

Senate Standing Committee on Education and Employment

**QUESTIONS ON NOTICE
Budget Estimates 2015 - 2016**

Agency - Fair Work Ombudsman

Department of Employment Question No. EMSQ15-000175

Senator Cameron asked on 02 June 2015 on proof Hansard page 44

Question

FWO - Litigation policy

Senator CAMERON: Could you provide copies to the committee of your litigation policy?

Ms James: I am happy to provide copies to the committee of our litigation policy and the enforcement and compliance strategy. They are both available on our website as well.

Answer

Please find attached at Appendix A the Litigation Policy of the Fair Work Ombudsman.

Please find attached at Appendix B the Fair Work Ombudsman's Compliance and Enforcement Policy.

Copies of the Fair Work Ombudsman's Litigation Policy and Compliance and Enforcement Policy are available at www.fairwork.gov.au.



Fair Work
OMBUDSMAN

GN 1
FWO Litigation Policy

On 1 May 2015, the Full Court of the Federal Court of Australia handed down the decision of [Director, Fair Work Building Industry Inspectorate v Constructions, Forestry, Mining and Energy Union \[2015\] FCAFC 59 \(FWBC v CFMEU\)](#). This decision determined that in civil penalty litigation, parties cannot make statements to a Court urging the imposition of specific penalty ranges or amounts. The Office of the Fair Work Ombudsman (FWO) notes that this decision impacts on the FWO's guidelines in respect of breach bargaining and submissions on penalty, as set out at paragraphs 15.6 and 17 of this Guidance Note. Paragraphs 15.6 and 17 are currently under review and must now be read in conjunction with the decision in *FWBC v CFMEU*.

Guidance Note No.	1	Guidance Note Title	Litigation Policy of the Office of the Fair Work Ombudsman
Publication History		Relevant legislation or materials	<i>Fair Work Act 2009</i> <i>Prosecution Policy of the Commonwealth 2nd Edition (1990)</i> ²
First edition	15 July 2009		
Second edition	20 July 2011		
Third Edition	21 December 2012		
Fourth Edition	3 December 2013		

1. The purpose of FWO Guidance Notes

- 1.1. Guidance Notes are a means by which the Office of the Fair Work Ombudsman (**FWO**) publishes and disseminates advice on the interpretation of the laws it enforces or about its internal policies and or procedures.
- 1.2. The FWO will publish Guidance Notes from time to time on a range of subject matters concerning the *Fair Work Act 2009* (**FW Act**). The general public are welcome to suggest subject matter for future Guidance Notes.

2. This Guidance Note

- 2.1. This Guidance Note sets out guidelines to be followed by the FWO in the making of decisions relating to the commencement of litigation (proceedings) in relation to a contravention or proposed contravention of the FW Act, the *Fair Work Regulations 2009*, the *Paid Parental Leave Act 2010* (**PPL Act**), a fair work instrument⁶, the National Employment Standards, a national minimum wage order, an equal remuneration order, a safety net contractual entitlement or other legislation over which it has jurisdiction (collectively referred to as **Commonwealth workplace laws**).
- 2.2. This Guidance Note is to be referred to as:

² FWO Litigation Policy is substantially based upon the *Prosecution Policy of the Commonwealth 2nd Edition (1990)* ("Commonwealth Prosecution Policy"). In many parts it deliberately draws upon or reproduces the Commonwealth Prosecution Policy. However, because the FWO does not prosecute criminal breaches the Commonwealth Prosecution Policy is not the most relevant policy and, as such, where there is a difference between the Commonwealth Prosecution Policy and the FWO Litigation Policy that is intended.

⁶A fair work instrument includes Modern Awards and Enterprise Agreements.

- (a) Guidance Note 1; or
 - (b) the FWO Litigation Policy.
- 2.3. This Guidance Note addresses the following topics:
- (a) The purpose of FWO Guidance Notes (paragraph 1);
 - (b) This Guidance Note (paragraph 2);
 - (c) About the Fair Work Ombudsman (paragraph 3);
 - (d) Litigation as a compliance tool (paragraph 4);
 - (e) Nature of contraventions (paragraph 5);
 - (f) Persons involved in contraventions (paragraph 6);
 - (g) Direction to Inspectors and Consent to Litigation (paragraph 7);
 - (h) Fair Work Ombudsman's independence and discretion unfettered (paragraph 8);
 - (i) The decision to commence litigation – the two step process (paragraph 9);
 - (j) Sufficient evidence (paragraph 10);
 - (k) Public interest (paragraph 11);
 - (l) Relevant public interest factors (paragraph 12);
 - (m) Determination of appropriate enforcement mechanism (paragraph 13);
 - (n) The commencement and conduct of FWO litigation (paragraph 14);
 - (o) Breach bargaining (paragraph 15);
 - (p) Discontinuance of proceedings (paragraph 16);
 - (q) Submissions on penalty (paragraph 17);
 - (r) Notification of enforcement decisions (paragraph 18);
 - (s) Publishing and utilising enforcement activity (paragraph 19).
- 2.4. The purpose of this Guidance Note is two fold. First, it operates as a guide for the FWO in the exercise of its function to commence litigation.
- 2.5. Secondly, it aims to provide the community with a better understanding of the manner in which the FWO exercises that function.

