

OFFICIAL



Auditor-General for Australia



24 April 2026

Senator Maria Kovacic
Chair
Education and Employment References Committee
By email: eec.sen@aph.gov.au

Dear Senator Kovacic

ANAO submission – Inquiry into wage theft

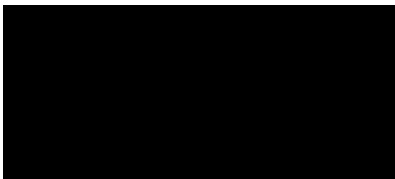
The Australian National Audit Office (ANAO) presented the following performance audits to the Parliament that you may find relevant to the above inquiry:

- Auditor-General Report No. 24 2021–22, [Addressing Superannuation Guarantee Non-Compliance](#).
- Auditor-General Report No. 30 2024–25, [Effectiveness of the Office of the Fair Work Ombudsman's Regulatory Functions](#).

Information about what the audits assessed, concluded, and recommended is attached. The full audit reports are available online at www.anao.gov.au.

Should the Committee require further information in relation to these matters, my office would be pleased to provide you with a briefing at a time convenient to you or appear as a witness at a hearing. To arrange a briefing, please contact our External Relations team at [REDACTED]

Yours sincerely



Dr Caralee McLiesh PSM
Auditor-General

OFFICIAL

The Auditor-General
Auditor-General Report No.24 2021–22
Performance Audit

Addressing Superannuation Guarantee Non-Compliance

[Australian Taxation Office](#)

© Commonwealth of Australia 2022

ISSN 1036–7632 (Print)

ISSN 2203–0352 (Online)

ISBN 978-1-76033-715-5 (Print)

ISBN 978-1-76033-716-2 (Online)

Except for the content in this document supplied by third parties, the Australian National Audit Office logo, the Commonwealth Coat of Arms, and any material protected by a trade mark, this document is licensed by the Australian National Audit Office for use under the terms of a Creative Commons Attribution-NonCommercial-NoDerivatives 3.0 Australia licence. To view a copy of this licence, visit <http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.

You are free to copy and communicate the document in its current form for non-commercial purposes, as long as you attribute the document to the Australian National Audit Office and abide by the other licence terms. You may not alter or adapt the work in any way.

Permission to use material for which the copyright is owned by a third party must be sought from the relevant copyright owner. As far as practicable, such material will be clearly labelled.

For terms of use of the Commonwealth Coat of Arms, visit the *It's an Honour* website at <https://www.pmc.gov.au/government/its-honour>.

Requests and inquiries concerning reproduction and rights should be addressed to:

Senior Executive Director
Corporate Management Group
Australian National Audit Office
GPO Box 707
Canberra ACT 2601

Or via email:

communication@anao.gov.au.





Canberra ACT
28 April 2022

Dear Mr President
Dear Mr Speaker

In accordance with the authority contained in the *Auditor-General Act 1997*, I have undertaken an independent performance audit in the Australian Taxation Office. The report is titled *Addressing Superannuation Guarantee Non-Compliance*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website — <http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, reading 'Grant Hehir'.

Grant Hehir
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office (ANAO). The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits, financial statement audits and assurance reviews of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Australian Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

For further information contact:
Australian National Audit Office
GPO Box 707
Canberra ACT 2601

Phone: (02) 6203 7300
Email: ag1@anao.gov.au

Auditor-General reports and information about the ANAO are available on our website:
<http://www.anao.gov.au>

Audit team

Peter Hoefler
Kim Bond
Robyn Clark
Dr Patrick N. O'Neill
Amanda Reynolds
Peta Martyn
Christine Chalmers

Contents

Summary and recommendations.....	7
Background	7
Conclusion	7
Supporting findings.....	8
Recommendations.....	9
Summary of entity response.....	10
Key messages from this audit for all Australian Government entities	10
Audit findings.....	11
1. Background	12
Introduction.....	12
Rationale for undertaking the audit	18
Audit approach	18
2. Risk-based compliance framework	20
Are there effective processes in place to identify and monitor risks?	20
Has the ATO implemented a risk-based compliance strategy?	28
3. Effectiveness of compliance activities	35
Have the ATO’s compliance activities improved employer compliance?.....	35
Did the SG Taskforce and Amnesty achieve planned outcomes?	50
Has the ATO effectively used its debt-recovery powers to collect unpaid superannuation?	56
Appendices	67
Appendix 1 Australian Taxation Office response.....	68
Appendix 2 Improvements observed by the ANAO	69
Appendix 3 Superannuation Guarantee Charge penalties	71
Appendix 4 Superannuation Holding Accounts Special Account	72



Audit snapshot

Auditor-General Report No.24 2021–22

Addressing Superannuation Guarantee Non-Compliance



Why did we do this audit?

- ▶ Employer non-compliance with Superannuation Guarantee obligations has an impact on the retirement incomes of Australians.
- ▶ This topic was identified as a parliamentary priority in 2019–20.



Key facts

- ▶ In respect of superannuation, the Australian Taxation Office's (ATO's) role is to encourage voluntary compliance and enforce the penalties of non-compliance.
- ▶ Total superannuation assets in Australia as at 30 June 2021 were \$3.3 trillion.
- ▶ Employer Superannuation Guarantee contributions in 2020–21 were \$74.1 billion.
- ▶ Employers who fail to pay Superannuation Guarantee are subject to a tax called the Superannuation Guarantee Charge.
- ▶ The ATO's Superannuation Guarantee compliance activities raised liabilities of \$1.7 billion in 2020–21.



What did we find?

- ▶ The ATO's activities in addressing Superannuation Guarantee non-compliance are partly effective.
- ▶ The ATO's risk-based Superannuation Guarantee compliance framework is partly effective.
- ▶ The ATO's compliance activities are partly effective in achieving greater employer compliance with Superannuation Guarantee obligations. They have had a small influence on reducing the Superannuation Guarantee gap (an estimate of non-compliance) over time.
- ▶ Compliance activities continue to be mainly corrective and reactive.



What did we recommend?

- ▶ There were three recommendations relating to: implementing a preventative compliance strategy; use of enforcement and debt-recovery powers; and enhanced performance reporting.
- ▶ The ATO agreed to two recommendations, and agreed with qualification to the third.

95%

of Superannuation Guarantee contributions are paid without ATO intervention

\$2.9 bn

in unpaid Superannuation Guarantee Charge was owed as at 30 June 2021

55%

of Superannuation Guarantee Charge raised was collected (average over four years to 2020–21)

Summary and recommendations

Background

1. The Superannuation Guarantee (SG) system was introduced in 1992 as a means of funding the retirement of individuals. The SG system prescribes a level of superannuation support to be provided by employers to employees. Total superannuation assets in Australia as at 30 June 2021 were \$3.3 trillion. Employer SG contributions in 2020–21 were \$74.1 billion.
2. The SG system operates largely without regulatory intervention. The Australian Taxation Office (ATO) has reported a high rate of voluntary compliance with SG. In respect of superannuation, the ATO's role is to encourage voluntary compliance and enforce the penalties of non-compliance.

Rationale for undertaking the audit

3. Employer non-compliance with SG obligations has an impact on the retirement incomes of Australians, and has been subject to two major reviews in recent years. This topic was identified as a parliamentary priority in 2019–20. The audit provides assurance about the effectiveness of ATO activities aimed at fostering participation in the superannuation system.

Audit objective and criteria

4. The objective of the audit was to assess the effectiveness of the ATO's activities in addressing SG non-compliance.
5. To form a conclusion against the audit objective, the following criteria were adopted:
 - Does the ATO have an effective risk-based SG compliance framework?
 - Are the ATO's compliance activities effective in achieving greater employer compliance with their SG obligations?

Conclusion

6. The ATO's activities in addressing Superannuation Guarantee non-compliance are partly effective.
7. The ATO's risk-based SG compliance framework is partly effective. Although SG risks are assessed and treated, the risk rating for unpaid SG is lower than the ATO risk framework would indicate if consideration of risk to revenue was applied. Although there is a compliance strategy to shift to a more preventative approach, it is not yet supported by effective data analysis.
8. The ATO's compliance activities are partly effective in achieving greater employer compliance with SG obligations. The extent of improvement in employer compliance is difficult to establish due to a lack of performance information. Although there has been an increase in the absolute amount of debt raised and funds collected, the ATO has acknowledged that it has a small influence on the net SG gap. Planned targeted reforms to improve the integrity and administration of the SG system were partly implemented. Although the ATO did not fully employ its SG debt-recovery powers during 2020, in line with its suspension of other ATO-initiated

compliance work during the COVID-19 pandemic, SG debt increased at a higher rate than total ATO debt in 2020–21.

Supporting findings

Risk-based compliance framework

9. Processes in place to identify and monitor risks to SG compliance are partly effective. SG risks are included in enterprise and business line risk assessments, however the ATO does not assess risk to revenue, which leads to a lower than merited risk rating. The mechanisms for escalating risks identified by the business line risk committee are yet to be fully developed. The ATO assesses its controls for SG compliance risk as ‘partially effective’. (See paragraphs 2.2 to 2.31).

10. The ATO has partly implemented a risk-based compliance strategy. There is a compliance strategy that is designed to shift the focus from a reactive approach through enforcement, to a preventative approach through encouraging voluntary compliance. The compliance strategy has not been fully implemented, and compliance activities remain largely reactive. A preventative approach is highly dependent on the implementation of a data-matching solution. The use of real-time data-driven analysis to inform risk assessment has been limited by data and systems issues. (See paragraphs 2.32 to 2.63).

Effectiveness of compliance activities

11. While there is some evidence that the ATO’s compliance activities are improving employer compliance, the extent of improvement cannot be reliably assessed. Public reporting of performance does not provide adequate information to evaluate the effectiveness of the ATO’s SG compliance activities. The ATO advised that a growing backlog of employee notifications of employer non-compliance was cleared by December 2021. There has been an increase in the absolute amount of debts raised and funds collected over the past four years. Although there has been a downward trend since 2013–14, the net SG gap reported for 2018–19 was little different from the gap reported for 2009–10. Between 2013–14 and 2018–19, the ATO’s compliance activities detected and collected unpaid SG amounting to less than an average of 15 per cent per year of the gross SG gap. The ATO did not consistently meet service commitments for reactive corrective compliance activities. A commitment that 40 per cent of corrective compliance activities would be proactive was reported as met in three of four years to 2020–21. However, there has been a shift from resource-intensive audit activity to low-touch nudges. (See paragraphs 3.2 to 3.37).

12. The SG Taskforce partly achieved the planned outcomes. It achieved a higher strike rate from a smaller case pool, but it did not achieve several of its objectives associated with the usage of Single Touch Payroll and other data. The level of proactive compliance activities undertaken by the ATO declined after the SG Taskforce was introduced. The SG Amnesty supported the ATO’s transition to a preventative compliance approach by encouraging employers to self-correct non-compliance and is associated with higher voluntary employer lodgments. The ATO did not report on SG Taskforce outcomes. Its reporting of SG Amnesty outcomes could have been improved by adjusting the results achieved to account for the business-as-usual level of voluntary lodgments. (See paragraphs 3.38 to 3.58).

13. The ATO has been partly effective in using its debt recovery powers to collect unpaid SG. Pauses in enforcement during the 2019–20 bushfires and COVID-19 pandemic impacted debt recovery as demonstrated by:

- stronger enforcement powers received in January 2019 have largely not been exercised;
- firm compliance activity was used less frequently during 2019–20 and 2020–21; and
- elements of new systems were turned off.

14. Pauses in enforcement were intended not to apply to egregious and criminal cases but enforcement against phoenix operators through Director Penalty Notices also decreased from 2018–19. Compared to the increase in total ATO debt during 2020–21, SG debt increased disproportionately. (See paragraphs 3.59 to 3.90).

Recommendations

Recommendation no. 1 The ATO implement the proposed preventative approach to SG compliance as documented in the risk-based compliance strategy.
Paragraph 2.64

Australian Taxation Office response: *Agreed*

Recommendation no. 2 The ATO assess its performance measures against the Public Governance, Performance and Accountability Rule 2014 and enhance its public SG performance information by:
Paragraph 3.10

- (a) setting targets for measures, including the SG gap; and
- (b) including explanations for performance results, including performance changes over time.

Australian Taxation Office response: *Agreed with qualification (a); Agreed (b)*

Recommendation no. 3 To maximise the benefit to employees' superannuation funds, the ATO:
Paragraph 3.91

- (a) make more use of its enforcement and debt recovery powers;
- (b) develop performance measures for evaluating the effectiveness of debt recovery; and
- (c) consider the merit of incorporating debtors holding the majority of debt into the prioritisation of debt recovery actions.

Australian Taxation Office response: *Agreed*

Summary of entity response

15. The Australian Taxation Office's summary response is provided below and its full response is included at Appendix 1.

The Australian Taxation Office (ATO) welcomes the review that found the ATO's risk-based compliance framework and compliance activities are partly effective in addressing Superannuation Guarantee (SG) non-compliance. We consider the report supportive of the direction that we are taking.

We acknowledge the critical role that the ATO has to ensure compliance with SG obligations and reducing the overall SG Gap. We are pleased that the report recognises the work the ATO is undertaking to move towards more preventative and proactive approaches to improve compliance.

In recent years the ATO has increased the visibility of employer superannuation contributions through myGov and we continue to investigate every complaint received in relation to the non-payment of SG as we work to reduce the overall SG Gap. With access to greater levels of real time payroll data through Single Touch Payroll, we acknowledge the challenge we have to effectively utilise these large volumes of data in real time to proactively improve compliance. We recognise the complexities we face around insolvent entities and will continue our consideration of this employer population through our debt recovery engagement actions. We also acknowledge complexities associated with the timing of legislated SG reporting obligations.

The report makes 3 recommendations for the ATO, for which the ATO agrees in part. We will make more use of our debt recovery powers now that firmer recovery action has recommenced following the pandemic and note that we will explore opportunities to enhance our performance measures and commentary on SG performance information.

Key messages from this audit for all Australian Government entities

16. Below is a summary of key messages, including instances of good practice, that have been identified in this audit and may be relevant for the operations of other Australian Government entities.

Governance and risk management

- Entities should ensure that enterprise-level risk committees have appropriate risk escalation processes from business-level committees for high risks, and regulators should ensure that compliance risk ratings reflect all relevant criteria so that they are appropriately rated and escalated.
- Regulators should develop risk-based compliance strategies, which consider the appropriate balance of preventative, corrective, proactive and reactive compliance measures, and target the areas of highest risk.

Performance and impact measurement

- To facilitate a meaningful assessment of progress and achievement, regulators should ensure that they are monitoring, evaluating against targets and reporting on their effectiveness in achieving regulatory objectives.

Policy/program implementation

- Regulators should ensure that they are appropriately utilising the enforcement powers available to them to achieve program objectives.

Audit findings

1. Background

Introduction

1.1 The Superannuation Guarantee (SG) system was introduced in 1992 as a means of funding the retirement of individuals and to provide a higher standard of retirement living. The SG system prescribes a level of superannuation support to be provided by employers to employees.

1.2 The level of prescribed employer support in 2021 is ten per cent of ordinary time earnings.¹ Total superannuation assets in Australia as at 30 June 2021 were \$3.3 trillion.² Employer contributions³ in 2020–21 were \$98.5 billion (1.9 per cent greater than in 2019–20), of which \$74.1 billion were SG contributions (4.3 per cent greater).

1.3 The SG system operates largely without regulatory intervention. Employers make SG contributions to employees' superannuation funds either directly or via clearing houses.⁴ The Australian Taxation Office (ATO) has reported a high rate of voluntary compliance with SG, with employers paying without intervention about 95 per cent on average of the SG they are required to pay.⁵

1.4 Unpaid SG results in smaller superannuation fund balances and loss of compound interest.⁶ A younger employee who is not paid the full amount of SG that they are owed experiences a larger decrease in their superannuation fund balance and eventual retirement income than an older worker who is not paid the SG for the same period.⁷

Legislative and revenue framework

1.5 The *Superannuation Guarantee (Administration) Act 1992* (the SGA Act) sets out the administrative arrangements for the operation of the SG system. The Commissioner of Taxation is responsible for the day-to-day administration of the SGA Act. The ATO's purpose is:

to contribute to the economic and social wellbeing of Australians by fostering willing participation in the tax and superannuation systems.⁸

1 Ordinary time earnings are the amount earned for ordinary hours of work and generally include leave, allowances, commissions and bonuses.

2 Australian Prudential Regulation Authority, *Quarterly superannuation performance statistics highlights*, June 2021, pp. 3 and 4.

3 Employer contributions include all superannuation payments including salary sacrifice and SG.

4 For example, the Australian Taxation Office provides the Small Business Superannuation Clearing House as a free online service. Eligible small businesses pay super for all their employees through a single payment to the clearing house, which distributes the money to each employee's super fund according to the employee's instructions.

5 ATO, *Super guarantee system* [Internet], available from <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/General-research/Tax-gap/Previous-years-analysis/Superannuation-guarantee-gap-2016-17/?anchor=SuperGuaranteeSystem#SuperGuaranteeSystem> [accessed 29 October 2021].

6 The ATO refers to 'unpaid SG' as 'unreported SG'.

7 Treasury, *Retirement Income Review: Final Report*, Canberra, 2020, p. 304.

8 ATO, *Corporate Plan 2021–22*, p. 6.

1.6 The *Superannuation Guarantee Charge Act 1992* (the SGC Act) imposes a tax called the Superannuation Guarantee Charge (SGC) on employers who fail to pay SG.⁹ This tax is payable to the ATO, which is tasked with collecting it and paying an equivalent amount into the employee's superannuation fund. All employers are potentially liable for the tax if the employer has not provided the minimum level of superannuation support for each employee, unless the employer is exempt in respect of a particular employee.¹⁰

1.7 Section 3 of the SGC Act incorporates the SGA Act; that is, the SGA Act is to be read as one with the SGC Act. The SGA Act includes at Part 3 the formulas to calculate the amount of Superannuation Guarantee Charge to be imposed, and at Part 8 (section 71) a special appropriation to enable payments from the Consolidated Revenue Fund to the benefit of employees.¹¹ Section 71 of the SGA Act appropriates those amounts of Superannuation Guarantee Charge collected for the benefit of employees and empowers the Commissioner of Taxation to pay them to the employees' superannuation funds. Superannuation Guarantee Charge raised but not collected is a debt to the Commonwealth.

1.8 The components of the Superannuation Guarantee Charge are in Table 1.1. The SG shortfall is the amount of unpaid SG for the quarter, and is calculated on employees' salary and wages, including any overtime.¹²

Table 1.1: Superannuation Guarantee Charge components

Component ^a	Revenue remitted to Consolidated Revenue Fund	Appropriation
SG shortfall — superannuation	Superannuation calculated on salary and wages (including any overtime) +	Appropriated to employees' superannuation funds under section 71 of the SGA Act
SG shortfall — choice liability ^b	Based on the SG shortfall and capped at \$500 +	
Nominal interest, a proxy for superannuation fund earnings	10 per cent per annum (accrued from the start of the relevant quarter)	
Administration fee, to recover costs incurred in administering the tax	\$20 per employee per quarter	Available under section 83 of the Australian Constitution for an appropriation to be spent on any purpose for which the Commonwealth may lawfully spend money

Note a: Penalties are applied in addition to the Superannuation Guarantee Charge and are shown in Appendix 3.

Note b: Choice liability is imposed when there is a failure to comply with the choice-of-fund requirements.

Source: ANAO analysis of the SGC and SGA Acts.

9 *Superannuation Guarantee Charge Act 1992*, sections 5 and 6. The SGC was confirmed as a tax by the High Court of Australia in *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2011] HCA 35, [49].

10 Explanatory Memorandum, Superannuation Guarantee (Administration) Bill 1992, p. 1.

11 The Consolidated Revenue Fund was established under section 81 of the Australian Constitution and consists of all revenues and moneys raised or received by the executive government of the Commonwealth.

12 This differs from SG payments that are paid by the due date, which are calculated on ordinary time earnings.

1.9 The Superannuation Guarantee Charge is intended to act as:

an incentive for employers to meet their own obligations, and ... a support mechanism for employees where those obligations are not met.¹³

The Parliament intended the SGC Act and the SGA Act to be burdensome and punitive to encourage employer compliance. The Treasurer explained this when announcing the SG in the 1991–92 Budget speech:

In 1986, 3% superannuation was awarded by the then Conciliation and Arbitration Commission as part of a productivity and wage package. This award requirement has not been complied with in full. The Government will therefore introduce a superannuation guarantee levy, starting from July [1992]. The Government will legislate for a prescribed level of superannuation support to be provided by employers to all of their employees. Employers failing to meet this level will be subject to a superannuation levy which will not be deductible for income tax purposes.¹⁴

1.10 The long title of the SGC Act states that it is:

An Act to impose a charge on any shortfall in the amount contributed by employers to [Retirement Savings Accounts] or superannuation funds for the benefit of employees.

The long title indicates that, in respect of employees, the effect of the SGC Act is remedial and beneficial. In the usual course of Commonwealth administration, ‘ambiguity in a piece of legislation which is beneficial in character ... should be resolved in a way that is most favourable to the people the Act is intended to benefit.’¹⁵

The regulatory role of the Australian Taxation Office

1.11 In respect of superannuation, the ATO’s role is to encourage voluntary compliance and enforce the penalties of non-compliance. The ATO’s strategic objectives include providing assurance across the superannuation system; designing a better superannuation system to make it easy to comply and hard not to comply; and working with and through others to deliver an efficient and effective superannuation system.¹⁶

1.12 The SG gap is a measure of non-compliance with employer SG obligations (see Box 1).

13 The Hon. John Dawkins MP, Treasurer, ‘Second Reading Speech: Superannuation Guarantee (Administration) Bill 1992’, *House of Representatives Hansard*, 2 April 1992, p. 1764.

14 The Hon. John Kerin MP, Treasurer, ‘Second Reading Speech: Appropriation Bill (No. 1) 1991–92’, *House of Representatives Hansard*, 20 August 1991, p. 18.

15 Department of Social Services, *Social Security Guide* [Internet], Version 1.286, Released 27 September 2021, section 1.3.1, available from <https://guides.dss.gov.au/guide-social-security-law/1/3/1> [accessed 1 November 2021].

16 ATO, *Corporate Plan 2021–22*, p. 2.

Box 1: Calculation and reporting of the SG gap

The ATO commenced work in 2015 to develop a measure of the SG gap to assess the risk of non-compliance with SG obligations. A tax gap estimates the difference between the amount the ATO collects and what would have been collected if every taxpayer was fully compliant. The SG gap differs from a tax gap in that it is an estimation of the difference between theoretical SG contributions and the actual SG contribution amount reported to the ATO. Estimates of the SG gap are included in the suite of high-level tax gap measures that track the performance and integrity of the tax system and have been published on the ATO website since 2017.

ATO process for estimating the SG gap

- Step 1 — Examine and select Australian Bureau of Statistics Compensation of Employee data
- Step 2 — Apply an uplift factor for shadow economy (Step 1 adjusted)^a
- Step 3 — Adjust for earnings not subject to super guarantee (Step 2 adjusted)
- Step 4 — Adjust for the impact of overtime (Step 3 adjusted)
- Step 5 — Arrive at the estimate of theoretical SG liability (Steps 1–4 combined)
- Step 6 — Compare the theoretical SG liability to the SG reported from ATO data^b to estimate the gross gap
- Step 7 — Adjust the gross gap with ATO compliance activity outcomes to estimate the net gap

The ATO's methodology is 'top-down' in that it applies aggregate economic and financial data. The methodology and approach were reviewed by an independent expert panel, who assessed it as having a medium level of reliability due to the level of reliance on macro-level Australian Bureau of Statistics data and the assumptions made. The ATO advised the ANAO that the methodology is defensible and credible, and the estimates are suitable for publication.

Note a: The ATO adds a conservative estimate of the shadow economy not captured by the ABS data. This is a theoretical adjustment based on international benchmarks of 1.2 per cent.

Note b: To estimate actual payments, the ATO totals the reported payments into superannuation funds, adjusting for salary sacrifice contributions and other factors to arrive at an estimate of total SG contributions.

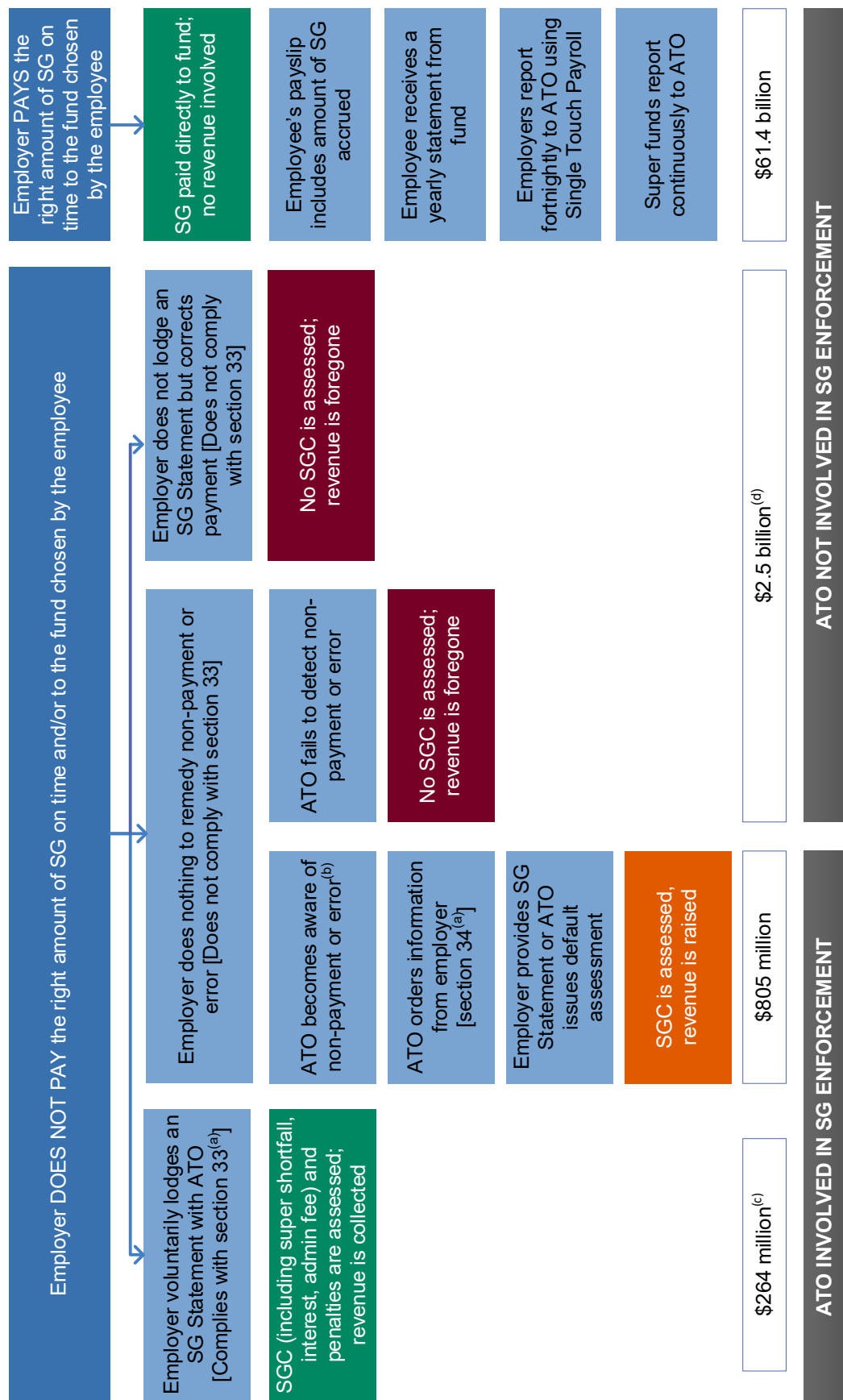
Source: ANAO analysis of ATO documentation.

1.13 The ATO's involvement in administering the Superannuation Guarantee Charge is limited to those cases where:

- employers voluntarily notify the ATO of their non-compliance by lodging an SG Statement¹⁷; or
- the ATO, after becoming aware of an employer's non-compliance, enforces the lodgment of an SG Statement and payment of Superannuation Guarantee Charge and penalties (Figure 1.1).

¹⁷ This audit report uses the terminology 'SG Statement', in line with the SGA Act. Because an SG Statement, once lodged, immediately results in an SG Charge, the ATO uses the terminology 'SGC Statement'.

Figure 1.1: The ATO's role in administering the Superannuation Guarantee Charge



Note a: SGA Act section 33 requires the lodgment of SG Statements by employers who have failed to pay SG. Section 34 enables the ATO to require information from employers who have failed to lodge an SG Statement.

Note b: Alerted by employees (33,858 in 2018–19) or detected by proactive ATO audit (8090 in 2018–19).

Note c: Financial figures are for 2018–19 (most recent year with results for the SG gap).

Note d: Revenue foregone (\$2.5 billion) is the net SG gap reported by the ATO. The gross gap equals the net gap plus the revenue associated with ATO compliance activities (\$264 million plus \$805 million, or \$1.1 billion). The 2018–19 gross gap reported by the ATO in August 2021 was \$3.5 billion, although the component parts shown here equate to \$3.6 billion.

Source: ANAO analysis of the SGC and SGA Acts and ATO records.

Reviews of Superannuation Guarantee compliance

1.14 An Auditor-General report and parliamentary and governmental inquiries have considered the topic of unpaid SG.

- Auditor-General Report No.39 of 2014–15, *Promoting Compliance with Superannuation Guarantee Obligations*, made four recommendations related to better analysing non-compliance and further engaging with superannuation stakeholders; emphasising the ATO's enforcement role; better coordinating compliance activities within the ATO; and evaluating the effectiveness of compliance activities.¹⁸
- In a May 2017 report, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*, the Senate Economics References Committee concluded that the approach taken by the ATO to identifying and addressing unpaid SG was inadequate, and that the ATO should shift from a reactive to a proactive stance.¹⁹ As at February 2022 the government had not tabled a response to the report.²⁰
- In July 2017 the government released the report of the Superannuation Guarantee Cross Agency Working Group, which found that 'while there is, overall, a high level of voluntary compliance by the majority of employers there is scope to improve compliance to better safeguard employee entitlements'.²¹ The report identified two main barriers to maintaining or improving SG compliance: lack of ATO visibility over an employer's superannuation obligations to their employees and the low frequency of reporting by superannuation funds to the ATO.

1.15 The government has responded to these reviews in several ways.

- The Superannuation Guarantee Taskforce (SG Taskforce), announced in August 2017, was part of a package of reforms intended to give the ATO near real-time visibility over SG compliance by employers.
- In August 2017 the ATO published for the first time an estimate of SG non-compliance. The estimated net SG gap (unpaid SG) in 2014–15 was \$2.9 billion (5.2 per cent of the total estimated SG payments of \$54.8 billion). In 2021 the ATO estimated that the net SG gap in 2018–19 was \$2.5 billion or 3.8 per cent.²²

18 Auditor-General Report No.39 2014–15, *Promoting Compliance with Superannuation Guarantee Obligations*, p. 20.

19 Senate Economics References Committee, *Superbad: Wage theft and non-compliance of the Superannuation Guarantee*, Canberra, May 2017, pp. ix–x.

20 President of the Senate, *President's report to the Senate on the status of government responses to parliamentary committee reports as at 30 June 2021* [Internet], available from https://www.aph.gov.au/-/media/02_Parliamentary_Business/24_Committees/242_Senate_Committees/Government_responses_to_outstanding_to_committee_reports/Responses-outstanding-30-June-2021.pdf?la=en&hash=188AD44DBD540B5A0647ED4FFED75FD18E77DF21 [accessed 3 December 2021].

21 Superannuation Guarantee Cross Agency Working Group, *Superannuation Guarantee Non-compliance: A report to the Minister for Revenue and Financial Services*, Canberra, 31 March 2017 [released on 14 July 2017], p. 5. The SG Cross Agency Working Group was comprised of representatives from the ATO; Treasury; Department of Employment; Australian Securities and Investments Commission and Australian Prudential Regulation Authority. It was established in December 2016.

22 The difference between the gross and the net gap is the impact of the ATO's compliance activities.

- In May 2018 the government announced a Superannuation Guarantee Amnesty (SG Amnesty) for unpaid SG for the period 1992 to 2018. The SG Amnesty was legislated in February 2020 and concluded in September 2020.²³

Rationale for undertaking the audit

1.16 Employer non-compliance with SG obligations has an impact on the retirement incomes of Australians, and has been subject to two major reviews in recent years. This topic was identified as a parliamentary priority in 2019–20. The audit provides assurance about the effectiveness of ATO activities aimed at fostering participation in the superannuation system.

Audit approach

Audit objective, criteria and scope

1.17 The objective of the audit was to assess the effectiveness of the ATO's activities in addressing SG non-compliance. To form a conclusion against the audit objective, the following criteria were adopted:

- Does the ATO have an effective risk-based SG compliance framework?
- Are the ATO's compliance activities effective in achieving greater employer compliance with their SG obligations?

1.18 The superannuation system has undergone significant transformation in recent years with the introduction of technology changes — SuperStream²⁴, Single Touch Payroll²⁵ and Member Account Transaction Service²⁶ — and the implementation of policy and legislation. The audit examined the incorporation of these changes into the ATO's compliance framework, and the ATO's compliance activities since the establishment of the SG Taskforce.

1.19 In the 2020–21 Budget, the government announced the *Super Reforms – Your Future, Your Super* measures. The supporting legislation for this reform received Royal Assent on 22 June 2021.²⁷ This legislative change was not within the scope of the audit.

23 ATO, *Superannuation guarantee amnesty* [Internet], last modified 6 July 2021, available from <https://www.ato.gov.au/Business/Super-for-employers/Missed-and-late-super-guarantee-payments/The-super-guarantee-charge/Superannuation-guarantee-amnesty/#Amountsdisclosed> [accessed 11 November 2021].

24 SuperStream is the way employers must pay employee Superannuation Guarantee contributions to super funds. Money and data are sent electronically in a standard format.

25 Single Touch Payroll involves employers reporting employees' payroll information (including salaries and wages, pay as you go (PAYG) withholding and superannuation) each time they are paid through Single Touch Payroll-enabled software. Single Touch Payroll was introduced in July 2018 for employers with 20 or more employees and is a mandatory obligation.

26 Member Account Transaction Service refers to the service for superannuation providers and their intermediaries that is used for reporting member contributions and transactions when they occur.

27 One key element is that, from 1 November 2021, where employees do not choose a super fund, most employers must check with the ATO if their employee has an existing super account, known as a 'stapled super fund', into which to pay the employee's super.

Audit methodology

1.20 The audit methodology involved:

- reviewing ATO documentation;
- conducting meetings with ATO staff and external stakeholders;
- analysing SG compliance processes; and
- analysing ATO data and statistics.

1.21 The audit was conducted in accordance with ANAO Auditing Standards at a cost to the ANAO of approximately \$420,800.

1.22 The team members for this audit were Peter Hoefer, Kim Bond, Robyn Clark, Dr Patrick N. O'Neill, Amanda Reynolds, Peta Martyn and Christine Chalmers.

2. Risk-based compliance framework

Areas examined

This chapter examines whether the Australian Taxation Office (ATO) has an effective risk-based Superannuation Guarantee (SG) compliance framework.

Conclusion

The ATO's risk-based SG compliance framework is partly effective. Although SG risks are assessed and treated, the risk rating for unpaid SG is lower than the ATO risk framework would indicate if consideration of risk to revenue was applied. Although there is a compliance strategy to shift to a more preventative approach, it is not yet supported by effective data analysis.

Areas for improvement

The ANAO made one recommendation for the ATO to implement the proposed preventative approach to SG compliance as documented in its risk-based compliance strategy. The ANAO also suggested there was scope for the ATO to work more with external stakeholders to discuss high-risk sectors and market segments.

2.1 To assess the effectiveness of the ATO's SG compliance framework, this chapter examines whether the ATO has:

- established effective processes to identify and monitor risks; and
- implemented a risk-based compliance strategy.

Are there effective processes in place to identify and monitor risks?

Processes in place to identify and monitor risks to SG compliance are partly effective. SG risks are included in enterprise and business line risk assessments, however the ATO does not assess risk to revenue, which leads to a lower than merited risk rating. The mechanisms for escalating risks identified by the business line risk committee are yet to be fully developed. The ATO assesses its controls for SG compliance risk as 'partially effective'.

2.2 To determine whether there are effective processes in place to identify and monitor SG risks, the ANAO examined consideration of SG risk by governance bodies, assessment of SG risks and treatment of SG risks.

Risk governance bodies' consideration of SG risk

2.3 The relevant ATO risk governance bodies are, at the enterprise level, the Audit and Risk Committee and the Enterprise Risk Management Committee. There is also a Risk and Data Committee within the ATO's Superannuation and Employer Obligations Business Service Line.

Audit and Risk Committee

2.4 The responsibilities of the Audit and Risk Committee include providing advice to the Commissioner of Taxation (the Commissioner) on the ATO's system of risk oversight and management. The Audit and Risk Committee's Charter states:

The committee will review and provide advice on the appropriateness of the ATO's: enterprise risk management framework and the necessary internal controls for the effective identification and

management of the ATO's risks, in keeping with the Commonwealth Risk Management Policy; approach to managing their key risks, including those associated with individual projects and program implementation and activities.

2.5 The Audit and Risk Committee receives quarterly performance reports containing operational information about SG compliance activities, including rates of finalisation of employee notifications²⁸ and the steps taken to clear backlogs of employee notifications. Since 2017 the Audit and Risk Committee has neither received nor requested strategic-level reports on the management of SG risks or compliance. Strategic-level reports would include, for example, compliance strategies, risk tolerances and the effectiveness of risk treatments in increasing compliance and reducing the SG gap.

Enterprise Risk Management Committee

2.6 In November 2017 the ATO established the Enterprise Risk Management Committee to ensure that the Enterprise Risk Management Framework was in place and embedded into day-to-day practices. According to its charter, the purpose of the Enterprise Risk Management Committee is:

To improve the ATO's ability to manage risk associated with achieving the strategic objectives that enable the ATO to fully carry out its purpose to contribute to the economic and social wellbeing of Australians by fostering willing participation in the tax and superannuation systems.

2.7 The Enterprise Risk Management Committee is responsible for the review of the ATO risk appetite statement and its risk management plans, and the effectiveness of the Enterprise Risk Management Framework. Its governance roles include escalating significant risks to the ATO Executive Committee and providing regular advice and assurance about the Enterprise Risk Management Framework to the Audit and Risk Committee.

2.8 The Enterprise Risk Management Committee is chaired by the Chief Operating Officer, with a member drawn from each of the ATO's five groups: Enterprise Strategy and Corporate Operations, Law Design and Practice, Enterprise Solutions and Technology, Service Delivery, and Client Engagement. The Client Engagement Group includes the Superannuation and Employer Obligations Business Service Line, which is responsible for SG compliance.

2.9 In early to mid-2021, the Enterprise Risk Management Committee identified an agreed set of 12 priority risks to include in the Enterprise Risk Register, which were accepted by the ATO Executive and included in the ATO Corporate Plan 2021–22. The ATO advised the ANAO that the 12 risks are the Enterprise Risk Management Committee's primary focus. The Corporate Plan risk relevant to superannuation is:

R5 Managing a complex superannuation ecosystem.

Our ability to manage the superannuation ecosystem may be impacted by increasing complexity and heightened stakeholder expectations.

2.10 The ATO's priority risks were formulated during the same period in which it played a significant role in the Australian Government's response to the coronavirus disease 2019 (COVID-19) pandemic. During that time, the ATO reallocated resources to implement the Australian

28 Employee notifications are complaints submitted by employees to the ATO about unpaid SG.

Government's economic response to the COVID-19 pandemic, including the JobKeeper Payment. The March 2021 Enterprise Risk Management Committee minutes noted that:

The ATO did an excellent job delivering the stimulus measures, shifting our focus was a strategic risk we decided to take on, however our [Quarter 2] report shows that other areas have been impacted and two of our strategic initiatives are now at risk, and some BAU activities are starting to slip beyond recovery (e.g. Super Guarantee).

2.11 Between April and December 2021, the Enterprise Risk Management Committee did not discuss any actions to be taken in light of this concern about SG. The Enterprise Risk Management Committee papers noted that:

We currently rely on an alert being raised to know when something is out of tolerance (e.g. ABRs), performance reports and internal audits. There is no structured way of bringing that picture together.

