

## Senate Standing Committee on Education and Employment

### QUESTIONS ON NOTICE Additional Estimates 2015 - 2016

Agency - Fair Work Ombudsman

Department of Employment Question No. EMSQ16-000232

Senator McKenzie provided in writing.

#### Question

##### FWO - Penalties and investigations

1. How many infringement notices have been issued by the FWO in respect of record keeping breaches in the 2014-2015 year?
2. How many audits were conducted in this period?
3. How many disputes have been lodged with the FWO in relation to record keeping matters?
4. How many of these have resulted in prosecution?
5. What is the typical range of fines typically handed down by the Courts for these matters?
6. What are the penalties that apply in relation to underpayment of wages?
7. How many infringement notices have been issued by the FWO in respect of underpayment breaches in the 2014-2015 year?
8. How many disputes have been lodged with the FWO in relation to underpayment claims?
9. How many of these have resulted in prosecution?
10. Can you outline what is the typical range of fines typically handed down by the Courts for these breaches of the underpayment provisions?
11. When was the current penalty scheme introduced?

#### Answer

1. In 2014-15, the Fair Work Ombudsman issued **348 infringement notices**.
2. In 2014-15, the Fair Work Ombudsman completed **4,564 audits**.
3. In 2014-15 the FWO assisted parties involved in over 25,000 workplace disputes, including around 18,000 allegations of non-compliance lodged through a formal dispute form. Included in those dispute forms were **1,119** separate allegations of record keeping and/or pay slip contraventions.

Record keeping contraventions often arise in conjunction with more substantive allegations such as underpayment of wages, and therefore may not be specifically raised by a person lodging a dispute form.

4. Record keeping breaches, such as failure to include all required content on a pay slip are often mistakes, and the FWO usually assists employers by alerting them to the problem and helping them to put in place systems to ensure mistakes aren't repeated.

Fair Work Inspectors may issue an employer with an infringement notice for failing to meet their record-keeping and pay slip obligations. The maximum penalty payable under an infringement notice is one-tenth of the penalty that a court could impose (i.e. \$540 for an individual and \$2,700 for a body corporate).

We reserve court action for the most serious instances of non-compliance. Cases usually involve an employer who has not cooperated with us or who has deliberately exploited vulnerable workers.

In all serious matters the Fair Work Ombudsman considers whether it is in the public interest to litigate, bearing in mind a range of factors including the employer's conduct. If the failure to keep records or issue pay slips prevents quantification of underpayments, or affects a number of workers over a long period of time, or involves fraudulent falsification, or is deliberate and systemic, litigation is more likely. We refer to the Fair Work Ombudsman's Litigation Policy available at [www.fairwork.gov.au](http://www.fairwork.gov.au).

In 2014-15, the FWO commenced **three legal proceedings** relating solely to contraventions of the record keeping obligations in section 535 of the *Fair Work Act 2009* (FW Act) and **one proceeding** that also involved a failure to make and keep a piecework agreement as required by a modern award.

In total, **30 of the 50 litigations commenced in 2014-15 involved a record keeping breach** as part of the alleged contraventions, being 60% of all litigations commenced in this period. The worst instances of employee underpayments or exploitation will often involve an element of insufficient or false record keeping and pay slip compliance, which is why a significant proportion of our underpayment proceedings include record keeping contraventions.

5. A contravention of the record keeping or pay slip obligations under the *Fair Work Act 2009* attracts a maximum civil penalty of 30 penalty units for an individual and five times that amount for a body corporate, being **\$5,400 for an individual** and **\$27,000 for a body corporate**.

Often, the penalty for failing to keep prescribed records will be less than the value of the underpayment.

The amount of a penalty imposed for breaches of terms of the FW Act depends on a number of factors. It is not possible to provide a typical range for cases generally as the potential penalties in a particular case depend on the number of separate provisions breached (which determines the maximum penalties available).

