a body corporate for contraventions of the FW Regulations.[33]

An Infringement Notice can be issued up to 12 months after the contravention occurred.[34]

A person who complies with an Infringement Notice is not taken to have admitted the contravention.[35]

Where a person complies with an Infringement Notice the FWO is unable to commence Court proceedings against that person for the particular contravention(s) that are the subject of the Infringement Notice.[36]

[31] FW Regulations reg. 5.05.
[32] FW Regulations reg. 4.03 & 4.04.
[33] FW Act s.558(2).
[34] FW Regulations reg. 4.04(2).
[35] FW Regulations reg. 4.09.
[36] FW Regulations reg. 4.09.

Litigation

Commencing legal proceedings, which we refer to as "litigation", is another enforcement mechanism available to the FWO and is generally reserved for more serious cases of non-compliance. Litigation is an essential enforcement mechanism for three reasons:

- enforcing the law and obtaining Court orders sends a powerful public message to others not to engage in similar conduct (general deterrence);
- stopping and deterring people from engaging in unlawful behaviour now and in the future makes the need to comply with Commonwealth workplace laws real for individuals (specific deterrence); and
- clarifying the law helps the community understand the various obligations and rights arising from Commonwealth workplace laws.

The FWO is more likely to litigate in cases involving:

- deliberate and/or repeated non-compliance with Commonwealth workplace laws;
- exploitation of vulnerable workers;
- failure to cooperate with us and fix contraventions after being given the opportunity to do so; and/or
- parties who have a prior history of contraventions who have not taken adequate steps to ensure compliance despite being advised of the consequences in the past.

Even in circumstances where contraventions have been rectified, it may still be appropriate for the FWO to commence legal proceedings (e.g. to obtain a penalty in respect of a contravention to achieve specific or general deterrence).

In addition to the FWO commencing its own proceedings,[37] section 682(1)(f) of the FW Act provides that the FWO may represent employees or outworkers who are, or may become, a party to proceedings in a court or the FWC, if the FWO considers that the representation will promote compliance with the FW Act or fair work instrument.

Who we litigate against

Liability for contraventions of Commonwealth workplace laws may lie with more than just one person or body. Sections 550 and 557A(5A) of the FW Act describe how a person can be "involved in" a contravention, and says that such persons are treated as having committed a contravention themselves.

We may commence legal proceedings and seek orders against any person who contravenes their obligations under Commonwealth workplace laws, as well as those who are "involved" in such

[37] FW Act s.682(1)(d).

contraventions. This might include:

- employers;
- registered organisations;
- company directors or company secretaries;
- officials of organisations;
- human resources managers or other managers;
- external agents or advisors, such as accountants, bookkeepers or external human resources consultants;
- companies and people involved in supply chains involving the procurement of labour;
- a holding company of a subsidiary employing entity or its directors; and/or
- a franchisor.

When does the FWO commence litigation?

The FWO will only commence proceedings if it considers that there is sufficient evidence to do so and it would be in the public interest.

In deciding whether to institute any appeal, the FWO will consider whether there are reasonable prospects of success and whether the appeal is in the public interest.

As a regulator utilising public funds, the FWO will consider the impact on its resources and costs before making a decision to commence first instance proceedings or an appeal.

The public interest factors the FWO considers in determining to commence, or not commence, litigation varies depending on the particular circumstances of each case. The following table sets out some of the matters the FWO typically considers.

Public interest factors	Examples of matters the FWO considers
Nature, seriousness and circumstances of the alleged contraventions	■ The seriousness of the alleged contraventions ■ Prevalence in the community of the type of behaviour ■ Any mitigating or aggravating circumstances ■ Whether the person(s) alleged to have committed the contraventions sought and relied on relevant professional advice ■ Evidence of deliberate or reckless conduct including omitting to take steps to ensure compliance ■ Whether contraventions have been admitted and/or fixed