2.12 The ATO advised the ANAO that, as an operational performance matter: the Enterprise Risk Management Committee's focus was on enterprise risk management; SG was being appropriately overseen by the ATO Executive Committee; and further work was being undertaken to establish clearer mechanisms for escalation of operational risks where appropriate.

2.13 Although an SG risk appears in the Enterprise Risk Register, the ATO advised the ANAO that SG risks have not been specifically discussed at the Enterprise Risk Management Committee and that SG risks are considered a business-level risk, with all governance occurring through the Superannuation and Employer Obligation Business Service Line's Risk and Data Committee.

Risk and Data Committee

2.14 The Superannuation and Employer Obligation Business Service Line has day-to-day responsibility for SG administration, including the management of risk. The Risk and Data Committee reports to the Superannuation and Employer Obligation Business Service Line Executive on SG risks and compliance performance against service standards, identifies key intelligence needs²⁹ for managing SG risks, and develops annual risk treatment plans for consideration by the Executive.

2.15 Of the three relevant risk governance bodies, the Risk and Data Committee considers SG risks in detail.

Assessment of SG risks

2.16 The ANAO examined the Enterprise Risk Register of 1 October 2021, which included 82 active operational risks, four of which related to SG (Table 2.1).

29 Key intelligence needs were initially identified in May 2019 to inform strategy and decision-making at strategic, tactical and operational levels. There are two types — data to monitor and understand the system in operation (for example, population demographics and characteristics); and analysis to inform decisions on a point-in-time basis (for example, employer non-compliance behaviours).

Table 2.1: SG-related risks from ATO Enterprise Risk Register, October 2021

Date added		Risk	Consequences			Controls	Consequence	Likelihood	Risk level	Within tolerance
1 February 2019		Individuals do not receive their superannuation entitlements	Growth of unclaimed superannuation		Partially Effective	2 — Medium	5 — Almost certain	Significant	Yes	
26 February 2019		Failure of the ATO to respond to the impacts of illegal phoenix activity in the tax and superannuation system ^a	Illegal phoenix activity has the potential to severely erode the revenue base		Partially Effective	3 — Major	4 — Likely	High	No	
16 June 2021		Employers fail to report and pay their SG contributions correctly and then fail to lodge and pay the resulting SG charge	Loss of community confidence in ATO administration of superannuation, additional age pension and income support claims, employees do not receive their full superannuation entitlements, employers identified as non-payers face significant penalties putting stress on their cash flow. Some employers may end up with large debts due to the relatively punitive nature of the Superannuation Guarantee Charge, resulting in threats to business viability and recovery of employee entitlements.		Partially Effective	3 — Major	3 — Even Chance	Significant	No	
16 June 2021		Workers classified as contractors rather than employees	Employees do not receive SG		Partially Effective	3 — Major	1 — Rare	Moderate	Yes	

Note a: The ATO describes phoenix activity as 'when a company is liquidated, wound up or abandoned to avoid paying its debts. A new company is then started to continue the same business activities without the debt. When this happens, employees miss out on wages, superannuation and entitlements; other businesses are put at a competitive disadvantage; suppliers or sub-contractors are left unpaid; the community misses out on revenue that could have contributed to community services.' Australian Taxation Office, *Illegal phoenix activity* [Internet], available from <https://www.ato.gov.au/general/the-fight-against-tax-crime/our-focus/illegal-phoenix-activity> [accessed 26 October 2021].

Source: ANAO analysis of ATO documentation.

2.17 Enterprise Risk Register risks are rated according to estimated likelihood and consequence (Figure 2.1).

Figure 2.1: ATO risk assessment matrix, July 2021

Consequence	Extreme	High	High	Severe	Severe	Catastrophic
	Very High	Significant	Significant	High	Severe	Severe
	Major	Moderate	Significant	Significant	High	High
	Medium	Low	Moderate	Significant	Significant	Significant
	Insignificant	Low	Low	Moderate	Moderate	Moderate
	Rare	Unlikely	Even Chance	Likely	Almost Certain	
	Likelihood					

Source: ATO.

2.18 The most relevant SG risk for this audit is the third risk in Table 2.1: that employers fail to report and pay their SG contributions correctly and then fail to lodge and pay the resulting Superannuation Guarantee Charge (see Table 1.1). The first risk, that individuals do not receive their superannuation entitlements, is discussed in Chapter 3. The second and fourth risks, failure of the ATO to respond to the impacts of illegal phoenix activity and workers classified as contractors rather than employees, were outside the scope of this audit.

2.19 Risk controls for the third risk were assessed as ‘partially effective’. A July 2021 risk assessment stated that:

[Superannuation Guarantee Charge] penalties in the past have been remitted in full and therefore [have not led] to long term behaviour change ... only 60% of [Superannuation Guarantee Charge] debt is recovered ... less than 2% of [Superannuation Guarantee Charge assessments] are lodged on time.³⁰

2.20 On the ATO’s six-level risk assessment matrix, the risk that employers fail to report and pay their SG contributions correctly and then fail to lodge and pay the resulting Superannuation Guarantee Charge, is rated ‘significant’ based on an ‘even chance’ likelihood and ‘major’ consequence.

- Likelihood was assessed as ‘even chance’ on the basis that:
There is a reasonable probability that the risk could occur ... From 40 to 60% of the risk population could be involved in the risk. Compliance activity shows the ATO receives and investigates on

30 Table 3.10 shows the SGC collected in 2019–20 represented 65 per cent of the SGC raised in that year. This was a result of the SG Amnesty. Results from other years suggest that a 50 per cent collection ratio is more typical.

average approximately 25,000 employee notifications per annum. From this, approximately 50% of employers are investigated and 75% of these employers are found to owe money.³¹

- The ATO rated the consequence of the risk as ‘major’ taking into account compliance behaviour, the impact on ATO staffing, the likely view of external scrutineers including the Parliament and the reputation of the ATO.

2.21 In assigning the consequence rating, the ATO did not take into account the \$2.5 billion revenue at risk represented by the net SG gap (2018–19 estimate) (see Figure 1.1).³² The revenue at risk amounts to about 0.5 per cent of ATO net revenue collections (which were \$426 billion in 2018–19).³³ The ATO risk matrix indicates that a ‘very high’ consequence rather than a ‘major’ consequence should be assigned to revenue at risk that is between 0.2 per cent to 2 per cent of net revenue collections. At the same likelihood level (even chance) this should result in an overall risk rating of ‘high’ rather than ‘significant’ for the risk of employers failing to report and pay their SG contributions correctly.

2.22 Even with a ‘significant’ risk rating, the risk was considered to be outside its tolerance levels.³⁴ Additional controls were identified in June 2021, including proactive risk treatments using real-time data, engaging with third-party intermediaries to influence employer behaviour and addressing deliberate and egregious non-compliance behaviour.

2.23 Of the other three SG risks in Table 2.1, the ATO also considers the risk posed by phoenix employers (the second risk) to be out of tolerance. The risks of individuals not receiving their superannuation entitlements (leading to the growth of unclaimed superannuation) and workers being classified as contractors rather than employees were determined to be within tolerance.

Treatment of SG risks

2.24 The Superannuation and Employer Obligations Business Service Line last updated its SG Risk Treatment Plan in September 2021, describing the SG risk as:

Employers fail to correctly report and pay their SG contributions on time or at all and subsequently fail to lodge a [Superannuation Guarantee Charge] statement and pay the [Superannuation Guarantee Charge] to the ATO, leading to employees not receiving their entitlements, impacting on the integrity of the superannuation system.

2.25 In the Risk Treatment Plan, the SG risk was described as outside the risk tolerance of ‘moderate’ for this risk, which is documented in a ‘risk rationale’ paper. This was based on a net SG gap of four per cent for 2017–18.

2.26 The overall objective of the SG Risk Treatment Plan is to reduce the rate of non-compliance in the population to within a tolerable range of 97 per cent of SG being paid (that is, the net SG gap being three per cent or less). The objective is underpinned by the following principles:

- prevention before correction, as this yields a better return on investment;

31 The ATO advised the ANAO that by early 2022 it expects that 15 per cent of employee notifications will result in an audit, with 85 per cent expected to be managed through ‘light-touch’ actions.

32 The ATO advised the ANAO that ATO usage of the term ‘revenue at risk’ (or ‘revenue foregone’) would also include an estimate of interest and administration fees.

33 ATO, *Commissioner of Taxation Annual Report 2019–20*, p. 202.

34 The ATO determines its tolerance levels with reference to the proportion of SG paid, the timeliness of SG payments to funds, the number of employee notifications received and the level of SGC debt on hand.

- if employers make an honest mistake, the ATO will give them tools to self-correct; and
- the ATO encourages employers to negotiate a payment arrangement early if they are unable to pay by the due date.

2.27 The September 2021 SG Risk Treatment Plan shows a number of compliance activities (Table 2.2). It indicates that the majority of full-time equivalent (FTE) staff involved in SG compliance activity (of which there were 220) were involved in complaints-based (reactive) compliance activity. More specifically, 90 per cent were responding to employee notifications. Employee notifications were estimated to account for 91 per cent of the SG liabilities raised. Thirteen of the 220 SG compliance staff resources (six per cent) were involved in ATO-initiated (proactive) compliance activity. Overall, staff resources allocated to SG compliance decreased from 266 in 2019 to 220 in 2021.

Table 2.2: SG Risk Treatment Plan compliance activities, September 2021

Compliance activity type	Work program	Number of planned actions for 2021–22	Estimated liabilities to be raised (\$million)	Full-time equivalent staff to be deployed
Reactive	Employee notifications	13,728	662.4	197.5
	Large employer disclosures ^a	100	4.2	1
	Education Direction ^b	2700	N/A	1.2
	Implement new choice requirements for stapled funds ^c	800,000 letters 6000 emails 6000 phone calls	unknown	7.5
Proactive	Audit from third party referral	50	2.1	0.5
	Reminders to late lodgers/payers	40,000 emails 24,000 letters 500 phone calls	N/A	0.25
	Under-payers	4000 letters 1320 audits	55.5	12
	Pilot — Cafés and Fast-Food Restaurants	500 phone calls	0.05	0.25
	Total		724.3	220.2

Note a: Disclosures relating to large employers are handled by a dedicated team of ATO auditors.

Note b: Education Directions are a new power available to the ATO to ensure that employers understand their obligations; see Table 3.8. If the ATO detects employer non-compliance as a result of lack of understanding of obligations, a direction can be issued, requiring them to complete an SG course of education.

Note c: If an employee does not execute the option to choose a super fund the default option was for the employer to determine the super fund. Legislation prescribed that, from 1 November 2021, an individual employee's super accounts would be linked, or 'stapled', so that new super accounts would not be opened each time an employee starts a new job.

Source: ATO data and documentation.

2.28 Table 2.3 shows the ATO's evaluation of the effectiveness of controls, which were documented in the 'risk rationale' paper. The overall rating of the controls was 'partially effective'.

Table 2.3: ATO assessment of risk control effectiveness, September 2021

Control description	Effectiveness
Preventative (nudges) ^a	Effective
Data-matching (Single Touch Payroll and Member Account Transaction Service)	Ineffective
Third-party referrals	Partially effective
Risk based models — High Risk Employer (HRE), Stratified Sampling Nearest Neighbour (NN) (see paragraph 2.45)	Partially effective
Employee notifications ^b	Effective
Proactive compliance activities ^b	Effective
Superannuation Guarantee Charge penalties ^c and payment plans ^d	Partially effective
Help and educate	Partially effective
Post-Amnesty disqualification and penalties, Education Direction and disclosures	Insufficient evidence
Enabling services to make it easier to comply: <ul style="list-style-type: none"> • Small Business Superannuation Clearing House and SuperStream • Single Touch Payroll • Online tools • Electronic lodgment of Superannuation Guarantee Charge statements^e 	Effective Partially effective Partially effective Partially effective
Firmer action for debt recovery	Insufficient evidence

Note a: Nudges are used to remind employers of upcoming SG due dates or to prompt lodgment of Superannuation Guarantee Charge statements where SG is unpaid or paid late.

Note b: The 'risk rationale' paper noted employee notifications and proactive compliance activities (such as audits and reviews) to be labour intensive and not timely.

Note c: The 'risk rationale' paper noted that, pre-Amnesty, most penalties were remitted in full.

Note d: The 'risk rationale' paper stated that: 'Data indicates only 60% of Superannuation Guarantee Charge debt is ever recovered.'

Note e: The 'risk rationale' paper stated that: 'Less than two per cent of SG statements are lodged on time.'

Source: ANAO analysis of ATO 'risk rationale' paper, 19 September 2021.

2.29 The ATO assessed Key Intelligence Needs (KINs) in 2019 as a primary component of the risk identification process. The KINs identify the data required to support the SG Risk Treatment Plan and the data analysis required to support SG compliance actions.³⁵ A total of 79 KINs were identified in May 2019; 60 more were added in August 2019; and a further 30 in November 2019. The KINs relate to a range of ATO responsibilities including SG, Fringe Benefits Tax and Pay As You Go obligations.

2.30 A stocktake of KINs was undertaken in May 2020 and reported to the Superannuation and Employer Obligations Business Service Line Executive in July 2020. In respect of KINs in support of SG compliance, it was reported that:

35 KINs include population demographics, characteristics and interactions in the system and transactional flows, non-compliance behaviours (characteristics, drivers and causes), emerging risks (patterns and trends) and engagement (patterns and channels for client experience).

- the data model for identifying discrepancies between Single Touch Payroll, reported SG liability and Member Account Transaction Service-reported payments was not yet mature and at an appropriate level of confidence;
- it was difficult to reliably match SG payments with Member Account Transaction Service transactions;
- to help manage SG risk, a synthetic data model was derived (dMATS) to plug gaps in the Member Account Transaction Service data;
- the very large data sets produced were being analysed in Microsoft Excel in multiple spreadsheets with millions of rows; and
- significant time was required to process the data.

2.31 The Superannuation and Employer Obligations Business Service Line Executive was advised that, because of these difficulties, SG compliance targeting continued to rely primarily on employee notifications.

Has the ATO implemented a risk-based compliance strategy?

The ATO has partly implemented a risk-based compliance strategy. There is a compliance strategy that is designed to shift the focus from a reactive approach through enforcement, to a preventative approach through encouraging voluntary compliance. The compliance strategy has not been fully implemented, and compliance activities remain largely reactive. A preventative approach is highly dependent on the implementation of a data-matching solution. The use of real-time data-driven analysis to inform risk assessment has been limited by data and systems issues.

2.32 Regulators should apply an appropriate risk-based approach for selecting entities for compliance action.³⁶ To assess whether the ATO has implemented a risk-based compliance strategy, the ANAO examined whether it:

- has a compliance strategy;
- has used analysis to select entities for compliance activity;
- targets high-risk industries and groups through its compliance activities; and
- engages with external stakeholders to improve its understanding of compliance risks.

Compliance strategy

2.33 The most recent compliance strategy was presented by the Deputy Commissioner, Superannuation and Employer Obligations Business Service Line, to the ATO Executive in July 2020.³⁷

2.34 The ATO's SG compliance activities comprise reactive activities responding to employee notifications and proactive activities that involve targeting employers for audit or other compliance

36 ANAO, *Audit Insights: Administering Regulation* [Internet], January 2021, available from <https://www.anao.gov.au/work/audit-insights/administering-regulation>.

37 The ATO introduced a Practical Compliance approach in June 2015 as part of an expansion of the Tailoring the Employer Experience with Superannuation initiative (see paragraph 2.40). The ATO was unable to provide to the ANAO an approved version of the 2015 compliance approach.

activities. The July 2020 strategy made a strategic shift from reactive corrective compliance actions to reduce the net SG gap to preventative and proactive actions to increase voluntary compliance and reduce the gross SG gap.

...making a progressive move from a reactive complaints-based approach towards a more pre-emptive, lodgement based approach where employers clearly understand their obligations and system improvements are made to make it easier for employers to comply.

2.35 A preventative approach guides employers in a more timely and less resource-intensive way towards voluntary compliance through the use of low-touch communications with employers (letters, emails and phone calls). These are aimed at encouraging employers to self-correct through the lodgement of SG Statements (see Figure 1.1).

Use of analysis to select entities for compliance activity

2.36 The July 2020 compliance strategy stated that the implementation of a preventative strategy is highly dependent on the capacity of the ATO to implement a data-matching solution:

...the ability to undertake this work on a large scale is dependent on the availability and quality of [Single Touch Payroll] and [Member Account Transaction Service] data as well as analytical models.

2.37 The ATO has applied data analysis to identify high-risk employers for proactive activities since 2008.

2.38 In response to a June 2015 Auditor-General recommendation that the ATO better analyse the level and nature of SG non-compliance,³⁸ the ATO advised that it was commencing work to measure the SG gap, assessing systemic risks with employer non-compliance and exploring opportunities to pilot collaborative approaches with superannuation industry compliance bodies.

2.39 Since 2015 there have been three major phases in the ATO's use of analysis in risk-based SG compliance activities: practical compliance, data-driven risk-based compliance activities and real-time data-driven compliance activities.

Practical compliance

2.40 The June 2015 Tailoring the Employer Experience with Superannuation project involved the application of a 'practical compliance' approach. Practical compliance meant tailoring compliance action to correspond to employers' behaviour and taking a 'light touch' approach when the ATO formed the view that the employer had substantially complied with their SG obligations. A more punitive approach was reserved for employers who had intentionally disregarded their SG obligations.

2.41 Internal ATO documents from April 2017 indicate that substantial compliance included: unintentional failure; as well as cases where, on becoming aware of their failure, employers paid the minimum SG contribution owed (plus an amount of 'top-up interest' to compensate employees

38 Auditor-General Report No.39 2014–15, *Promoting Compliance with Superannuation Guarantee Obligations*, p. 63. The Auditor-General recommendation was:

To provide greater assurance of the level and nature of non-compliance with Superannuation Guarantee obligations, the ANAO recommends that the ATO:

- (a) better analyses non-compliance, including at the industry sector levels and among the categories of employees most at risk; and
- (b) further engages with external stakeholders involved in Superannuation Guarantee compliance activities.

for lost earnings) and notified the ATO of their failure and the remedial actions they had taken. The documents indicated that, in such cases, the Commissioner:

will not pursue the lodgement of an SG statement, will not raise a [Superannuation Guarantee Charge] debt on the employer's ATO accounts, will not exercise his power under section 36 of the [Superannuation Guarantee (Administration) Act 1992] to issue a default assessment, and will remit Part 7 penalties to nil (and as such, will not make an assessment of the Part 7 penalties).

2.42 On 18 June 2015 the ATO published corresponding advice to employers on its website:

While the law requires employers to lodge an [Superannuation Guarantee Charge] statement, if they do not make the required amount of super contributions to a super fund by the end of the contribution cut-off date, we may not check the current compliance of those employers who are viewed as low risk (as a result of having a good compliance history) and who have appropriately compensated their employees.

2.43 The ATO applied the practical compliance approach from mid-2015 to August 2017, at which time it was discontinued on the basis of legal advice prompted by concerns raised by a Deputy Commissioner. The ATO formed the view that it was not clear that the concessional treatment of employers was supported by the SG legislation and that the practical compliance approach could not be utilised where the ATO was made aware of the factual circumstances of a particular case and that an entity had not complied with their SG obligations.

Data-driven risk-based SG compliance activities

2.44 By October 2016 there was increased analysis of SG non-compliance through the use of data and predictive analytics. This included the analysis of ATO payment summaries and the Member Contribution Statements of superannuation funds. This analysis identified that the highest-risk employers were those with fewer than 20 employees in industries where the cash economy operated.

2.45 By the end of 2017 the ATO had developed two risk-based models to identify employers with a high risk of not paying SG entitlements: the High Risk Employer model and the Stratified Sampling Nearest Neighbour model. Both models relied on historical superannuation fund and income tax return data.

- High Risk Employer model — compared the amount of SG paid to an employee (as detailed in Member Contribution Statements) to an estimate of the SG entitlement calculated using the employee's income tax return. The output of the model was the likelihood of an employee having received their SG entitlement. The ATO targeted employers for audit where the High Risk Employer model indicated that a significant proportion of their employees were unlikely to have received their SG entitlements.
- Stratified Sampling Nearest Neighbour model — used an established statistical method to create notional 'peer' employers for comparison with a target employer. The peer employers have the same number of employees overall and in each occupation, and have employees with similar salary and wages. The output of the model was a risk score and an estimated SG shortfall for the targeted employer. These outputs were used to select targets for audit and other actions.

Real-time data-driven risk-based compliance activities

2.46 In October 2018 the Risk and Data Committee approved an SG Risk Treatment Plan that aimed to ‘move from a reactive, largely historical perspective on SG compliance to a more proactive, contemporary focus’. This would involve moving from risk models based on retrospective data received annually toward risk targeting based on real-time data, noting that there would be an extended transition period. During that time, data would progressively become available, with the extension of Single Touch Payroll to all employers from July 2019, and as Member Contribution Statements were replaced by more regular reporting from superannuation funds through the Member Account Attribute Service³⁹ and Member Account Transaction Service from April 2019.

2.47 The transition period would be used to:

- develop tools to identify risk associated with employers not in the Single Touch Payroll/Pay As You Go Withholding reporting system; and
- establish a facility to bring together a wider range of available data to aid the development of SG risk assessment.

2.48 The first real-time data-driven SG compliance tools were to become operational in 2018–19. These comprised payday ‘health checks’ of the completeness and integrity of payday reporting including SG calculations and quarterly diagnostic reports comparing Member Account Transaction Service data with reported SG obligations. Exceptions or discrepancies identified could then prompt ATO compliance action.

2.49 In 2018–19 the ATO replaced the High Risk Employer and Stratified Sampling Nearest Neighbour models with real-time data models.

- Employer Simulation and Evaluation Model — compares employers’ behaviour by looking at similar groups of employees. The model initially used Member Contribution Statements data as the source of contributions made, but was subsequently updated to use Member Account Transaction Service data.
- SG Under Reporting model — identifies under-reporting using Single Touch Payroll and Member Account Transaction Service data.

2.50 SG ‘strike rate’ refers to the proportion of SG compliance cases that have liabilities raised. The new models increased the average strike rate from approximately 60–70 per cent to 90 per cent. However, the new models require a high level of data validation, involve limited sampled data sets and compliance cases, are manually intensive, and require intensive use of Microsoft Excel by a few experienced staff.

2.51 The ATO advised the ANAO that the complexity, volume of employer population data from which samples are drawn, and difficulties in matching the Single Touch Payroll and Member Account Transaction Service / Member Account Attribute Service data sets at scale had been underestimated. The ATO stated that the employer reporting requirements (and resulting data) were established for multiple purposes aside from SG compliance and at different points in time. Before the data sets could be used to identify SG compliance risks and targets, a reconciliation of the data reporting is required to facilitate matching. This involves accounting for differences in frequency, time periods and business reporting; dealing with duplicate and missing data; and

39 Member Account Attribute Service is an online ATO service for superannuation providers.

removing data-entry errors (chiefly made by employers and superannuation funds). The ATO estimated that data integrity issues affected 10 to 15 per cent of the data.

2.52 In July 2020 the Superannuation and Employer Obligations Business Service Line reported to the ATO Executive that the ATO was receiving greater numbers of employee notifications and a backlog was growing, due in part to the reallocation of 80 per cent of staff for around six months to deliver the Australian Government's economic response to the COVID-19 pandemic (see paragraph 3.28). The Superannuation and Employer Obligations Business Service Line also reported that the SG Amnesty (see paragraphs 3.44 to 3.58) would end in September 2020 and it was desirable that compliance action resume promptly utilising real-time data.

2.53 The development of the data-matching solution is heavily reliant on the available capacity of the Smarter Data team.⁴⁰ Minutes from an August 2021 Risk and Data Committee meeting stated that Smarter Data's work program was at capacity.

2.54 The ATO's progress in undertaking Single Touch Payroll and Member Account Transaction Service data-matching was reviewed and future requirements identified as part of a 'discovery and opportunity' Superannuation and Employer Obligations project from September 2020 until August 2021 (later renamed the SG Assurance Project).⁴¹ The Superannuation and Employer Obligations Business Service Line and Smarter Data and Enterprise Solutions and Technology divisions each allocated two to three full-time equivalent staff to the project. A proposal for resolution of the Single Touch Payroll and Member Account Transaction Service data-matching issues was approved to proceed to a value case in August 2021.

2.55 The ATO advised the ANAO in September 2021 that it was making limited use of real-time data to select cases for compliance activities, amounting to around 200 cases in 2021–22, but with the intention to increase over time to 1000 cases per year. The ATO advised the ANAO that analysis and resolution of fundamental differences between the data in Single Touch Payroll and Member Account Transaction Service for SG compliance was feasible and fundamental to achieving an efficient solution to deliver the design. The September 2021 Risk Treatment Plan for SG non-compliance noted that:

The treatment plan, particularly proactive and tailored risk treatment, relies heavily on the ability to reliably match [Single Touch Payroll] and [Member Account Transaction Service] data at an employee/employer level and store that result in an enterprise system. The current state of our models and systems does not allow this to happen. The underlying causes and potential investment pathways have been identified as part of the SG Assurance Project and are pending funding approval.

2.56 In December 2021 the ATO Executive decided to continue the SG Data Assurance project at a slower pace due to the ATO's budget position.

Targeting of high-risk industries and groups

2.57 The ATO's SG compliance approach is based on the selection of cases where the greatest debt can be recovered and there is a greater likelihood of a higher strike rate (that is, the proportion

40 The ATO's Smarter Data unit conducts data analytics and works on improved data processing.

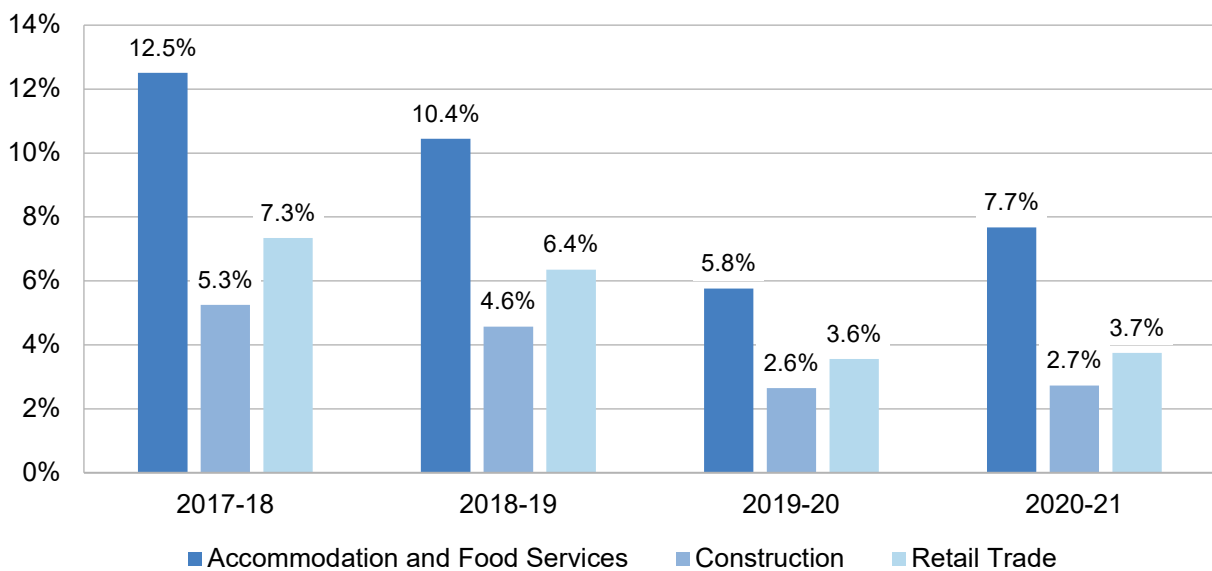
41 Following a decision at the ATO's Strategy and Integration Committee, ongoing work was designated as the 'SG Assurance Project'.

of cases created that identify unpaid SG and raise a liability). The ATO does not specifically target higher-risk industry sectors.

2.58 The ATO’s analysis of ATO and third-party data confirms that non-compliance is unevenly spread across employers, with prevalence greater for small and micro businesses and certain industries. Ninety two per cent of businesses audited by the ATO were entities with turnover under \$10 million, 78 per cent had 30 or fewer employees and 44 per cent had 10 or fewer employees. In 2016 the ATO began to develop a high-risk industry strategy that would operate across its business lines. Three industries (cafés and restaurants, hairdressing and beauty services, and investigation and security services) were flagged for further consideration. The strategy was not pursued.

2.59 The ANAO analysed the number of employee notifications, the number of SG proactive audits and reviews, and the ATO’s engagement with employers between 2017–18 and 2020–21 in the top high-risk industries (as assessed by the ATO in 2018–19) (Figure 2.2). Collectively, these industries accounted for about 25 per cent of all SG compliance activity in 2017–18. The proportion of SG compliance activity accounted for by these industries declined to around 14 per cent in 2020–21.

Figure 2.2: Proportion of SG compliance activity represented by the ATO-identified top three high-risk industries, 2017–18 to 2020–21



Note a: Data for 2018–19, 2019–20 and 2020–21 includes SG Taskforce outcomes.

Source: ATO data. The ANAO has not validated this data.

2.60 Although high-risk industries are covered by the ATO’s compliance activities, the total number of employers engaged is low as a proportion of all employers. Between 2017–18 and 2020–21, compliance activities (excluding preventative measures such as nudges) for employers in the construction industry covered between 0.01 and 0.002 per cent of construction industry employers, depending on the year.

2.61 As at June 2021 the ATO was planning a pilot SG compliance effort targeting the café and fast food industry. About 500 employers would be identified using existing data analytic tools, and the outcome would be considered for further targeted compliance efforts. The pilot was scheduled

to commence in March 2022. The ATO advised the ANAO on 24 February 2022 that the pilot would be finalised by the end of April 2022.

2.62 The ATO's top-down approach to calculating the SG gap (see Box 1) does not provide risk intelligence by market segment or industry sector. A bottom-up approach using tax and superannuation data at the individual employer and employee level has the potential to provide this information. The ATO advised the ANAO that it may be possible to calculate a bottom-up SG gap using Single Touch Payroll data in future,⁴² with the publication of a bottom-up estimate possible in the 2023–24 Annual Report.

Engagement with external stakeholders

2.63 The ATO's consultative arrangements for discussing superannuation matters with external stakeholders⁴³ comprise forums that discuss major policy, administrative and implementation issues; special projects; and information-sharing. There are currently no external stakeholder forums that have a specific focus on SG non-compliance. There is scope for the ATO to improve the overall effectiveness of its SG compliance activity by working more effectively with external stakeholders, noting that the ATO cannot share information with other organisations unless they meet a legislative exemption, such as established for the Fair Work Ombudsman and interagency taskforces.⁴⁴

Recommendation no. 1

2.64 The ATO implement the proposed preventative approach to SG compliance as documented in the risk-based compliance strategy.

Australian Taxation Office response: *Agreed.*

2.65 *The ATO is undertaking a risk-based approach to managing the SG risk and will implement a range of approaches, including preventative approaches, which have already commenced.*

42 Single Touch Payroll data can allow for a breakdown of employees' income to provide greater visibility of the components included in Ordinary Time Earnings and therefore subject to SG. For example, it will distinguish superannuation salary sacrifice payments from non-superannuation salary sacrifice payments.

43 External stakeholders include superannuation funds, other government agencies, joint government taskforces, unions and the general public.

44 The ATO advised the ANAO that while the ATO and Fair Work Ombudsman have a memorandum of understanding in place to facilitate information sharing, legislation restricts the ATO from sharing information in relation to clients and referral outcomes.

3. Effectiveness of compliance activities

Areas examined

This chapter examines whether the Australian Taxation Office's (ATO's) compliance activities are effective in achieving greater employer compliance with superannuation guarantee (SG) obligations.

Conclusion

The ATO's compliance activities are partly effective in achieving greater employer compliance with SG obligations. The extent of improvement in employer compliance is difficult to establish due to a lack of performance information. Although there has been an increase in the absolute amount of debt raised and funds collected, the ATO has acknowledged that it has a small influence on the net SG gap. Planned targeted reforms to improve the integrity and administration of the SG system were partly implemented. Although the ATO did not fully employ its SG debt-recovery powers during 2020, in line with its suspension of other ATO-initiated compliance work during the COVID-19 pandemic, SG debt increased at a higher rate than total ATO debt in 2020–21.

Areas for improvement

The ANAO made two recommendations aimed at enhanced SG performance reporting and maximising the benefit to employees' superannuation funds through more effective debt recovery. To enable performance assessment, the ANAO suggested that the ATO should set clear performance targets in respect of the SG gap.

3.1 To assess the effectiveness of the ATO's compliance activities in achieving greater employer compliance with SG obligations, this chapter examines whether:

- the ATO's compliance activities improved employer compliance with SG obligations;
- the SG Taskforce and Amnesty achieved their objectives; and
- the ATO effectively used its debt recovery powers to collect unpaid SG.

Have the ATO's compliance activities improved employer compliance?

While there is some evidence that the ATO's compliance activities are improving employer compliance, the extent of improvement cannot be reliably assessed. Public reporting of performance does not provide adequate information to evaluate the effectiveness of the ATO's SG compliance activities. The ATO advised that a growing backlog of employee notifications of employer non-compliance was cleared by December 2021. There has been an increase in the absolute amount of debts raised and funds collected over the past four years. Although there has been a downward trend since 2013–14, the net SG gap reported for 2018–19 was little different from the gap reported for 2009–10. Between 2013–14 and 2018–19, the ATO's compliance activities detected and collected unpaid SG amounting to less than an average of 15 per cent per year of the gross SG gap. The ATO did not consistently meet service commitments for reactive corrective compliance activities. A commitment that 40 per cent of corrective compliance activities would be proactive was reported as met in three of four years to 2020–21. However, there has been a shift from resource-intensive audit activity to low-touch nudges.

3.2 To determine whether the ATO's compliance activities have improved employer compliance with SG obligations, the ANAO examined the quality of the ATO's SG performance information and the performance results.

Quality of ATO's Superannuation Guarantee performance information

3.3 The Commonwealth Performance Framework requires entities to publish performance information that outlines how the entity's performance will be measured and the results of that measurement.⁴⁵ Regulators should report on the number and the outcomes of core compliance activities to provide confidence to the Parliament and the community that regulated entities are complying with their obligations.⁴⁶

3.4 The ATO includes performance measures for the SG program in its Portfolio Budget Statements (PBS) and publishes results in its Annual Performance Statement.⁴⁷ Auditor-General Report No. 39 of 2014–15 recommended that the ATO develop indicators, targets and timeframes to assess whether goals were being achieved.⁴⁸ The ATO agreed with the recommendation. Part of the ATO's response was to develop its estimates of the SG gap (see Box 1). The performance criteria in Table 3.1 have been in place since 2019–20.

45 ANAO, *Audit Insights: Performance Measurement and Monitoring — Developing Performance Measures and Tracking Progress* [Internet], 11 November 2020, available from <https://www.anao.gov.au/work/audit-insights/performance-measurement-and-monitoring-developing-performance-measures-and-tracking-progress>. The Commonwealth Performance Framework is defined at Department of Finance, *Commonwealth Performance Framework* [Internet], available from <https://www.finance.gov.au/government/managing-commonwealth-resources/planning-and-reporting/commonwealth-performance-framework> [accessed 2 January 2022].

46 ANAO, *Audit Insights: Administering Regulation* [Internet], January 2021, available from <https://www.anao.gov.au/work/audit-insights/administering-regulation>.

47 ATO, *Commissioner of Taxation Annual Report 2020–21*, October 2021, p. 56.

48 Auditor-General Report No. 39 2014–15, *Promoting Compliance with Superannuation Guarantee Obligations*, p. 116.

Table 3.1: Portfolio Budget Statements SG performance measures, 2021–22

Outcome 1 — Confidence in the administration of aspects of Australia’s taxation and superannuation systems, including through helping people understand their rights and obligations, improving ease of compliance and access to benefits, and managing non-compliance with the law; and in delivering effective and efficient business registry services.			
Program 1.14 Superannuation Guarantee Scheme performance criteria	Targets		
Superannuation guarantee gap as a proportion of superannuation guarantee contributions	Reduce the gap to a level as low as practicable given the nature and complexity of the law and the resources available.		
Value of Superannuation Guarantee Charge: <ul style="list-style-type: none"> raised (including penalties and interest) collected 	Financial year	Targets \$ million	
		Raised	Collected
	2020–21	1020	516
	2021–22	812	462
	2022–23	845	478
	2023–24	902	513
	2024–25	974	554
Value of superannuation guarantee entitlements distributed to individuals or superannuation funds	Financial year	Targets \$ million	
	2020–21	485	
	2021–22	421	
	2022–23	414	
	2023–24	445	
	2024–25	480	
Value of superannuation guarantee debt on hand and the amount of superannuation guarantee debt irrecoverable at law or uneconomical to pursue	Financial year	Targets \$ million	
		Debt on hand	Irrecoverable at law or uneconomical to pursue
	2020–21	2800	23
	2021–22	2700	195
	2022–23	2900	198
	2023–24	3100	203
	2024–25	3300	209

Source: Portfolio Budget Statements 2021–22, Treasury Portfolio, pp. 221–222.

3.5 ATO annual reports⁴⁹ also provide:

- the number of employee notifications leading to a superannuation liability being raised or having no result;

⁴⁹ ATO, *Commissioner of Taxation Annual Report 2020–21*, October 2021, Appendix 8.

- the number of employees who have had SG entitlements raised as a result of ATO compliance activities and voluntary disclosures;
- the number of employers whose records are checked and the number of checks leading to a superannuation liability being raised;
- the proportion of employers for whom SG liabilities were raised by the ATO; and
- the proportion of SG compliance casework consisting of ATO-initiated work.

3.6 The ATO's service commitments as reported in annual reports include:

- commencing processing of employee notifications within 28 days of receipt;
- finalising 60 per cent of employee notifications within four months of receipt; and
- finalising 90 per cent of employee notifications within nine months of receipt.

3.7 In addition to the publicly reported performance measures, the Superannuation and Employer Obligations Business Service Line Executive receives a monthly performance report largely focusing on the processing of employee notifications, backlog and project status.

3.8 Section 16EA of the Public Governance, Performance and Accountability Rule 2014 (PGPA Rule) requires an entity's performance measures to relate directly to one or more of the entity's purposes or key activities; and be measurable. Under subsection 16E(2) item 5 of the PGPA Rule, an entity's corporate plan should specify targets for each of those performance measures for which it is reasonably practicable to set a target.

3.9 ATO SG performance reporting could be improved in a number of ways.

- There are targets for three of four PBS SG measures. The ATO does not have measurable targets for tax gaps, including the SG gap. The ATO advised the ANAO that establishing a precise numerical target for the SG gap was not practicable due to a two-year time lag in calculating the measure and the statistical confidence interval around the estimate, but that there is an expectation that the SG gap should decrease over time. The ATO also advised that the development of a 'bottom up' SG gap measure (see paragraph 2.62) will provide a stronger basis for setting a precise numerical target. The ANAO notes that performance data sets involving a time lag are not unusual and that targets can be expressed as a range. The ATO should consider whether a target range or a target that conveys general expectations for a reduction in the gap over time would provide greater transparency than the current approach. Further, Resource Management Guide 131 states that where it is not reasonably practicable to set a target, the reasoning should be documented and reported.⁵⁰
- Publication of the overall number of employee notifications received each year would provide valuable context for the other performance and service standard results that are published.
- The ATO cautions against analysing year-on-year changes to theoretical tax gap models like the SG gap and suggests that medium to longer-term trends are more meaningful indicators of the overall performance and health of the tax and superannuation systems.⁵¹

50 Department of Finance, Resource Management Guide No. 131: *Developing good performance information*, May 2020, p. 40.

51 ATO, *Commissioner of Taxation Annual Report 2020–21*, October 2021, p. 40.

Although time series of the SG gap are presented in annual reports and on the ATO website, reporting is not supported by any commentary about trends or any assessment of the overall effectiveness of the ATO's compliance activities.