- 2.6. This Guidance Note does not have the force of statute. Accordingly, any failure by the FWO to act in accordance with this Guidance Note cannot affect the validity or conduct of proceedings commenced by the FWO or prosecutorial rights of the Commonwealth Director of Public Prosecutions (**CDPP**).
- 2.7. The Guidance Note sits within any Directions to Inspectors issued by the Fair Work Ombudsman (see paragraph 7 below) and neither diminishes nor amends those Directions. Where there is an inconsistency, the Directions to Inspectors prevail.
- 2.8. This Guidance Note is to be read in conjunction with the FWO's obligations under the *Legal Services Directions 2005* (**Legal Services Directions**) issued by the Attorney General under section 55ZF of the *Judiciary Act 1903*.

3. About the Fair Work Ombudsman

- 3.1. The Fair Work Ombudsman is a statutory office holder pursuant to section 681 of the FW Act.
- 3.2. The Office of the Fair Work Ombudsman is a statutory office pursuant to section 696 of the FW Act.
- 3.3. In broad terms, the Fair Work Ombudsman:
 - (a) promotes harmonious, productive and cooperative workplace relations;
 - (b) assists employees and employers to understand their rights and obligations;
 - (c) provides advice and disseminates information;
 - (d) promotes and monitors compliance with Commonwealth workplace laws;
 - (e) investigates complaints;
 - (f) inquires into, and investigates, any act or practice that may be contrary to Commonwealth workplace laws;
 - (g) commences proceedings or makes applications to enforce Commonwealth workplace laws and, where appropriate, seeks a penalty for contravention of Commonwealth workplace laws; and
 - (h) represents workers who are, or might become, a party to proceedings.

- 3.4. The Fair Work Ombudsman appoints Fair Work Inspectors empowered to investigate and enforce compliance with a range of Commonwealth workplace laws including but not limited to legislation relating to:
- (a) minimum pay, terms and conditions of employment;
 - (b) general protections, including workplace rights, freedom of association, discrimination, sham arrangements, coercion and undue influence;
 - (c) right of entry;
 - (d) unprotected industrial action; and
 - (e) employee records and pay slip requirements.

4. Litigation as a compliance tool

- 4.1. The functions of the Fair Work Ombudsman are specified in section 682 of the FW Act and include:
- (a) to commence proceedings in a court, or make applications to the Fair Work Commission to enforce this Act, fair work instruments and safety net contractual entitlement (section 682(d) of the FW Act); and
 - (b) to represent employees who are, or might become, a party to proceedings in a court, or a party to a matter before Fair Work Commission, under this Act, or a fair work instrument, if the Fair Work Ombudsman considers that representing the employees will promote compliance with this Act or the fair work instrument (section 682(f) of the FW Act).
- 4.2. The FWO's litigation activities are part of a broader compliance system which comprises a combination of positive motivators and deterrents aimed at bringing about compliance with Commonwealth workplace laws. Litigation may also be appropriate when there is a need for judicial clarification of Commonwealth workplace laws.
- 4.3. As part of the FWO's compliance system the FWO encourages members of the community to seek and follow advice on Commonwealth workplace laws. If the FWO provides incorrect advice to an employer about terms and conditions of employment and that advice is relied and acted upon in good faith, the FWO will not pursue a penalty for failure to provide the correct terms and conditions of employment relating to the period before the employer is advised of the FWO's mistake

- 4.4. The FWO may help parties attempt to resolve allegations of non-compliance with Commonwealth workplace laws through assisted dispute resolution. Where resolution is not achieved and where appropriate the FWO will move to a formal investigation of alleged contraventions of Commonwealth workplace laws. Where a contravention is identified, and the matter is not resolved through voluntary compliance, enforcement measures (including in appropriate cases, the issue of Compliance Notices, the acceptance of Enforceable Undertakings or the commencement of proceedings) may be used to secure specific and/or general deterrence objectives.
- 4.5. In certain circumstances proceedings may be commenced, notwithstanding any voluntary compliance, if the FWO considers such proceedings to be the most appropriate means of dealing with the contravention or deterring others from contravening Commonwealth workplace laws (for example, where there are significant amounts underpaid, a number of employees or vulnerable employees involved).

