

Senate Select Committee on Temporary Migration

Fair Work Ombudsman responses to additional written Questions on Notice 13 May 2021

Hearing date: 17 September 2020

Question No: 01

Subject: Fair Work Inspectors and inspections

Asked by: Whole Committee

In response to question number one taken on notice at the public hearing of the Select Committee on Temporary Migration (the committee) on 17 September 2020, the Fair Work Ombudsman (FWO) stated that as of 30 June 2020, the FWO has 195 Fair Work Inspectors under the Fair Work Act.¹ How many inspections have Fair Work Inspectors undertaken over the last 5 years broken down by relevant year?

Answer:

The FWO undertakes its reactive and proactive compliance work via a mix of targeted advice, education, and impartial enforcement, reflecting the agency's broad statutory functions under the *Fair Work Act 2009*.

Each year the agency receives a large number of Requests for Assistance (RFAs) involving a workplace dispute, a significant portion of which can be resolved without the use of enforcement tools or the need for workplace inspections. FWO inspectors do not undertake random audits of workplaces – the agency takes an intelligence-based approach to targeting employers based on internal analysis and consultations with stakeholders and the community.

The FWO has adopted a firmer approach to non-compliance through better targeting, a significant increase in the use of enforcement tools such as compliance notices and a phasing out of mediation services. The success of this approach is evidenced by the significant increase in proportion of matters resolved via compliance and enforcement over recent years, set out in the table below.

Enforcement tools are more effective and efficient for the agency and ensure that underpaid workers are fully reimbursed quickly. FWO inspectors closely monitor compliance with enforcement tools and enforce them where necessary through court action. Investigations usually involve workplace visits to seek information from employers and workers. Inspectors are supported by staff across the agency who provide technical advice, data analytics, wage calculations, legal services and a range of other functions that support workplace compliance.

The FWO also sets evidence-based annual priorities to guide our work and in recent years has received additional funding to support work in the priority areas of vulnerable workers, sham contracting, large corporate non-compliance and supporting small business. Inspectors undertake investigations against these priority areas, each corporate sector self-report of underpayment and reports of significant non-compliance from the community, other regulators via referral, or the media. Our self-reported matters

often involve many thousands of employees, span multiple years and relate to contraventions across a number of enterprise agreements or awards.

	July 20-May 21	2019-2020	2018-2019	2017-2018	2016-2017
Total disputes completed	16,981	21,914	29,130	28,275	26,917
Disputes completed via compliance and enforcement	3,768	2,370	1,256	1,201	1,585
Total enforcement tools	2,294	1621	877	877	952
<i>Infringement notices</i>	446	603	563	615	665
<i>Compliance notices</i>	1,763	952	274	220	192
<i>Enforceable Undertakings</i>	17	12	17	7	40
<i>Litigations</i>	68	54	23	35	55
Total recoveries	\$117,762,351	\$123,461,548	\$40,204,976	\$29,679,387	\$30,699,682
Number of employees paid	56,886	25,583	17,718	13,367	17,071

Senate Select Committee on Temporary Migration

Fair Work Ombudsman responses to written Questions on Notice

Hearing date: 17 September 2020

Question No: 02

Subject: Further breakdown of enforcement activity and compliance tools

Asked by: Whole Committee

In response to a question number two taken on notice at the public hearing of the committee on 17 September 2020, the FWO provided a table of enforcement activity the FWO has undertaken over the last two financial years. Provide a breakdown of the issue(s) that resulted in compliance notices, infringement notices, enforceable undertakings and litigation during this period?

Answer:

The top three issues relating to matters that have involved the use of an enforcement tool over the past two full financial years are as follows:

Top 3 issues	
2019-20 FY	2018-19 FY
Underpayment of wages	Underpayment of wages
Penalty rates	Failure to provide payslips
Annual leave	Annual leave

Senate Select Committee on Temporary Migration

Fair Work Ombudsman responses to written Questions on Notice

Hearing date: 17 September 2020

Question No: 03

Subject: Enforcement tools and visa type

Asked by: Whole Committee

What proportion of these enforcement activities have involved temporary visa holders? Please provide a breakdown of visa types involved, if known.