- To inform an assessment of the overall effectiveness of its SG compliance activities, in addition to tracking macro-level movements in the SG gap over time, the ATO could report the percentage of the gross gap detected by the ATO and the percentage detected and collected.
- The ATO could consider micro-level measures that focus on assessing the impact of specific risk treatments on the level of employer compliance by market segment and industry sector, especially high-risk industries and employers. This approach would require developing a baseline level of employer non-compliance.
- The monthly performance report to the Superannuation and Employer Obligations Business Service Line Executive has limited analysis on the performance of the SG compliance activities.

Recommendation no. 2

3.10 The ATO assess its performance measures against the Public Governance, Performance and Accountability Rule 2014 and enhance its public SG performance information by:

- (a) setting targets for measures, including the SG gap; and
- (b) including explanations for performance results, including performance changes over time.

Australian Taxation Office response: *Agreed with qualification (a); Agreed (b).*

3.11 (a) *We agree that sustainably reducing the SG gap (and therefore increasing SG performance) is our goal.*

Consistent with the recommendation, we intend to bolster our current measurement and publication of gaps/performance by establishing and publishing our ambitions as to SG gap/performance over time. This aligns with our intended approach for gaps/performance more broadly.

We note that gap/performance (generally and in relation to SG) has some challenges in the context of a PGPA target, for a variety of reasons, including:

- *It tends to be a 'lag' measure, as it takes up to several years to reliably estimate the gap for a year;*
- *It is an estimate, and there can be significant variations in calculated gap due to changes in methodologies and assumptions rather than ATO performance;*
- *Changes in policy settings can have significant effects on gap/performance.*

We agree in part to setting targets in relation to a number of performance measures which will provide more real time information.

3.12 (b) *The ATO will explore opportunities to improve its explanations and commentary on SG performance information.*

Performance results

3.13 The ANAO examined performance results for the SG gap and compliance activity.

SG gap performance

3.14 There are two SG gap estimates, the gross gap (a measure of employer compliance that estimates the difference between actual SG employer contributions and the amount that would have been paid with full employer compliance before ATO intervention) and the net gap (the gross SG gap minus SG amendments voluntarily disclosed by employers and from ATO compliance activities).⁵²

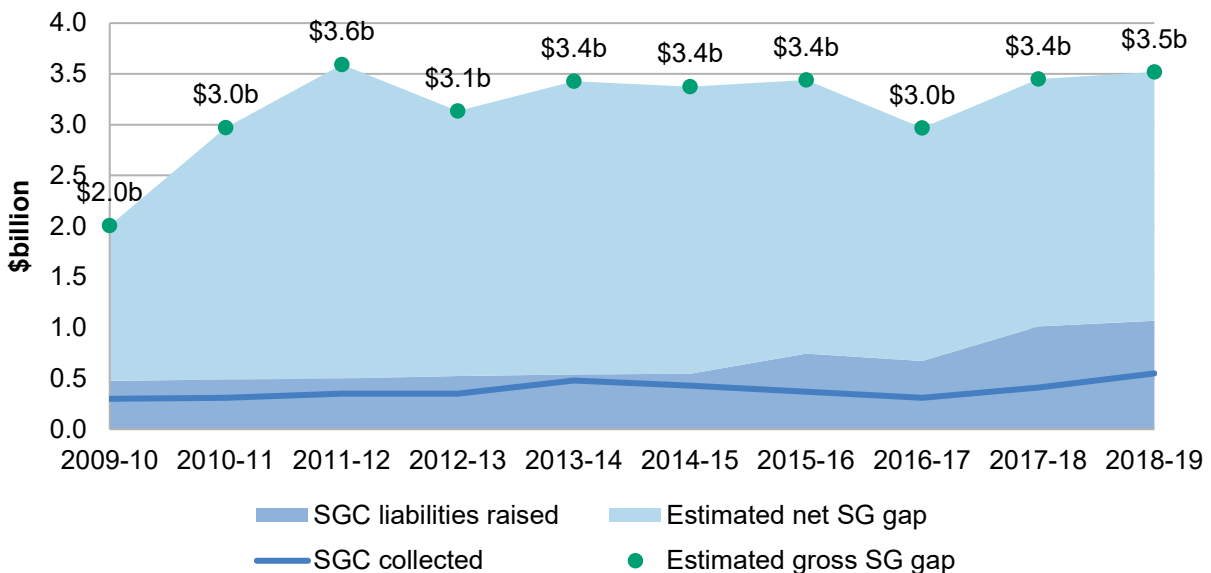
52 ATO, *Superannuation guarantee gap* [Internet], available from <https://www.ato.gov.au/about-ato/research-and-statistics/in-detail/tax-gap/superannuation-guarantee-gap/> [accessed 3 November 2021].

- For 2018–19 the ATO estimated a gross SG gap of 5.4 per cent or \$3.5 billion — in other words, the ATO estimates that employers were paying about 95 per cent of their SG obligations voluntarily.
- For 2018–19 the ATO estimated a net SG gap of 3.8 per cent or \$2.5 billion.

3.15 Figure 3.1 shows the absolute gross and net SG gap estimates, and SGC liabilities raised and collected, for 2009–10 to 2018–19.

- In 2018–19 \$2.5 billion of the gross gap was undetected by the ATO and \$1.1 billion was detected. The detected SG gap results from ATO compliance activities and is also referred to as ‘SGC liabilities raised’.
- Over 10 years, the proportion of unpaid SG detected by the ATO increased from 21.6 to 30.4 per cent (average 20.5 per cent) of the gross SG gap.⁵³
- In 2018–19, \$0.55 billion of SGC liabilities was collected. Between 2013–14 and 2018–19, the ATO’s compliance activities detected and collected unpaid SG amounting to less than an average of 15 per cent per year of the gross SG gap.⁵⁴
- The ATO estimates that approximately 40 per cent of the undetected SG is within the shadow economy and not readily susceptible to SG compliance activities.⁵⁵

Figure 3.1: ATO estimated gross and net SG gap, and SGC liabilities raised and collected, 2009–10 to 2018–19



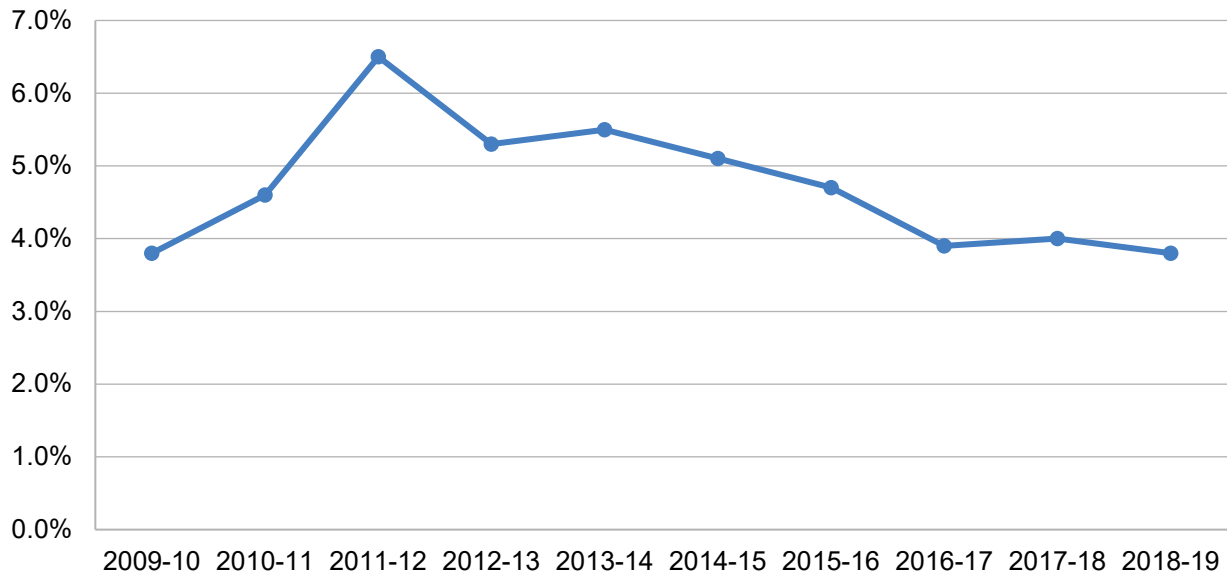
Source: ANAO presentation of ATO data. The ANAO has not validated the data.

3.16 Figure 3.2 shows that the net SG gap, as a percentage of theoretical SG, has fluctuated between around four and six per cent in the ten-year period.⁵⁶ The net SG gap percentage in

53 Given that the gap is measured on an accrual basis, the ATO prefers the term ‘unreported SG’ to ‘unpaid SG’.
 54 Note that the total collected in a particular year may not have been raised in that same year; collections may arise from assessments made in previous years and may continue over several years.
 55 The ATO prefers the term ‘unreported SG’ to ‘undetected SG’.
 56 The calculation of the net gap percentage in 2018–19 is the undetected \$2.5 billion divided by the theoretical SG of \$64.94 billion.

2018–19 is the same as the gap in 2009–10 (3.8 per cent). There has been a downward trend in the gap since 2013–14.

Figure 3.2: Net SG gap, 2009–10 to 2018–19



Source: ATO data. The ANAO has not validated this data.

3.17 Table 3.2 shows that the amount of SGC raised was around 30 per cent of the gross SG gap in 2017–18 and 2018–19. Not all ATO compliance activities result in a Superannuation Guarantee Charge (SGC) liability being raised.⁵⁷ The ATO recovers 50 to 60 per cent of the liability raised. A 2020 internal strategy document stated that the ATO’s ‘primarily reactive, resource intensive compliance and debt approach has only a small influence on the net gap’.

Table 3.2: Gross SG gap estimate and SGC outcomes, 2017–18 and 2018–19

Measure	2017–18		2018–19	
	\$ million		\$ million	
Gross SG gap estimate ^a	3448		3520	
SGC raised by the ATO ^b	1107		1069	
SGC collected by the ATO ^c	441		577	

Note a: The ATO publishes SG gap estimates two years in arrears. In 2021, the ATO published SG gap estimates for 2018–19.

Note b: Superannuation Guarantee Charge raised includes voluntary Superannuation Guarantee Charge lodgments.

Note c: The total collected in a particular year may not have been raised in that same year; collections may arise from assessments made in previous years and may continue over several years.

Source: ANAO analysis of ATO data. The ANAO has not validated this data.

Compliance activity performance

3.18 The ATO’s two compliance strategies are preventative and corrective.⁵⁸ Until recently, most of the ATO’s compliance actions were corrective measures directed at reducing the net SG gap.

⁵⁷ SG is the employer obligation. SGC is the ATO intervention.

⁵⁸ This audit did not examine some ATO compliance activities, such as help and education.

Corrective activities can be reactive or proactive and include audits and reviews based on reports of unpaid SG from employees (reactive) or based on ATO-held data (proactive corrective) (Table 3.3).

Table 3.3: ATO compliance activities

Address gross SG gap	Address net SG gap
<i>Preventative activities^a</i>	<i>Corrective activities</i>
<ul style="list-style-type: none"> • Communications and education • Education Direction^b • Employer engagement (reminder reviews and nudges)^c 	Reactive activities: <ul style="list-style-type: none"> • Employee notification reviews and audits^d Proactive activities: <ul style="list-style-type: none"> • ATO-initiated audits • SG Taskforce audits

Note a: Preventative activities are also proactive. Corrective activities can be either reactive or proactive.

Note b: Education Directions are a new power available to the ATO to ensure that employers understand their obligations; see Table 3.8.

Note c: Nudges are used to remind employers of upcoming SG due dates or to prompt lodgment of Superannuation Guarantee Charge statements where SG is unpaid or paid late.

Note d: Employees can lodge notifications with the ATO when they identify that their employer has not paid SG to their superannuation fund. ATO records indicate that most employee notifications are from employees of small business, and in the accommodation and food services, construction and retail trade industries.

Source: ANAO analysis.

3.19 The transition from corrective to preventative activities underpins the ATO’s 2021 SG compliance strategy. Single Touch Payroll and Member Account Transaction Service data will support the transition to preventative activities that encourage voluntary compliance. Over time, the ATO expects that preventative activities such as nudges will reduce the number of employee notifications received and enable greater focus on proactive ATO-initiated audits of high-risk employers.⁵⁹ Currently the ATO does not report on the effectiveness of preventative compliance activities. However, there have been informal evaluations of pilot projects of preventative treatments.⁶⁰

3.20 Between 2017–18 and 2020–21 the ATO raised \$3.2 billion from corrective compliance activities (Table 3.4), with 78 per cent from employee notification audits. The remaining 22 per cent was raised from ATO-initiated audits and reviews. Almost half of this amount was from employers who lodged an SG Statement after an audit had commenced, that is, corrected non-compliance after being notified by the ATO of scrutiny.

59 The ATO counts nudges towards a 40 per cent ATO-initiated casework commitment to government.

60 The evaluations were of pilot projects for Education Directions, processes to reengage disengaged employers, an outbound phone strategy, reminder reviews and corrective nudges.

Table 3.4: Total liabilities raised from corrective compliance activities, 2017–18 to 2020–21

Corrective activity	2017–18	2018–19	2019–20	2020–21	Total	% of total
	(\$ million)					
Employee notifications (reactive)	671.3	543.1	486.4	789.9	2,490.7	78%
ATO-initiated (proactive)	179.1	262.2	170.5	91.3	703.1	22%
Total	850.4	805.3	656.9	881.2	3,193.8	100%

Source: ANAO analysis of ATO documentation. The ANAO has not validated this data.

Reactive corrective activities

3.21 Employee notifications are the major source of intelligence and the main trigger for ATO compliance activity. The ATO is committed to reviewing every employee notification. The ATO was unable to advise when the commitment to review every employee notification was introduced. A 1999 Auditor-General report stated that the ATO was no longer investigating every employee notification received.⁶¹ In 2000 in response to a Question on Notice in the House of Representatives and in its 2001–02 Annual Report, the ATO reported that its policy was to investigate all employee notifications received.⁶² The ATO advised the ANAO that it is unlikely to reconsider the effectiveness of the employee notification policy commitment.

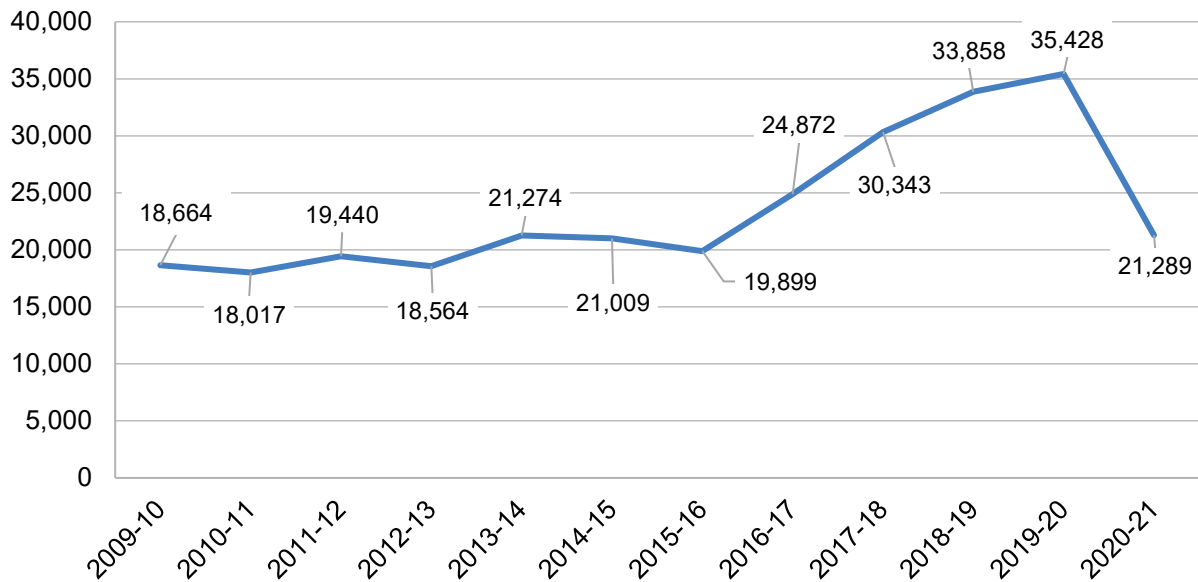
3.22 Between 2009–10 and 2015–16 the ATO received about 20,000 employee notifications annually. Between 2016–17 and 2019–20, the number of employee notifications increased, peaking at 35,428 in 2019–20 before decreasing in 2020–21 (Figure 3.3).⁶³ A 2020 Senate Estimates brief stated:

The steady growth in [employee notification] receipts is driven by increased visibility of entitlement and payment information online, increased community awareness and interest through media reporting and improvements to make it easier to notify the ATO about unpaid super.

61 Auditor-General Report No. 16 1999–2000, *Superannuation Guarantee*, November 1999, p. 67.

62 House of Representatives Hansard, 'Superannuation Guarantee Levy: Employer Compliance', Question on Notice No. 992, 17 February 2000, p. 13864, and ATO, *Commissioner of Taxation Annual Report 2001–02*, October 2002, p. 46.

63 The ATO advised the ANAO that it does not know why the volume of employee notifications decreased in 2020–21.

Figure 3.3: Numbers of employee notifications received, 2009–10 to 2020–21

Source: ATO data. The ANAO has not validated this data.

3.23 The ANAO examined a random sample of 50 employee notifications received during 2019–20. Some of the issues raised by employees included:

- phoenixing;
- blanket non-payment of SG to a workforce;
- persistent employer obfuscation in the face of employee complaints;
- failure to pay superannuation funds despite amounts being shown on payslips;
- low job security and the threat of retrenchment or non-renewal of contract if employees are exposed as having complained;
- mistreatment of migrants; and
- underpayment.

3.24 Over the four years to 2020–21 the ATO consistently achieved one of its employee notification (EN) timeliness service commitments:⁶⁴ at least 99 per cent of employee notification cases commenced within 28 days of receipt. The other service commitments were not consistently met (Table 3.5). The ATO advised the ANAO that performance against service commitments had improved significantly by December 2021 (66 per cent finalised within nine months of commencement).

64 See ATO, *Current year commitments to service* [Internet], available from <https://www.ato.gov.au/about-ato/commitments-and-reporting/service-commitments/current-year-commitments-to-service/> [accessed 9 December 2021].

Table 3.5: Timeliness of employee notification processing, 2017–18 to 2020–21

EN service commitment	Target	2017–18	2018–19	2019–20	2020–21
% of SG EN cases commenced within 28 days of receipt ^a	99%	100%	100%	100%	99%
% of SG EN cases finalised within four months of creation	60%	68%	51%	16%	7%
% of SG EN cases finalised within nine months of creation	90%	99%	99%	88%	37%

Note a: Timeliness is measured from the date an audit case is created, not the date the complaint was received.

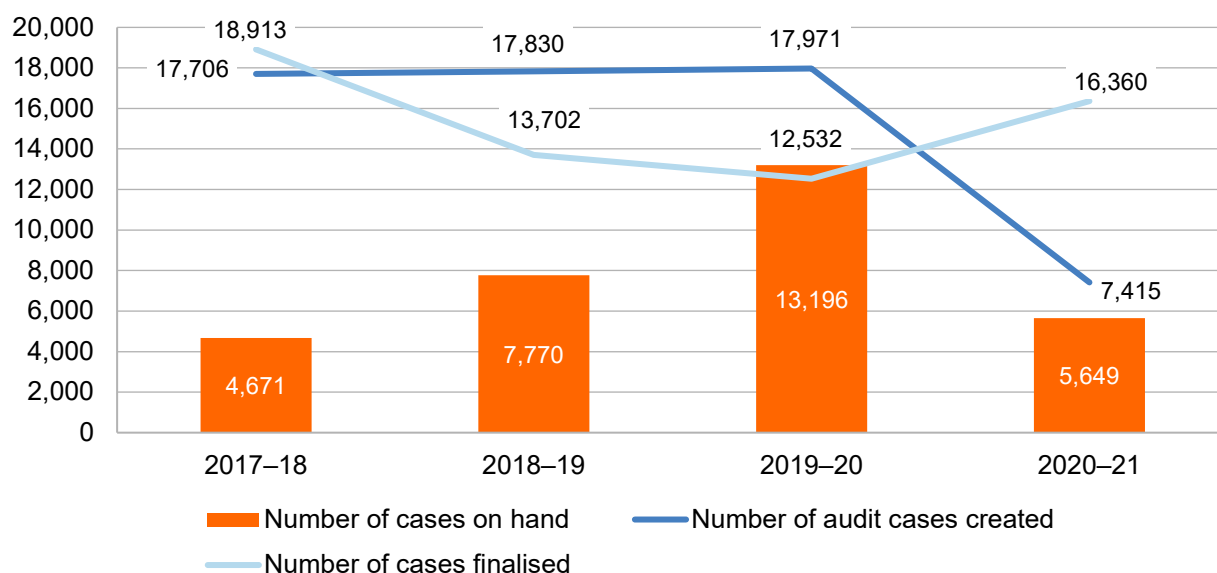
Source: ATO annual reports and ATO advice to the ANAO for 2018–19 data, which was not reported. The ANAO has not validated this data.

3.25 The percentage of employee notification cases closed with Superannuation Guarantee Charge raised and those with no result was relatively stable across the four years. The three main reasons that employee notification cases were closed with no results were: employers had met their SG obligations (42.2 per cent); the employee had withdrawn their complaint (12.9 per cent); and the employer’s business was insolvent (9.1 per cent).

3.26 The Superannuation and Employer Obligations Business Service Line reports internally against two timeliness measures: cases on hand (cases that are unallocated, on hold, or in progress) (Figure 3.4); and aged cases (cases that are not closed within the standard timeframe) (Table 3.6).

- The ATO created 60,922 employee notification audit cases between 2017–18 and 2020–21 and raised SGC liabilities of \$2.5 billion from these cases.
- The number of audit cases created in the three years 2017–18 to 2019–20 remained relatively stable before decreasing in 2020–21.
- The number of cases on hand increased in 2018–19 and 2019–20, by 66 and 70 per cent respectively on the previous year’s result.
- The ATO reduced the backlog of employee notification cases in 2020–21. An internal ATO performance report stated this was achieved through the allocation of additional resources and a review of processes and procedures. Despite this, the performance report indicated that the SG program was ‘out of tolerance’ and that it would take time for employee notification service standards to be achieved due to the age of cases on hand.
- The ATO advised the ANAO that the backlog of employee notification cases was cleared by the end of 2021 and a temporary workforce had been released. The ATO advised the ANAO that as at 31 December 2021, there were 2052 cases on hand.

Figure 3.4: Employee notification audit cases created, finalised and on hand, 2017–18 to 2020–21



Note a: Cases on hand as at 30 June. Cases created means cases started.

Source: ANAO analysis of ATO performance data. The ANAO has not validated this data.

3.27 The ATO met the aged case target in two of the four years between 2017–18 and 2020–21, nearly met it in one and did not meet it in one (Table 3.6).

Table 3.6: Percentage of employee notification cases classified as aged as at 30 June, 2017–18 to 2020–21

	Target	2017–18	2018–19	2019–20	2020–21
Employee notification cases classified as aged	<10%	8%	6%	47%	10%

Note a: An ‘aged’ case refers to a case that has not been finalised within its ‘cycle time’ (the standard time allocated to complete a category of audit), generally within 120 days of being allocated to a staff member. Cases can fail the four-month service standard, but not necessarily become an aged case, because the time in which a case remains unallocated is not counted towards the aged case metric.

Source: ATO data. The ANAO has not validated this data.

3.28 Between 2017–18 and 2020–21, the ATO did not always achieve service commitment targets because:

- the number of lodged employee notifications increased substantially in 2017–18 to 2019–20;
- the ATO suspended all ATO-initiated compliance work where the auditee elected for it to do so⁶⁵ due to the bushfires and COVID-19 pandemic in 2019 and 2020; and

65 ATO, *Commissioner of Taxation Annual Report 2019–20*, p. 13: ‘Taxpayers being audited were given the choice of continuing or pausing the audits. Most of those who chose to pause their audits were individuals and small businesses.’

- 80 per cent of Superannuation and Employer Obligations Business Service Line staff were redeployed to implement the Australian Government's economic response to the COVID-19 pandemic in 2019–20.

3.29 The increase in the number of employee notifications received by the ATO to 2019–20 and the growth in the backlog led to a range of administrative changes. The ATO advised that it: simplified the employee notification online lodgment form; automated elements of the early-treatment pre-audit process; and grouped cases by complexity, allocating less complex cases to temporary staff.

3.30 In September 2021 the ATO commenced a three-month early engagement pilot for low-risk employee notifications. The objective was to reduce the number of employee notifications that lead to an audit. Employers were engaged via telephone calls, mobile phone messages and ATO online services, reducing response times to early engagement letters from 21 to 14 days.⁶⁶ The ATO advised that pilot outcomes were positive, with 85 per cent of employee notification cases finalised within 36 days (compared to 70–80 days for an audit) and 73 per cent resulting in lodgment of an SG Statement. The ATO advised the ANAO that it is now scaling up the strategy and transitioning pilot practices to business as usual.

Proactive corrective activities

3.31 The ATO's proactive corrective compliance activities vary in complexity and effort.

- Audits — An audit examines an employer's compliance with SG only; or with SG, Pay As You Go Withholding and Fringe Benefits Tax obligations; involving a direct case time of around 14 hours for SG-only audits.
- Reviews — Distinct from reminder reviews or nudges, a review in the context of proactive corrective activity is a telephone call, email or letter to the employer or their intermediary. A review has an estimated direct case time of three hours. The ATO introduced low-touch, low-cost early intervention reviews in 2017 to target specific employer behaviours.⁶⁷
- Health checks — In 2020–21 the ATO also introduced telephone 'health checks' for employers who had commenced Single Touch Payroll reporting. Health checks include checking on the reported SG obligations.

3.32 In September 2021, 13 of 220 full-time equivalent staff were allocated to proactive compliance activities (see Table 2.2).

3.33 Several reviews have recommended an increase in proactive SG compliance work.

- In May 2017 the Senate Economics References Committee⁶⁸ recommended that the ATO consider undertaking more proactive SG initiatives, including random SG audits.

66 An early engagement letter is sent before a case is created.

67 Reviews may target employers with previous audit action to remind them when their next SG payment is due; who did not engage during a previous audit activity; or who have a history of non-compliance.

68 Senate Economics References Committee, *Superbad: Wage theft and non-compliance of the Superannuation Guarantee*, Canberra, May 2017, Recommendation 12, pp. xii, 56–57, 62.

- The Inspector-General of Taxation recommended that the ATO undertake more proactive SG compliance activities in *Review into the ATO's administration of the Superannuation Guarantee Charge* (March 2010).⁶⁹
- The Inspector-General of Taxation made a similar recommendation in *Review into the Australian Taxation Office's employer obligations compliance activities* (December 2016).⁷⁰
- In response to an SG Cross Agency Working Group report to the Minister in 2017, the ATO undertook that proactive casework would be at least 40 per cent of its overall SG casework from 2017–18 (replacing an existing target of 30 per cent):

Within ATO's current funding arrangements, the ATO will re-balance the focus of its superannuation guarantee compliance program to increase by 10 per cent the proportion of its ATO-initiated superannuation guarantee case work to 40 per cent. The ATO finds a greater percentage of non-compliant employers from its proactive case work than from employee notification cases: 82 per cent and 65 per cent respectively.⁷¹

3.34 The ATO introduced a performance measure for the 40 per cent commitment in 2018–19 (Table 3.7). The ATO reported in its 2020–21 Annual Report that the target was met in three of four years to 2020–21. Although the target was met, the proactive case mix changed from two thirds resource-intensive audits in 2017–18 to 14 per cent in 2020–21. In 2020–21, 86 per cent of proactive activities were low-touch nudges.

Table 3.7: Number of audits and reviews, 2017–18 to 2020–21

Cases ^a	2017–18	2018–19	2019–20	2020–21
ATO-initiated audits	4405 ^b	1435	5	1716
Employer Obligations audits ^c	4175	3869	1159	0
Reminder reviews (nudges)	4458	4479	2551	10,398
Total proactive compliance activities	13,038	9783	3715	12,114
Total cases	31,954	24,504	16,247	28,474
Percentage cases that are proactive	40.8%	39.9%	22.9%	42.5%

Note a: Numbers exclude SG Taskforce compliance activities.

Note b: The 4405 ATO-initiated audits in 2017–18 consisted of 1029 'SG-only' audits and 3376 'disengaged revisit streamlined' audits. These two audit products vary in complexity and duration. The 1435 ATO-initiated audits in 2018–19 included 1217 disengaged revisit audits. The direct case time for an SG-only audit is about 14 hours compared to three hours for a disengaged revisit audit.

Note c: Employer Obligations audits cover Pay as You Go and Fringe Benefits Tax as well as SG.

Source: ANAO analysis of ATO data. The ANAO has not validated this data.

69 Inspector-General of Taxation, *Review into the ATO's administration of the Superannuation Guarantee Charge*, IGT, March 2010, p. iii.

70 Inspector-General of Taxation, *Review into the Australian Taxation Office's employer obligations compliance activities*, IGT, December 2016, pp. x, 62–63.

71 Superannuation Guarantee Cross Agency Working Group, *Superannuation Guarantee Non-compliance: A report to the Minister for Revenue and Financial Services*, Canberra, 31 March 2017 [released on 14 July 2017], Agency Action 2, pp. 9, 29, 30.

3.35 The ATO internally reports against three efficiency indicators for its proactive compliance work:

- audit strike rate — the proportion of created cases that identify unpaid SG and raise a liability;
- cycle times — the standard time allocated to complete an audit case; and
- aged cases — cases on hand for more than 120 days.

3.36 The main results for 2017–18 to 2019–20 were that the ATO exceeded the strike-rate target in 2019–20 after failing to meet the target in prior years, on the basis of a small number of cases in 2019–20; the ATO consistently exceeded target cycle times; and the aged-case target was consistently met.

3.37 The ATO's capacity to increase the volume of proactive casework is limited by its commitment to action 100 per cent of employee notifications, which, at September 2021, involved 90 per cent of the available full-time equivalent resources. The ATO-wide pause on enforcement activities during the COVID-19 pandemic, and the redeployment of staff to implement the Australian Government's economic response to the COVID-19 pandemic, also impacted on resources available to conduct proactive casework.

Did the SG Taskforce and Amnesty achieve planned outcomes?

The SG Taskforce partly achieved the planned outcomes. It achieved a higher strike rate from a smaller case pool, but it did not achieve several of its objectives associated with the usage of Single Touch Payroll and other data. The level of proactive compliance activities undertaken by the ATO declined after the SG Taskforce was introduced. The SG Amnesty supported the ATO's transition to a preventative compliance approach by encouraging employers to self-correct non-compliance and is associated with higher voluntary employer lodgments. The ATO did not report on SG Taskforce outcomes. Its reporting of SG Amnesty outcomes could have been improved by adjusting the results achieved to account for the business-as-usual level of voluntary lodgments.

3.38 In August 2017 the Australian Government announced four targeted reforms to improve the integrity and administration of the SG system,⁷² leading to two one-off projects in 2018–19 and 2019–2020: the SG Taskforce and the SG Amnesty. The primary objective of the projects was preventative — to reduce the gross SG gap by changing employer behaviour. The SG Taskforce also had corrective elements through increased volume of proactive compliance activities.

The Superannuation Guarantee Taskforce

3.39 SG Taskforce operations commenced on 1 July 2018 and ended on 30 June 2021. The ATO received additional funding of \$20.92 million over four years for the SG Taskforce to undertake additional data modelling, and early intervention compliance activities using Single Touch Payroll

72 The reform package was known as the 'Superannuation Guarantee Integrity Package' and was announced by the Minister for Revenue on 9 August 2017. Two of the reforms were related to debt recovery and are discussed in the next section.

and Member Account Transaction Service data; and conduct debt collection activities for unpaid SG.⁷³

- Additional data modelling using Single Touch Payroll and Member Account Transaction Service data — Internal reports stated that the SG Taskforce had only partly met the objective of incorporating Single Touch Payroll and Member Account Transaction Service data into ATO risk models and case selection tools (real-time data models were discussed in paragraphs 2.46 to 2.56), and noted that small-scale case selection activities required substantial manual intervention and were not sustainable.
- Early intervention compliance activities using Single Touch Payroll and Member Account Transaction Service data — In December 2017 an Assistant Commissioner sought clarification on the role and activities of SG Taskforce resources and proposed and obtained agreement for the SG Taskforce to be used for high-risk audit work. The focus was changed from early intervention reviews based on Single Touch Payroll data to high-risk employers through existing case selection models using standard SG audit treatments. The ATO advised the ANAO that:

We do not agree that this is a departure from the funding approval, as it was still in the spirit of the [New Policy Proposal], which was about earlier intervention, and being proactive rather than reactive.

- Debt collection activities for unpaid SG — The ANAO was unable to assess the extent to which the SG Taskforce undertook debt collection activities for unpaid SG. A September 2020 internal audit report stated that several business service lines did not separately identify taskforce-funded resources from business-as-usual activities because there was no information technology solution to support the separation. An apportionment method to estimate the effect of the additional funding was not able to clearly demonstrate end-to-end outcomes. The internal audit report made one recommendation, that the taskforce implement end-to-end case reporting (from liabilities raised to collection of SG debts).

3.40 The ATO advised the ANAO that, during the three years of the SG Taskforce: around 6800 audits were conducted; \$600 million of debt was raised; \$340 million was collected or credited to the debtor accounts; 4800 clients made at least one payment; and 1472 payment plans were in effect as at 3 September 2021, to a value of \$73 million.

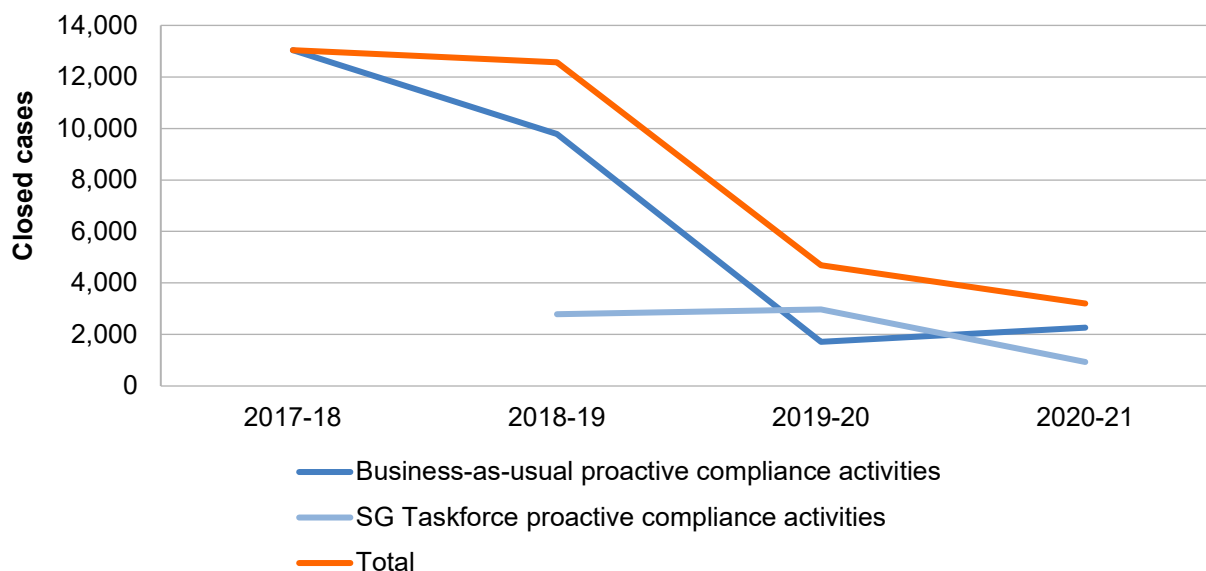
3.41 The audit strike rate ranged between 92 and 96 per cent compared to a business-as-usual strike rate average of 74 per cent and a target of 90 per cent or higher.⁷⁴ The higher strike rate may in part be due to SG Taskforce audit cases being selected from high-risk, disengaged employers in the small and micro business market segments.

3.42 Proactive closed cases decreased between 2017–18 and 2019–20 (see Figure 3.5). The SG Taskforce funding coincided with a significant increase in the number of employee notifications lodged and in reductions in resources applied to this function as they were shifted to the COVID-19 response measures.

73 *Mid-Year Economic and Fiscal Outlook 2017–18*, 'Superannuation Guarantee Integrity Package — Superannuation Guarantee Compliance Taskforce', p. 120.

74 The audit strike rate is the proportion of cases created that identify unpaid SG and raise a liability.

Figure 3.5: Business-as-usual and SG Taskforce proactive closed cases, 2017–18 to 2020–21



Note a: ATO business-as-usual proactive work includes nudges, whereas SG Taskforce activities were all audits.
Source: ATO. The ANAO has not validated this data.

3.43 The ANAO examined whether the ATO evaluated outcomes. There was no coordinating governance or clear lines of reporting of SG Taskforce activities across the four business service lines involved. Although the ATO prepared performance measures and conducted internal reviews part way through the project, it did not evaluate or prepare a final report on outcomes. Four previous Auditor-General reports⁷⁵ have identified issues regarding the transparency of the ATO’s taskforce activities.

The Superannuation Guarantee Amnesty

3.44 The SG Amnesty provided employers with an opportunity to voluntarily disclose and pay any shortfall without incurring the usual \$20 per employee per quarter administration fees or penalties, while retaining tax deductibility of disclosed amounts. The original intention was for the SG Amnesty to precede the SG Taskforce to provide employers with an opportunity to self-correct historical non-compliance before the introduction of Single Touch Payroll and Member Account Transaction Service reporting.

3.45 A 12-month Amnesty for voluntary employer SG disclosures was announced by the Minister for Revenue and Financial Services on 24 May 2018 on introduction of the Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018 into Parliament. After Parliament was dissolved on 11 April 2019 the Bill lapsed. On 18 September 2019 the Minister for Housing and Assistant Treasurer reintroduced the Amnesty via the Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019, which received Royal Assent on 6 March 2020.

75 See: Auditor-General Report No. 15 2016–17, *Meeting revenue commitments from compliance measures*; Auditor-General Report No. 41 2016–17, *Management of selected fraud prevention and compliance budget measures*; Auditor-General Report No. 51 2017–18, *The design, implementation and monitoring of Health’s savings measures*; and Auditor-General Report No. 18 2019–20, *Tax Avoidance Taskforce – meeting budget commitments*.

3.46 From February 2020, the Australian Government had also commenced the introduction of a range of policies and measures in response to the emergence of COVID-19. On 18 March 2020, in response to the pandemic in Australia, the Governor-General of the Commonwealth of Australia declared that a human biosecurity emergency exists.⁷⁶

3.47 The SG Amnesty legislation provided for an Amnesty to apply to SG Statements lodged between 24 May 2018 and 7 September 2020. The Amnesty period was for SG quarters between 1 July 1992, when the SG system was introduced, to the quarter ending 31 March 2018.

3.48 There were three eligibility criteria: employer disclosures were made during the Amnesty period; they related to an amount of SG shortfall not previously disclosed; and they were in the approved form. The Amnesty did not extend to SG quarters where the employer had been informed that the ATO was examining or intended to examine the employer's SG compliance.

3.49 Where an employer disclosed an amount of unpaid SG for a quarter that qualified for the Amnesty, the employer was not charged the administration component of the Superannuation Guarantee Charge or penalties and could claim a tax deduction for SG payments made before the end of the Amnesty period. There were disqualification provisions for employers who disclosed but did not pay their historical SG debt in full or maintain agreed payment plans. Disqualified employers lost Amnesty benefits for any unpaid quarters.

Administering the Amnesty

3.50 The Superannuation and Employer Obligations Business Service Line established appropriate governance arrangements to oversee implementation of the Amnesty.

3.51 The ATO was allocated \$974,200 across 2017–18 to 2018–19 to conduct a communications campaign. This included funding for the ATO to commission research on non-compliance. By 6 March 2020 the ATO had in place the necessary system updates and communications.

3.52 The ATO anticipated a significant increase in the number of applications lodged in the final weeks of the Amnesty. In the week commencing 31 August 2020, the ATO received 2229 inbound calls; 21,000 Amnesty applications were downloaded from the ATO's website; and around 17,000 disclosures were received, with 7000 of these on the final day. A post-implementation review stated:

This last minute approach resulted in significant pressure in the final days from large employers and accounting firms seeking assistance by phone...which was unprecedented and continued late into the evening on 7 [September] 2020.