5. Nature of contraventions

- 5.1. The FW Act distinguishes between civil remedy provisions and offences. Litigation action under this Guidance Note relates only to contraventions of civil remedy provisions.
- 5.2. In the FW Act "offence" denotes criminal liability and is to be distinguished from civil penalty liability. Criminal prosecutions are initiated by the CDPP. Where the FWO becomes aware of offences having occurred it will, in the ordinary course of events, refer a brief to the CDPP. The CDPP has the sole discretion for commencing, or not commencing a criminal prosecution, and for the conduct of any case taken to court in respect of an offence.
- 5.3. In a criminal case, the prosecution must prove the facts to the strictly applied legal standard of "beyond reasonable doubt". However, the facts of a civil case need only be proved to the lesser standard of "on the balance of probabilities": *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362.

6. Persons involved in contraventions

- 6.1. Section 550(1) of the FW Act provides that:

A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision.

- 6.2. “Involved in” requires that a person has:
- (a) aided, abetted, counselled or procured the contravention; or
 - (b) induced the contravention, whether by threats or promises or otherwise; or
 - (c) been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
 - (d) conspired with others to effect the contravention.
- 6.3. The FWO considers that holding individuals accountable for contraventions in which they are involved in is an appropriate compliance tool.
- 6.4. Accordingly, in each matter considered for litigation action the FWO will look to determine if s.550 proceedings can also be commenced. The FWO then applies the same two step process (described in paragraph 9 below) in determining whether to commence such a proceeding.
- 6.5. A person “involved in” a contravention may include:
- (a) a Company Director;
 - (b) a sole director and shareholder who abrogated their authority to others;
 - (c) the principal employer (through the actions of its contracted “employment issues” consultant who made offers of Australian Workplace Agreements);
 - (d) an HR Manager or other manager; and/or
 - (e) an advisor to a business.

7. Direction to Inspectors and Consent to Litigate

- 7.1. On 24 March 2011¹⁴ the Fair Work Ombudsman, acting under section 704 of the FW Act, issued directions to Fair Work Inspectors (**Direction to Inspectors**), providing that, before commencing litigation relating to alleged contraventions of Commonwealth workplace laws a Fair Work Inspector must, among other things (including complying with this Guidance Note), obtain the consent of the Fair Work Ombudsman or the consent of a member of the staff of the FWO authorised by the Fair Work Ombudsman to give such consent.

¹⁴With effect from 2 May 2011 when the Directions were registered as a legislative instrument F2011L00683.

7.2. On 18 May 2011 the Fair Work Ombudsman issued a “General Authorisation to Consent to Litigation” (**General Authorisation**) under the Direction to Inspectors, in which the Fair Work Ombudsman authorised the:

- (a) Chief Counsel;
- (b) Director – Legal Practice; and
- (c) Executive Director – Dispute Resolution and Compliance;

as members of the staff of the FWO authorised by the Fair Work Ombudsman to consent to the commencement of litigation (**Authorised SES Officers**).

7.3. In the Direction to Inspectors, the Fair Work Ombudsman directs that, before commencing, or intervening in, litigation, a Fair Work Inspector must:

- (a) comply with any Guidance Note concerning the litigation policy of the FWO;
- (b) be satisfied that:
 - there is sufficient evidence to commence civil proceedings; and
 - the facts in the matter and all the surrounding circumstances demonstrate that civil proceedings are in the public interest (including that the contraventions are not trivial or minor).

7.4. Notwithstanding the need for consent, the decision whether to recommend that proceedings be commenced (or some other enforcement activity) rests with the Fair Work Inspector and their Executive Level 2 Manager in consultation with the Executive Director Dispute Resolution and Compliance and the Group Manager, Operations. If an Executive Level 2 Manager has a query about their capacity to recommend the commencement of proceedings, they must immediately consult with the Group Manager, Operations.

8. Fair Work Ombudsman’s independence and discretion unfettered

8.1. Section 684 of the FW Act provides that the Minister for Employment (**Minister**) may give directions to the Fair Work Ombudsman in relation to the performance of their functions.

8.2. However, any directions given by the Minister under the FW Act must be of a general nature only (section 684(2)).

8.3. In this respect the independence of the Fair Work Ombudsman in the exercise of her discretion to commence proceedings is unfettered.