Answer:

For all enforcement tools, the proportion that involved visa holders was 12% in 2019-20 and 7% in 2018-19, with the primary visa types being the subclass 417, subclass 457 and student visas.

Senate Select Committee on Temporary Migration

Fair Work Ombudsman responses to written Questions on Notice

Hearing date: 17 September 2020

Question No: 04

Subject: Further breakdown of enforcement activities

Asked by: Whole Committee

In response to a question number three taken on notice at the public hearing of the committee on 17 September 2020, the FWO provided the current enforcement tool targets for 2020-21. As at 3 May 2021, for each enforcement tool, how many enforcement activities have been undertaken for 2020-21?

- a) How many litigations filed involved wage theft or underpayments and of these, how many involved a temporary visa holder?
- b) What were the timeframes for the litigations filed and the penalty decisions handed down by the courts?
- c) Is the FWO aware of any temporary migrants who had to leave the country while litigation was ongoing?

Answer:

The following table sets out how the FWO is tracking against its targets:

Enforcement tool type	2020-21 target	Number issued between 1 July 2020 to 3 May 2021
Compliance Notices	850	1537
Infringement Notices	400	391
Enforceable Undertakings	20	16
Litigations filed	40-50	62

- a) During 2020-21 to 3 May 2021, the FWO has filed 56 litigations involving underpayments and 18 of these have involved a temporary visa holder.
- b) Of the 56 matters involving underpayments filed this financial year, four matters have been concluded, within a range of 5 to 9 months from filing.

These timeframes are consistent with the FWO's experience that after filing, the timeframe to conclude an uncontested matter is approximately 6 to 12 months. The timeframe for a contested matter that involves hearings to determine both liability and penalty may extend to over 3 years.

- c) Yes, the FWO is aware of a limited number of instances where visa holders have departed Australia either during the litigation or prior to filing the litigation. Where a visa holder is no longer in Australia, a litigation can continue through the courts and to the extent possible, the FWO remains in contact with these individuals to facilitate the return of any back-payment amounts recovered once the matter has been finalised. In legal proceedings where employee witnesses have been contested, the FWO has arranged for these workers to return to Australia and appear in court.

The FWO also has an Assurance Protocol in place with the Department of Home Affairs to ensure visa holders are not deterred to seek help from the FWO through fear of visa cancellation and deportation, even in situations where they have breached their work-related visa conditions.

Senate Select Committee on Temporary Migration

Fair Work Ombudsman responses to written Questions on Notice

Hearing date: 17 September 2020

Question No: 05

Subject: Activities related to specific funding measures

Asked by: Whole Committee

During the 17 September public hearing, the FWO advised the committee that in 2019-20 it had received the following:

- \$6.416 million for the extension of the Seasonal Worker Program,
- \$1.577 million to further enhance the Seasonal Worker Program,
- \$9.245 million to establish a dedicated sham contracting unit
- \$25.8 million related to the Migrant Workers' Taskforce recommendations
- \$8.465 million to enhance compliance capability
- \$2.331 million to provide further education and resources; and
- \$15.004 million to establish a national labour hire registration scheme.

Provide detailed information around what activity and how much funding has been expended to date in relation to each of these measures.

Answer:

Key activities the FWO has undertaken with the additional funding received for each of these measures are below, noting that the funding for the Migrant Workers' Taskforce recommendations (\$25.8 million) includes the funding for the National Labour Hire Registration Scheme, enhancing compliance capability and providing education and resources for migrant workers and small business employers.