Amnesty outcomes

3.53 At 30 April 2021 the ATO reported Amnesty disclosures totalling \$912 million, the major components of which were:

- \$789.5 million (87 per cent) paid into 692,266 employee superannuation accounts⁷⁷;
- \$19.6 million paid to the ATO and awaiting transfer to funds; and
- \$55.7 million under payment plan.

76 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020*, 18 March 2020.

77 This amount includes late payment offset amounts paid directly to superannuation funds by employers.

3.54 At 30 April 2021 approximately 2500 (or nine per cent) of eligible employers had not paid or set up a payment plan as required by the legislation.⁷⁸ According to ATO analysis, 42 per cent of these employers made disclosures in the final week of the Amnesty with the majority from the small business market segment. In February 2021 the ATO commenced its disqualification strategy with a bulk letter mail-out and follow-up telephone contact to encourage employers to pay in full or set-up payment arrangements. Employers who did not act following this contact were disqualified from the Amnesty. At 30 June 2021 the ATO had disqualified 231 employers.

3.55 A Superannuation and Employer Obligations Business Service Line post-implementation review stated that Amnesty data was being analysed and compared to SG Statement lodgment data and compliance strategies. It summarised Amnesty participation and demographic data, noting that:

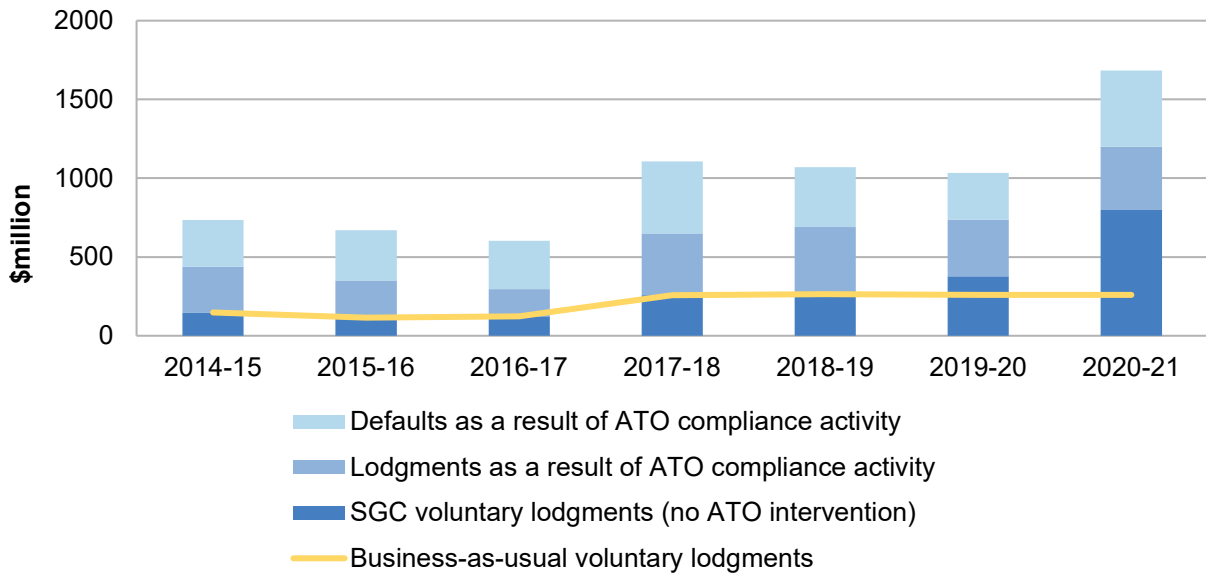
- 70 per cent of employers were micro businesses;
- 55 per cent of employers, and 45 per cent of amounts disclosed, were from the top five high-risk industries: construction, retail trade, professional scientific and technical services, accommodation and food services, and other services; and
- 62 per cent (\$561 million) of amounts disclosed were for three financial years immediately before the Amnesty — 2015–16, 2016–17 and 2017–18.

3.56 The ATO's reporting of Amnesty outcomes could be improved. It did not record or report Amnesty outcomes by financial year or benchmark Amnesty outcomes against business-as-usual baseline outcomes.

3.57 The three different routes for Superannuation Guarantee Charge (SGC) lodgment are voluntary lodgment by the employer; lodgment due to ATO compliance activity; and default assessment by the ATO after the employer's failure to respond to ATO compliance activity. The value of Superannuation Guarantee Charge voluntary lodgments increased between 2015–16 and 2020–21 (Figure 3.6). The average value of Superannuation Guarantee Charge voluntary lodgments in 2017–18 and 2018–19, the two years before the Amnesty was legislated, provides a business-as-usual baseline outcome of around \$250 million annually. Compared to this baseline, voluntary lodgments in 2019–20 and 2020–21 increased by \$127 million and \$552 million respectively.

78 The ATO advised that 44 of these employers had not entered into a payment plan pending resolution of a complaint or review process.

Figure 3.6: SG Statement lodgments and liabilities raised, 2014–15 to 2020–21



Note: ‘Lodgments as a result of ATO compliance activities’ are lodgments made by employers after compliance activity has commenced. ‘Defaults as a result of ATO compliance activity’ are where the ATO raises Superannuation Guarantee Charge liabilities as a result of an audit or review. The business-as-usual baseline for voluntary lodgments (yellow line) is based on the actual results for each year to 2018–19. An average of the two preceding years before the SG Amnesty commenced (2017–18 and 2018–19) was used for 2019–20 and 2020–21.

Source: ANAO analysis of ATO data. The ANAO has not validated this data.

3.58 Auditor-General Report No. 15 2016–17 recommended that, in developing compliance measures, the ATO document in its funding proposals how the additional revenue from a measure will be determined and any pre-existing level of activity related to the compliance risks addressed by the measure. The ATO disagreed with this recommendation.

The ATO has indicated that for some measures it would be difficult to identify the base level of revenue and requiring it to maintain a base level of compliance activity under a measure would limit its ability to reallocate resources to realise higher revenue in other areas.⁷⁹

79 Auditor General Report No. 15 of 2016–17, *Meeting Revenue Commitments from Compliance Measures*, September 2016, paragraph 12, pp. 9–10.

Has the ATO effectively used its debt-recovery powers to collect unpaid superannuation?

The ATO has been partly effective in using its debt recovery powers to collect unpaid SG. Pauses in enforcement during the 2019–20 bushfires and COVID-19 pandemic impacted debt recovery as demonstrated by:

- stronger enforcement powers received in January 2019 have largely not been exercised;
- firm compliance activity was used less frequently during 2019–20 and 2020–21; and
- elements of new systems were turned off.

Pauses in enforcement were intended not to apply to egregious and criminal cases but enforcement against phoenix operators through Director Penalty Notices also decreased from 2018–19. Compared to the increase in total ATO debt during 2020–21, SG debt increased disproportionately.

3.59 Once the ATO has advised an employer that the employer owes SG, that amount (the Superannuation Guarantee Charge) is a debt owed to the Commonwealth. The ATO seeks to collect the debt for payment to the employee's superannuation fund. An employer's failure to lodge an SG Statement (outlining the amounts of unpaid SG) on time may lead to the imposition of a penalty that may be twice the amount originally due (see Appendix 3).

3.60 To determine whether the ATO has effectively used its debt recovery powers to collect unpaid SG, the ANAO examined the ATO's use of debt recovery powers, development and application of new systems to recover debt, and use of penalties; and the amount of Superannuation Guarantee Charge transferred to employees' superannuation funds.

Use of powers to recover debt

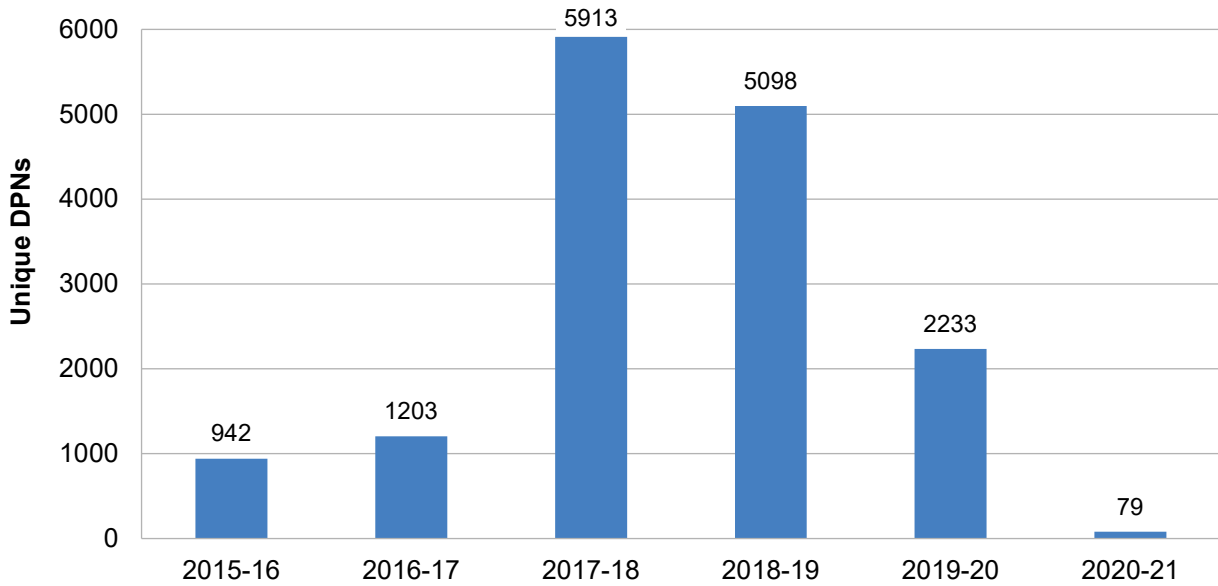
3.61 For some years, the ATO has taken a 'whole of client' approach to debt recovery. ATO risk assessments and strategies describe a whole of client approach as one which considers all of the client's outstanding debts, including but not limited to SG debt, and which balances clients' needs against organisational needs.

3.62 The ATO's stronger enforcement actions include: garnishee notice; Director Penalty Notices; disclosure of business tax debts; and various forms of legal action, such as a summons, bankruptcy notice, creditor's petition, statutory demand or wind-up action.

3.63 The ATO can recover debt by issuing a garnishee notice to, for example, a bank or financial institution that holds a person's or company's funds. Garnishee actions for SG have decreased significantly since 2018–19 (3673 in 2018–19, 693 in 2019–20, and 17 in 2020–21).

3.64 The number of Director Penalty Notices (DPNs) issued by the ATO in the last six years is shown in Figure 3.7.

Figure 3.7: Unique Director Penalty Notices issued in relation to SG debt, 2015–16 to 2020–21



Note a: Unique notices issued to individual directors (that is, notices issued to multiple directors for the same company on the same day) are counted once per director/notice. Any Superannuation Guarantee Director Penalty Notices issued prior to February 2018 will only be included in these figures if they were transitioned to new systems — not all Director Penalty Notices were transitioned.

Source: ATO. The ANAO has not validated this data.

3.65 The value of Director Penalty Notices imposed and the amounts collected decreased significantly from 2017–18 to 2020–21.⁸⁰ The number of companies issued with two or more Director Penalty Notices decreased from 1471 in 2017–18 to 16 in 2020–21.

3.66 In 2019 the methods to recover Superannuation Guarantee Charge debt were enhanced in four ways (Table 3.8).⁸¹ The ATO has issued Education Directions but has made limited use of other new powers.

Table 3.8: ATO’s use of new powers to recover Superannuation Guarantee Charge debt

New powers	Description of new powers	ATO’s use of new powers
Security Bond Demand	The power to seek a court order requiring an employer to provide a security bond over an unpaid tax or superannuation liability.	Between 2017–18 and 2020–21 one Security Bond Demand that included SG was issued.
Director Penalty Notices	The ATO’s existing power to issue Director Penalty Notices (applicable since 2012) was strengthened by abolishing the three-month period that enabled directors to place a company into administration or liquidation and so escape liability for unpaid SG.	Not applicable as this was an existing power.

80 2017–18: \$355 million imposed and \$99 million collected; 2018–19: \$282 million and \$80 million; 2019–20: \$149 million and \$31 million; 2020–21: \$18 million and \$1 million.

81 The *Treasury Laws Amendment (2018 Measures No. 4) Act 2019* received Royal Assent on 1 March 2019 and came into effect on 1 April 2019. These powers are available to the ATO as methods to pursue other types of debt.

New powers	Description of new powers	ATO's use of new powers
Direction to Pay	The power to issue an employer with a Direction to Pay unpaid SG. Failure to comply was made a criminal offence. This power was intended to be used against employers with a history of serious non-compliance.	No Directions to Pay have been applied for since the ATO was given this power in 2019. The ATO advised the ANAO that it prioritises firmer recovery action prior to invoking a Direction to Pay.
Education Direction	The power to require a person who has failed to comply with taxation laws to undertake a course on taxation laws, accessible from the ATO's website. ^a	The ATO issued 551 Education Directions in 2019–20 and 1716 in 2020–21.

Note a: ATO, *Super guarantee employer obligations course* [Internet], available from <https://www.ato.gov.au/Business/Super-for-employers/Super-guarantee-employer-obligations-course/> [accessed 28 November 2021].

Source: Treasury Laws Amendment (2018 Measures No. 4) Bill 2018; *Treasury Laws Amendment (2018 Measures No. 4) Act 2019*, Schedule 1, Part 2; ATO documentation and ATO advice to the ANAO as at September 2021.

3.67 The ATO advised the ANAO in September 2021 that:

With the ATO pausing and then recommencing debt recovery activities in a phased manner in response to the ongoing COVID economic challenges, there has not been sufficient time to assess the effectiveness of the powers. This is due to a high proportion of small business clients representing our SG debt population, we have needed to respond cautiously and appropriately to the current economic environment when considering the use of escalated actions.

Development and application of new systems to recover debt

3.68 In December 2017 the ATO deployed a 'Director Penalty for SG' system, removing the need for much of the manual work previously associated with managing Director Penalty Notices and enabling the removal of the previous cap of 2500 per year.

3.69 During 2019 the ATO adopted new data analytics models to guide how it dealt with debtors, using graduated steps from automated nudges to preventative strategies to firmer actions. In April 2020 this approach was underpinned by a new operating model, which differentiated debtors for minimal-touch actions (for example, monitoring of payment plans), low-touch actions (for example, provision of ATO assistance through digital channels), medium-touch actions (for example, warning letters) and high-touch actions (for example, Director Penalty Notices or legal action).

3.70 The Activity Statement Financial Processing system was deployed in December 2019. The new system included a new Payment Receivables Management system, replacing a previous system that treated all clients alike. Using data analytics, the new system was intended to assess all clients in the tax and superannuation system in real time, and to select which debts to action, using the best strategy for a particular taxpayer based on their previous compliance history. The new system was intended to deliver eight million tailored client interactions per year and to manage \$60 to \$80 billion of debt annually.

3.71 In January 2020 the ATO paused recovery actions against bushfire-affected clients, which included turning off elements of the new systems. In March 2020 the ATO paused most of its firmer and stronger recovery activities (except for high-risk cases involving egregious taxpayers and criminals). These pauses were based on the ATO's general power of administration as to how it

enforces its legislation. At the same time, the ATO reminded employers that they still needed to meet their ongoing SG obligations for their employees. In January 2021 the ATO reported that it had granted additional time beyond the original due date for more than 12.9 million lodgments and payments, and 680,000 payment plans were tailored to individual circumstances.⁸²

3.72 In mid-2020, the ATO planned to resume its recovery activities in a phased approach over six months: Phase 1 (from June 2020) — help-and-assist actions; Phase 2 (from September 2020) — re-introduction of warnings; and Phase 3 (from November 2020) — introduction of firmer actions where appropriate.

3.73 In October 2020 ongoing COVID-19 lockdowns prompted the ATO to delay Phases 2 and 3, initially to February–May 2021. Further lockdowns in New South Wales and Victoria from mid-2021 occurred as the ATO was preparing to resume normal debt-recovery activity. As at October 2021, the new debt-recovery systems were not expected to operate in a business-as-usual environment for the ATO categories of firmer and stronger debt recovery until 1 July 2022.

Use of penalties to encourage compliance

3.74 To encourage employers to comply with their Superannuation Guarantee obligations, Part 7 of the *Superannuation Guarantee (Administration) Act 1992* (the SGA Act) provides for penalties (Appendix 3). The penalties outlined in the SGA Act are significant and illustrative of the Parliament's 1992 intention to establish a system where voluntary compliance would be a much more attractive option to employers than becoming subject to ATO enforcement.

3.75 Employers who have failed to pay the correct amount of SG on time must lodge an SG Statement with the ATO within one calendar month after the SG due date. Where an employer does not lodge an SG Statement, the Commissioner of Taxation may make a default assessment of the shortfall amount and the Superannuation Guarantee Charge payable on the shortfall. Superannuation Guarantee Charge is not tax deductible.

3.76 The Commissioner of Taxation may remit some or all of the Part 7 penalty or provide penalty relief.⁸³ Penalty remission supports the ATO's transition to a proactive compliance approach by encouraging employers to self-correct non-compliance.

3.77 The ATO issues guidance to staff to encourage consistency in remission decisions and to reflect community and government expectations.⁸⁴ In response to concerns from employers and industry about guidance issued in November 2020,⁸⁵ in July 2021 the ATO released revised draft

82 ATO, *ATO Regulator Performance Framework self-assessment report 2019–20*, January 2021, p. 9.

83 From 8 September 2020, the day after the SG Amnesty ended, by law the Commissioner cannot remit Part 7 penalties below 100 per cent of the amount of SGC payable, for quarters covered by the SG Amnesty, except under exceptional circumstances. *Superannuation Guarantee (Administration) Act 1992*, subsections 62(4) and 62(5). The significant increase in Part 7 penalties — and the subsequent restrictions on the ability of the ATO to remit those penalties — were an incentive for employer participation in the SG Amnesty.

84 In July 2020 the ATO released draft policy guidance on the application of the new penalty provisions that would apply from 8 September 2020. The ATO policy guidance extended the same approach to non-Amnesty quarters as the SGA Act applies to Amnesty quarters (that is, no remissions below 100 per cent in either case). However, under the SGA Act, the Commissioner retained the discretion to remit penalties in exceptional circumstances.

85 ATO Practice Statement Law Administration, PSLA 2020/4 *Remission of additional superannuation charge*. The policy guidance did not enable ATO staff to differentiate between employers with a good compliance history and repeat offenders.

guidance. The revised draft guidance enabled a higher level of penalty remission for employers who attempt to comply with their SG obligations by making late payments. The guidance provided for additional remission where education was considered a more effective option. In addition, penalty relief was to be available for employers with a turnover of less than \$50 million with a compliant lodgment history that meets certain criteria. The draft guidance was open for comment until 27 August 2021 and was finalised on 25 November 2021.⁸⁶

3.78 Between 8 September 2020 and 28 February 2021, the ATO imposed a Part 7 penalty on 2406 employers resulting in \$126 million in net penalties. The numbers of Part 7 penalties issued since 2016–17, and the extent to which the Part 7 penalty was remitted, are shown in Table 3.9. In 2020–21, 60 per cent of Part 7 penalties were fully remitted, and a full (200 per cent) penalty was fully applied for fewer than one per cent of Part 7 penalties issued.

Table 3.9: Part 7 penalties on Superannuation Guarantee Charge closed cases that resulted in a liability, 2016–17 to 2020–21

Remission amount (penalty)	2016–17		2017–18		2018–19		2019–20		2020–21 ^a	
	No.	%	No.	%	No.	%	No.	%	No.	%
Nil Remitted (200%) ^b	0	0%	0	0%	1	<1%	5	<1%	55	<1%
151–199%	808	10%	2380	13%	3257	19%	1790	15%	1935	15%
101–150%	2287	29%	3969	21%	2507	15%	1223	10%	1270	10%
51–100%	26	<1%	342	2%	375	2%	206	2%	1038	8%
1–50%	3	<1%	10	<1%	14	<1%	92	1%	760	6%
Fully remitted ^c	4864	61%	11,787	64%	10,635	63%	8992	73%	7648	60%
Total	7988	100%	18,488	100%	16,789	100%	12,308	100%	12,706	100%

Note a: 2020–21 results do not include the impact of the Part 7 remediation process conducted in the first quarter of 2021–22.

Note b: 'Nil remitted' means the whole prescribed 200 per cent Part 7 penalty was exacted.

Note c: 'Fully remitted' means the prescribed 200 per cent Part 7 penalty was completely erased.

Source: ATO. The ANAO has not validated this data.

Superannuation Guarantee Charge collection and transfer to employees

Superannuation Guarantee Charge raised and collected

3.79 The amounts of Superannuation Guarantee Charge liabilities raised⁸⁷ against employers over the last four years are shown in Figure 3.6. There was a significant increase in employee notifications in the three years from 2016–17 with a corresponding increase in the Superannuation

86 ATO Practice Statement Law Administration, PSLA 2021/3 *Remission of additional superannuation guarantee charge*.

87 The ATO uses the term SGC 'raised', and similarly for debt uses the term 'debt raised'. Not all SGC and debt raised is collected.

Guarantee Charge liabilities raised from default assessments. The voluntary disclosure of \$802 million in 2020–21 can be attributed to the SG Amnesty.

3.80 The ATO’s published target for Superannuation Guarantee Charge raised was \$1.02 billion in 2020–21 and \$812 million in 2021–22. The total Superannuation Guarantee Charge liabilities raised exceeded the target in 2020–21 (\$1.7 billion).

3.81 The published targets for Superannuation Guarantee Charge collected were \$516 million in 2020–21 and \$462 million in 2021–22.⁸⁸ Performance in Superannuation Guarantee Charge collection in 2020–21 exceeded the target (\$1.0 billion).

3.82 Table 3.10 shows the percentage of Superannuation Guarantee Charge collected each year as a proportion of the amount raised in that year, noting there is not a straight line between the amount raised and collected in a single financial year. The collected-to-raised ratio peaked in 2019–20. The ATO advised the ANAO in October 2021 that an increase in the ratio in 2019–20 was due to the SG Amnesty and was not sustainable; post-Amnesty the ATO expects it to return to about 50 per cent.

Table 3.10: Superannuation Guarantee Charge raised and collected, 2014–15 to 2020–21

	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21
	\$m	\$m	\$m	\$m	\$m	\$m	\$m
Total raised	734	670	604	1107	1069	1034	1683
Total collected	379	341	283	441	577	674	1040
% raised that was collected	51.6%	50.9%	46.9%	39.8%	53.9%	65.2%	61.8%

Note a: The total collected in a particular year may not have been raised in that same year; collections may arise from assessments made in previous years and may continue over several years. The total collected also includes associated General Interest Charge.

Source: ATO. The ANAO has not validated this data.

3.83 Internal ATO documentation dated August 2021 attributes a ‘historically poor’ collection rate to Superannuation Guarantee Charge liabilities often being raised when the liability has significantly escalated and employers are close to or already insolvent. The same documentation noted that the ATO was implementing new strategies to identify non-compliance and raise liabilities earlier.

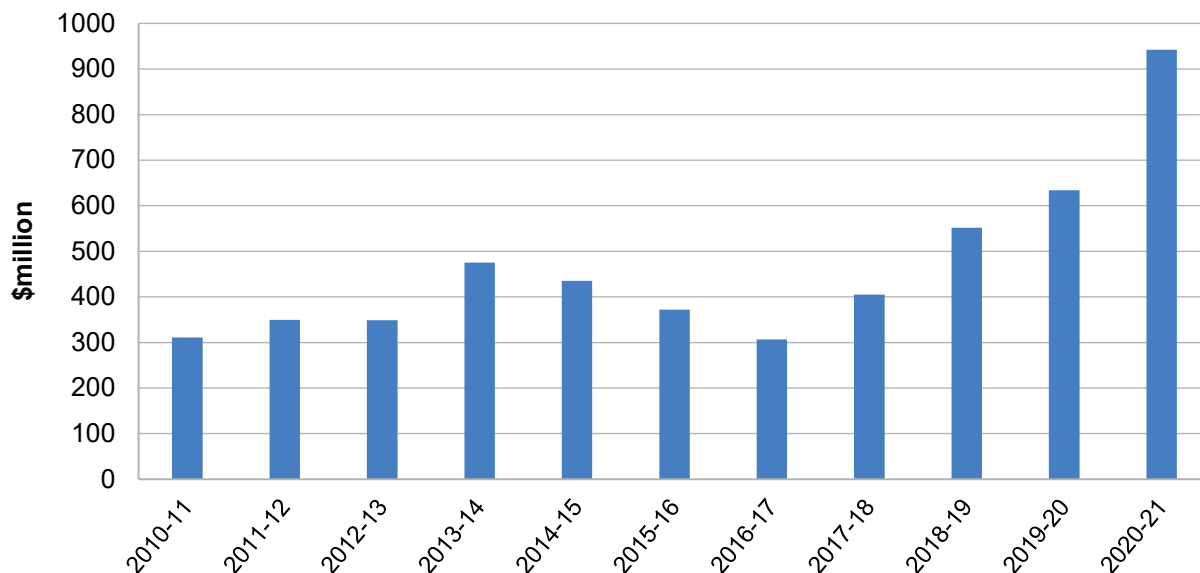
Superannuation Guarantee Charge transferred to employees’ superannuation funds

3.84 The amounts transferred by the ATO to employees’ superannuation funds are shown in Figure 3.8. ATO records indicate that from 2017–18 to 2020–21, the proportion of money collected that was transferred to superannuation funds was 91 or 92 per cent.⁸⁹

88 Portfolio Budget Statements 2021–22, Treasury Portfolio, p. 221.

89 For discussion of the Superannuation Holding Accounts Special Account, see Appendix 4.

Figure 3.8: Superannuation Guarantee Charge transferred to employees' superannuation funds, 2010–11 to 2020–21



Note a: The amounts appropriated do not take account of money later returned to the ATO by superannuation funds because they were unable to match the money to a particular account holder.

Source: ANAO analysis of appropriations to employees in audited financial statements in ATO Annual Reports. The ANAO has not validated this data.

Superannuation Guarantee Charge debt on hand

3.85 In 2021–22 as a result of the enforcement pauses, the ATO’s overall target for collectable debt was changed from a target of less than 5.5 per cent of net tax collections to a target of less than eight per cent. At September 2021, the result was 8.4 per cent.

3.86 In a 2018 strategy document, the ATO noted that SG debt levels were continuing to rise. ATO analysis in 2019 and 2020 identified some underlying drivers including natural growth from tax collections and compounding interest; resourcing challenges; economic conditions; and natural disasters. Some of the growth may also be attributed to the increase in debts raised from the increase in employee notifications since 2016–17.

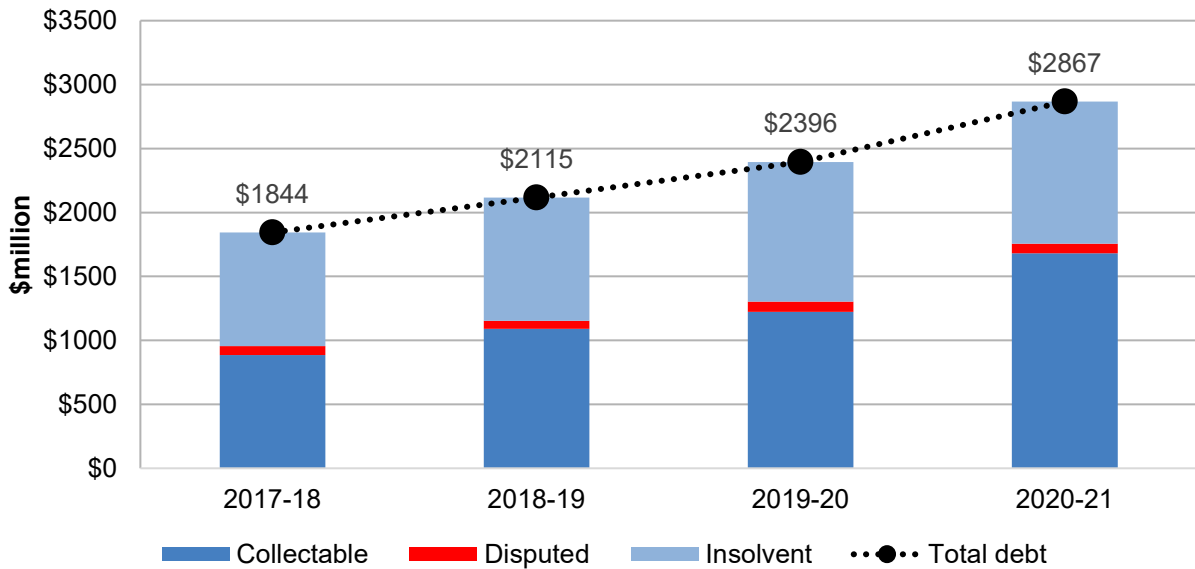
3.87 In June 2021 the Inspector-General of Taxation stated that Superannuation Guarantee Charge accounts were not viewable in the Business Portal⁹⁰, causing a lack of visibility for businesses over their Superannuation Guarantee Charge debt, and that further investigation was required.⁹¹

3.88 The cumulative amount of Superannuation Guarantee Charge debt owed to the ATO, as advised to the ANAO in November 2021, is shown in Figure 3.9. About half of the \$1.8 billion in SG debt in 2017–18 was insolvent debt, which poses a revenue risk. The 2020–21 data shows a decrease in the proportion of SG debt that is insolvent and a corresponding increase in the proportion of collectable debt. Between June 2020 and June 2021, total SG debt increased by 19.7 per cent, while total ATO debt increased by 10.5 per cent.

90 The ATO Business Portal was a free website for business to manage their tax affairs. It was replaced in July 2021 with online services for business.

91 Inspector-General of Taxation, *An Investigation and Exploration of Undisputed Tax Debts in Australia*, Canberra, June 2021, p. 79.

Figure 3.9: Superannuation Guarantee Charge debt on hand, 2017–18 to 2020–21

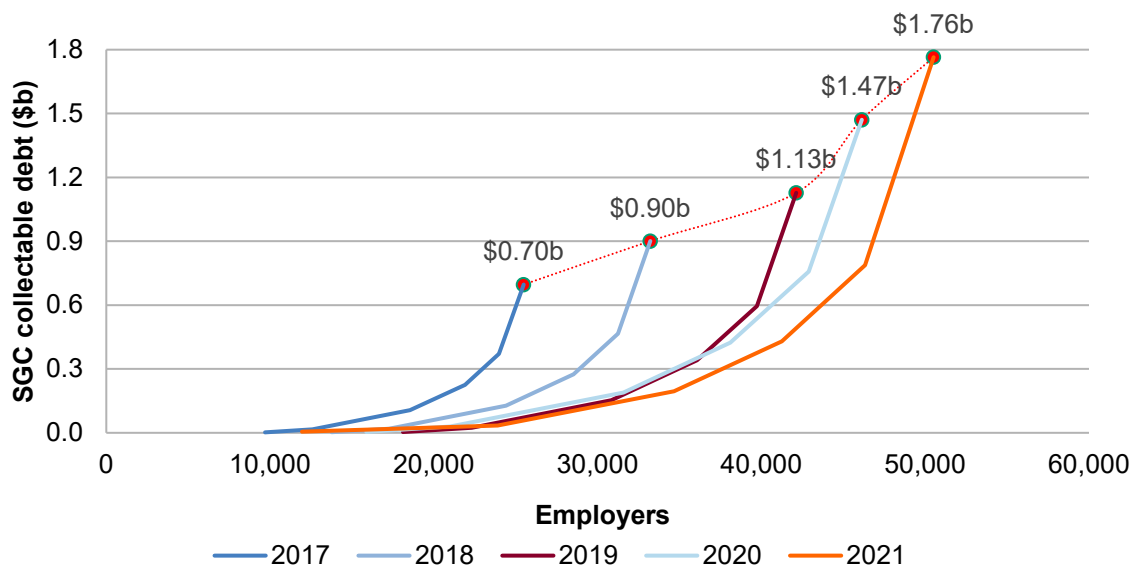


Note a: Insolvent debt is where the employer has entered into insolvency. This debt may be awaiting dividend or non-pursuit if no dividend is expected. Disputed debt is where an objection, appeal or similar has been lodged. This debt may be reduced by a favourable client outcome, may become collectable debt after the dispute is finalised or may become insolvent debt. The interest and penalties component of disputed debt is nearly 40 per cent. The ATO does not pursue stronger actions or recovery when a debt has been disputed, except in extremely rare circumstances. Collectable debt is where employers agree they owe the money but are unable to pay. The interest and penalties component of collectable debt is 16 per cent.

Source: ATO.

3.89 Figure 3.10 illustrates the substantial proportion of collectable debt owed by a relatively small number of employers. Almost 40 per cent of debtor employers owe small debts, while a quarter of debtor employers owe 85 per cent of the total, and the top six per cent owe nearly half the collectable debt. The ANAO has seen no evidence that the ATO focuses on the top six per cent. There would be merit in the ATO considering the largest debtors when prioritising cases for debt recovery action along with the employer’s capacity to pay. Collecting from the 25 per cent of employers with the greatest debt would have potential to recover more than 80 per cent of the collectable debt.

Figure 3.10: Superannuation Guarantee Charge debt on hand by number of employers, 2017 to 2021



Source: ANAO analysis of ATO data as at August 2017, August 2018, August 2019, October 2020 and September 2021. The ANAO has not validated this data.

3.90 The March 2021 Debt and Lodgment Strategy outlined strategic objectives for dealing with failure to collect debt, including SG debt. These objectives included making timely contact with clients; tailoring solutions; understanding drivers; and differentiated strategies. The ATO advised the ANAO in October 2021 that its debt-recovery approach is leading-edge amongst Organisation for Economic Co-operation and Development countries, building on behavioural economics, big data, data and predictive analytics, and a focus on prevention. The ATO advised that it is 18 months from being well positioned to evaluate the effectiveness of the changes in its approach.

Recommendation no. 3

3.91 To maximise the benefit to employees' superannuation funds, the ATO:

- (a) make more use of its enforcement and debt recovery powers;
- (b) develop performance measures for evaluating the effectiveness of debt recovery; and
- (c) consider the merit of incorporating debtors holding the majority of debt into the prioritisation of debt recovery actions.

Australian Taxation Office response: *Agreed.*

3.92 *(a) The ATO agrees to make more use of its enforcement and debt recovery powers, where appropriate. The ATO paused much of its firmer action in favour of support and assistance to the Australian community through the COVID-19 pandemic. Firmer debt recovery actions have now recommenced.*

3.93 *(b) The ATO will consider enhancing its performance measures for evaluating the effectiveness of debt recovery.*

3.94 *(c) The ATO agrees to consider the merit of prioritising debt recovery action for debtors holding the majority of debt, noting that we consider all clients for debt recovery action and tailor our action appropriately to the taxpayer's circumstances.*



Grant Hehir
Auditor-General

Canberra ACT
28 April 2022

Appendices

Appendix 1 Australian Taxation Office response



Australian Government
Australian Taxation Office

Second Commissioner of Taxation

Grant Hehir
Auditor-General for Australia
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Mr Hehir,

Re: ANAO s19 draft report for Addressing Superannuation Guarantee Non-compliance audit – 7 March 2022

Thank you for your letter dated 7 March 2022 and for the opportunity to provide comments on the s19 draft report for the Addressing Superannuation Guarantee Non-compliance audit.

I would like to acknowledge and thank the ANAO audit team for their co-operative and professional approach as they engaged with us and reviewed the effectiveness of our Superannuation Guarantee compliance framework and activities.

The ATO agrees in part with the three recommendations as presented in the s19 report (provided at Attachment A).

Our formal response (provided at Attachment B) acknowledges the importance of the superannuation guarantee to the Australian community, and its vital role in providing for people's retirement. The ATO administers key elements of the superannuation law including the super guarantee charge, with the objective of giving all Australians the confidence that the superannuation system is working in their best interests. We are proud of the work we have done to increase willing participation in the superannuation system, but note the challenges we face as we move towards implementing more proactive and preventative compliance approaches.

If you require further information on this matter, please contact Michelle Allen, Acting Assistant Commissioner, on 02 6216 8201.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jeremy Hirschhorn'.

Jeremy Hirschhorn
Second Commissioner of Taxation
31 March 2022

T +61 (0)2 6216 1111 PO Box 900 Civic Square ACT 2608 Australia ato.gov.au

Appendix 2 Improvements observed by the ANAO

1. The existence of independent external audit, and the accompanying potential for scrutiny improves performance. Improvements in administrative and management practices usually occur: in anticipation of ANAO audit activity; during an audit engagement; as interim findings are made; and/or after the audit has been completed and formal findings are communicated.

2. The Joint Committee of Public Accounts and Audit (JCPAA) has encouraged the ANAO to consider ways in which the ANAO could capture and describe some of these impacts. The ANAO's 2021–22 Corporate Plan states that the ANAO's annual performance statements will provide a narrative that will consider, amongst other matters, analysis of key improvements made by entities during a performance audit process based on information included in tabled performance audit reports.

3. Performance audits involve close engagement between the ANAO and the audited entity as well as other stakeholders involved in the program or activity being audited. Throughout the audit engagement, the ANAO outlines to the entity the preliminary audit findings, conclusions and potential audit recommendations. This ensures that final recommendations are appropriately targeted and encourages entities to take early remedial action on any identified matters during the course of an audit. Remedial actions entities may take during the audit include:

- strengthening governance arrangements;
- introducing or revising policies, strategies, guidelines or administrative processes; and
- initiating reviews or investigations.

4. In this context, the below actions were observed by the ANAO during the course of the audit. It is not clear whether these actions and/or the timing of these actions were planned in response to proposed or actual audit activity. The ANAO has not sought to obtain assurance over the source of these actions or whether they have been appropriately implemented.

- The ATO commenced a pilot project in June 2021 to further improve the efficiency of the processing of employee notifications. Key changes included a differentiated approach for low-risk cases based on early engagement, and a significant reduction in the number of cases that proceed to audit (15 per cent).
- The ATO commenced a review of its Employer Obligations risk in June 2021.
- The web content for the annual SG gap estimate was updated on 19 October 2021, in line with usual practice, after the release of the Commissioner of Taxation Annual Report 2020–21 on 6 October 2021.
- A limited pilot compliance program is scheduled for 2021–22, targeting the café and fast-food industries; the pilot was included in a draft Risk Treatment Plan prior to the commencement of this audit.
- In the Superannuation Industry Stewardship Group meeting on 17 November 2021, there was discussion about the Superannuation Guarantee (SG) gap (following the annual publication of the gap figures in the ATO's annual report), the operation of SG clearing houses, and the most appropriate treatment of employers who are trying to do the right thing and how the ATO can avoid unfairly penalising them. Members supported further

discussion on SG matters and were invited to send specific questions or note areas of concern.

- At February 2022, the ATO is transitioning work practices from a three-month early engagement pilot for low-risk employee notification cases to business as usual.

Appendix 3 Superannuation Guarantee Charge penalties

Table A.1: Superannuation Guarantee Charge penalties

Cause for penalty	Penalty name (where applicable)	Revenue remitted to Consolidated Revenue Fund
Late lodgement of Superannuation Guarantee (SG) Statement Failure to provide a Statement or information when requested during an audit	Additional Superannuation Guarantee Charge (also called the Part 7 penalty)	200 per cent of the Superannuation Guarantee Charge.
Underpayment of the Superannuation Guarantee Charge due to a false or misleading statement	Administrative penalty	Up to 75 per cent of the Superannuation Guarantee shortfall.
Avoiding superannuation obligations through arrangements		The charge avoided plus an additional penalty.
Failure to pay the Superannuation Guarantee Charge in full by the due date	Director penalty	Penalty equal to the unpaid amount.
SG Statement lodged but not paid by the due date	General Interest Charge (GIC)	7.01 per cent per annum October–December 2021. ^a
Failure to keep adequate records		Up to 30 penalty units (\$6660). ^b An additional administrative penalty of up to 20 penalty units (\$4440) may also apply.

Note a: GIC increases from the due date up to the date Superannuation Guarantee Charge is paid in full, compounding daily (tax-deductible in the year incurred). The GIC rate is updated quarterly at [https://www.ato.gov.au/Rates/General-interest-charge-\(GIC\)-rates/](https://www.ato.gov.au/Rates/General-interest-charge-(GIC)-rates/).

Note b: The value of penalty units is as at December 2021.

Source: ANAO analysis.