When determining penalty, the Courts do not undertake a comparative exercise comparing the range of penalties awarded in other cases to determine what an appropriate penalty is as each case is considered on its own facts and can be impacted differently by statutory course of conduct provisions. In determining the appropriate penalty the Courts will consider factors such as:

- the amount of the underpayment(s), number of people affected and period over which it occurred;
- how the breaches happened, e.g. whether they were deliberate;
- the prior conduct of the employer or person who committed the breaches;
- the size of the business enterprise and involvement of senior management;
- whether the underpayments have been rectified;
- whether the business has implemented corrective action to avoid future breaches, cooperated with FWO and demonstrated contrition;
- whether the breaches were admitted at the earliest opportunity; and
- what kind of penalty is needed to ensure specific and general deterrence.

As a result of the considerations above, the actual quantum of penalties ordered can vary significantly from case to case.

By way of example, penalties at the higher end of the range that a Court has ordered for record keeping breaches in FWO proceedings include **\$14,107.50** against a company (85% of the maximum at that time, being \$16,500) and **\$2,970** against a director (90% of the maximum at that time, being \$3,300). By contrast, record keeping penalties on the lower end have been as little as **\$123.75** for an individual and **\$618.75** for a body corporate (both are less than 5% of the maximum).

6. Under subsections 539(2) and 546(2) of the FW Act, underpayment of wages that occur because of breaches of a modern award, minimum wage order, enterprise agreement or the National Employment Standards attract a maximum penalty of 60 penalty units per breach for an individual, and five times this amount for a body corporate.

This means the current maximum pecuniary penalties for underpayment contraventions are **\$54,000 per contravention** for a corporation, and **\$10,800 per contravention** for an individual.

In addition, under section 545 of the FW Act a Court can make appropriate orders to remedy the effects of contraventions or to prevent them. The FWO regularly seeks orders in addition to civil penalties to address underpayment contraventions

7. None, as infringement notices cannot be issued in respect of underpayment contraventions.

An infringement notice is a monetary penalty or fine imposed under the *Fair Work Regulations 2009* as an alternative to litigation action in respect of time and wage records and pay slips contraventions. The maximum penalty payable under an infringement notice is one-tenth of the penalty that a court could impose (i.e. \$540 for an individual and \$2,700 for a body corporate).

8. In 2014-15 the FWO assisted parties involved in over 25,000 workplace disputes, including around 18,000 allegations of non-compliance lodged through a formal dispute form. Included in those dispute forms were **14,291 separate allegations** relating to underpayment of entitlements.
9. In 2014-15, there were **42 litigations commenced involving underpayment breaches** as part of the alleged contraventions, which represents 84% of all litigations commenced in this period.

As with penalties for record keeping breaches, penalties for underpayment contraventions vary from case to case depending on a range of factors. At the highest end of the range, one individual was fined 100% of the maximum penalty at the time (**\$6,600**) for each of six underpayment contraventions alleged against him (to a combined penalty of \$39,600). One corporate respondent attracted a combined penalty of **\$286,550** in respect of a series of underpayment and other contraventions.

From time to time, for a variety of reasons, individual underpayment contraventions may attract only nominal penalties. For example, a penalty of **\$247.50** was imposed on one director for her involvement in an underpayment contravention by the corporate employer, as part of a broader suite of penalties imposed for other contraventions of the Act, including sham contracting.

10. Please refer to Question 5.
11. The current scheme comprises the penalties set out in the *Fair Work Act* in 2009. The number of penalty units determines the dollar amount by reference to a formula in the *Crimes Act 1914* which is reviewed from time to time.

As at 31 July 2015 the value of a penalty unit increased to \$180. This resulted in maximum penalties for breaches, such as underpayments that had a 60 penalty unit maximum, increasing to the current maximum of \$54,000 for body corporates and \$10,800 for individuals.

The *Crimes Legislation Amendment (Penalty Unit) Act 2015 (Cth)* also provides that the penalty unit will be automatically indexed in line with the consumer price index every three years commencing from 1 July 2018.