Seasonal Worker Program (\$6.416 million over 4 years from 1 May 2019)

- The FWO's role in the Seasonal Worker Program involves:
 - conducting compliance activities, including proactive monitoring activities and investigations;
 - developing educative resources and engaging with program participants; and
 - delivering on-arrival briefings to seasonal workers after their arrival in Australia.
- In 2019-20, the FWO completed 24 investigations into Approved Employers in the Seasonal Worker Programme recovering \$127,285 for 248 seasonal workers.
- In the 2019-20 financial year, the FWO attended 83 on-arrival briefings for approximately 1,916 seasonal workers. With the recommencement of FWO field activities in November

2020 following a pause due to COVID-19, the FWO has resumed engagement with newly arrived seasonal workers and Approved Employers at on-arrival briefings, conducting 13 on-arrival briefings with 266 seasonal workers since recommencing face-to-face activities to 31 March 2021.

- The FWO has also focused on enhancing our educative materials and resources for seasonal workers by:
 - In February 2021, launching a targeted FWO on-arrival briefing brochure for seasonal workers.
 - Since late 2020, distributing FWO-branded water bottles to seasonal workers at on-arrival briefings and other engagement opportunities.
 - In October 2020, sending nearly 20,000 in-language postcards to posts across Pacific and Timor-Leste that introduce seasonal workers to the FWO prior to arriving in Australia and the commencement of their recruitment.
 - For delivery in mid-2021, procuring the development of new in-language and English videos created specifically for arriving seasonal workers that convey key workplace relations information relevant for working in Australia, and to introduce the Fair Work Ombudsman as the agency to approach for advice and assistance.

Sham Contracting Unit (\$9.245 million over four years from 1 July 2019)

- The FWO established its Sham Contracting Unit on 1 July 2019. Since then, the FWO has completed 579 sham contracting / misclassification matters and recovered more than \$423,500 in entitlements for misclassified workers. Over 120 compliance and infringement notices have also been issued.
- The Sham Contracting Unit has also been conducting relevant enforcement activities, including a proactive compliance activity into cleaning arrangements at some of Australia's best-known sports stadiums. A final report was published in October 2020.
- The FWO's ongoing work in this area is guided by a Sham Contracting Strategy that focuses on instances of sham arrangements and misclassification in transport, health care, cleaning, and support services.
- As part of the Sham contracting Strategy, the FWO published new and updated resources on www.fairwork.gov.au and ran a digital communications campaign to promote this content. The campaign was promoted through social media, digital display advertising and Google search.

Funding related to the Migrant Workers' Taskforce recommendations

Enhancing compliance capability (\$8.465 million over 4 years from 1 July 2019)

The FWO has strengthened its compliance posture which has resulted in a significant increase in our use of compliance tools.

- Fair Work Inspectors issued 250 percent more compliance notices in 2019-20 than the previous year, recovering \$7.8 million for workers through this tool. This compares with \$95,000 returned to workers through compliance notices in 2017-18.
- This financial year to 31 April 2021, the FWO has issued 1534 compliance notices surpassing last financial year's numbers and resulted in the recovery of over \$13.3 million for workers.

Educational resources (\$2.331 million over 4 years from 1 July 2019)

There are a number of activities that the funding has contributed towards, including:

- A visual piece work agreement tailored to the needs of low literacy workers, including migrant workers engaged under the Horticulture Industry Award.
- In partnership with Monash University, a pilot of a behaviourally informed education workplace rights quiz targeted at international students.
- Ongoing maintenance of the FWO's Record My Hours smartphone app, which is available in 18 different languages and helps young workers including migrant workers record their hours of work.
- A Horticulture Showcase with information for growers and workers in the horticulture and viticulture industries (including automated translator functionality). The Showcase has been promoted through two communications campaigns.
- A series of animated, translated videos aimed at educating small business owners from migrant and CALD backgrounds delivering services in emerging franchises about their workplace obligations under the Fair Work Act.

National labour hire registration scheme (\$15.004 million over 4 years from 1 July 2021)

- The funding for the National Labour hire registration scheme has been re-profiled to commence in 2021-22 as the enabling legislation has not been passed. The FWO has established an internal Taskforce and is ready to implement the scheme once passed.