Appendix 4 Superannuation Holding Accounts Special Account

1. The age of the funds held in the Australian Government's Superannuation Holding Accounts Special Account as at 30 September 2021 is shown in the table below. The ATO advised the ANAO that funds can remain in the Special Account for up to ten years, after which they are transferred to the Consolidated Revenue Fund.

Table A.2: Age of funds in Superannuation Holding Accounts Special Account, as at 30 September 2021

Period in Special Account	Amount (\$)
Less than a year	11,586,690
1 year	6,816,824
2 years	2,690,739
3 years	15,179,197
4 years	7,351,052
5 years	18,359,864
6 years	197,800
7 years	2,651,523
8 years	1,300,941
9 years	772,184
10 years+	8,007,772
Totals	74,914,587

Note a: The Special Account includes four types of funds: Superannuation Guarantee; co-contributions; Low Income Super Tax Offset/ Low Income Superannuation Contributions; and pre-2006 employer deposits to the Superannuation Holding Account Reserve.

Source: ATO.

2. The ATO advised the ANAO that remedies to improve the proportion transferred from the Special Account into employees' superannuation funds include use of myGov and bulk mailouts.⁹²

⁹² myGov is an Australian government portal that allows users to access multiple government online services — including the ATO, Centrelink and Medicare — through one website.

The Auditor-General
Auditor-General Report No.30 2024–25
Performance Audit

Effectiveness of the Office of the Fair Work Ombudsman’s Regulatory Functions

Office of the Fair Work Ombudsman

© Commonwealth of Australia 2025

ISSN 1036–7632 (Print)

ISSN 2203–0352 (Online)

ISBN 978-1-923405-15-8 (Print)

ISBN 978-1-923405-16-5 (Online)

Except for the content in this document supplied by third parties, the Australian National Audit Office logo, the Commonwealth Coat of Arms, and any material protected by a trade mark, this document is licensed by the Australian National Audit Office for use under the terms of a Creative Commons Attribution-NonCommercial-NoDerivatives 3.0 Australia licence. To view a copy of this licence, visit <http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.

You are free to copy and communicate the document in its current form for non-commercial purposes, as long as you attribute the document to the Australian National Audit Office and abide by the other licence terms. You may not alter or adapt the work in any way.

Permission to use material for which the copyright is owned by a third party must be sought from the relevant copyright owner. As far as practicable, such material will be clearly labelled.

For terms of use of the Commonwealth Coat of Arms, visit the *Australian honours system* website at <https://www.pmc.gov.au/honours-and-symbols/australian-honours-system>.

Requests and inquiries concerning reproduction and rights should be addressed to:

Chief Operating Officer
Corporate Management Group
Australian National Audit Office
GPO Box 707
Canberra ACT 2601

Or via email:

communication@anao.gov.au.





Canberra ACT
14 April 2025

Dear President
Dear Mr Speaker

In accordance with the authority contained in the *Auditor-General Act 1997*, I have undertaken an independent performance audit in the Office of the Fair Work Ombudsman. The report is titled *Effectiveness of the Office of the Fair Work Ombudsman's Regulatory Functions*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website — <http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Caralee'.

Dr Caralee McLiesh PSM
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office (ANAO). The ANAO assists the Auditor-General to carry out their duties under the *Auditor-General Act 1997* to undertake performance audits, financial statement audits and assurance reviews of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Australian Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

For further information contact:
Australian National Audit Office
GPO Box 707
Canberra ACT 2601

Phone: (02) 6203 7300
Email: ag1@anao.gov.au

Auditor-General reports and information about the ANAO are available on our website:
<http://www.anao.gov.au>

Audit team

Peter Bell
Susan Ryan
Renina Boyd
Anne Rainger

Contents

Summary and recommendations.....	7
Background	7
Conclusion	8
Supporting findings.....	8
Recommendations.....	10
Summary of entity response.....	10
Key messages from this audit for all Australian Government entities	11
Audit findings.....	13
1. Background	14
Introduction.....	14
External review of the OFWO.....	17
Previous ANAO audit.....	18
Rationale for undertaking the audit	18
Audit approach	18
2. Governance arrangements.....	20
Has the OFWO developed a risk-based compliance strategy?	21
Does the OFWO effectively manage its relationships, including appropriately addressing regulatory capture risk?.....	27
Does the OFWO effectively monitor and report on its performance?	31
3. Prevention and detection of non-compliance	43
Are the OFWO's arrangements for the prevention of non-compliance effective?.....	44
Are the OFWO's arrangements for the detection of non-compliance effective?	51
4. Enforcement	59
Are there effective arrangements to manage non-compliance cases?	59
Are enforcement actions undertaken in accordance with relevant standards?.....	63
Appendices	73
Appendix 1 Entity response	74
Appendix 2 Improvements observed by the ANAO	75
Appendix 3 OFWO's corporate plan performance measures and targets.....	76



Audit snapshot

Auditor-General Report No.30 2024–25

Effectiveness of the Office of the Fair Work Ombudsman's Regulatory Functions



Why did we do this audit?

- ▶ The Office of the Fair Work Ombudsman (the OFWO) regulates approximately one million businesses and 13 million workers under the *Fair Work Act 2009* (Fair Work Act).
- ▶ Since July 2022, the OFWO has made changes to its strategic direction and operations in response to changes to legislation and revisions to its budget. The OFWO uses a range of compliance and enforcement activities and tools.
- ▶ The audit examined the effectiveness of the OFWO's exercise of its regulatory functions.



What did we find?

- ▶ The OFWO is largely effective in the exercise of its regulatory functions.
- ▶ The OFWO has established largely fit-for-purpose governance arrangements to support the effective management of compliance with the Fair Work Act.
- ▶ The OFWO's arrangements to encourage voluntary compliance and detect non-compliance with the Fair Work Act are largely effective.
- ▶ The OFWO's arrangements to enforce compliance with the Fair Work Act are largely effective.



Key facts

- ▶ In 2023–24 there were over 300 education tools and resources maintained and published by the OFWO.
- ▶ In 2023–24 approximately 16,440 enquiries were classified as formal requests for assistance. This represents approximately five per cent of total enquiries received.
- ▶ The proactive investigation caseload in 2023–24 was 1,329. This is approximately 20 per cent of the total investigation caseload for the OFWO.



What did we recommend?

- ▶ There were three recommendations to the OFWO aimed at: delivering a framework for the implementation and monitoring of regulatory priority areas; ensuring governance bodies perform strategic oversight and consider the efficiency and effectiveness of regulatory activities; and ensuring there is adequate documentation, review and quality assurance of investigations.
- ▶ The OFWO agreed to all three recommendations.

310,000

number of phone or online enquiries received by the OFWO in 2023–24.

3,256

requests for assistance referred for investigation in 2023–24.

215 days

to finalise 75 per cent of investigations closed between July 2022 and September 2024.

Summary and recommendations

Background

1. The Office of the Fair Work Ombudsman (the OFWO) was established on 1 July 2009 as an independent statutory office created by the *Fair Work Act 2009* (the Fair Work Act) to promote compliance with workplace relations through advice, education and, where necessary, enforcement.¹
2. The OFWO regulates all businesses and workers covered by the Fair Work Act. This represents approximately one million employing businesses and around 13 million workers. In 2023–24 the OFWO reported that it recovered \$473 million in unpaid wages and entitlements for nearly 160,000 employees, of which \$333 million was recovered from the large corporates sector.²
3. The Fair Work Ombudsman is the accountable authority of the OFWO. The Minister for Employment and Workplace Relations sets government policies and objectives relevant to the OFWO in carrying out its statutory functions as a regulator.³ Since July 2022, there have been legislative amendments to the Fair Work Act, including changes to the protection and entitlements of employees and additional responsibilities and funding for the OFWO. This included the OFWO assuming responsibility for the regulation of the Fair Work Act for the commercial building and construction industry and the ability to investigate allegations related to the prohibition of workplace sexual harassment.

Rationale for undertaking the audit

4. The OFWO is the national workplace relations regulator. Its functions include promoting and monitoring compliance with workplace laws, inquiring into and investigating breaches of the Fair Work Act and taking appropriate enforcement action. Since July 2022, the OFWO has made changes to its approach and operations in response to: the expansion of the coverage of the Fair Work Act; implementation of the recommendations resulting from an external review; and revisions to its budget. This audit was conducted to provide assurance to Parliament that the OFWO is exercising its regulatory functions effectively.

Audit objective and criteria

5. The objective of the audit was to assess the effectiveness of the Office of the Fair Work Ombudsman's exercise of its regulatory functions.
6. To form a conclusion against the objective, the following high-level criteria were adopted:
 - Has the OFWO established fit-for-purpose governance arrangements to support the effective management of compliance with the Fair Work Act?

1 Fair Work Ombudsman, *Office of the Fair Work Ombudsman Annual Report 2023–24*, p. 2, available from <https://www.fairwork.gov.au/sites/default/files/2024-10/office-of-the-fair-work-ombudsman-annual-report-2023-24.pdf> [accessed 11 January 2025].

2 *ibid.*, 'Performance snapshot', p. x.

3 Minister for Employment and Workplace Relations, *Minister Statement of Expectations – 2023*, October 2023, p. 1.

- Are the OFWO's arrangements to encourage voluntary compliance and detect non-compliance with the Fair Work Act effective?
- Are the OFWO's arrangements to enforce compliance with the Fair Work Act effective?

Conclusion

7. The OFWO is largely effective in the exercise of its regulatory functions. There are opportunities for it to improve its effectiveness by improving strategic oversight of its regulatory objectives and outcomes, establishing frameworks for implementing and monitoring of regulatory priority areas and activities, and measuring the efficiency and effectiveness of its regulation.

8. The OFWO has established largely fit-for-purpose governance arrangements to support the effective management of compliance with the Fair Work Act. The OFWO developed compliance strategies that reflected ministerial Statements of Expectations. The compliance strategies were partly risk-based and not fully integrated into OFWO's business planning. The OFWO is effective in managing its stakeholder relationships except for not assessing regulatory capture risk as a discrete source of risk. The OFWO's monitoring of its regulatory performance focused on operational decision-making rather than the achievement of its regulatory priorities and outcomes. The OFWO is redeveloping its performance measures with the intention of improving its reporting of efficiency and effectiveness.

9. The OFWO's arrangements to encourage voluntary compliance and detect non-compliance with the Fair Work Act are largely effective. The OFWO has established arrangements for the prevention, and proactive and reactive detection, of non-compliance and has published a compliance and enforcement policy. The OFWO does not monitor timeliness, risk, or return on investment for its prevention and detection of non-compliance. The OFWO does not have insight into whether the balance of preventative and detective compliance and enforcement activities is appropriate.

10. The OFWO's arrangements to enforce compliance with the Fair Work Act are largely effective. The OFWO has established arrangements to manage non-compliance cases and the OFWO deploys its enforcement tools in line with its regulatory posture and policies. The OFWO's monitoring and reporting does not provide an assessment of the effectiveness of its enforcement activities and outcomes in promoting compliance with the Fair Work Act. The OFWO compliance and enforcement actions were undertaken in accordance with internal policies. These actions were not adequately documented in OFWO's records management systems. The OFWO documented that it would deviate from implementing the mandatory requirements of the Australian Government Investigations Standard, October 2022 (AGIS 2022). Deviations include not implementing a quality assurance framework.

Supporting findings

Governance arrangements

11. The OFWO's approach to developing and implementing regulatory priorities and compliance strategies takes into consideration the requirements of the ministerial Statements of Expectations. The OFWO's regulatory priorities and compliance strategies are not fully integrated

into business planning and do not reflect a comprehensive assessment of risk exposures and mitigations. (See paragraphs 2.4 to 2.30)

12. The OFWO has established stakeholder engagement and management arrangements to support its regulatory functions. The OFWO has also established stakeholder feedback processes. The OFWO has not documented regulatory capture as a discrete source of risk or assessed the adequacy of its controls to mitigate regulatory capture risk. (See paragraphs 2.31 to 2.49)

13. The OFWO's governance arrangements have a focus on operational decision-making. The enforcement board did not fully meet its terms of reference to provide strategic monitoring of regulatory activities. The OFWO's performance reporting arrangements prior to 2024–25 included measures of output rather than efficiency and effectiveness. The OFWO is re-developing its performance measures and will need to provide greater insight into the ongoing effectiveness of its regulatory outcomes and impacts. (See paragraphs 2.50 to 2.84)

Prevention and detection of non-compliance

14. The OFWO has provided assistance, advice and education to employees, employers, outworkers, outworker entities and organisations to achieve regulatory objectives. The OFWO has developed and published a compliance and enforcement policy. The policy does not provide clear guidance to users about: how services will be prioritised and provided; and does not fully address the different needs of internal and external users. (See paragraphs 3.4 to 3.33)

15. The OFWO has established arrangements for proactive and reactive detection of non-compliance, including intelligence and analysis, proactive investigations, responding to requests for assistance, self-reporting of non-compliance and ad hoc investigations. These arrangements do not consider operational requirements and constraints, such as budgets, timeliness, risk and return on investment. This information would allow the OFWO to monitor the efficiency and effectiveness of its regulatory activities and assess whether the balance of preventative and detective activities is appropriate for the OFWO's regulatory objectives. (See paragraphs 3.34 to 3.66)

Enforcement

16. The OFWO deploys its compliance and enforcement tools in line with its regulatory posture and compliance and enforcement policy. The use of compliance and enforcement tools requires long term management. Fifty per cent of investigations take more than 136 days to finalise with two per cent taking more than two years. The OFWO's monitoring and reporting does not provide an assessment of the effectiveness of its enforcement activities and outcomes in promoting compliance with the Fair Work Act. (See paragraphs 4.2 to 4.17)

17. In July 2024, the OFWO assessed and agreed deviations from AGIS 2022. One 'notable deviation' from AGIS 2022 was the decision not to implement a quality assurance framework. Prior to July 2024, the OFWO did not use the relevant AGIS to inform the development of its policies, procedures, staff roles and staff qualifications. At November 2024, 50 per cent of OFWO staff conducting or overseeing investigations did not hold the relevant certification as required by AGIS 2022. The OFWO's decision records did not evidence that compliance and enforcement activities were performed adequately. For example, case monitoring meeting and approvals were not consistently recorded in OFWO's records management systems. (See paragraphs 4.18 to 4.55)

Recommendations

Recommendation no. 1
Paragraph 2.29 The Office of the Fair Work Ombudsman delivers a framework for the implementation and monitoring of regulatory priority areas and activities that is integrated with business planning and is risk-based.

Office of the Fair Work Ombudsman response: *Agreed.*

Recommendation no. 2
Paragraph 2.63 The Office of the Fair Work Ombudsman ensures that governance bodies perform strategic oversight and monitoring of regulatory objectives and outcomes and consider the efficiency and effectiveness of regulatory activities.

Office of the Fair Work Ombudsman response: *Agreed.*

Recommendation no. 3
Paragraph 4.54 The Office of the Fair Work Ombudsman ensures that there is:

- (a) documentation of the completion of mandatory steps set out in policies and procedures for investigations; and
- (b) appropriate review and quality assurance of investigations to improve levels of compliance and to take corrective action where necessary.

Office of the Fair Work Ombudsman response: *Agreed.*

Summary of entity response

18. The proposed audit report was provided to the OFWO. The OFWO's summary response is reproduced below and its full response is at Appendix 1. Improvements observed by the ANAO during the course of this audit are listed in Appendix 2.

The OFWO welcomes the ANAO's report and agrees with the recommendations.

The OFWO has experienced considerable transformation over the past year. Central to the new strategic enforcement approach is tripartism, recognising that each element within the workplace relations system plays an important role in fostering a culture of compliance. As part of this, the OFWO has established a range of collaborative mechanisms with stakeholders and is updating critical strategic documents that define the Agency's approach and operating environment.

A new organisational structure took effect on 1 July 2024 so that the OFWO is best positioned to deliver its identified objectives and strategic goals.

As detailed in our Statement of Intent, we use intelligence and data to inform our work, including the selection of our priority areas. We are committed to maintaining strong governance, supporting transparent and consistent decision-making.

As detailed in our Statement of Intent, we strive for continuous improvement in our policies, processes and practices. We are committed to focussing on developing the leadership and operational capability of staff at all levels, through our capability uplift program, to ensure we effectively discharge our statutory functions.

Key messages from this audit for all Australian Government entities

19. Below is a summary of key messages, including instances of good practice, which have been identified in this audit and may be relevant for the operations of other Australian Government entities.

Governance and risk management

- Risk management for regulators should be integrated across all functions and levels of the organisation to ensure effective and efficient targeting of the areas of greatest concern.

Performance and impact measurement

- Performance measures and targets relevant to regulatory achievements and outcomes should reflect the three principles of regulatory best practice outlined in the Department of Finance *Resource Management Guide No.128: Regulator Performance*.

Policy/program implementation

- An intelligence function should be integrated into service delivery to ensure its ongoing relevance and responsiveness to regulatory objectives.
- Stakeholder engagement arrangements should be closely linked to regulatory priorities to assist regulators to stay informed and be responsive to the changing context and operating environment.

Audit findings

1. Background

Introduction

1.1 The Office of the Fair Work Ombudsman (the OFWO) was established on 1 July 2009 as an independent statutory office created by the *Fair Work Act 2009* (the Fair Work Act) to promote compliance with workplace relations legislation by employees and employers through advice, education and, where necessary, enforcement.⁴

1.2 The OFWO regulates all businesses and workers covered by the Fair Work Act. This represents approximately one million employing businesses and around 13 million workers. In 2023–24 the OFWO reported that it recovered \$473 million in unpaid wages and entitlements for nearly 160,000 employees, of which \$333 million was recovered from the large corporates sector.⁵

1.3 The Fair Work Ombudsman is the accountable authority of the OFWO. The Minister for Employment and Workplace Relations sets government policies and objectives relevant to the OFWO in carrying out its statutory functions as a regulator. The minister expects the OFWO ‘to be agile and to adapt to legislative change, working with stakeholders to implement these reforms and to support tripartism in Australian workplace relations’. The minister also expects the OFWO to apply the principles outlined in the Department of Finance *Resource Management Guide No.128: Regulator Performance* (RMG 128)⁶ in its regulatory functions and in assessing performance and engagement with stakeholders.⁷

Regulatory functions

1.4 The Fair Work Ombudsman has the following functions as outlined in section 682 of the Fair Work Act:

- to promote: harmonious, productive and cooperative workplace relations; and compliance with the Fair Work Act and fair work instruments; including by providing education, assistance and advice to employees, employers, regulated workers, regulated businesses, persons in a road transport contractual chain, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices;
- to monitor compliance with the Fair Work Act and fair work instruments;
- to inquire into, and investigate, any act or practice that may be contrary to the Fair Work Act, a fair work instrument or a safety net contractual entitlement;

4 Fair Work Ombudsman, *Office of the Fair Work Ombudsman Annual Report 2023–24*, p. 2, available from <https://www.fairwork.gov.au/sites/default/files/2024-10/office-of-the-fair-work-ombudsman-annual-report-2023-24.pdf> [accessed 11 January 2025].

5 *ibid.*, ‘Performance snapshot’, p. x.

6 Department of Finance, *Resource Management Guide No.128: Regulator Performance*, available from <https://www.finance.gov.au/government/managing-commonwealth-resources/regulator-performance-rmg-128> [accessed 15 November 2024].

7 Minister for Employment and Workplace Relations, *Minister Statement of Expectations – 2023*, October 2023, p. 1 and p. 3.

- to commence proceedings in a court, or to make applications to the Fair Work Commission⁸, to enforce the Fair Work Act, fair work instruments and safety net contractual entitlements;
- to publish a compliance and enforcement policy, including guidelines relating to the circumstances in which the Fair Work Ombudsman will, or will not, exercise relevant powers;
- to refer matters to relevant authorities; and
- to represent employees, regulated workers, or outworkers who are, or may become, a party to proceedings in a court, or a party to a matter before the Fair Work Commission, under the Fair Work Act or a fair work instrument, if the Fair Work Ombudsman considers that representing the employees, regulated workers, or outworkers will promote compliance with the Fair Work Act or the fair work instrument.

1.5 To discharge its regulatory functions, the OFWO uses a range of compliance and enforcement activities and tools that are either preventative or detective. Preventative regulatory activities include: providing education and advice to employees, employers, outworkers, outworker entities and organisations⁹; producing best practice guides and tools; and publishing a compliance and enforcement policy.

1.6 Detective regulatory activities include: gathering and reviewing intelligence and evidence; monitoring and analysis of workplace trends; exchanging information and intelligence with other regulators and government agencies; responding to requests for assistance; proactive investigations¹⁰; and monitoring and investigating voluntarily reported non-compliance (self-reported non-compliance).

1.7 When responding to requests for assistance, proactive investigations and monitoring and investigating instances of self-reported non-compliance, the OFWO can use a range of compliance and enforcement tools described in Table 1.1.

8 The Fair Work Commission and the Fair Work Ombudsman are separate government organisations. The Fair Work Commission is the national workplace relations tribunal and also regulates registered organisations. The Fair Work Ombudsman is the national workplace relations regulator.

9 The meaning of employees, employers, outworkers, outworker entities and organisations is defined in the *Fair Work Act 2009*, Division 2, section 12 The Dictionary, available from <https://www.legislation.gov.au/C2009A00028/latest/versions> [accessed 11 January 2025].

10 A proactive investigation is an intelligence-led and targeted activity to collect information or evidence to a particular standard of proof related to an alleged, apparent or suspected breach of the Fair Work Act or fair work instrument. Proactive investigations are usually targeted at specific industry sectors, issues or organisations in accordance with the OFWO's priorities.

Table 1.1: Compliance and enforcement tools

Compliance and enforcement tool	Description
Enforceable undertaking	An enforceable undertaking is a written agreement between an employer and the OFWO in relation to a Fair Work Act or fair work instrument contravention. An enforceable undertaking is often used where a contravention has occurred and the employer is prepared to voluntarily fix the issue and has agreed to prevention actions for the future. If an employer fails to comply with an enforceable undertaking, it may result in litigation/court proceedings. Enforceable undertakings are an enforcement tool outlined in section 715 of the Fair Work Act.
Compliance notice	A compliance notice may be issued by a Fair Work Inspector if they form a reasonable belief that the employer has contravened the Fair Work Act or fair work instrument. A compliance notice requires an employer to take specified action to remedy the direct effects of the identified contraventions and/or require the employer to produce reasonable evidence of compliance. The OFWO confirms compliance with compliance notices. If an employer fails to meet the requirements of a compliance notice, it may result in litigation/court proceedings. Compliance notices are an enforcement tool under section 716 of the Fair Work Act.
Infringement notice	An infringement notice requires an employer to pay a penalty if a Fair Work Inspector reasonably believes that the employer has committed one or more contraventions of the Fair Work Act, the regulations or fair work instrument. The level of the penalty will depend on the number and type of contraventions. Infringement notices are an enforcement tool outlined in regulation 4.04 of the Fair Work Regulations 2009.
Contravention letter	A contravention letter may be issued by a Fair Work Inspector under regulation 5.05 of the Fair Work Regulations 2009 if the inspector is satisfied that the employer has failed to observe a requirement of the Fair Work Act, regulations or fair work instrument. The contravention letter informs the employer of the failure, requires the employer to take the action specified in the letter, within the period specified in the letter to rectify the failure and require the employer to notify the Fair Work Inspector of any action taken to comply with the letter.
Caution letter	A caution letter is correspondence between the OFWO and an employer providing a caution regarding future compliance and warning that any future contraventions may lead to the issuing of an infringement notice or litigation/court proceedings.
Litigation/court proceedings	Litigation/court proceedings are reserved for more serious cases of non-compliance or when there is a failure to comply with another type of compliance and enforcement tool such as a compliance notice.

Source: ANAO analysis of the OFWO compliance and enforcement policy and internal policies and procedures.

1.8 Since July 2022, there have been legislative amendments to the Fair Work Act, including changes to the protection and entitlements of employees and additional responsibilities and funding for the OFWO. This included the OFWO assuming responsibility for the regulation of the Fair Work Act for the commercial building and construction industry¹¹ and the ability to investigate allegations related to the prohibition of workplace sexual harassment. In addition, legislative changes have introduced Commonwealth jurisdiction over criminal underpayments to allow the

11 The regulation of the commercial building and construction industry was previously the responsibility of the Australian Building and Construction Commission.

Commonwealth to bring criminal charges against businesses and individuals for the intentional underpayment of employees' wages and certain entitlements. The impact of this change is that from January 2025 — in addition to the OFWO's existing compliance and enforcement activities through civil proceedings — the OFWO has the responsibility to investigate potential criminal underpayment offences. As a result of these investigations the OFWO may, where appropriate, refer matters to the Australian Federal Police or the Commonwealth Director of Public Prosecutions for consideration of criminal prosecution.

1.9 In 2023–24 the OFWO received approximately \$167 million in departmental operating appropriations.¹² As at 30 June 2024, the OFWO had 996 staff located in a network of 22 offices — one in each of the capital cities and 14 in regional areas. The Fair Work Ombudsman is structured into four groups, each lead by a Group Manager (SES Band 2 positions). The OFWO Executive team comprised Group Manager – Operations, Group Manager – Regulatory Transformation, Chief Operating Officer (Group Manager – Corporate and Engagement) and Chief Counsel (Group Manager – Legal and Policy). The Fair Work Ombudsman has established two executive advisory groups – referred to as governance bodies – to assist with oversight of the exercise of its regulatory functions. These are the enforcement board and corporate board.

External review of the OFWO

1.10 The Australian Government announced a review into the operations of the OFWO in the 2023–24 Budget. The objectives of the review were to:

- examine the operational practices and activities of the OFWO;
- assess how the OFWO allocates its resources to deliver its statutory mandate;
- identify any barriers to the OFWO operating efficiently to fulfil its functions; and
- provide recommendations to identify efficiencies and opportunities for savings and provide the basis for a 2.5 per cent ongoing saving from the OFWO's departmental budget based on its October 2022 budget allocation.

1.11 The review was conducted by KPMG, contracted by the Department of Employment and Workplace Relations through a procurement process.¹³ The final report, the *Review of the Office of the Fair Work Ombudsman*, was provided to the Minister for Employment and Workplace Relations in December 2023.

1.12 The review identified three primary opportunities for potential 'immediate budget savings' with associated recommendations; and four 'other opportunities for consideration' that were focused on improving overall operational efficiency and maximising regulatory impact. These were:

- review and rationalise office space in line with demand and flexible working arrangements (primary opportunity);
- address structural inefficiencies both horizontally across groups and vertically within organisational units (primary opportunity);

12 Fair Work Ombudsman, *Office of the Fair Work Ombudsman Annual Report 2023–24*, p. 99, available from <https://www.fairwork.gov.au/sites/default/files/2024-10/office-of-the-fair-work-ombudsman-annual-report-2023-24.pdf> [accessed 11 January 2025].

13 Austender Contract Notice CN4003221, available from <https://www.tenders.gov.au/Cn/Show/494cd10b-4e9c-4953-849f-e7ccb982c9f4> [accessed 30 January 2025].

- achieve greater efficiency through shared services (primary opportunity);
- review regulatory strategy and outcomes of regulatory actions and adjust to ensure these are focused on the greatest harm, and are risk-based, strategic and targeted (other opportunity for consideration);
- strengthen the OFWO's focus on collaboration to better leverage the influence and resources of other actors in the workplace relations ecosystem (other opportunity for consideration);
- support employees to engage with risk to allow for devolved decision-making, reduced layers of approval and more efficient processes (other opportunity for consideration); and
- continue capability uplift initiatives (other opportunity for consideration).

1.13 In March 2024, the Fair Work Ombudsman responded to the review in a letter to the Minister for Employment and Workplace Relations outlining the steps that the OFWO would take to consider and implement the recommendations. This included incorporating changes into the entity's regulatory approach outlined in its 2024–25 corporate plan.

Previous ANAO audit

1.14 Auditor-General Report No.14 2012–13 *Delivery of Workplace Relations Services by the Office of the Fair Work Ombudsman*¹⁴ assessed the effectiveness of the OFWO's administration of education and compliance services under the Fair Work Act. It found that the OFWO's administration was generally sound, with scope to improve the use of information and analysis to further inform service delivery strategies. The ANAO made two recommendations relating to integrating risk management into planning and decision-making, and establishing performance measures, including measures of efficiency. For details on the implementation of these recommendations see paragraphs 2.28 and 2.84.

Rationale for undertaking the audit

1.15 The OFWO is the national workplace relations regulator. Its statutory functions include promoting and monitoring compliance with workplace laws, inquiring into and investigating breaches of the Fair Work Act and taking appropriate enforcement action. The OFWO regulates approximately one million employing businesses and around 13 million workers under the Fair Work Act. Since July 2022, the OFWO has made changes to its approach and operations in response to: the expansion of the coverage of the Fair Work Act; implementation of the recommendations resulting from an external review; and revisions to its budget. This audit was conducted to provide assurance to Parliament that the OFWO is exercising its regulatory functions effectively.

Audit approach

Audit objective, criteria and scope

1.16 The objective of the audit was to assess the effectiveness of the Office of the Fair Work Ombudsman's exercise of its regulatory functions.

14 Auditor-General Report No.14 2012–13, *Delivery of Workplace Relations Services by the Office of the Fair Work Ombudsman*, ANAO, Canberra, 2012, available from <https://www.anao.gov.au/work/performance-audit/delivery-workplace-relations-services-the-office-the-fair-work-ombudsman> [accessed 30 January 2025].

1.17 To form a conclusion against the objective, the following high-level criteria were adopted:

- Has the OFWO established fit-for-purpose governance arrangements to support the effective management of compliance with the Fair Work Act?
- Are the OFWO's arrangements to encourage voluntary compliance and detect non-compliance with the Fair Work Act effective?
- Are the OFWO's arrangements to enforce compliance with the Fair Work Act effective?

1.18 The audit examined the regulatory operations of the OFWO over the period from 1 July 2022 to 31 December 2024.

Audit methodology

1.19 To address the audit objective, the audit team:

- reviewed legislative and internal arrangements for activities to support regulatory functions;
- examined executive and governance committee meeting papers and minutes;
- reviewed strategy, procedures, guidance, risk registers and monitoring information relevant to regulatory decision-making;
- examined internal and external review outcomes and tracking of recommendation implementation; and
- held meetings with the Fair Work Ombudsman, OFWO Executives and officials.

1.20 The audit was conducted in accordance with ANAO Auditing Standards at a cost to the ANAO of approximately \$351,714.

1.21 The team members for this audit were Peter Bell, Susan Ryan, Renina Boyd and Anne Rainger.

2. Governance arrangements

Areas examined

This chapter examines whether the Office of the Fair Work Ombudsman (the OFWO) has established fit-for-purpose governance arrangements to support the effective management of compliance with the *Fair Work Act 2009* (the Fair Work Act).

Conclusion

The OFWO has established largely fit-for-purpose governance arrangements to support the effective management of compliance with the Fair Work Act. The OFWO developed compliance strategies that reflected ministerial Statements of Expectations. The compliance strategies were partly risk-based and not fully integrated into OFWO's business planning. The OFWO is effective in managing its stakeholder relationships except for not assessing regulatory capture risk as a discrete source of risk. The OFWO's monitoring of its regulatory performance focused on operational decision-making rather than the achievement of its regulatory priorities and outcomes. The OFWO is redeveloping its performance measures with the intention of improving its reporting of efficiency and effectiveness.

Areas for improvement

The ANAO made two recommendations aimed at: delivering a framework for the implementation and monitoring of regulatory priority areas and activities that is integrated with business planning and is risk-based; and ensuring governance bodies perform strategic oversight and consider the efficiency and effectiveness of regulatory activities.

The ANAO also identified one opportunity for improvement relating to performing a risk assessment for regulatory capture.

2.1 The Department of Finance has issued better practice guidance as part of *Resource Management Guide No.128: Regulator Performance* (RMG 128) to assist Commonwealth entities that perform regulatory functions.¹⁵ This guidance outlines the content and use of the ministerial Statements of Expectations for regulators and corresponding regulator Statements of Intent.

2.2 Ministerial Statements of Expectations are issued by the responsible minister to a regulator to provide clarity about government policies and objectives relevant to the regulator in line with its statutory objectives, and the priorities the minister expects it to observe in conducting its operations. RMG 128 states that Statements of Expectations should be refreshed with every change in minister, change in regulator leadership, change in Australian Government policy or every two years.

2.3 In line with ministerial Statements of Expectations, the ANAO's assessment of the OFWO's governance arrangements for regulatory functions focuses on the development of a risk-based compliance strategy and regulatory priorities, effectiveness in managing stakeholder relationships and monitoring and reporting on regulatory performance.

15 Department of Finance, *Resource Management Guide No.128: Regulator Performance*, available from <https://www.finance.gov.au/government/managing-commonwealth-resources/regulator-performance-rmg-128> [accessed 15 November 2024].

Has the OFWO developed a risk-based compliance strategy?

The OFWO's approach to developing and implementing regulatory priorities and compliance strategies takes into consideration the requirements of the ministerial Statements of Expectations. The OFWO's regulatory priorities and compliance strategies are not fully integrated into business planning and do not reflect a comprehensive assessment of risk exposures and mitigations.

Statements of expectations

2.4 The OFWO has been issued with two Statements of Expectations — the first in October 2021 and the second in October 2023.¹⁶

2.5 The October 2021 Statement of Expectations reflected the principles of regulator best practice to be implemented by the OFWO as required by RMG 128. These principles were:

Continuous improvement and building trust: regulators adopt a whole-of-system perspective, continuously improving their performance, capability and culture, to build trust and confidence in Australia's regulatory settings.

Risk-based and data-driven: regulators maintain essential safeguards, using data and digital technology to manage risks proportionately to minimise regulatory burden and to support those they regulate to comply and grow.

Collaboration and engagement: regulators are transparent and responsive, implementing regulations in a modern and collaborative way.

2.6 This Statement of Expectations emphasised the need to take a risk-based and data-driven approach to compliance and enforcement activities, centred on the establishment and maintenance of well-defined and clearly communicated compliance and enforcement priorities, and a clearly articulated approach to risk and how this informs decision-making. This statement also reflected the minister's expectations for the OFWO's contribution to the government's deregulation agenda.

2.7 The 2023 Statement of Expectations built on the earlier statement and outlined expectations related to supporting tripartism¹⁷, working with stakeholders and adapting to legislative change that reflected the changed legislative landscape under the government's workplace reform agenda and role of the OFWO. In particular, the Statement of Expectations referred to the need for the OFWO to make appropriate use of the full range of its enforcement powers and tools, while seeking to resolve workplace issues using voluntary means where appropriate to do so.

2.8 To develop its response (Statement of Intent), the OFWO established a formal process. This process included both internal and external consultation to allow staff and workplace relations stakeholders to engage with, and have an opportunity to provide input into, the direction of the

16 On 12 December 2024 the OFWO received a new Statement of Expectations. As at 31 December 2024 the OFWO was considering its corresponding Statement of Intent.

17 Tripartism relates to engagement and consultation between the OFWO as regulator and employers and employees subject to regulation under the Fair Work Act.

OFWO. Statements of Intent were provided to the minister in December 2021 and December 2023 respectively.

2.9 RMG 128 states that Statements of Expectations should be incorporated into *Public Governance, Performance and Accountability Act 2013* (PGPA Act) processes such as corporate plans and annual reports. This requirement came into effect for the 2023–24 reporting year. The OFWO corporate plan for 2023–24 did not mention the Statement of Expectations or Statement of Intent. The corporate plan for 2024–25 mentions both. The OFWO annual report for 2023–24 mentions the Statement of Intent.

Compliance strategy and regulatory posture

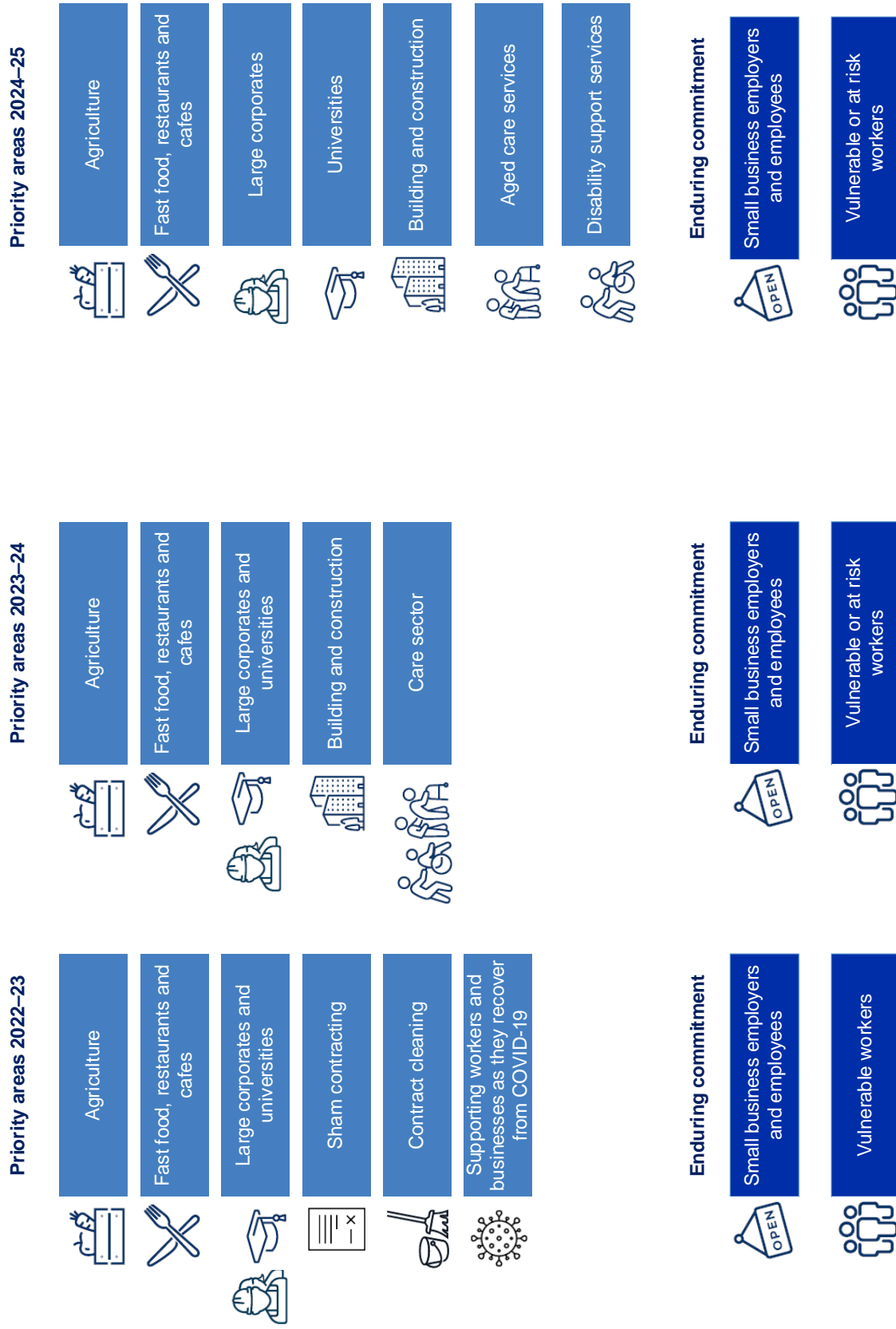
2.10 A compliance strategy and regulatory posture are mechanisms used by regulators to articulate their regulatory approach. For the OFWO, its compliance strategy should cover regulatory priorities, how it will balance education and advice, compliance activities and enforcement actions to maximise regulatory effectiveness. Regulatory posture defines its approach and prioritisation of its regulatory functions. This includes the emphasis placed on the use of compliance and enforcement tools and how it will make decisions about resource allocation and risk. The OFWO uses its priority areas and priority work plans to articulate and document its overarching compliance strategy and regulatory posture. In addition, the OFWO’s compliance and enforcement policy communicates, internally and externally, how the OFWO fulfills its role as the workplace regulator.

2.11 Each year the OFWO develops and communicates its priority areas in its corporate plan.¹⁸ The development of priority areas is one mechanism used by the OFWO to enable the community to remain informed about the OFWO’s areas of focus. The priority areas are intended to give priority to industries that are at significant risk or demonstrate a history of non-compliance. The OFWO also prioritises, as enduring commitments, cohorts that are identified as requiring additional assistance. This includes vulnerable or at risk workers, including those who are young, live with disability or arrived in Australia on a temporary visa.