Public interest factors	Examples of matters the FWO considers
Characteristics of person(s) alleged to have committed the contraventions	■ Compliance history ■ Sophistication and financial position (including the impact on business viability, service delivery and employees if excessive costs and sanction imposed) ■ Whether the person has actively assisted the FWO's inquiries and whether they genuinely accept their non-compliance ■ What steps they have taken to prevent further contraventions
Characteristics of person(s) affected by the alleged contraventions	■ Any special vulnerability, such as whether the person has a disability, is a young or mature worker, is present in Australia on a visa or is from a culturally and linguistically diverse background ■ Whether the person has the ability and resources to commence their own proceedings
Impact of the alleged contraventions	■ Direct and indirect impact on the people who have been affected by the alleged contraventions ■ Impact on any other person(s), including other businesses/competitors ■ The impact of the alleged contraventions and their size, such as the number of people affected or the quantum of any underpayments
Impact of litigation on general and specific deterrence	■ Whether litigation will reduce the likelihood that others will engage in similar behaviour (general deterrence) ■ Whether litigation will reduce the likelihood of further contraventions of workplace laws by the person(s) involved in the proceedings (specific deterrence)
Effect of litigation	■ Suitability and efficacy of other enforcement mechanisms as an alternative to litigation ■ Likely outcome in the event the contraventions are found to have occurred (e.g. penalties, compensation or other orders) ■ Whether the likely outcome would be unduly harsh or oppressive
Administration of justice	■ Passage of time since the alleged contraventions ■ Likely length and cost of litigation ■ Whether proceedings are necessary to maintain public confidence in the administration of workplace laws

The FWO's decision to commence or not commence proceedings must be made impartially, and must not be influenced by any inappropriate consideration of race, religion, sex, national origin or political association. The decision must not be influenced by any political advantage or disadvantage to the Government, any political group or party or any union, industrial or employer group or association.

Approach to self-reported non-compliance

The FWO takes a practical and proportionate approach to self-reported non-compliance. Isolated payroll errors resulting in underpayments over a short period of time (up to 12 months) do not need to be actively reported to the FWO, as long as:

- employees are appropriately informed of the underpayment;
- employees are back paid in full as soon as practicable; and
- changes are implemented to ensure the error does not happen again.

For broader and/or potential systemic non-compliance, it is best to notify the FWO as soon as possible. Reports should be made through the FWO's Corporate Sector team via email – corporateassurance@fwo.gov.au.

Any self-reports should identify the following:

- details of the non-compliance;
- what led to or contributed to it;
- the action taken to assess and rectify it; and
- confirmation of notification to the Australian Tax Office (ATO) (if there will be likely tax and superannuation implications). Notifications to the ATO can be made via email to employerobligationsworkinggroup@ato.gov.au.

Self-reporting, cooperation and remediation can justify the FWO's use of non-litigious and non-punitive compliance tools to resolve the matter, such as contravention letters or compliance notices.

Where more serious contraventions are involved (for example large scale underpayments going back many years), the FWO may accept an Enforceable Undertaking offered by an employer with terms reflecting the scale of the underpayment and the employer's cooperative response. Such undertakings (discussed above) are provided for by section 715 of the FW Act, and provide an opportunity for a cooperative and self-reporting employer to avoid costly litigation. Of course, the FWO will continue to use litigation for the most serious and/or deliberate contraventions as appropriate.

Apart from the statutory requirements that must be satisfied before the FWO can accept an Enforceable Undertaking, the FWO will generally accept such undertakings where it has established:

- the amount of the underpayments owed (or agreed to a process for establishing this), and
- the nature and/or number of the contraventions of the FW Act relating to the underpayments.

Through offering and acceptance of an Enforceable Undertaking, an employer will avoid significant legal costs and civil penalties. Where an employer could expect to receive significant civil penalties for contraventions of the FW Act, the FWO may consider that an Enforceable Undertaking should include a contrition payment (discussed above). The amount of the contrition payment will be comparable to a

penalty, but with significant discounts for early disclosure and cooperation. Like any penalty awarded by a court, the contrition payment will go into Consolidated Revenue for the benefit of the Australian community.

Conduct of proceedings

The FWO will conduct litigation honestly, fairly, consistently and in accordance with the Commonwealth's Obligation to Act as a Model Litigant (Appendix B to the *Legal Services Directions 2017*).

The FWO will make decisions about the conduct of litigation on the basis of the available evidence. If another party asks the FWO to agree to a particular course, or to put a submission to the Court, we may ask them to provide us with evidence to support their request.

Where evidence discloses a number of potential contraventions of Commonwealth workplace laws, the FWO will take care to plead the contraventions which adequately reflect the nature and extent of the relevant behaviour. Where the FWO alleges there have been serious contraventions within the meaning of section 557A of the FW Act, we will specify the relevant serious contraventions. A breach will only be a serious contravention where a person knowingly contravened the relevant provision, and that breach was part of a systematic pattern of conduct.