2.12 Figure 2.1 sets out how the OFWO’s priority areas have changed over the past three financial years.

18 Referred to in OFWO documentation as regulatory priority areas in 2023–24 and priorities in 2024–25.

Figure 2.1: Evolution of OFWO priority areas 2022–23 to 2024–25



Source: ANAO analysis of the OFWO's corporate plans for 2022–23, 2023–24 and 2024–25.

2.13 The development of OFWO's priority areas is undertaken using a process which includes an analysis of quantitative and qualitative data derived from feedback from staff and stakeholders and an analysis of existing priorities, emerging issues, trends and regulatory risks across the labour market.

2.14 In 2022–23 and 2023–24 the OFWO established annual work plans covering each priority area. These work plans identified activities to be undertaken such as: education and communication; development of tailored material and resources; and proactive compliance and enforcement activities. These work plans were provided to the OFWO governance bodies on a quarterly basis.¹⁹ An annual priority work plan for 2024–25 has not been developed by the OFWO. In December 2024, the OFWO advised the ANAO that it is taking a new approach to addressing its priority areas by working with external stakeholder reference groups to identify and understand the issues within each priority area.

2.15 An overarching compliance strategy and regulatory posture were not consistently incorporated into the OFWO's business planning documentation. Business plans and work plans did not contain information on the number of activities, budget or resources allocated to each priority area based on risk. The work plans did not articulate how the planned mix of regulatory activities would achieve the OFWO's regulatory posture and target the areas of greatest harm.

2.16 Some priority areas had detailed strategies and performance measures established, whereas others had no strategies or performance measures reported. Two examples are discussed below.

- The agriculture sector had detailed communication and enforcement strategies which were provided to governance bodies on a quarterly basis.
- The care sector became a priority area on 1 July 2023, a care sector communication strategy was not prepared until October 2024. As at December 2024, this document had not been provided to the OFWO governance bodies.

2.17 The OFWO has not identified or documented what business planning information should be prepared to support the implementation and monitoring of its priority areas and/or work plans. Without adequate documentation and monitoring of each priority area, there is a risk that the OFWO is not targeting or achieving effective regulation of its priority areas.

2.18 Annual branch business plans are prepared by all branches within the OFWO to set out each branch's intended deliverables for the year and to provide links to corporate plan objectives and strategies. Branch business plans for 2022–23 and 2023–24 included information on activities, outcomes, risks and measuring success (often linked to corporate plan performance measures and targets). Branch business plans for 2024–25 included information on key deliverables and risks

19 The OFWO has established two executive advisory groups to assist the Fair Work Ombudsman in discharging their role as the accountable authority. These governance bodies are the enforcement board and corporate board. These are discussed at paragraphs 2.50 to 2.62.

linked to strategic objectives.²⁰ Branch business plans for 2024–25 did not include information on activities in the priority areas.

2.19 Branch business plans are supported by organisation-level budget processes where average staffing levels for each branch are allocated, monitored and reviewed mid-year and annually. The OFWO's priority work plans were not supported by budget or resource planning information. For example, annual priority plans do not provide a connection to budget or performance measures for proactive and responsive compliance and enforcement activities.

Identification and management of risks and exposures

2.20 The ministerial Statements of Expectations issued in October 2021 and October 2023 set out the requirement for the OFWO's compliance and enforcement activities to be risk-based and data-driven. In its responding Statements of Intent, the OFWO outlined a number of mechanisms to fulfil this requirement including:

- through a risk management framework and processes, including risk appetite statements;
- risk-based and data-driven analysis to support the development of the regulatory priorities and corporate plans;
- use of intelligence and analysis to drive compliance and enforcement activities (such as anonymous reports, research, education and proactive investigations); and
- regularly seeking feedback from a range of stakeholders.

Risk management framework and processes

2.21 The OFWO risk management policy and guidelines were updated in July 2023. These documents are consistent with the Commonwealth Risk Management Policy 2023.

2.22 The OFWO risk management policy and guidelines provide information on risk management responsibilities and activities for corporate functions. They do not include information on regulatory functions.

2.23 The OFWO risk management guidelines identify that risk assessments should be undertaken as part of annual business planning processes. Business plans for 2022–23, 2023–24 and 2024–25 included risk information. They did not assess risks in accordance with the OFWO risk management policy. For example, they did not identify current controls, proposed mitigations and/or rate residual risks.

2.24 The OFWO risk management policy states that a review of the strategic risk register will be undertaken 'at least every six months'. The OFWO's strategic risks were last assessed by the OFWO in December 2022. Strategic risks were updated as part of the preparation of the 2024–25 corporate plan, with two additional risks added. An assessment of the strategic risks in accordance with OFWO's risk management guidelines (for example the rating of residual risk and assessment of whether the risk was within risk appetite) has not occurred as at December 2024.

20 The strategic objectives included in the 2024–25 corporate plan were: (1) employers and workers know about the Fair Work Ombudsman and what we do; (2) employers and workers understand their workplace rights and obligations; (3) disputes about compliance and workplace laws are resolved by dispute resolution and the use of enforcement tools; (4) non-compliance is deterred through strategic compliance and enforcement activities; (5) serious and systemic non-compliance is detected and addressed; and (6) our systems, capabilities, and ways of working support our people to deliver our objectives.

2.25 The OFWO risk management policy outlines the entity's risk appetite and tolerance statement. The risk tolerances were identified for three of five strategic risks that were identified in corporate plans for 2022–23 and 2023–24.²¹ The target risk levels in the strategic risk assessment were set above stated risk appetites and tolerances included in the OFWO's risk management policy without challenge or explanation of why these risks were acceptable to the OFWO. As at December 2024 the risk appetite and tolerance statements in the OFWO risk management policy were not updated to reflect the strategic risks outlined in the 2024–25 corporate plan published in August 2024.

2.26 The OFWO has not tested controls related to strategic and operational risks in accordance with the requirements of the Commonwealth Risk Management Policy 2023 and its own risk management policy.

2.27 The KPMG review of the Office of the Fair Work Ombudsman, December 2023²², identified that there were opportunities for consideration related to a review of the OFWO's regulatory strategy and outcomes based on risk. In response to the KPMG report, the OFWO agreed to perform a comprehensive review of its compliance and enforcement policy (refer to paragraphs 3.29 to 3.33). Regulatory posture and performance measures were also updated as part of the 2024–25 corporate plan development process (refer to paragraphs 2.72 to 2.84 for further discussion on performance reporting). The actions taken by the OFWO to address the external review's 'opportunities for consideration' did not resolve underlying issues with business planning and risk management.

2.28 Auditor-General Report No.14 2012–13 *Delivery of Workplace Relations Services by the Office of the Fair Work Ombudsman* assessed the effectiveness of the OFWO's administration of education and compliance services under the Fair Work Act. At that time, the audit found that the quality of business plans prepared by the OFWO was variable, particularly in terms of alignment with the strategic plan and projects, performance information and risk assessments. In that report, the ANAO recommended that the OFWO 'better integrate risk management into strategic and operational planning and decision making'. These findings from 2012–13 have not resulted in a lasting improvement and continue to be relevant for the OFWO and its approach to business planning, performance monitoring and risk management.

21 The strategic risks outlined in the corporate plans for 2022–23 and 2023–24 remained unchanged. The strategic risks were: community expectations are not reflected in the OFWO's compliance and enforcement activities and approach, nor in relation to providing education and advice; staff compliance and enforcement capabilities and systems fail to keep pace with the rapidly changing and increasingly complex workplace arrangements; operational platforms, technology systems and services do not meet the growing expectations of users; changed working arrangements result in flow-on impacts for the OFWO's customers and the community; and failure to meet the OFWO's own corporate compliance obligations.

22 For the objectives of this external review see paragraph 1.10.

Recommendation no. 1

2.29 The Office of the Fair Work Ombudsman delivers a framework for the implementation and monitoring of regulatory priority areas and activities that is integrated with business planning and is risk-based.

Office of the Fair Work Ombudsman response: *Agreed.*

2.30 *The OFWO acknowledges the identified issues regarding a lack of consistency as to how regulatory priority areas are considered in the business planning process. The OFWO will undertake a review of these processes to identify improvements across all relevant areas, including the development of a risk-based framework to inform the implementation and oversight of regulatory priority areas. This review will also encompass the methods by which operational areas design, monitor, and report on outcomes in accordance with the framework.*

Does the OFWO effectively manage its relationships, including appropriately addressing regulatory capture risk?

The OFWO has established stakeholder engagement and management arrangements to support its regulatory functions. The OFWO has also established stakeholder feedback processes. The OFWO has not documented regulatory capture as a discrete source of risk or assessed the adequacy of its controls to mitigate regulatory capture risk.

2.31 The Statement of Expectations October 2023 states that to perform its regulatory functions, the OFWO must be open, transparent and have consistent engagement with a wide range of stakeholders, including industry, government and the broader community to build tripartism, and to maintain competent and innovative regulatory practices.

2.32 The 2018 stakeholder engagement strategy was in effect until a new stakeholder engagement strategy was developed and approved in December 2022. The new strategy took into consideration the collaboration and engagement expectations outlined in the 2021 Statement of Intent. The strategy included information on how the OFWO would ‘involve and collaborate’ with stakeholders for advice, to seek expertise, to share perspectives or experience, to generate innovative ideas, or to help address complex issues. This included the use of reference groups, taskforces, cross-government working groups and bi-lateral and multi-lateral government forums. An updated stakeholder engagement strategy (including changed dates and titles) was published on the OFWO website in May 2024.²³

2.33 In addition to the stakeholder engagement strategy, a community engagement strategy and work plan were developed by the OFWO in September 2023. The aim of the community engagement strategy outlined in the document was to:

educate communities and stakeholders about the role of the OFWO, workplace rights and obligations, the tools and resources available to support workplace participants, and the pathways

23 Office of the Fair Work Ombudsman, *Stakeholder Engagement Strategy*, May 2024, available from <https://www.fairwork.gov.au/sites/default/files/migration/725/fair-work-ombudsman-stakeholder-engagement-strategy.pdf> [accessed 11 January 2025].

available for accessing advice services to achieve harmonious, productive, cooperative and compliant workplace relations.

2.34 Community engagement work plans were prepared to support the strategy. The work plans outlined key activities and success measures to be implemented during the year. The success measures included a mixture of targets, tasks and mechanisms (such as feedback and regular forums) to be used by the OFWO to understand the use and impact of engagement activities. These measures did not include baselines to assess achievements, and results were compared to prior years.

2.35 The OFWO governance bodies were provided with quarterly updates on activities related to stakeholder and community engagement. Updates focused on activities, performance and engagement types compared to the prior period.

Forums and advisory groups

2.36 To facilitate the establishment and maintenance of arrangements for collaboration and engagement, in its December 2023 Statement of Intent the OFWO committed to the following stakeholder engagement arrangements:

There was consensus on the benefits of establishing a standing tripartite advisory group of peak employer organisations and worker representatives to provide ... advice and information relevant to our work assisting the regulated community, with equal representation from worker and business organisations. The organisations that I intend to invite to become standing members of this group are key workplace relations institutions and represent the broad interests of both workers and businesses. They are the:

- Australian Council of Trade Unions
- Australian Chamber of Commerce and Industry
- Australian Industry Group
- Business Council of Australia
- Council of Small Business Organisations of Australia.²⁴

2.37 As at December 2024, the OFWO had established a range of tripartite forums which comprise external stakeholder representatives and are chaired by the Fair Work Ombudsman or OFWO Executive. Terms of reference, agendas and meeting outcomes are maintained for these forums. The forums, which are aligned to the priority areas, are:

- advisory group (peak group which includes sub-committees for large corporates and small business);
- aged care services reference group;
- agriculture reference group;
- building and construction reference group;
- disability support services reference group;
- fast food, restaurants and cafés reference group; and

24 Fair Work Ombudsman, *Fair Work Ombudsman Statement of Intent*, 15 December 2023, pp. 2–3.

- higher education reference group.

2.38 In addition, the OFWO participates in a number of intergovernmental committees to share information and approaches to regulation and monitoring non-compliance with the Fair Work Act. These include the: Federal Regulatory Agency Group; Phoenix Taskforce; Interdepartmental Committee on Human Trafficking and Slavery; Migrant Workers Interagency Group; Pacific Labour and Pacific Migration Interdepartmental Committee; and Respect@Work Council.

Stakeholder feedback

2.39 The OFWO has established stakeholder feedback mechanisms and considers stakeholder feedback when preparing its strategic direction, priority areas and in corporate plan performance measure reporting.

2.40 In 2023 the OFWO engaged with external stakeholders when preparing its response to the ministerial Statement of Expectations. It also engaged with external stakeholder groups when developing its priorities, corporate plans and performance measures in 2023 and 2024. Feedback from external stakeholders has been collated and maintained by the OFWO to assist in informing its strategic planning activities.

2.41 In its 2022–23 and 2023–24 corporate plans the OFWO identified a range of performance measures which included the collection and analysis of stakeholder feedback to assess satisfaction with advice from, and interactions with, the OFWO. These performance measures included obtaining direct feedback and information on satisfaction levels from customers²⁵ interacting with the OFWO through the Fair Work Infoline²⁶ and use of digital education tools. In 2022–23 and 2023–24 the OFWO reported in its annual reports that these performance measures were met with satisfaction levels of customers meeting the target of greater than 75 per cent.²⁷

2.42 In its 2024–25 corporate plan, the OFWO states that it is re-developing its performance measures, including those related to customer perceptions and feedback. The revisions to the performance measures include the development of a performance measure to conduct a survey to assess the Australian public's knowledge of the Fair Work Ombudsman and the role of the OFWO. As at December 2024 these new performance measures remained under development.

Regulatory capture risk

2.43 Maintaining independence is crucial for regulators to effectively perform their functions. The 2019 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Hayne Royal Commission) stated that 'the risk of regulatory capture is well acknowledged'.²⁸ The Parliamentary Joint Committee on Corporations and Financial Services, in its 2019 report on *Statutory Oversight of the Australian Securities and Investments Commission, the Takeovers Panel and the Corporations Legislation*, stated that:

25 The OFWO frequently refers to those who access its services as 'customers'.

26 The Fair Work Infoline is the OFWO call centre to provide information and advice to help the public to understand workplace rights and responsibilities.

27 Details of the OFWO corporate plan performance measures and targets for 2022–23, 2023–24 and 2024–25 are included in Appendix 3 of this report.

28 K M Hayne, *Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, p. 443, available from <https://www.royalcommission.gov.au/banking> [accessed 25 January 2025].

The committee considers that regulatory capture is a significant issue faced by Australian regulators generally, given the size and power of corporations that operate in Australia.²⁹

2.44 The committee defined regulatory capture as:

instances where regulators are excessively influenced or effectively controlled by the industry they are supposed to be regulating. There are three areas in which particular risks arise for regulatory capture:

- staff moving between industry and regulatory jobs;
- secondments; and
- where regulatory staff are embedded in private sector organisations (that is, required to conduct their work within the workplace of industry participants, away from their home base at the regulator).³⁰

2.45 The NSW Government Independent Pricing and Regulatory Tribunal has stated that:

Regulatory capture risks refer to the scenario where a regulatory agency, mandated to oversee and enforce rules to maintain public interest, ends up being unduly influenced by parties with vested interests, such as entities it is meant to regulate or special interest groups. This situation can result in the regulator making decisions that prioritise the interest of those parties over the broader public interest.³¹

2.46 The OFWO has not assessed regulatory capture risk or controls as part of its risk management or business planning processes. The OFWO has considered reputational risks, stakeholder engagement risks, and fraud and integrity risks as part of developing its internal processes and procedures. Branch business plans did not assess risks in accordance with the OFWO risk management policy and guidelines, and did not identify controls, mitigations and/or residual risk ratings for risks.

2.47 The OFWO fraud risk assessment, December 2023, identified risks related to the fraudulent manipulation or misuse of authority of position in compliance and enforcement activities including:

- employees using their position to exert influence over parties subject to regulation (or perform additional investigation processes) for personal gain, or for the benefit of family or friends;
- employees provide favourable interpretations of awards, legislative or regulatory instruments or overlook contraventions or fraudulent/criminal activity for personal gain;
- staff do not appropriately escalate complaints received from the public about personnel due to a conflict of interest or personal relationship with the personnel member; and

29 Joint Committee on Corporations and Financial Services, *Statutory Oversight of the Australian Securities and Investments Commission, the Takeovers Panel and the Corporations Legislation*, Report No. 1 of the 45th Parliament, February 2019, p. 54, paragraph 3.49, available from https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/No1of45thParliament/Report [accessed 25 January 2025].

30 *ibid.*, p. 31, paragraph 3.24.

31 The Independent Pricing and Regulatory Tribunal of NSW definition of regulatory capture is available from <https://www.ipart.nsw.gov.au/Home/About-IPART/regulatory-capture> [accessed 20 March 2025].

- an employee fails to declare changes in their personal circumstances that have a material impact on their suitability to carry out their role, such as criminal conviction or bankruptcy proceedings.

2.48 The fraud risk assessment identified a range of controls to mitigate these risks including: annual declarations by fair work inspectors of continuing good character; the need for all staff to disclose potential, real or apparent conflicts of interest; annual declarations of interest for fair work inspectors; and that non-SES staff must seek approval of a delegate prior to accepting gifts, benefits or hospitality.

Opportunity for improvement

2.49 The OFWO could perform a risk assessment for regulatory capture, including identification and assessment of controls and residual risk.

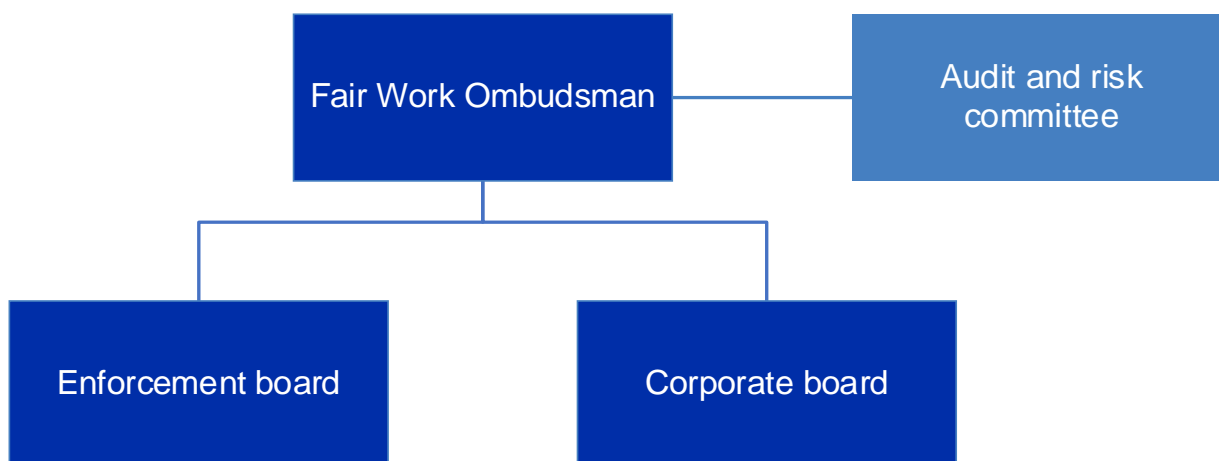
Does the OFWO effectively monitor and report on its performance?

The OFWO’s governance arrangements have a focus on operational decision-making. The enforcement board did not fully meet its terms of reference to provide strategic monitoring of regulatory activities. The OFWO’s performance reporting arrangements prior to 2024–25 included measures of output rather than efficiency and effectiveness. The OFWO is re-developing its performance measures and will need to provide greater insight into the ongoing effectiveness of its regulatory outcomes and impacts.

Governance arrangements

2.50 The Fair Work Ombudsman has established two executive advisory groups to assist in discharging their role as the accountable authority of the OFWO under the PGPA Act — the enforcement board and the corporate board. In addition, the OFWO audit and risk committee provides ‘independent assurance and advice’ on the OFWO’s financial and performance reporting, risk oversight and management, internal controls system and policy compliance. Figure 2.2 illustrates the governance structure.

Figure 2.2: Office of the Fair Work Ombudsman’s governance structure



Source: ANAO analysis of the OFWO’s governance structure.

Enforcement board

2.51 The enforcement board was established to advise and assist the Fair Work Ombudsman in relation to the OFWO’s whole of agency compliance and enforcement activities and the strategic application of resources to achieve the OFWO’s functions under the Fair Work Act and other legislation. The enforcement board terms of reference dated July 2022 outlined the three members of the board as: the Fair Work Ombudsman (chair); Deputy Fair Work Ombudsman Compliance and Enforcement; and Deputy Fair Work Ombudsman Policy and Communications. The terms of reference stated that the Chief Operating Officer and the Chief Counsel were standing attendees — not voting members of the board. The position of Deputy Fair Work Ombudsman Large Corporates and Industrial Compliance, created in February 2023, was not added to the terms of reference as a member of the board. This position ceased in July 2024 when there were structural changes to the OFWO Executive team.



2.52 Since September 2023, the enforcement board has been chaired by the Deputy Fair Work Ombudsman Compliance and Enforcement rather than the Fair Work Ombudsman. The terms of reference were updated to reflect this change in July 2024. The composition of the enforcement board between July 2022 and June 2024 did not include the Chief Operating Officer who had responsibility for people, technology and corporate services.

2.53 The July 2024 enforcement board terms of reference updated the membership of the board to reflect changes in OFWO’s organisational structure. The three members of the enforcement board from July 2024 were: Group Manager – Operations (Chair); Fair Work Ombudsman and Group Manager – Regulatory Transformation. The Group Manager – Corporate and Engagement and Group Manager – Legal and Policy may attend the board. They are not voting members of the board. The enforcement board meets fortnightly.


2.54 In the terms of reference, the purpose of the enforcement board was to provide advice and assistance to the accountable authority. This was achieved with meeting minutes recording board ‘endorsement’ of decisions and accountable authority ‘approval’ of the decision in the same meeting.

2.55 The functions of the enforcement board remained consistent between July 2022 and December 2024. The specific functions of the board, as set out in its terms of reference, have been summarised in Table 2.1, including a high-level analysis of whether the function was discharged.

Table 2.1: Functions of the enforcement board and analysis of its responsibilities

Function of the board	ANAO analysis	Assessment
Setting the key priority areas for the OFWO.	Priority areas were analysed and set for 2022–23, 2023–24 and 2024–25.	
Making key strategic and operational decisions with respect to the OFWO’s compliance and enforcement activities in line with the priorities, as well as the OFWO’s purpose and functions as set out in the Fair Work Act.	There was no analysis and decision-making related to strategic planning and monitoring of regulatory activities and outcomes. For example, the balance of activities, time and effort for implementation of regulatory functions and activities or achievement of regulatory performance outcomes and impacts were not considered by the board. Key operational decisions were considered by the board and recommended to the accountable authority for approval. This included information	

Function of the board	ANAO analysis	Assessment
	<p>related to: 'significant matters progressing to potential high-end enforcement outcomes'; key investigations; key litigations; self-report decisions and enforcement outcomes; approval of proactive investigations plans and finalisation of key investigations.</p> <p>Neither the enforcement board nor corporate board assessed the efficient and effective deployment of resources, investments and budgets for the OFWO's regulatory functions and activities.</p>	
<p>Guiding the OFWO to promote a culture of compliance by equipping workers and businesses in Australia with the information and support they need to make good choices in their workplaces and comply with workplace laws.</p>	<p>Although education, advice and assistance were included as categories in the priority annual work plans monitored by the enforcement board; underlying strategies were not assessed or monitored by the board for all priority areas. The OFWO monitored corporate plan performance measures. It did not monitor regulatory impacts and outcomes.</p>	<p>▲</p>
<p>Leveraging communication activities to send a strong message to the community about workplace relations laws and the consequences of non-compliance.</p>	<p>Quarterly communications reporting was considered by the board.</p>	<p>◆</p>
<p>Approving the annual Priority Areas Plan, including the key deliverables designed to address identified priorities and how information, education and communication activities will support the OFWO's compliance activities.</p>	<p>Annual work plans were approved for 2022–23 and 2023–24. Deficiencies in these work plans are identified at paragraphs 2.14 and 2.15. No annual work plan was approved or monitored for 2024–25.</p>	<p>▲</p>
<p>Monitoring implementation of deliverables in the Priority Areas Plan, and efforts to support these through complementary promotional, education and communication activities.</p>	<p>Work plans were provided on a quarterly basis until June 2024. Work plans included 'tracked changes' to record progress.</p> <p>Several activities spanned multiple years and were not appropriately tracked. Operational constraints such as budget and resource allocation were not considered by the board.</p>	<p>▲</p>
<p>Approving the OFWO's Compliance and Enforcement Policy</p>	<p>The compliance and enforcement policy was not updated between July 2020 and December 2024. In January 2025 a new compliance and enforcement policy was published on the OFWO website. The enforcement board did not approve the new compliance and enforcement policy before it was published.</p>	<p>■</p>

Function of the board	ANAO analysis	Assessment
<p>Making decisions relating to the exercise of the OFWO’s powers and functions under the Fair Work Act and other relevant legislation, including with respect to:</p> <ul style="list-style-type: none"> litigation (including appeals); enforceable undertakings; and matters where the risk to the OFWO is rated significant or higher within the meaning of the OFWO’s risk management framework. 	<p>Information on enforceable undertakings was examined by the board, including recommendations to commence negotiations for enforceable undertakings. Key operational decisions were reviewed by the enforcement board.</p>	

Key:  Fully discharged  Partially discharged  Not discharged

Source: ANAO analysis of enforcement board papers and minutes between July 2022 and December 2024.

2.56 Table 2.1 shows that the enforcement board did not discharge its strategic oversight functions as outlined in its terms of reference. The board received operational reporting on investigations underway. These reports did not include analysis of important trends or impacts on the OFWO’s strategies and objectives. Regulatory activities frequently spanned multiple years. The enforcement board did not adequately monitor these multi-year regulatory activities and outcomes. Since July 2024, with the implementation of the new organisational structure and changes in membership of the Executive team, the enforcement board has commenced consideration of changes to its forward agenda to better align to its terms of reference.

2.57 The enforcement board had a role in the OFWO’s regulatory operational decisions.³² For example, all decisions relating to negotiating an enforceable undertaking were taken to the board. The enforcement board did not leverage its operational role into strategic decision-making and oversight as required by its terms of reference.

Corporate board

2.58 The corporate board was established to support and assist the Fair Work Ombudsman by engaging in informed discussion in relation to the corporate and financial performance of the OFWO, compliance with relevant legislation, and the monitoring and review of compliance requirements and performance indicators. It meets monthly.

2.59 The corporate board terms of reference July 2022 prescribed that there would be five members of the board: the Fair Work Ombudsman (chair); Chief Operating Officer; Chief Counsel; Deputy Fair Work Ombudsman Compliance and Enforcement; and Deputy Fair Work Ombudsman Policy and Communications. Updated terms of reference were introduced in July 2023 to include the Deputy Fair Work Ombudsman Large Corporates and Industrial Compliance as a member of the corporate board.

32 The enforcement board terms of reference refer to both strategic and operational decision-making. Operational decision-making encompasses involvement in decisions with respect to key investigations, enforceable undertakings and litigations to determine choice of activity and enforcement tool. Strategic decision-making and oversight relate to broader organisational-wide considerations such as the impact of operational decisions on regulatory priorities and outcomes.

2.60 In practice, since September 2023, the corporate board was chaired by the Chief Operating Officer rather than the Fair Work Ombudsman. The terms of reference have not been updated as at December 2024 to reflect this change in the board’s operation.

2.61 The functions of the corporate board remained consistent between July 2022 and December 2024. The specific terms of reference of the board which relate to the exercise of its regulatory functions have been summarised in Table 2.2, including a high-level analysis of whether the function was discharged.

Table 2.2: Functions of the corporate board relevant to its regulatory role and analysis of its responsibilities

Function of the board ^a	ANAO analysis	Assessment
Making key strategic and operational decisions with respect to corporate and financial performance	Budgets and mid-year budget reviews were assessed by the board, this included the allocation of average staffing levels to relevant branches.	◆
Initiation of entity wide reviews	The tracking of the implementation of actions to address key reviews was considered by the board. This included tracking recommendations from: <ul style="list-style-type: none"> Review of the Office of the Fair Work Ombudsman by KPMG in December 2023; and An external report following a review of the Fair Work Ombudsman’s Compliance Notice Function by Sue Bird Consultancy and People Services Pty Ltd in September 2021. 	◆
Systems of internal controls for the oversight and management of strategic risks Strategic risks and risk appetite of the OFWO	Monitoring of strategic risk registers. This was last reviewed by the board in December 2022. The OFWO’s risk management policy including the risk appetite statement was endorsed by the board in July 2023. The OFWO corporate plan 2024–25 was discussed at the board, this included revisions to the strategic risks. A strategic risk assessment, as required by the OFWO risk management policy and guidelines, was not performed. The assessment should have included the identification of controls, mitigations and residual risk ratings.	▲
The efficient and effective deployment of resources, investments and budgets in accordance with agreed [regulatory] priorities	Although budget and mid-year budget review information is considered, this was at the branch level focused on allocation of average staffing levels within branches. There is no resourcing allocated to priority areas or activities. Neither the corporate board nor enforcement board assessed the efficient and effective deployment of resources, investments and budgets for the OFWO’s regulatory functions and activities.	▲
Endorsing and monitoring business plans and the OFWO’s corporate plan	Information related to corporate plan development and branch business planning processes were discussed by the board. There were mid-year budget reviews of branch business plans.	◆

Function of the board ^a	ANAO analysis	Assessment
Whole of entity corporate strategies and frameworks, including the Information and communications technology strategy and performance, capability and staff development frameworks	Discussed the compliance and enforcement capability framework review progress. Endorsed the gap analysis of the Australian Government Investigations Standard (AGIS), including acceptance of deviations from mandatory requirements. Provided with updates on the approach to determining and implementing the criminal underpayment responsibilities.	◆

Key: ◆ Fully discharged ▲ Partially discharged ■ Not discharged

Note a: General functions outlined in the corporate board terms of reference identified in this table have been assessed against their relevance to the exercise of the OFWO's regulatory role.

Source: ANAO analysis of corporate board papers and minutes between July 2022 and December 2024.

2.62 The corporate board did not fully discharge its terms of reference relevant to the exercise of its regulatory functions. This was largely because there was no connection between regulatory priorities, budget and resource information and risk.

Recommendation no. 2

2.63 The Office of the Fair Work Ombudsman ensures that governance bodies perform strategic oversight and monitoring of regulatory objectives and outcomes and consider the efficiency and effectiveness of regulatory activities.

Office of the Fair Work Ombudsman response: *Agreed.*

2.64 *The OFWO acknowledges the observations and findings regarding the functions of its governance bodies and recognises the identified areas for improvement in strategic and operational risk management. The OFWO commenced a comprehensive governance review in late 2024 that includes evaluating the current governance bodies and assessing whether the governance framework operates effectively and supports the Accountable Authority in ensuring that the OFWO meets its objectives, including maintaining appropriate systems for risk oversight and consideration of efficiency and effectiveness of regulatory activities. The outcomes of this governance review involve changes to the current governance bodies, including a review of the terms of reference for each Board and Sub-Committee, to embed a strong governance framework that supports strategic oversight and monitoring of the legislative functions and strategic objectives of the OFWO.*

Governance reviews

2.65 The terms of reference for the enforcement board and corporate board include that a review of the boards will form part of the annual governance framework review conducted by the OFWO.

2.66 A 2022 governance evaluation review report was prepared in December 2022. This document reviewed the activities of the enforcement board and corporate board. The review was based on a survey of 80 staff including committee members and regular attendees.³³ A total of 58

³³ All staff members may observe the enforcement board fortnightly meeting. Regular attendees were surveyed.

people responded to the survey. The survey centred around whether members and attendees believed the mandate was discharged appropriately and to identify opportunities to increase the efficiency and effectiveness of decision-making.

2.67 Eight recommendations were identified by the review and monitored by the OFWO. These recommendations related to administrative support for the boards; clarifying the type and volume of information to be provided to boards; processes to manage conflicts of interest; and decision-making responsibilities of sub-committees.

2.68 A subsequent governance review was deferred in 2023 to allow for the new Fair Work Ombudsman — who commenced in September 2023 — to have input into the review. There was a further deferral of a governance review to accommodate the organisational restructure which became effective in July 2024. In December 2024, the outcomes of the 2024 governance evaluation review were tabled at the corporate board for discussion. The review identified 46 general findings and 11 considerations for change.

Audit and risk committee

2.69 The audit and risk committee charter was updated in March 2024. The committee has been established in accordance with section 45 of the PGPA Act and section 17 of the Public Governance, Performance and Accountability Rule 2014 (PGPA Rule). The charter sets out the role and responsibilities of the committee, including its objective, authority, membership, functions, reporting and administrative arrangements. During 2022–23 and 2023–24, the committee comprised four independent members and met five times during the year.

2.70 In June 2023 the committee discussed and supported the preparation of a 2023–26 internal audit plan.³⁴ Internal audit reports and outcomes were discussed at the audit and risk committee. The committee monitored the implementation of management actions to address identified risk, control and compliance weaknesses.

2.71 The committee examined processes to prepare information to support the annual financial statements and annual performance statements and provided advice to the accountable authority.

Performance reporting

Performance reporting as a non-corporate Commonwealth entity

2.72 In line with the PGPA Act and PGPA Rule requirements the OFWO performance measures and targets are included in its corporate plans and annual reports. The OFWO's performance measures and targets included in its corporate plans and annual reports remained consistent for 2022–23 and 2023–24.³⁵ For the 2024–25 corporate plan, performance measures and targets were redeveloped. As at December 2024, two performance measures and targets for 2024–25 were under development. The intention of the redevelopment is to improve measurement of the efficiency and effectiveness of the OFWO's regulatory activities and outcomes.

34 The proposed 2024–25 audits are: leave management; compliance review of Australian Government Investigations Standard; records management/privacy; erroneous payments; and financial health check. The proposed 2025–26 audits are: information access requests; IT general control environment; contract management and annual performance statements.

35 In its annual reports for 2022–23 and 2023–24 the OFWO reported that it met all of its performance measures and targets with the exception of KPI 8 in 2023–24. This performance measure required the OFWO to file between 65–75 new litigations. Sixty-four litigations were filed in 2023–24.

2.73 The OFWO's performance measures and targets outlined in its corporate plans for 2022–23 and 2023–24 are summarised in Appendix 3. There were a total of nine performance measures:









- three of the performance measures were output measures related to the quality of the services provided by the OFWO through its Fair Work Infoline, digital tools and engagement with key stakeholders (KPI 1, KPI 2 and KPI 3);
- one of the performance measures was an output measure related to the time taken to produce an output for responding to requests for assistance involving a workplace dispute (KPI 4);
- four of the performance measures were output measures related to the number of compliance and enforcement tools used by the OFWO during the reporting period. For example, the number of compliance notices issued (KPI 5, KPI 6, KPI 7 and KPI 8); and
- one of the performance measures related to the task of developing and publishing priority areas (KPI 9).

2.74 The OFWO's performance measures and targets outlined in its corporate plan for 2024–25 are also summarised in Appendix 3. There were a total of eight performance measures, with two still under development.³⁶

2.75 An assessment of the OFWO's compliance with PGPA Rule requirements for the design and establishment of its performance measures related to its regulatory functions is detailed in Table 2.3.

36 The eight performance measures are those which relate to the exercise of the OFWO's regulatory functions. Two other performance measures, related to the OFWO's corporate functions, have not been included.

Table 2.3: ANAO analysis of OFWO's compliance with PGPA Rule requirements for its regulatory function performance measures

PGPA Rule requirement		2022-23	2023-24	2024-25	ANAO analysis
Use sources of information and methodologies that are reliable and verifiable Subsection 16EA(a)			Under development	For each financial year, the OFWO prepared information on every performance measure and target to outline the sources of information and methodologies to be used to measure performance. The OFWO has documented its awareness of deficiencies related to the reliability of information, particularly where surveys with low response rates are used to assess performance.	
Provide an unbiased basis for the measurement and assessment of the entity's performance Subsection 16EA(c)			Under development	For each financial year, the OFWO prepared information on every performance measure and target to outline the sources of information and methodologies to be used to measure performance. The OFWO has documented its awareness of the potential bias in the performance measure and how this would be managed by the OFWO.	
Comprise a mix of qualitative and quantitative performance measures Subsection 16EA(d)			Under development	The OFWO has provided a mix of qualitative and quantitative measures through performance measures which focus on the number of compliance and enforcement actions, the timeliness of operations and the level of satisfaction of customers with the quality of service.	
Include measures of the entity's outputs, efficiency and effectiveness Subsection 16EA(e)			Under development	In 2022-23 and 2023-24 the OFWO performance measures related to outputs. In its 2024-25 corporate plan the OFWO categorised its performance measures as output, efficiency and/or effectiveness measures. It identified: two measures as under development and yet to be categorised; four measures as efficiency and/or effectiveness measures; one measure as an output measure; and one measure related to a task. The ANAO assessed the measures against the definitions set out in RMG 131. ^a The assessment identified that the measures categorised by the OFWO as efficiency and/or effectiveness measures were measures of output. The OFWO's performance measures have not identified how the OFWO will measure the efficiency or effectiveness of its regulatory operations. The OFWO's performance measures for 2022-23, 2023-24 and 2024-25 did not provide a complete assessment of the OFWO's regulatory performance. There were no performance measures for key prevention and detection activities including: advice in response to enquiries; proactive investigations; and self-reported non-compliance. OFWO's annual reports included a 'performance snapshot' with statistics for the reporting period that addressed	

PGPA Rule requirement	2022-23	2023-24	2024-25	ANAO analysis
Provide a basis for an assessment of the entity's performance over time Subsection 16EA(f)	◆	◆	Under development	some of these gaps. The annual report information did not allow for year-on-year comparisons or the assessment of performance against set targets. The OFWO, in its 2022-23 and 2023-24 performance measures, provides the basis for the assessment of OFWO's performance over time using the 'compliance notice focus' regulatory posture. From July 2024 the OFWO changed its regulatory posture to provide greater emphasis on the use of a broader range of dispute resolution services (dispute resolution focus). While still under development, the 2024-25 performance measures do not provide performance measures which 'reflect the different stages or maturity of implementation of programs or activities' as there are no proposed performance measures for dispute resolution.

Key: ◆ Achieved ▲ Partially achieved ■ Not achieved

Note a: *Resource Management Guide 131: Developing performance measures* (RMG 131) defines the measurement type as output, efficiency or effectiveness. Output measures assess the quantity and quality of the goods and services produced by an activity (including their volume or quality). Efficiency is generally measured as the price of producing a unit of output and is generally expressed as a ratio of inputs to outputs. Measures of effectiveness assess how well an entity has delivered on its purposes. That is, whether the activities of the entity have had the intended impact, policy objective or contributed to achieving the purpose. Effectiveness can be measured in quantitative or qualitative terms.

Source: ANAO analysis of corporate plans and annual reports for 2022-23, 2023-24 and 2024-25.

2.76 Table 2.3 highlights that the OFWO's performance reporting arrangements do not provide insight into the ongoing effectiveness of the OFWO's regulatory outcomes and impacts. Information published in corporate plans and annual reports for performance measures do not provide adequate information about the OFWO's regulatory outcomes.

2.77 In February 2022 and August 2022 the OFWO completed two internal audits which reviewed the OFWO's performance measures and targets and identified opportunities for improvement. The first report identified two moderate risk issues and identified seven actions agreed to by management to address deficiencies. This included ensuring performance measures and targets provided a closer connection to the OFWO's regulatory objectives, and improving the methodology and approach for measuring and reporting on performance. The second audit identified three moderate risk issues and outlined three agreed management actions to provide a better balance of performance measures, including using a mix of qualitative and quantitative performance targets and data.

2.78 The OFWO audit and risk committee was provided with regular updates on the status of implementation of the agreed management actions from the two internal audits. The audit and risk committee also monitored the OFWO approach to reviewing and revising its performance measures and targets included in the 2024–25 corporate plan.

Performance reporting as a Commonwealth regulator

2.79 RMG 128 sets out the three principles of regulator best practice which enable regulators to demonstrate how they are meeting the Australian Government's expectations.³⁷ RMG 128 encourages regulators to develop performance measures to allow reporting against each of the three principles of regulator best practice. The guide also encourages regulators to adopt outcomes-focused performance measures for reporting, and where practicable, use a mixture of qualitative and quantitative performance measures. RMG 128 states that regulators should reconcile performance outcomes in their annual performance statements with reference to the best practice principles.

2.80 The OFWO performance measures and targets included in its corporate plans and annual reports do not explicitly align to the best practice principles. Corporate plans for 2022–23 and 2023–24 included case studies to demonstrate how it was meeting the three principles. The 2024–25 corporate plan did not provide similar case studies and identified that the OFWO had 'reviewed our framework incorporating the government's principles of regulatory best practice into our measures and processes ...'. Some of the performance measures and targets identified in the 2024–25 corporate plan were still under development at December 2024.

2.81 The OFWO's annual reports for 2022–23 and 2023–24 include a range of case studies and information which outlines how the OFWO was implementing the principles of regulator best practice.

2.82 RMG 128 states that regulators should embed methodologies in its performance monitoring and reporting processes to understand the costs, impact and outcomes of regulation and collect evidence of this at a system-wide level, using insights to support and drive improved outcomes. As

37 Department of Finance, *Resource Management Guide No.128: Regulator Performance*, available from <https://www.finance.gov.au/government/managing-commonwealth-resources/regulator-performance-rmg-128> [accessed 15 November 2024]. See paragraph 2.5 for explanation of the three principles.

detailed in Table 2.2, the OFWO's understanding of resourcing and impacts as part of monitoring the implementation of annual regulatory priorities has been identified as a gap in the OFWO's strategic oversight arrangements.

2.83 Auditor-General Report No.14 2012–13 *Delivery of Workplace Relations Services by the Office of the Fair Work Ombudsman* assessed the effectiveness of the OFWO's administration of education and compliance services under the Fair Work Act. The report found that:

the KPIs do not directly measure the effectiveness of FWO's program in achieving its objective and contributing to FWO's outcome. Although developing measures of effectiveness can be challenging, it is important that they are established for internal management and external accountability purposes, including gauging the impact of changes in delivery approaches over time.

2.84 The ANAO recommended that the OFWO establish key performance indicators to measure the effectiveness of its services in supporting compliance with workplace laws; and develop measures of the efficiency of its service delivery, which relate to the number, type and cost of resource inputs, and the level of workplace relations services delivered.³⁸ The recommendation has not been implemented and these findings from 2012–13 continue to be issues for the OFWO and its approach to performance measure development and monitoring. The OFWO performance reporting arrangements do not provide insight into the ongoing efficiency and effectiveness of regulatory outcomes and impacts.

38 Auditor-General Report No.14 2012–13, *Delivery of Workplace Relations Services by the Office of the Fair Work Ombudsman*, ANAO, Canberra, 2012, pp. 96–97, available from <https://www.anao.gov.au/work/performance-audit/delivery-workplace-relations-services-the-office-the-fair-work-ombudsman> [accessed 30 January 2025].

3. Prevention and detection of non-compliance

Areas examined

This chapter examines whether the Office of the Fair Work Ombudsman (the OFWO) has established effective arrangements to encourage voluntary compliance and detect non-compliance with the *Fair Work Act 2009* (the Fair Work Act).

Conclusion

The OFWO's arrangements to encourage voluntary compliance and detect non-compliance with the Fair Work Act are largely effective. The OFWO has established arrangements for the prevention, and proactive and reactive detection, of non-compliance and has published a compliance and enforcement policy. The OFWO does not monitor timeliness, risk, or return on investment for its prevention and detection of non-compliance. The OFWO does not have insight into whether the balance of preventative and detective compliance and enforcement activities is appropriate.

Areas for improvement

The ANAO identified one opportunity for improvement aimed at implementing arrangements to provide insight into whether the balance of preventative and detective compliance and enforcement activities is appropriate.

3.1 Section 682 of the Fair Work Act outlines the functions of the Fair Work Ombudsman. The functions are aimed at both preventing and detecting non-compliance with the Fair Work Act and fair work instruments.

3.2 Prevention activities are those used to promote harmonious, productive and cooperative workplace relations and compliance. The OFWO's prevention activities include: providing education and advice to employees, employers, outworkers, outworker entities and organisations through its Fair Work Infoline³⁹ and fairwork.gov.au website including a suite of resources and digital products and services; producing best practice guides and tools; and publishing a compliance and enforcement policy.

3.3 Detection activities are those used to monitor compliance with the Fair Work Act and fair work instruments. The OFWO's detection activities include: gathering and reviewing intelligence and evidence; monitoring and analysis of workplace trends; exchanging information and intelligence with other regulators and government agencies; responding to requests for assistance; proactive investigations⁴⁰; and monitoring and investigating self-reported non-compliance.

39 The Fair Work Infoline is the OFWO call centre to provide information and advice to help the public to understand workplace rights and responsibilities.

40 A proactive investigation is an intelligence-led and targeted activity to collect information or evidence to a particular standard of proof related to an alleged, apparent or suspected breach of the Fair Work Act or fair work instruments. Proactive investigations are usually targeted at specific industry sectors, issues or organisations in accordance with the OFWO's regulatory priorities.

Are the OFWO's arrangements for the prevention of non-compliance effective?

The OFWO has provided assistance, advice and education to employees, employers, outworkers, outworker entities and organisations to achieve regulatory objectives. The OFWO has developed and published a compliance and enforcement policy. The policy does not provide clear guidance to users about: how services will be prioritised and provided; and does not fully address the different needs of internal and external users.

Education, best practice guides and advice

Education and best practice guides

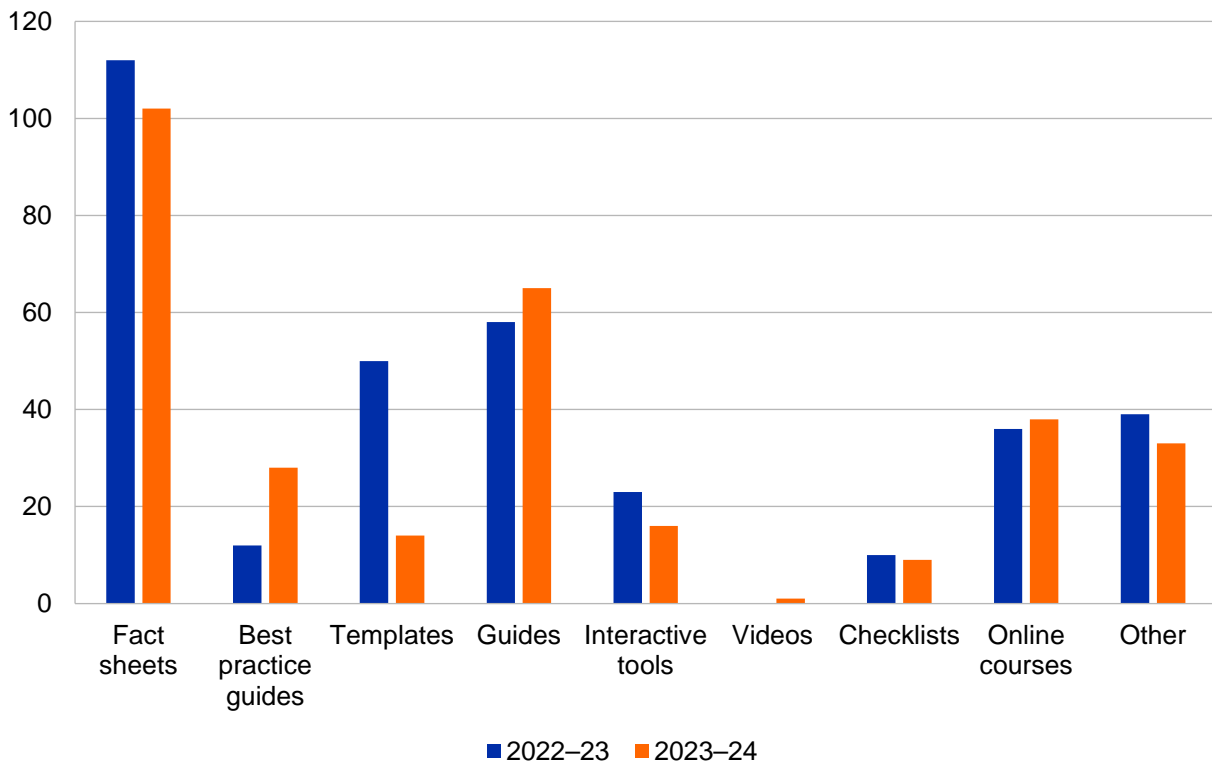
3.4 The OFWO provides education resources and guidance to assist employers and employees to understand their rights and obligations under workplace laws and to support the Fair Work Ombudsman's strategic priorities and regulatory posture.

3.5 The fairwork.gov.au website enables access to materials related to the exercise of the OFWO's regulatory functions. The OFWO maintains a strategy for planning, managing and delivering content on fairwork.gov.au to guide how information is accessible, reliable and fit-for-purpose. The strategy was last updated in October 2023 and the key objective of the strategy is to ensure a seamless digital experience across fairwork.gov.au. The OFWO has also prepared a behavioural economics and education team strategy 2020–23, which outlines how the OFWO creates and maintains a suite of over 300 education tools and resources. Both strategies include statements about how the OFWO will measure success.⁴¹ These documents do not identify performance measures, targets or baselines in which the success of the education regulatory functions can be measured or monitored by the OFWO.

3.6 The type and number of education and guidance materials maintained and published by the OFWO is summarised in Figure 3.1. The OFWO maintains information on how many existing resources are updated, new resources are developed and old resources are decommissioned each month.

41 For example, the measures of success in the behavioural economics and education team strategy are: our work is clearly aligned to the OFWO's annual strategic priorities; our work applies best practice behavioural economics and human centred design approaches; our work is valued by stakeholders and the community alike; our work is co-designed with customers as well as internal and external stakeholders; we measured the impact of our initiatives in accordance with the techniques outlined in this strategy.

Figure 3.1: Education and guidance materials maintained and published by the OFWO in 2022–23 and 2023–24



Source: ANAO analysis of management reporting on education and better practice guides.

3.7 The enforcement board receives quarterly information on education and communication activities which have been undertaken by the OFWO. The 2023–24 annual report also includes information on the education and communication activities undertaken in some of the priority areas.

3.8 In March 2024, the OFWO commenced a project to perform a comprehensive review of education and guidance resources to determine whether they were relevant, fit-for-purpose, effective and aligned with the entity’s brand and priorities.

3.9 As part of its corporate plan performance measures, the OFWO has established processes for collecting and reporting customer satisfaction levels through surveys to determine the percentage of digital tool users who report that the tools improved their understanding of workplace rights and obligations. The survey results indicate that more than 80 per cent of customers were satisfied or better in 2022–23 and 2023–24.

Employer Advisory Service

3.10 The Employer Advisory Service (EAS) became operational in July 2021 and was established to provide free, tailored written technical advice to eligible small business employers to assist them to understand and meet their obligations under the Fair Work Act. Small business employers can contact the service using an online enquiry form, online account or by calling the Fair Work Infoline and requesting a referral. In 2023–24 the EAS provided 3,142 tailored, written pieces of advice.

3.11 In July 2023, the EAS established an internal customer service charter and customer service level standards. The standards set internal expectations that customers are to be contacted within

one to two days of enquiry allocation when additional information is required to prepare the advice, and premium enquiries⁴² are to be closed within 10 business days of gathering information from the customer. In 2022–23, 77 per cent of premium enquiries were resolved within 10 business days and 90 per cent of all enquiries were responded to in 15 business days or less. To facilitate the operation of the service, the OFWO has established a complexity matrix which outlines when an enquiry requires escalation to a supervisor or other quality assurance process based on technical complexity, nature of the customer and nature of the enquiry.

3.12 The OFWO has also established processes to monitor feedback from recipients of the written advice and internal quality assurance processes to confirm advice is consistent, accurate and to a high quality, and to identify technical and other training needs. In 2022–23, 86 per cent of feedback respondents agreed or strongly agreed that they were satisfied with the advice provided.⁴³ Quarterly reporting is prepared to monitor the type of advice provided by the EAS and to identify any trends in information which may warrant additional education tools being developed. This information also includes a breakdown analysis showing to which industries the enquiries relate.

3.13 The OFWO responds to all EAS enquiries. An internal audit of the operation of the EAS was undertaken in February 2024. The audit found that the service was effective and governance provided an appropriate balance between risk management and efficient customer services. It noted:

as reflected by the significant uptake by small business employers of the EAS since its inception, the current level of resources and manual processes involved may impact the level and quality of the service provided. The FWO will need to closely monitor the capacity of the EAS as demand is rapidly increasing and develop effective strategies to meet those demands.

3.14 One agreed management action was identified in the report which stated that by the end of August 2024 the OFWO would conduct an annual assessment to analyse the demand for the service and evaluate resources, staff, processes and tracking tools to ensure that the service can meet future levels of demand. This action included a requirement to document strategies to address the increased demand and to formulate action plans for enhancing workplace capability. The Director Assurance (Executive Level 2) approved the closure of the management action as completed in August 2024.

3.15 In the 2024–25 OFWO corporate plan, a new performance measure was identified which related to the quality of written information and advice provided by the EAS. The target was identified as ‘greater than 75 per cent’ customer survey responses ‘demonstrating a rating of satisfied or better where small business customers identified that the information they were provided helped them to understand their workplace rights and obligations’.

Advice in response to enquiries

3.16 The OFWO received around 320,000 phone or online enquiries in 2022–23 and around 310,000 in 2023–24. Responding to enquiries allows the OFWO to assist people to access workplace advice. Enquiries may be responded to by the OFWO in a number of ways including:

42 The EAS procedure manual defines premium services as those enquiries that require in-depth research by the OFWO.

43 In 2023–24 no analysis of the feedback was prepared by the OFWO.

- no involvement and referral if the enquiry is best handled through another agency (for example the Australian Taxation Office);
- the provision of educational resources and tools;
- the provision of advice to support the enquirer to resolve the issue directly at the workplace level (referred to internally as ‘dispute assistance’);
- the provision of free written technical advice to assist small business employers through the EAS;
- the classification and handling of the enquiry as an employer self-reported instance of non-compliance⁴⁴; or
- classifying the matter as a formal ‘request for assistance’ involving a workplace dispute which may require further involvement, analysis and/or investigation by the OFWO to resolve.

3.17 An enquiry can become a formal request for assistance if the following elements exist or if an enquirer has been assessed by the OFWO as not being able to resolve the issue on their own:

- the enquiry is within the OFWO’s jurisdiction;
- allegations relate to a minimum entitlement within an applicable industrial instrument;
- the enquirer has attempted to resolve the issue directly at the workplace level, yet the issue remains unresolved;
- the enquirer understands the OFWO will assess the allegations and decide what (if any) response the OFWO will take; and
- any decision will be based on the evidence and information provided to the OFWO (generally, the enquirer must be willing to participate in the process and for the relevant employer to be contacted).

3.18 In 2022–23 approximately 16,390 enquiries were classified as formal requests for assistance. This remained consistent in 2023–24 with approximately 16,440 enquiries classified as formal requests for assistance. Formal requests for assistance represent approximately five per cent of total enquiries received.

3.19 The OFWO customer service charter outlines the nature of the services the public can expect from the OFWO. The charter is principles-based and does not make any claims related to the timeliness of responding to enquiries or service delivery by the OFWO. In its frequently asked questions about the dispute assistance service: *You’ve asked for our help with a dispute — what happens now?* the OFWO notes that the ‘dispute assistance service is tailored to each dispute, so timeframes vary. However, most parties resolve their dispute, or choose to take alternative action, within 2-4 weeks’.

3.20 Internally, performance information related to the receipt and handling of enquiries is monitored by management and the enforcement board. Information that is monitored by the enforcement board on a fortnightly basis includes:

44 Self-reported non-compliance is usually by employers who report underpayments to workers. The OFWO provides advice on, investigates and monitors these self-reports. The processes and procedures for the management of self-reports is further discussed in paragraphs 3.56 to 3.63.

- number of enquiries answered;
- call wait times; and
- percentage of abandoned calls.

3.21 This information is monitored by comparing information to relevant prior year to date actual results. The OFWO has internal performance measures for the average speed of answer for calls (average call wait times) to not exceed 15 minutes and a maximum call abandonment rate of 25 per cent. In addition, initial response to online enquiries had an internal benchmark of two working days. Where appropriate, the enforcement board requested management take corrective action.

3.22 Enforcement board meeting papers identified that in June 2023, year to date average call wait time was 15 minutes 57 seconds and the percentage of abandoned calls was 24 per cent. In June 2024, year to date average call wait time was 23 minutes 29 seconds and the percentage of abandoned calls was 30 per cent.

3.23 In 2022–23 and 2023–24 feedback on the quality of advice and assistance provided by the OFWO as part of responding to enquiries was gathered and analysed as part of the OFWO’s corporate plan performance measures and included in the annual performance statements. A sample of customers who interacted with advisers through the Fair Work Infoline were asked to participate in surveys. The percentage of responses by customers who reported a rating of satisfied or better with OFWO services met the target of being greater than 75 per cent.

3.24 To facilitate the provision of advice, the OFWO has established the following policies:

- Principles and Customer Service Reference;
- Incorrect or Erroneous Advice Policy, July 2023;
- Feedback and Complaints Management Policy, October 2022 and the Feedback and Complaints Guide, July 2024; and
- internal framework, policies and procedures related to the ongoing training, coaching and development of staff.

3.25 The Principles and Customer Service Reference is the online repository which contains guidance and information to assist OFWO staff to respond to customers. The Incorrect or Erroneous Advice Policy provides staff with guidance and direction to manage instances where the provision of erroneous or incorrect advice by the OFWO has occurred. This also includes capturing areas for improvement.

3.26 The Feedback and Complaints Management Policy outlines the mechanisms to address customer dissatisfaction with the service they received or the information that was provided. The policy outlines the approach to provide feedback, service complaints or requests for review⁴⁵ to the OFWO. The Feedback and Complaints Guide provides internal protocols on how to manage, review and communicate feedback from complaints against the OFWO. In 2022–23 the OFWO received 597 instances of constructive feedback, service complaints and requests for review. This increased to 866 (45 per cent increase) in 2023–24. In addition, in 2023–24 there were 88 instances of customers highlighting their positive experience with the OFWO up from 55 (60 per cent increase)

45 A request for review is a request for the OFWO to reassess a decision and to consider whether a matter was handled in accordance with OFWO policies and procedures.

in 2023–24. The OFWO has established processes to identify potential business improvements arising from feedback and complaints.

3.27 In August 2024, the Fair Work Ombudsman provided internal communication to staff to outline a more structured approach to responding to enquiries and how the OFWO would assist with dispute resolution. This change in emphasis on dispute resolution was foreshadowed in the OFWO's strategic objectives set out in its corporate plan 2024–25. The change in emphasis included the proposed adoption of a 'regulatory triangle'. The OFWO proposed to use this model to guide how matters should be dealt with by the OFWO.

3.28 The regulatory triangle has three levels:

- Voluntary compliance — encouraging voluntary compliance. The OFWO will provide information, education and advice to support cooperation between employers and employees.
- Guided compliance — guiding compliance where required. Such guidance typically involves fair work inspectors, having conducted an investigation, determining it is appropriate to formally direct employers requiring them to undertake certain specified actions and to demonstrate compliance with workplace laws. The most common forms of guided compliance include issuing compliance notices and contravention letters. Failure to comply with requirements can lead to court proceedings.
- Enforced compliance — enforcing the law when it is in the public interest. These are the minority of matters that typically involve serious non-compliance. Enforced compliance includes enforceable undertakings, civil proceedings to seek financial penalties and criminal proceedings.

Compliance and enforcement policy

3.29 The OFWO has published a compliance and enforcement policy on its website. The policy was initially published in July 2020 to outline the Fair Work Ombudsman's approach to exercising their statutory functions and assessing each matter to determine the appropriate response. The compliance and enforcement policy was updated in January 2025. There were no changes to the compliance and enforcement policy between July 2020 and December 2024. During this period, the compliance and enforcement policy was not updated to reflect:

- the minister's expectation for an external, public facing compliance and enforcement policy to be published in response to the October 2021 Statement of Expectations;
- a key change in regulatory posture and approach to using compliance and enforcement tools in 2021–22 when the use of compliance notices became the Fair Work Ombudsman's primary enforcement tool;
- the full breath of OFWO compliance and enforcement activities including the use of targeted and proactive investigations;
- a new regulatory function effective from 14 June 2024 under section 682 of the Fair Work Act for the Fair Work Ombudsman to publish a compliance and enforcement policy,

including guidelines relating to the circumstances in which the Fair Work Ombudsman will, or will not, use enforceable undertakings or cooperation agreements⁴⁶; or

- the adoption of dispute resolution techniques as well as compliance and enforcement tools as part of its changed regulatory posture outlined in the 2024–25 corporate plan which was published in August 2024.

3.30 In August 2024, the OFWO announced to its staff that it would be reviewing the compliance and enforcement policy.

The purpose of the review is to work together to create a C&E policy that supports our Agency's new strategic direction and is informed by the experiences of all FWO teams. A review of the C&E Policy is in line with the various ongoing initiatives to evolve the direction of how the FWO goes about its work. These initiatives include our new organisational structure, the new Corporate Plan, our Statement of Intent and our response to the independent KPMG report.

3.31 A compliance and enforcement policy review consultation and communication plan was prepared in August 2024. This plan outlined the approach to internal consultation and communication to update the policy. An external communication and consultation plan was not prepared. In December 2024, the OFWO consulted with members of its Advisory Group (peak tripartite forum) to obtain feedback from external stakeholders. This included requesting feedback from the Australian Council of Trade Unions, Australian Chamber of Commerce and Industry, Australian Industry Group, Business Council of Australia and Council of Small Business Organisations Australia. An analysis of feedback (internal and external) was prepared and used to inform changes to the compliance and enforcement policy.

3.32 The OFWO published its new compliance and enforcement policy in January 2025. This policy includes information on the regulatory triangle (see paragraph 3.28). The purpose of the model is to outline the OFWO's 'compliance and enforcement approach to allegations, evidence and suspected instances of non-compliance'. It also outlines the OFWO's compliance powers.

3.33 The compliance and enforcement policy is intended to meet the OFWO's obligation to publish a compliance and enforcement policy and to guide its staff. The OFWO's decision to produce a compliance and enforcement policy to meet both internal and external stakeholder needs means that the document must meet the needs of a diverse group of external users (both employers and employees), and be sufficiently directive to support the day-to-day work of internal users. The new compliance and enforcement policy does not contain:

- a complete description of all regulatory functions, including how priorities determine the type of compliance and enforcement actions (for example use of intelligence and proactive investigations);
- sufficient information for internal users to guide how they weigh up a wide range of factors to support decision-making; and
- a clear and concise outline of what the OFWO does and how it will, or will not, respond to individual lines of enquiry for external users.

46 Cooperation agreements provide a person with the opportunity to access 'safe harbour' from potential criminal prosecution. It is a written agreement between the Fair Work Ombudsman and a person (an individual, corporate entity or Commonwealth agency).

Are the OFWO's arrangements for the detection of non-compliance effective?

The OFWO has established arrangements for proactive and reactive detection of non-compliance, including intelligence and analysis, proactive investigations, responding to requests for assistance, self-reporting of non-compliance and ad hoc investigations. These arrangements do not consider operational requirements and constraints, such as budgets, timeliness, risk and return on investment. This information would allow the OFWO to monitor the efficiency and effectiveness of its regulatory activities and assess whether the balance of preventative and detective activities is appropriate for the OFWO's regulatory objectives.

Proactive detection

3.34 The key proactive⁴⁷ detection mechanisms used by the OFWO include: gathering and reviewing intelligence and evidence; monitoring and analysing workplace trends; and proactive investigations.

Intelligence and analysis

3.35 Under the Department of Finance *Resource Management Guide No.128: Regulator Performance*⁴⁸ (RMG 128), the OFWO must model the regulator best practice principle of being risk-based and data-driven. This requirement is also detailed in the ministerial Statements of Expectations. To facilitate this, the OFWO has established an intelligence and analysis function to:

- collect and assess information from anonymous reports and external tip-offs⁴⁹;
- identify and assess emerging trends and issues relevant to the OFWO's regulatory functions, such as preparing regular analysis of the labour force;
- develop intelligence products to provide insights into possible non-compliance with workplace laws;
- prepare information to support the targeting of proactive investigations relevant to priority areas;
- support reactive investigation activities, such as with the collection of information to support the analysis and monitoring of self-reported non-compliance; and
- collect and assess information to support strategic and business planning activities, such as preparation of information to identify potential priority areas.

3.36 To support the performance of these functions, and to provide relevant governance and planning for intelligence activities, the OFWO has prepared the following instruction documentation for staff.

47 In the context of OFWO's regulatory functions, proactive means where the OFWO takes the initiative to commence an investigation or inquiry. Reactive means where the OFWO responds to enquiries/requests for assistance it receives from an external party.

48 Department of Finance, *Resource Management Guide No.128: Regulator Performance*, available from <https://www.finance.gov.au/government/managing-commonwealth-resources/regulator-performance-rmg-128> [accessed 15 November 2024].

49 The OFWO receives anonymous reports and tip-offs which allows members of the public to discreetly report suspected breaches of the Fair Work Act, a specific award or enterprise agreement. The OFWO received 17,021 anonymous reports in 2023–24 compared to 14,309 in 2022–23.

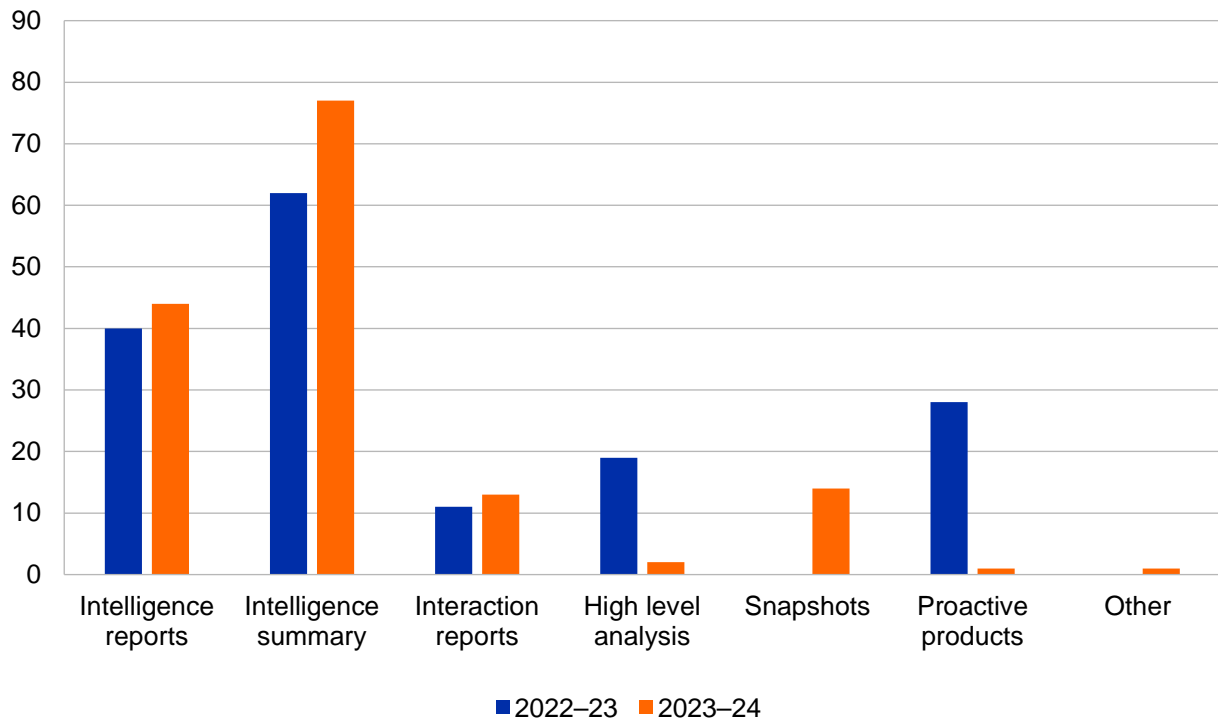
- Intelligence Governance Framework September 2023 — outlines key roles and functions within the intelligence team and how decisions and information will be reviewed.
- Operational and intelligence workflow approaches — outlines how intelligence reports will be prioritised and prepared. This prioritisation approach relies on prioritisation/urgency of information being determined by other operational areas requesting intelligence reports. The OFWO does not document consideration of budgets or operational constraints when responding to requests for intelligence and analysis.
- Anonymous Report Assessment Guide April 2024 — provides an overview of processes and considerations including when and how information should be referred to other business areas, such as for investigation.

3.37 In June 2022, an internal audit report on the management of intelligence reports was discussed at the audit and risk committee. The report considered the processes in place to compile intelligence reports, and the approach used to inform and incorporate intelligence products into operational activities. Overall, the report identified that there were some weaknesses in the design and application of controls and opportunities to increase efficiencies in the management of intelligence reports.

3.38 The internal audit report identified two medium rated findings and eight agreed management actions. The management actions related to: updating policies and workflow approaches; developing a formal feedback mechanism; standardising the peer review/approval processes; and identifying training needs of staff. The audit and risk committee monitored the implementation of the agreed management actions and noted closure of all actions by March 2023.

3.39 The OFWO prepares monthly reports on anonymous report trends, quarterly reporting on intelligence feedback received and a monthly dashboard to provide information on case statistics and a summary of requests on-hand. In 2022–23 the intelligence team responded to 160 intelligence requests from line areas, this decreased to 152 (five per cent decrease) in 2023–24. The average number of intelligence requests on-hand at the end of each month was 12 in 2022–23 and 15 (25 per cent increase) in 2023–24. Key intelligence deliverables for 2022–23 and 2023–24 are summarised in Figure 3.2.

Figure 3.2: Key intelligence deliverables 2022–23 and 2023–24



Note: Deliverables are categorised as follows.

Intelligence reports provide detailed tactical and operational analysis of specific businesses and/or persons of interest, including analysis of compliance history across OFWO data sources and other relevant sources.

An intelligence summary includes concise analysis of specific businesses and/or persons of interest, including compliance history across OFWO data sources and other relevant sources to support preliminary decision-making.

Interaction reports provide operational insights with a focus on OFWO data source analysis and specific targeting of identified issues.

High level analysis includes a concise narrative analysis of OFWO data sources and relevant open sources.

Snapshots are short, rapid response summaries including analysis of OFWO data sources to support preliminary decision-making.

Proactive products include information to support the development of targeting for proactive investigations.

Source: ANAO analysis of intelligence team monthly and quarterly reporting.

3.40 An intelligence product is provided to the enforcement board annually to assist its consideration and setting of regulatory priorities. The intelligence and analysis team does not prepare or report to the enforcement board on the level of compliance with the Fair Work Act and fair work instruments for priority areas or for the Australian environment more generally. In its 2024–25 corporate plan, the OFWO has indicated that it is re-developing a performance measure and target related to where ‘serious and systemic non-compliance is detected and addressed by the OFWO’.

Proactive investigations

3.41 The OFWO undertakes a range of proactive investigations and targeted investigation programs to detect and monitor non-compliance with the Fair Work Act and fair work instruments. Proactive investigations are usually based on intelligence and are targeted at specific industry sectors, issues or organisations in accordance with the OFWO priorities. These activities provide an opportunity for the OFWO to identify non-compliance, use compliance and enforcement tools,

recover underpayments for workers, provide education and conduct joint site inspections with other agencies.

3.42 The annual regulatory priority work plan includes information about proactive investigations planned to occur in priority areas during the year.⁵⁰ The plan does not identify how many organisations would be investigated, the timing of activities or budget associated with undertaking proactive investigations.

3.43 Between July 2022 and December 2024, the OFWO did not set performance targets for the number of proactive investigations to be undertaken or how many investigations should be undertaken in each priority area. Information on the number of proactive investigations commenced, conducted and on-hand in 2022–23 and 2023–24 is summarised in Table 3.1.

Table 3.1: Information on the number of proactive investigations 2022–23 and 2023–24

Key information	2022–23	2023–24
Number of proactive investigations brought forward from prior years	473	366
Number of proactive investigations commenced	870	963
Number of proactive investigations finalised	977	940
Number of proactive investigations on-hand	366	389

Source: ANAO analysis of reporting provided by the OFWO for the period 2022–23 and 2023–24.

3.44 The proactive investigation caseload represented approximately 20 per cent of the total investigation caseload for the OFWO. Fifty-eight per cent of proactive investigations were finalised with the use of enforcement tools in 2023–24. This was an increase from 53 per cent in 2022–23.

3.45 To oversee proactive investigations, the enforcement board received project plans and investigation outcome reports for ‘key and/or significant’ proactive investigations. There are no frameworks, policies or procedures which identify what information should be included in proactive investigation project plans or when project plans should be prepared and/or reported to the enforcement board. The proactive investigation project plans reviewed by the enforcement board included information on: objective of the program and link to the regulatory priorities work plan; analysis of intelligence information gathered to support the performance of the investigation; scope of the investigation including types of non-compliance to be targeted and expected outcomes; deliverables; progress reporting; and risks.

3.46 Between July 2022 and December 2024, there was no systematic monitoring of progress of proactive investigations, including timeliness and return on investment.

3.47 Between July 2022 and December 2024, the enforcement board endorsed, and the accountable authority approved, the publication of proactive investigation outcomes to be included on the OFWO website. The publication of proactive investigation outcomes included copies of

⁵⁰ Annual priority work plans are discussed in paragraph 2.14 to 2.15.

proactive investigation reports and/or media releases related to the compliance issues identified, compliance and enforcement tools used and recoveries made from proactive investigations.

Reactive detection

3.48 Key reactive detection mechanisms include: responding to requests for assistance; monitoring and investigating non-compliance self-reported by employers and responding to requests from ministers and departments to inquire or investigate.

Requests for assistance

3.49 Formal requests for assistance received through enquiries are referred to an OFWO assessment team to confirm that the request for assistance may result in a dispute resolution or compliance and enforcement intervention by the OFWO. During 2022–23 and 2023–24, this intervention centred around the use of compliance notices as the ‘default enforcement tool for responding to standard underpayment matters’.⁵¹ The use of compliance notices was considered by the OFWO to be ‘an efficient and effective way of enforcing the law and getting more money back into the hands of workers’.

3.50 From July 2024, the assessment of a request for assistance should no longer focus on the use of compliance notices as the primary intervention tool. The OFWO intends to provide a broader range of dispute resolution services related to:

- dispute resolution techniques;
- diverting employers and employees to appropriate options to continue their dispute if it remains unresolved or if the OFWO cannot assist (such as small claims court or to the Fair Work Commission); and
- the use of the OFWO’s full range of compliance and enforcement tools.

3.51 As at December 2024, the policies and procedures to guide the new dispute assistance approach were in draft. In December 2024, the OFWO advised the ANAO that since July 2024 the OFWO has been operating under an interim model of dispute assistance pending the finalisation of policies and procedures.

3.52 If a request for assistance may result in the use of a compliance notice and/or infringement notice, the OFWO classifies the matter as an investigation and it is considered by a Fair Work Inspector. Of the 16,390 formal requests for assistance received in 2022–23, 3,805 were referred for investigation. This represents approximately 23 per cent of requests for assistance. In 2023–24, of the 16,440 formal requests for assistance received 3,256 were referred for investigation. This represents approximately 20 per cent.

3.53 If a request for assistance may result in the use of a compliance notice and/or an infringement notice, a Fair Work Inspector must establish a reasonable belief that an employer has

51 The compliance notice focus was articulated in OFWO’s internal policies and procedures related to responding to requests for assistance.

contravened one or more provisions of the Fair Work Act or fair work instruments, based on the evidence collected.⁵²

3.54 To support decision-making related to compliance notices and infringement notices, the Fair Work Inspector must generate a 'reasonable belief document' on the matter. The reasonable belief document provides: a summary of the matter; lists the evidence obtained and considered; describes threshold issues; and details the analysis of each allegation and finding. The reasonable belief document also contains a formal declaration by the Fair Work Inspector on the matter.

3.55 A recommendation for a compliance notice and/or infringement notice must be reviewed by a team leader (APS Level 6). Team leaders are also responsible for the monitoring of workflows and the allocation of requests for assistance for investigation to staff. The OFWO does not assess requests for assistance in terms of how much effort (budget) or lapsed time will be required to resolve the dispute through an investigation. The team leaders receive weekly spreadsheets reporting on the number of open requests for assistance involving investigations that have exceeded 120 days and 150 days.

Self-reported non-compliance

3.56 The OFWO encourages employers to voluntarily report non-compliance with the Fair Work Act and fair work instruments, particularly in relation to the underpayment of employees. The July 2020 OFWO compliance and enforcement policy states that isolated payroll errors resulting in underpayments to employees over a short period of time (up to 12 months) do not need to be actively reported to the OFWO 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.

3.57 Upon self-reporting, the OFWO undertakes analysis and/or investigations to verify the underpayments, confirm that the entity is taking appropriate action to remediate identified issues and, where appropriate, take compliance and enforcement action. The types of compliance and enforcement activities related to self-reported non-compliance include:

- enforceable undertaking⁵³;
- compliance notice⁵⁴;
- infringement notice⁵⁵;

52 Section 716 the Fair Work Act and regulation 4.04 of the Fair Work Regulations 2009 outline the requirements that determine whether a Fair Work Inspector 'reasonably believes' contraventions have occurred.

53 An enforceable undertaking is a written agreement between the employer and the OFWO in relation to a contravention. An enforceable undertaking is often used where a contravention has occurred and the employer is prepared to voluntarily fix the issue and has agreed to prevention actions for the future. Enforceable undertakings are an enforcement tool outlined in section 715 of the Fair Work Act.

54 As specified by section 716 of the Fair Work Act.

55 As specified by regulation 4.04 of the Fair Work Regulations 2009.

- contravention letter⁵⁶;
- caution letter; or
- litigation/court proceedings.

3.58 In July 2020, internal protocols for the management of self-reported non-compliance were developed by the OFWO. These protocols outline that the treatment and investment of resources in each self-reported matter is considered on a case-by-case basis and that new self-reports are recorded centrally. Intelligence may also be used to support the analysis and/or investigation of a self-reported matter. During 2022–23, the total self-reports caseload was 215. This increased to 291 (35 per cent increase) in 2023–24.

3.59 If a self-report may result in the use of a contravention letter, compliance notice and/or infringement notice, it is allocated to a Fair Work Inspector to complete a reasonable belief assessment that a contravention has occurred. If a self-report involves the use of an enforceable undertaking, staff involved in approving an enforceable undertaking, withdrawing or varying an undertaking or identifying a contravention with the terms of an undertaking require formal delegation from the Fair Work Ombudsman. Delegation instruments related to these powers and functions under the Fair Work Act have been made by the Fair Work Ombudsman. These delegated powers and functions sit at the branch manager level (SES Band 1) and above.

3.60 In 2022–23 and 2023–24 the enforcement board was provided with: project plans for ‘significant’ self-reported non-compliance; requests to commence enforceable undertaking negotiations for self-reports; requests to finalise enforceable undertakings related to self-reports; requests to finalise investigations with a caution letter and requests to commence litigation. These documents were provided to the enforcement board for endorsement and accountable authority approval as they related to ‘significant’ matters. It was also a way to promote consistent decision-making in self-reported matters.

3.61 The protocols for the management of self-reported matters state that significant self-reported matters require enforcement board oversight. Although the protocols outline a definition of what constitutes a significant matter, the spreadsheet used to manage and record self-reported matters does not classify individual matters as significant or otherwise, or record all matters that have been reported to the enforcement board.

3.62 The enforcement board is provided with a range of operational information related to self-reports including:

- quarterly reporting on matters received, referred for investigation and the level of underpayments identified; and
- a listing of all self-report enforcement outcomes approved by Chief Counsel (SES Band 2), the Deputy Fair Work Ombudsman (SES Band 2) and Executive Directors – Operations (SES Band 1).

56 A contravention letter is issued by a Fair Work Inspector under regulation 5.05 of the Fair Work Regulations 2009 if the inspector is satisfied that the employer has failed to observe a requirement of the Fair Work Act, regulations or fair work instrument. The contravention letter informs the employer of the contravention, requires the employer to take specified action, within a specified period, and to notify the Fair Work Inspector of action taken to comply with the notice.

3.63 Reporting provided to the enforcement board does not identify the budget associated with, or the timeliness of monitoring and finalisation, of the self-reports caseload.