After proceedings have been commenced, the FWO participates in discussions to limit any issues in dispute, for example, during Court mediations. As a regulator, the FWO approaches such discussions from a public interest perspective. In circumstances where a party provides new evidence alleging that the contravention(s) did not occur, the FWO will consider the evidence and may:

- proceed with the original contraventions;
- proceed in relation to fewer contraventions than originally identified; and/or
- accept admissions only in relation to some contraventions and not press or seek orders in relation to other contraventions. All admissions must reflect a genuine acceptance of responsibility.

We will discontinue legal proceedings if it is appropriate to do so. It will be rare for us to make this decision, given the detailed assessment we undertake before we commence proceedings.

Admissions or payments made just before or after proceedings are commenced will usually not justify discontinuing the proceedings, but the FWO will take such action into account when seeking orders and making submissions to the Court on appropriate penalties.

Orders and penalties

The FW Act allows eligible Courts to make a wide range of orders if a person is found to have contravened the FW Act. Orders that the FWO may seek in proceedings include orders:

- that underpayments be rectified and interest be paid;
- that compensation be paid to person(s) affected by the contraventions. Such compensation would be paid by person(s) responsible for contraventions and/or other persons who were "involved" in them;
- for a civil penalty to be paid to the Commonwealth[38] or, where appropriate, the penalty be redirected to an impacted party;
- that a person pay any civil penalty personally, without seeking or accepting indemnity from a third party;
- for injunctions to stop, prevent or restrain further contraventions from occurring; and/or
- that a person take specific steps, for example by undertaking training or conducting wage audits.

Submissions on penalty

The Courts are responsible for deciding what orders are appropriate in a case and the amount of any civil penalty. Courts may have regard to submissions made by the parties to proceedings in relation to penalty, including as to what facts are relevant.[39] The FWO may put evidence before the Court to support our submissions on penalty, including evidence about compliance in particular industries, places or amongst particular groups of workplace participants.

The FWO will seek penalties that:

- are proportionate to the nature of the behaviour;
- will achieve general and specific deterrence; and
- avoid a harsh or oppressive outcome.

In appropriate cases, we may reach agreement with other parties about the amount of penalty we ask the Court to order. The Court may accept the agreed penalty if it is satisfied that the amount is appropriate.[40]

Discounts on penalty

Courts may reduce the penalty to be ordered if a person admits the contraventions and cooperates with the Court process.[41] We will draw the Court's attention to any conduct that justifies a discount on penalty, in particular any admissions made early in the course of an investigation or soon after the commencement of proceedings. If admissions are made close to, or during, the Court hearing, we may submit to the Court

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[38] As a result of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth), the maximum penalties for serious contraventions, within the meaning of s.557A of the FW Act, are higher than for other contraventions of the FW Act.
[39] *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 (**Commonwealth v FWBII**) at [46]-[64] (per French CJ, Kiefel, Bell, Nettle and Gordon JJ).
[40] Commonwealth v FWBII at [48], [57]-[59] (per French CJ, Kiefel, Bell, Nettle and Gordon JJ).
[41] *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [74]-[76] (per Stone and Buchannan JJ).

that a lesser or no discount on penalty is appropriate.

Costs

Under the FW Act, parties to litigation will normally pay their own costs of the proceeding. However, the Court can order a party to pay someone else's costs in some circumstances, such as when a party has acted unreasonably. In appropriate cases, the FWO may seek orders that a party pay costs.

Referrals

Where the FWO becomes aware of issues that are outside of its statutory functions the FWO will refer the matter, or provide the information obtained, to the relevant bodies.[42]

Publicising compliance and enforcement

The FWO will publish information regarding its compliance activities and enforcement outcomes. Our Media Policy can be found here.[43]

Feedback

We encourage feedback about your experience with us and invite people to contact us at www.fairwork.gov.au/feedback.

If a person requests a review of our actions and is not satisfied with the result of our review, they can contact the Commonwealth Ombudsman on 1300 362 072, or at www.ombudsman.gov.au.

[42] See FW Act s.682(1)(e) and s.718.
[43] https://www.fairwork.gov.au/ArticleDocuments/725/fwo-media-policy.pdf.aspx