Responding to requests from ministers and other government departments

3.64 The OFWO received a number of requests or referrals from ministers, Parliament (via Senate motions) and other government departments to investigate potential non-compliance with the Fair Work Act and fair work instruments. There were no processes associated with these types of requests. The requests were discussed at the enforcement board. This included approval of project plans for the relevant investigations. Project plans did not identify the budget, timing and/or risks associated with these investigations.

3.65 Overall, for both proactive and reactive detection of non-compliance, the OFWO has established protocols and procedures for the allocation of work to staff and to identify when the use of an enforcement tool may be required. Although work is allocated, there is no consideration of risk for the activities undertaken, or visibility of the budget and costs associated with detection activities.

Opportunity for improvement

3.66 The OFWO could implement arrangements to provide insight into whether the balance of preventative and detective compliance and enforcement activities is appropriate.

4. Enforcement

Areas examined

This chapter examines whether the Office of the Fair Work Ombudsman (the OFWO) has established effective arrangements to enforce compliance with the *Fair Work Act 2009* (the Fair Work Act).

Conclusion

The OFWO's arrangements to enforce compliance with the Fair Work Act are largely effective. The OFWO has established arrangements to manage non-compliance cases and the OFWO deploys its enforcement tools in line with its regulatory posture and policies. The OFWO's monitoring and reporting does not provide an assessment of the effectiveness of its enforcement activities and outcomes in promoting compliance with the Fair Work Act. The OFWO compliance and enforcement actions were undertaken in accordance with internal policies. These actions were not adequately documented in OFWO's records management systems. The OFWO documented that it would deviate from implementing the mandatory requirements of the Australian Government Investigations Standard, October 2022 (AGIS 2022). Deviations include not implementing a quality assurance framework.

Areas for improvement

The ANAO made one recommendation aimed at ensuring there is adequate documentation, review and quality assurance of investigations.

4.1 Section 682 of the Fair Work Act outlines the functions of the Fair Work Ombudsman including: to monitor compliance with the Fair Work Act and instruments; to inquire into and investigate any act or practice that may be contrary to the Fair Work Act, a fair work instrument or a safety net contractual requirement; and to commence proceedings in a court, or to make applications to the Fair Work Commission. Section 715 of the Fair Work Act sets out the legislative basis for enforceable undertakings, section 716 outlines the legislative basis for compliance notices and regulation 4.04 of the Fair Work Regulations 2009 outlines when an infringement notice may be given.

Are there effective arrangements to manage non-compliance cases?

The Office of the Fair Work Ombudsman (the OFWO) deploys its compliance and enforcement tools in line with its regulatory posture and compliance and enforcement policy. The use of compliance and enforcement tools requires long term management. Fifty per cent of investigations take more than 136 days to finalise with two per cent taking more than two years. The OFWO's monitoring and reporting does not provide an assessment of the effectiveness of its enforcement activities and outcomes in promoting compliance with the Fair Work Act.

Management of non-compliance through the use of enforcement tools

4.2 As set out in paragraph 2.10, regulatory posture refers to how the OFWO will approach and prioritise the exercise of its regulatory functions. It includes the emphasis placed on the use of compliance and enforcement tools and how it will make decisions about resource allocation and risk. The OFWO's regulatory posture evolved over recent years. During 2022–23 and 2023–24, the

OFWO considered the use of compliance notices as the primary enforcement tool (compliance notice focus). From July 2024, the Fair Work Ombudsman changed this approach to provide greater emphasis on the use of a broader range of dispute resolution services (dispute resolution focus).

4.3 The change in regulatory posture was partly reflected in the internal management performance information prepared for and monitored by governance bodies such as the enforcement board. In 2022–23, performance targets were set for the use of some enforcement tools (these tools are described in Table 1.1). Numerical performance targets — included in Table 4.1 — highlight the use of compliance notices as the primary enforcement tool to be used.

4.4 In 2024–25, performance targets were not set for the use of compliance and enforcement tools. Management information compared year to date results of the use of compliance and enforcement tools to prior year results rather than to established targets.

4.5 In November 2024, the OFWO proposed internal performance targets for the use of some enforcement tools. Table 4.1 illustrates the difference between the published enforcement tool performance targets in 2022–23 and 2023–24 and the proposed internal targets for 2024–25.

Table 4.1: Summary of performance targets related to the use of compliance and enforcement tools

Compliance and enforcement tool type	Performance targets for 2022–23 and 2023–24	Proposed internal performance target for 2024–25
Compliance notices issued	2,000–2,500	1,000–2,000
Infringement notices issued	550	700
Enforceable undertakings	15	15
New litigations filed	65–85	55–65

Source: ANAO analysis of enforcement board meeting papers and minutes between July 2022 and December 2024.

4.6 In 2024–25, performance measures included in the corporate plan were altered to reflect the OFWO’s changed approach, as it moved away from numerical enforcement tools performance targets and instead set targets in terms of ‘the percentage of investigations finalised in the reporting period using one or more enforcement tools’. The target for this performance measure in 2024–25 was set at greater than 40 per cent. The compliance and enforcement tools included in this performance measure were infringement notices, compliance notices, enforceable undertakings and court proceedings. No performance targets were set for the use of contravention letters, caution letters or other dispute resolution compliance tools. No performance targets were set for reactive investigations or proactive investigations.

4.7 Between July 2022 and December 2024, the enforcement board received regular information on the tracking of the achievement of performance measures. Performance information was monitored monthly by the enforcement board and included information on:

- number of compliance tools used during the period;
- number of investigations on-hand;
- number of investigations on-hand greater than 150 days and average days on-hand;
- enforcement tools on-hand aged greater than 150 days (e.g. compliance notices not resolved or infringement notices not paid); and

- monies recovered.

4.8 In addition, the enforcement board was provided with dashboard information about priority areas between March 2023 and April 2024. The dashboards included information on the number of investigations completed, number of compliance notices issued, number of infringement notices issued and anonymous reports received.

4.9 Information on activities in each of the priority areas was described in the 2023–24 annual report. This included descriptive information about the number of disputes completed, the number of compliance notices issued and recoveries made. It did not provide a basis for comparison across priority areas or against targets (as no targets were set). The information was also not reported for each priority area in the annual report.

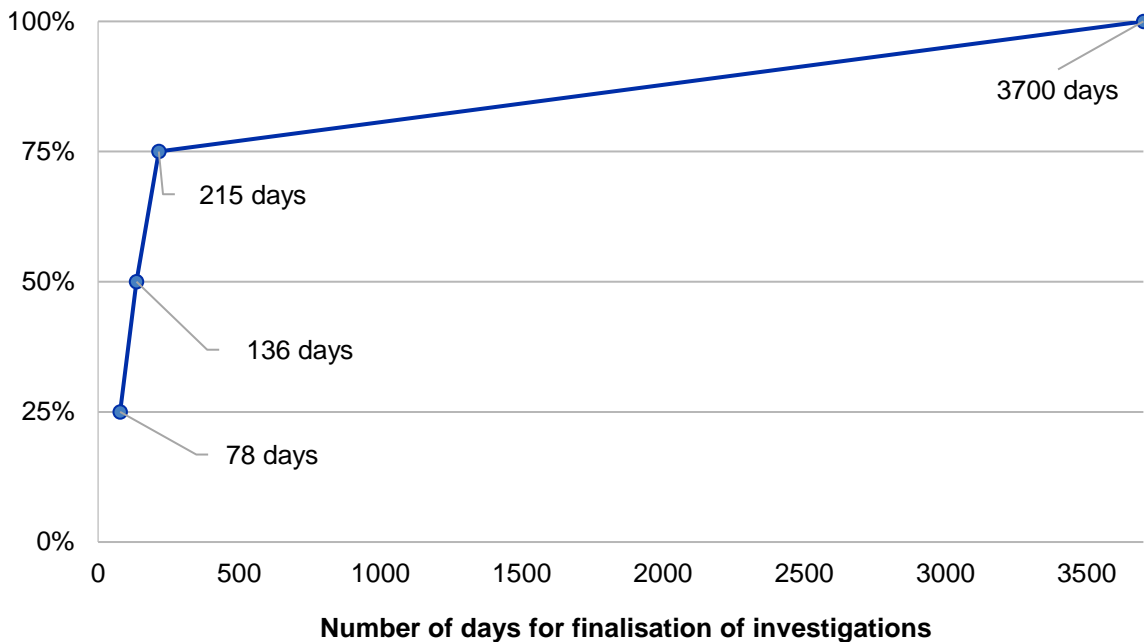
4.10 Between July 2022 and December 2024, performance targets were not established for all types of compliance and enforcement activities and tools. For example, the OFWO did not set or monitor targets for the number of proactive investigations or number of proactive investigations in each priority area. The enforcement board did not determine or monitor the balance between reactive and proactive detection mechanisms used or whether this supported its regulatory posture or priority area work plans.

4.11 The enforcement board received quarterly reporting on compliance notices which detailed the number of compliance notices issued, and information on levels of adherence with compliance notices by the due date; and number of compliance notices which had been referred to the legal team for failure to comply with requirements. The enforcement board used this performance information to monitor and address perceived performance issues. For example, in September 2022 the enforcement board was informed of a trend in compliance notices issued in 2021–22 where 48 per cent had been complied with by the due date. The enforcement board required that additional effort and processes be directed at monitoring adherence to compliance notices by the due date. For compliance notices issued in the first three quarters of 2023–24 that had passed their due date, 1,451 (69 per cent) had been complied with, of which 49 per cent had been complied with by the due date.

4.12 Information is provided to the enforcement board on the number of investigations greater than 150 days. The board did not receive information about the timeliness of regulatory activities such as the ageing of requests for assistance and proactive investigations on-hand. No timeliness performance targets were set for investigations.

4.13 The ANAO analysed investigations finalised between July 2022 and September 2024 to identify the length of time taken to complete investigations. The finalisation of an investigation includes the time to confirm that the requirements of any compliance and enforcement tool had been met and the completion of any subsequent litigation/court proceedings. This analysis identified that 75 per cent of the investigations took 215 days to be finalised. Figure 4.1 provides the outcome of the analysis and identifies the number of days to finalise 25 per cent, 50 per cent and 75 per cent of the finalised investigations caseload.

Figure 4.1: Number of days to finalise investigations closed between July 2022 and September 2024



Note: The data used to prepare this analysis was drawn from OFWO management information. The integrity, completeness and accuracy of the information has not been validated by the ANAO. The purpose of the figure is to illustrate the time taken to finalise investigations. The data reflects cases closed between July 2022 and September 2024.

The length of time required to finalise investigations in the fourth quartile reflects that many of the longer-term cases are subject to litigation/court proceedings. Two-hundred and twenty-five cases (two per cent) took more than 730 days (two years) to finalise.

Source: ANAO analysis of OFWO management and caseload information for investigations closed between July 2022 and September 2024.

4.14 In November 2024, the enforcement board received performance information for the first quarter of 2024–25 under the new dispute resolution regulatory posture. This report included information on the timeliness of finalising the caseload. The report noted that for the first quarter the average age of on-hand requests for assistance in investigation teams had increased to 298 days – up from 123 days (142 per cent increase) in the previous year. At the end of September 2024 there were 92 matters aged over 600 days. This represents 14 per cent of the request for assistance caseload in investigation teams. In the previous year, this represented three per cent of the request for assistance caseload.

Assessment of the effectiveness of compliance and enforcement activities and outcomes

4.15 The enforcement board is provided with information about the use of compliance and enforcement tools. This information was primarily focused on whether the OFWO was meeting its numerical targets for the various types of compliance and enforcement tools. The board did not receive information on the broader impacts of enforcement actions on the achievement of its regulatory objectives. Department of Finance *Resource Management Guide No.128: Regulator Performance* (RMG 128) states that ‘regulators are encouraged to adopt outcomes focused

performance measures for reporting'.⁵⁷ The OFWO is currently reviewing its performance measures with the intention of providing greater information on the outcomes of the OFWO's regulatory functions (refer to paragraphs 2.72 to 2.84).

4.16 The enforcement board does not receive information about the adequacy of the use of compliance and enforcement tools across the OFWO. As detailed in Table 2.1 the enforcement board receives operational decision-making information. The enforcement board has not determined how the appropriate use of enforcement tools should be assessed and monitored strategically or to achieve its terms of reference to ensure that compliance and enforcement activities are in line with the priorities as well as the purpose and functions set out in the Fair Work Act.

External reporting of enforcement outcomes

4.17 The OFWO publishes a range of information on its website to promote transparency of its compliance and enforcement activities and outcomes. This includes:

- all enforceable undertakings⁵⁸;
- litigation outcomes, including penalties awarded⁵⁹; and
- outcomes of proactive investigations, including extracts of reporting and/or media releases.⁶⁰

Are enforcement actions undertaken in accordance with relevant standards?

In July 2024, the OFWO assessed and agreed deviations from the Australian Government Investigations Standard, October 2022 (AGIS 2022). One 'notable deviation' from AGIS 2022 was the decision not to implement a quality assurance framework. Prior to July 2024, the OFWO did not use the relevant AGIS to inform the development of its policies, procedures, staff roles and staff qualifications. At November 2024, 50 per cent of OFWO staff conducting or overseeing investigations did not hold the relevant certification as required by AGIS 2022. The OFWO's decision records did not evidence that compliance and enforcement activities

57 Department of Finance, *Resource Management Guide No.128: Regulator Performance*, available from <https://www.finance.gov.au/government/managing-commonwealth-resources/regulator-performance-rmg-128> [accessed 15 November 2024].

58 For example, enforceable undertakings published 2023–24 are included on the OFWO website at <https://www.fairwork.gov.au/about-us/compliance-and-enforcement/enforceable-undertakings/2023-2024-enforceable-undertakings> [accessed 27 November 2024].

59 For example, litigation outcomes from to July 2023 to March 2024 are included on the OFWO website at <https://www.fairwork.gov.au/about-us/compliance-and-enforcement/litigation/2023-2024-litigation-outcomes> [accessed 27 November 2024].

60 The OFWO maintains website pages which include downloadable reports and media releases for proactive investigations. This can be found at <https://www.fairwork.gov.au/about-us/compliance-and-enforcement/reporting-outcomes/proactive-investigations-reports> [accessed 27 November 2024] and at <https://www.fairwork.gov.au/about-us/compliance-and-enforcement/reporting-outcomes/activity-reports> [accessed 5 January 2025]. From April 2023, the publication of proactive investigation reports was discontinued. Outcomes continued to be communicated to the public by the OFWO through media releases and published on the website's Newsroom.

were performed adequately. For example, case monitoring meeting and approvals were not consistently recorded in OFWO’s records management systems.

4.18 The OFWO has established a range of policies, procedures and protocols for undertaking compliance and enforcement activities. At December 2024, these policies, procedures and protocols were being updated to reflect the new dispute resolution focus and changes in the organisational structure which came into effect in July 2024.

4.19 Any matter referred to a Fair Work Inspector is classified as an ‘investigation’. This is because a Fair Work Inspector has the legislative authority to form a ‘reasonable belief’ regarding non-compliance and contraventions and has the powers to issue compliance and enforcement tools such as compliance notices, infringement notices and contravention letters. A Fair Work Inspector also has powers to enter premises and to require a person or entity to produce any records or documents relevant to a compliance matter.⁶¹

4.20 Table 4.2 identifies the type and number of compliance and enforcement activities which the OFWO classified as an investigation in 2022–23 and 2023–24.

Table 4.2: Type and number of investigations in OFWO’s caseload in 2022–23 and 2023–24

Type of investigation	2022–23	2023–24
Reactive investigations	5,518	5,238
Proactive investigations	1,343	1,329
Total investigations caseload	6,861	6,567

Source: ANAO analysis of reporting information provided by the OFWO for the purposes of this audit.

Alignment to Australian Government Investigations Standard

4.21 The Australian Government Investigations Standard, October 2022 (AGIS 2022) articulates the Australian Government’s policy for entities who conduct investigations relating to government programs and legislation. Non-corporate Commonwealth entities are required to comply with AGIS 2022 noting that it is principle-based and provides flexibility for entities to apply the standards relevant to their own operations.

4.22 AGIS 2022 applies to non-corporate Commonwealth entities which conduct administrative, civil or criminal (type) investigations.

An investigation can be broadly described as an activity to collect information or evidence to a particular standard of proof related to an alleged, apparent or suspected breach. An investigation gathers information across a broad spectrum to assist entities to determine a course of action, which may also be preventative and/or disruptive action instead of prosecutorial.⁶²

4.23 The OFWO is a non-corporate Commonwealth entity and conducts ‘investigations’ to collect information and evidence to a particular standard of proof (to form a reasonable belief as outlined

61 Section 708 of the Fair Work Act outlines the power of inspectors to enter premises. Section 712 outlines the power to require persons to produce records or documents.

62 Australian Federal Police, *Australian Government Investigations Standard*, October 2022, p. 1, available from <https://www.ag.gov.au/sites/default/files/2022-12/Australian-Government-Investigations-Standard-2022.pdf> [accessed 11 January 2025].

in the Fair Work Act and Fair Work Regulations 2009) related to an alleged, apparent or suspected breach of the Fair Work Act or fair work instruments. The OFWO monitors entities' adherence with a compliance and enforcement tool issued. If the enforcement tool is not complied with by the entity, it may result in litigation/court proceedings.

4.24 AGIS 2022 stipulates what non-corporate Commonwealth entities 'should' and 'must' do to achieve the Australian Government's standards. Both 'should' and 'must' are considered best practice. If a component 'must' be undertaken, the activity is required by law or there may be 'significant' consequences of non-compliance with that requirement. AGIS 2022 states that the risk to an entity's investigation performance is greater if this level of directive is not followed.

4.25 The four principles set out in AGIS 2022 are:

- ethics and professionalism are applied and performed to the highest order in investigations;
- investigations support the business and reputation of government;
- a continuous cycle of review is applied to investigations; and
- entities are responsible for investigation information management of their entity.

4.26 These principles are connected to four streams of core requirements outlined in AGIS 2022 related to: personnel; information and evidence management; investigative processes; and quality assurance.

4.27 Prior to July 2024, the OFWO 'encouraged compliance' with AGIS 2011 requirements for qualifications and training as part of its 2013 Professionalisation Project.⁶³ AGIS 2011 was not used by the OFWO to inform the development of its policies, procedures, staff roles and staff qualifications. Instead, the OFWO advised the ANAO in January 2025 that it 'commissioned and leveraged independent advice to endeavour to achieve best practice arrangements'.

4.28 When the revised AGIS was released in October 2022, the OFWO used this as a catalyst to determine the OFWO's level of compliance with AGIS 2022. In November 2022, the OFWO established a working group to undertake a gap analysis of the extent to which the OFWO's investigation activities aligned with AGIS 2022, and identify where there were 'notable deviations'.

4.29 In July 2024, the findings of the working group were provided to the corporate board for consideration, and for approval by the accountable authority. The analysis considered compliance related to its civil investigation activities. Those relating to the new criminal underpayments jurisdiction, which came into effect from January 2025, were not considered. AGIS 2022 requirements which may apply to these new investigation processes are being considered separately by the OFWO.

4.30 A summary of the analysis prepared by the OFWO in July 2024 on AGIS 2022 compliance is in Table 4.3.

63 A previous version of AGIS was in force from August 2011. This defined an investigation as 'a process of seeking information relevant to an alleged, apparent or potential breach of the law, involving possible judicial proceedings. The primary purpose of an investigation is to gather admissible evidence for any subsequent action, whether under criminal, civil penalty, civil, disciplinary or administrative sanctions. Investigations can also result in prevention and/or disruption action.' These standards were mandatory for all agencies required to comply with the *Financial Management and Accountability Act 1997*.

Table 4.3: OFWO assessment of application of AGIS 2022 mandatory requirements to non-criminal investigations

AGIS 2022 streams	Requirement category	OFWO self-assessment
Personnel	1.1 Professional role	Meets/in progress
	1.2 Ethics and responsibility	Meets/in progress
	1.3 Qualifications and learning	Meets/in progress
	1.4 Competencies and mindset	Meets/in progress
Information and evidence management	2.1 Disclosure management	Notable deviation to be accepted by the OFWO
	2.2 Information sharing	Meets/in progress
	2.3 Investigation management system	Notable deviation to be accepted by the OFWO
Investigation practices	3.1 Risk management	Meets/in progress
	3.2 Investigation governance	Partially meets and in progress
	3.3 Investigation planning	Notable deviation to be accepted by the OFWO Partially meets/in progress ^a
	3.4 Investigation activities and tools	Partially meets/in progress
Quality assurance framework	4.1 Quality assurance policy	Notable deviation to be accepted by the OFWO
	4.2 Quality reviews and audits	Meets/in progress
	4.3 Scope for quality activities	Meets/in progress
	4.4 Quality reports/outcomes	Meets/in progress

Note a: The OFWO's finding against this section had multiple conclusions.

Source: ANAO analysis of the OFWO corporate board meeting papers and minutes.

4.31 For matters where the criminal jurisdiction was not applicable, the accountable authority approved the instances where the OFWO had notable deviations from the mandatory requirements in AGIS 2022. Notable deviations related to:

- the electronic investigation management system not being delivered in accordance with all Australian government standards;
- no quality assurance policy/framework; and
- no disclosure management policy related to recording, retaining, registering, reviewing, revealing and producing investigative information.

4.32 In the findings provided to the corporate board in July 2024, the OFWO states that it 'meets' the mandatory requirements related to qualifications set out in AGIS 2022. Staff conducting or overseeing investigations are required by AGIS 2022 to hold a vocational and educational training qualification (such as a Certification IV). As at November 2024, 50 per cent of OFWO staff conducting or overseeing investigations did not hold the relevant certification. The largest deviation from AGIS qualification and learning requirements is for supervisors where 63 out of 75 have not met the minimum training requirement. Supervision and review (weekly monitoring and approval of

decisions by supervisors) are key controls within investigation processes as described in paragraph 4.34. The ANAO identified deficiencies related to: risk management (refer to paragraphs 2.21 to 2.30); and investigation practices and records management (refer to paragraphs 4.33 to 4.55).

Evidence to support transparent and consistent decision-making

4.33 To assess whether the OFWO's enforcement activities and the use of compliance and enforcement tools were performed appropriately, consistently and transparently, the ANAO reviewed the policies, procedures and protocols and the key controls that support investigation decision-making. The ANAO also undertook walkthroughs of the decision-making for a selection of 17 decision records across reactive and proactive investigations to assess the extent to which key controls were evidenced in the OFWO's records management systems. The walkthroughs related to requests for assistance, proactive investigations and self-reported non-compliance investigations. The walkthroughs included demonstration of how records were maintained to support key decisions, evidence of supervision, evidence of decision approvals and use of mandatory templates as prescribed in policies and procedures.

Request for assistance investigations

4.34 Policies and procedures for request for assistance investigations outline the following key controls:

- Allocation for an investigation — the reason for the allocation of a request for assistance to be investigated must be documented and align to the compliance and enforcement policy.
- Weekly monitoring — team leaders must conduct weekly case meetings with fair work inspectors to discuss the progress of investigations, evaluate evidence and review record-keeping. Case meetings must be documented in TITAN (the investigation case management system) as a key task. The task must be used to record the summary of evidential evaluation, next steps and directions for the Fair Work Inspector.
- Reasonable belief record (evidence) — a reasonable belief document must be prepared to clearly articulate how a reasonable belief was formed and the recommendation for the use of a compliance and enforcement tool. A recommendation for the use of a compliance notice or infringement notice must be made by a Fair Work Inspector (a legislative function). This is recorded in the reasonable belief document and the notice itself.
- Approval of decisions — decisions made by fair work inspectors to issue a compliance notice or infringement notice must be approved by team leaders (APS Level 6). If team leaders are also the Fair Work Inspector issuing a compliance notice or infringement notice, these decisions should be approved by an assistant director (Executive Level 1). Team leaders should check that the reasonable belief document is complete and accurate, in particular: threshold issues; evidence collected is documented and uploaded to TITAN; evidence relied on to form a reasonable belief is referenced appropriately; any decision not to rely on evidence is documented; and contraventions are accurately identified. The review should confirm that the draft notice and cover letter are accurate and formatted correctly.

- Finalisation of matters — fair work inspectors must record their decisions to finalise matters and should record their notes of conversations with employers and employees advising them of the findings of the investigation and reasons for closing matters.

4.35 Table 4.4 sets out the results of the analysis of the request for assistance investigation documentation.

Table 4.4: Analysis of request for assistance investigation documentation

	Allocation for an investigation	Weekly monitoring	Reasonable belief record	Approval of decisions	Finalisation of matters
Assessment result	◆	■	◆	■	■

Key: ◆ Fully compliant ▲ Partially compliant ■ Not compliant

Source: ANAO analysis of a selection of transactions.

4.36 Case notes which summarise why a request for assistance was allocated to an investigation team were recorded within TITAN. This information often referred to the reasons for an investigation as outlined in the compliance and enforcement policy.

4.37 Weekly monitoring and supervision of investigations was not adequately documented. There was no evidence of any case meetings or discussions about next steps recorded in TITAN. There were no records of discussions or monitoring of the timeliness of undertaking and finalisation of investigations.

4.38 The reasonable belief documents recorded the analysis of evidence and the rationale for a recommendation to use a compliance and enforcement tool.

4.39 TITAN maintains a record of team leader and other approvals of a reasonable belief recommendation. These approvals are included in workflows with no connection to the actual documents reviewed. Other findings are set out below.

- It was unclear which documents were the subject of the review and approval by team leaders. While TITAN links the approval to relevant documents, the documents themselves are not locked in TITAN and can be modified after approval. This resulted in the inability to establish which documents were approved at a specific point in time. There were instances where documents linked to approvals were drafts, contained different information to what had been approved or had been modified after the approval date. In these instances the OFWO was unable to verify the version of the document at the time of approval.
- Approvals did not record what was being approved. Sometimes team leaders included notes in approval records to indicate what they had reviewed and why the approval was provided, others did not include any information other than ‘approved’. As it was not clear what was being approved, the OFWO was unable to demonstrate that the decisions were being made consistently across fair work inspectors and across different enforcement teams.
- Approval workflows were manually added to TITAN and the records management system did not require decisions to be reviewed. There were instances where the issue of compliance notices was not subject to second level review. In one instance the compliance

notice was issued without second level review and contained errors. This compliance notice was subsequently withdrawn and reissued.

4.40 Records did not adequately detail the basis for the decision to finalise a matter and/or confirm that employers and employees, where relevant, were advised of the investigation findings and reasons for closing the matter.

4.41 As described in paragraph 4.31, the OFWO does not have a quality assurance policy/framework for investigations. AGIS 2022 states that the benefits of implementing a quality assurance framework for investigations include:

- ability to consistently provide products that meet applicable legislative, statutory, and regulatory requirements
- addressing risks and opportunities associated with activities
- implement preventative controls to minimise risks
- corrective action and continual improvement process.

Proactive investigations

4.42 The execution of a proactive investigation follows the same policies, procedures and processes as a request for assistance investigation except for initiation and reporting. To initiate a proactive investigation, a project plan should be prepared and, for key proactive investigations, reviewed by the enforcement board. The ANAO's examination of decision records for proactive investigations centred on identifying whether decision records appropriately linked the rationale for the proactive investigation outlined in the project plan, to the investigation decision documentation.

4.43 Proactive investigations sometimes changed from the initial approach/purpose of the proactive investigation with no documented rationale for the change. Proactive investigations are based on intelligence, and once in the field, different contraventions, entities and employees may be identified and different approaches to gathering and analysing evidence may be required. There is no policy or process requirement to document when and why a proactive investigation changes direction nor is there a requirement to continue to reassess whether the investigation represents efficient and effective use of resources.

4.44 Proactive investigations that were connected with a broader campaign did not include links to documents related to the project plan for the broader proactive investigation campaign.

4.45 In terms of weekly monitoring, reasonable belief records, approval of decisions and finalisation of matters, the same issues identified for the request for assistance investigations were present for proactive investigations (refer to paragraphs 4.35 to 4.41).

Self-reported non-compliance investigations

4.46 The protocols for the management of self-reported non-compliance identify the following key controls:

- recording of self-reports centrally — a spreadsheet is used to record the initial receipt of a self-report and to record the key characteristics of the matter to facilitate monitoring. This includes whether a matter has been referred to an investigations team; and

- record keeping — investigations teams are responsible for ensuring records and data are classified and maintained in approved business and case management systems in a timely manner to support accurate and consistent reporting.

4.47 The key controls outlined above for request for assistance investigations also apply to an investigation of self-reported non-compliance if it may result in the use of a compliance and enforcement tool.

4.48 Table 4.5 highlights the outcomes of the analysis of the self-reported non-compliance investigation documentation.

Table 4.5: Analysis of self-report investigation documentation

	Recording of self-reports centrally	Record keeping
Assessment result	▲	▲

Key: ◆ Fully compliant ▲ Partially compliant ■ Not compliant

Source: ANAO examination of a selection of transactions.

4.49 The centrally maintained spreadsheet of self-reported matters contained errors in data such as incorrect dates and finalisation outcome type. Using a spreadsheet to maintain management information may result in data quality issues due to a lack of data integrity controls, multiple users and version control issues.

4.50 Records management for self-reported matters is stored in two OFWO systems — Docbank and TITAN. The Investigations Teams Document Management Protocol states that all documents related to self-reported matters are to be stored in Docbank. The matter is to be recorded in TITAN to facilitate entity-level reporting and no activities or documents should be saved in TITAN. TITAN should only contain information on the characteristics of the matter and a general note in the summary page. For the transactions examined, the OFWO produced information to support the processes and decisions. Information was contained in a large number of documents and email trails saved within Docbank. Document indices were prepared by the OFWO to facilitate analysis of each matter.

4.51 The ANAO examined investigations which resulted in the use of caution letters, compliance notices, and enforceable undertakings. Only investigations which may result in the issue of compliance notices or infringement notices must be allocated to an investigation team which includes a Fair Work Inspector. If the OFWO forms the view that notices requiring a ‘reasonable belief’ will not be issued, the examination of the matters may be conducted by other OFWO staff.

4.52 In terms of monitoring of the self-reported matters, approvals from senior staff members, including by branch managers (SES Band 1) and Chief Counsel (SES Band 2) could take several weeks. One request for approval of a compliance notice took eight weeks to approve.

4.53 In terms of reasonable belief records, approval of decisions and finalisation of matters, the same issues identified for request for assistance investigations were also identified for self-reported investigations. These are described in paragraph 4.35 to 4.41.


Recommendation no. 3

4.54 The Office of the Fair Work Ombudsman ensures that there is:

- (a) documentation of the completion of mandatory steps set out in policies and procedures for investigations; and
- (b) appropriate review and quality assurance of investigations to improve levels of compliance and to take corrective action where necessary.

Office of the Fair Work Ombudsman response: *Agreed.*

4.55 *The OFWO recognises the findings of the fieldwork portion of the audit. A quality assurance framework for investigations will be implemented, and planning undertaken to support the effective operation of review and quality assurance processes. The specific policies and procedures relating to the conduct of investigations at the OFWO will be reviewed following the audit, as well as how the relevant IT systems can further support these processes.*



Dr Caralee McLiesh PSM
Auditor-General

Canberra ACT
31 March 2025

Appendices

Appendix 1 Entity response



Fair Work
OMBUDSMAN

Australian Government

Dr Caralee McLiesh
Auditor-General for Australia
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Dr McLiesh,

Response to the Proposed Audit Report – Effectiveness of the Office of the Fair Work Ombudsman’s Regulatory Functions

Thank you for providing the Australian National Audit Office’s (ANAO) proposed report pursuant to section 19 of the Auditor-General Act 1997 on the audit of the *Effectiveness of the Office of the Fair Work Ombudsman’s Regulatory Functions*. I appreciate the opportunity to respond to the report.

The Office of the Fair Work Ombudsman (OFWO) welcomes the findings of the report and accepts the recommendations. It is pleasing to note the finding that the OFWO is largely effective in the performance of our regulatory functions.

Where opportunities for improvement have been identified in the report, work has already commenced to ensure the recommendations are implemented in a timely fashion.

The OFWO appreciates the professionalism and constructive engagement by the ANAO Audit Team throughout the performance audit.

If you have any questions regarding the OFWO’s response, please contact Rebecca Price, Executive Director, Corporate Services Branch on (03) 9954 2582.

Yours sincerely,



Anna Booth
Fair Work Ombudsman
14 March 2025

Appendix 2 Improvements observed by the ANAO

1. The existence of independent external audit, and the accompanying potential for scrutiny improves performance. Improvements in administrative and management practices usually occur: in anticipation of ANAO audit activity; during an audit engagement; as interim findings are made; and/or after the audit has been completed and formal findings are communicated.

2. The Joint Committee of Public Accounts and Audit (JCPAA) has encouraged the ANAO to consider ways in which the ANAO could capture and describe some of these impacts. The ANAO's corporate plan states that the ANAO's annual performance statements will provide a narrative that will consider, amongst other matters, analysis of key improvements made by entities during a performance audit process based on information included in tabled performance audit reports.

3. Performance audits involve close engagement between the ANAO and the audited entity as well as other stakeholders involved in the program or activity being audited. Throughout the audit engagement, the ANAO outlines to the entity the preliminary audit findings, conclusions and potential audit recommendations. This ensures that final recommendations are appropriately targeted and encourages entities to take early remedial action on any identified matters during the course of an audit. Remedial actions entities may take during the audit include:

- strengthening governance arrangements;
- introducing or revising policies, strategies, guidelines or administrative processes; and
- initiating reviews or investigations.

4. In this context, the below actions were observed by the ANAO during the course of the audit. It is not clear whether these actions and/or the timing of these actions were planned in response to proposed or actual audit activity. The ANAO has not sought to obtain assurance over the source of these actions or whether they have been appropriately implemented.

- Enforcement board terms of reference, July 2024 (see paragraph 2.52).
- AGIS 2022 gap analysis, July 2024 (see paragraph 4.29).
- Compliance and enforcement policy review consultation and communication plan, August 2024 (see paragraph 3.31).
- Draft operational guide for dispute assistance at FWO, December 2024 (see paragraph 3.51).
- A care sector communication strategy, October 2024 (paragraph 2.16).
- Compliance and enforcement policy, January 2025 (see paragraph 3.29).

Appendix 3 OFWO’s corporate plan performance measures and targets

1. The corporate plan performance measures and targets outlined in the OFWO’s corporate plans for 2022–23 and 2023–24 are summarised in Table A.1. In its annual reports for 2022–23 and 2023–24 the OFWO reported that it met all of its performance measures and targets with the exception of KPI 8 in 2023–24. This performance measure required the OFWO to file between 65–75 new litigations. Sixty-four litigations were filed in 2023–24.

Table A.1: OFWO’s performance measures and targets for 2022–23 and 2023–24

Performance measure reference and title	Performance measure description	Performance measure	Performance target
KPI 1: The OFWO has a positive impact on harmonious, productive, cooperative and compliant workplace relations.	The OFWO uses an annual survey to determine stakeholder satisfaction levels. Survey participants are determined by the OFWO Executive. The number of participants completing the survey ranged between 13 and 14 per year.	Percentage of stakeholder responses demonstrating a rating of satisfied or better	Greater than 75 per cent
KPI 2: The OFWO provides high quality advice and assistance.	The OFWO undertakes ongoing surveys to determine customer satisfaction levels. A sample of customers who have interacted with the OFWO through the Fair Work Infoline are asked to participate in the surveys.	Percentage of customer responses demonstrating a rating of satisfied or better	Greater than 75 per cent
KPI 3: The OFWO’s digital tools are effective.	The OFWO undertakes ongoing surveys to determine customer satisfaction levels. A sample of customers who have interacted with the OFWO as digital tool users are asked to participate in the surveys to report whether the tools improved their understanding of workplace rights and obligations.	Percentage of customer responses demonstrating a rating of satisfied or better	Greater than 75 per cent
KPI 4: The percentage of requests for assistance involving a workplace dispute finalised in an average of 30 days.	The OFWO reports the percentage of requests for assistance finalised within an average of 30 days of the request for assistance being received. The measure is calculated by determining the percentage of requests for assistance that have been finalised in an average of 30 days. The measure does not report on the actual time taken to finalise requests for assistance.	Percentage of matters finalised within an average of 30 days	At least 85 per cent
KPI 5: The OFWO uses infringement notices as an enforcement action.	The OFWO reports the number of infringement notices used as an enforcement action.	Number of infringement notices issued	550

Performance measure reference and title	Performance measure description	Performance measure	Performance target
KPI 6: The OFWO uses compliance notices as an enforcement action.	The OFWO reports the number of compliance notices issued as an enforcement action.	Number of compliance notices issued	2,000–2,500
KPI 7: The OFWO enters into enforceable undertakings as an enforcement action.	The OFWO reports the number of enforceable undertakings entered into as an enforcement action.	Number of enforceable undertakings entered into	15
KPI 8: The OFWO uses litigation as an enforcement action.	The OFWO reports the number of new litigations filed as an enforcement action.	Number of new litigations filed	65–75
KPI 9: The OFWO develops regulatory priorities to guide its approach.	The OFWO develops regulatory priorities to guide its approach and activity.	Regulatory priorities developed and announced	Yes

Source: ANAO analysis of the OFWO's corporate plans for 2022–23 and 2023–24.

- The corporate plan performance measures and targets outlined in the OFWO's corporate plan for 2024–25 are summarised in Table A.2. These performance measures and targets were under development as at December 2024.

Table A.2: OFWO's performance measures and targets for 2024–25

Performance measure reference and title ^a	Performance measure description	Performance measure	Performance target
KPI 1: The OFWO will ensure increased awareness of its role.	Under development	Under development	Under development
KPI 2.1: The Fair Work Infoline provides high quality advice and assistance.	The OFWO undertakes ongoing surveys to determine customer satisfaction levels. A sample of customers who have interacted with the OFWO through the Fair Work Infoline are asked to participate in the surveys.	Percentage of customer survey responses demonstrating a rating of satisfied or better	Greater than 75 per cent

Performance measure reference and title ^a	Performance measure description	Performance measure	Performance target
<p>KPI 2.2: The Employer Advisory Service (EAS) provides written information and advice that helps small business customers to understand their workplace rights and obligations.</p>	<p>The OFWO undertakes ongoing surveys to determine customer satisfaction levels. A sample of customers who have interacted with the OFWO through the EAS are asked to participate in the surveys to report whether the information they were provided helped them to understand their workplace rights and obligations.</p>	<p>Percentage of customer survey responses demonstrating a rating of satisfied or better</p>	<p>Greater than 75 per cent</p>
<p>KPI 2.3: The OFWO's digital tools are effective.</p>	<p>The OFWO undertakes ongoing surveys to determine customer satisfaction levels. A sample of customers who have interacted with the OFWO as digital tool users are asked to participate in the surveys to report whether the tools improved their understanding of workplace rights and obligations.</p>	<p>Percentage of customer responses demonstrating a rating of satisfied or better</p>	<p>Greater than 75 per cent</p>
<p>KPI 3.1: The OFWO will resolve requests for assistance involving workplace disputes in a timely manner to achieve compliance with workplace laws.</p>	<p>The OFWO reports the percentage of requests for assistance finalised within 60 days.</p>	<p>Time to finalise 80 per cent of requests for assistance involving workplace dispute</p>	<p>80 per cent finalised within 60 days</p>
<p>KPI 3.2: The OFWO will use enforcement tools to achieve compliance with workplace laws.</p>	<p>The OFWO reports on its approach to finalising investigations using one or more enforcement tools. The measure is to assess the effective use of compliance and enforcement tools.</p>	<p>The percentage of investigations finalised in the reporting period using one or more enforcement tools</p>	<p>Greater than 40 per cent</p>
<p>KPI 4.1: The OFWO develops and publishes its areas of priority.</p>	<p>The OFWO uses developed regulatory priorities to guide its approach and activity.</p>	<p>Priorities are published on the OFWO's website</p>	<p>Yes — by 31 July</p>
<p>KPI 5: Serious and systemic non-compliance is detected and addressed.</p>	<p>Under development.</p>	<p>Under development</p>	<p>Under development</p>

Note a: This table does not include performance measures 6.1: OFWO employees are engaged, committed and prepared to achieve our objectives; and 6.2: OFWO employees feel supported by the OFWO, as these performance measures do not relate to the exercise of the OFWO's regulatory functions.

Source: ANAO analysis of the OFWO's corporate plan for 2024–25.