9. The decision to commence litigation - the two-step process

- 9.1. The key aim of the FWO's enforcement activities is to achieve compliance with Commonwealth workplace laws. Litigation may be appropriate to achieve this aim or if there is a need for judicial clarification of Commonwealth workplace laws.
- 9.2. Therefore, the decision by the Fair Work Inspector and their Executive Level 2 Manager) to commence (or not commence) proceedings is an important one. In every case, great care must be taken so that the right decision is made. A wrong decision about whether or not to commence proceedings might tend to undermine the confidence of the community in the Australian Government's workplace relations system and in the FWO as the national regulator of Commonwealth workplace laws.
- 9.3. All FWO litigation related activities should be transparent, accountable, constructive and effective. In addition, all FWO litigation related activities should be targeted, proportionate, consistent and fair, and conducted in accordance with this Guidance Note and the requirements of the Legal Service Directions.
- 9.4. Any decision to commence proceedings requires a two-stage test be satisfied:
 - (a) First, there must be sufficient evidence to prosecute the case; and
 - (b) Secondly, it must be evident from the facts of the case, and all the surrounding circumstances, that commencing proceedings is in the public interest.
- 9.5. The two-step process also applies to decisions the FWO makes about the institution of appeals in that the FWO will consider:
 - (a) the merits of an appeal; and
 - (b) the public interest in pursuing an appeal.
- 9.6. The FWO does not make decisions about appeals for criminal prosecutions (see 5.2). The CDPP has sole responsibility for such decisions and the conduct of the appeal.

10. Sufficient evidence

- 10.1. In determining whether there is sufficient evidence to commence proceedings the FWO will consider if there:

- (a) is admissible, substantial and reliable evidence of a contravention of Commonwealth workplace laws;
 - (b) are available, competent and credible witnesses (where relevant);
 - (c) are admissions, or there are likely to be admissions, made by the alleged wrongdoer;
 - (d) are any lines of defence which are plainly open to, or have been indicated by, the alleged wrongdoer; and
 - (e) are any other factors which in the view of the FWO could affect the likelihood or otherwise of a successful litigation.
- 10.2. Having regard to the evidentiary considerations the FWO will consider whether there:
- (a) is a prima facie case against the alleged wrongdoer; and
 - (b) are reasonable prospects of an order being made that the alleged wrongdoer contravened Commonwealth workplace laws.
- 10.3. Under the Legal Services Directions, the FWO must not (except in urgent circumstances) commence proceedings unless it has received written legal advice from lawyers whom the agency is allowed to use in the proceeding indicating that there are reasonable grounds for starting the proceedings. Legal advice of this nature is covered by legal professional privilege.

11. Public Interest

- 11.1. Once satisfied that the evidence justifies the commencement of proceedings against the alleged wrongdoer, the FWO will usually proceed to litigation unless, having regard to the provable facts and the whole of the surrounding circumstances, the public interest dictates that proceedings not be commenced.
- 11.2. The Commonwealth Prosecution Policy makes clear that, as a general proposition:
- “It is not the rule that all offences brought to the attention of the authorities must be prosecuted.”*
- 11.3. Generally speaking, the more serious the civil remedy provision which has been contravened:

- (a) the more likely it will be that the public interest will require that proceedings be commenced; and
 - (b) the more compelling the reasons would have to be for proceedings not to be pursued if the evidence is strong and the prospects good.
- 11.4. Although there may be mitigating factors present in a particular case, often the proper decision will be to commence proceedings and for those factors to be put to the court in mitigation when the penalty is being considered.
- 11.5. The factors which can properly be taken into account in deciding whether the public interest requires that proceedings be commenced will vary from case to case.
- 11.6. However, a decision whether or not to commence proceedings must not be influenced by:
- (a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged wrongdoer or any other person involved (although, an employee's status as a vulnerable worker¹⁵ may be relevant and appropriate to have regard to);
 - (b) personal feelings concerning the alleged wrongdoer or the victim;
 - (c) possible political advantage or disadvantage to the Government or any political group or party;
 - (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the litigation decision;
 - (e) whether the matter has been, or is likely to be, the subject of media attention; or
 - (f) possible advantage or disadvantage to any employer, employer group, industrial or other association or union, or an office holder or member of such a group.

¹⁵ "Vulnerable worker" includes (but is not limited to): young people, trainees, apprentices, people with a physical or mental disability or literacy difficulties, recent immigrants and people from non-English speaking backgrounds, the long-term unemployed and those re-entering the workforce, outworkers, people with carer responsibilities, indigenous Australians, employees in precarious employment (e.g. casual employees) and people residing in regions with limited employment opportunities and/or with financial and social restraints on their ability to relocate to places where there might be greater job opportunities.

12. Relevant public interest factors

Factors which may arise in considering whether the public interest dictates that proceedings be, or not be, commenced are listed below:

12.1. Nature and circumstances of the alleged contravention

- (a) the seriousness of the alleged contravention or, conversely, the triviality of the alleged contravention, including whether it is of a “technical nature” only.

Generally, and by way of example, the FWO does not regard the following as “trivial”:

- (i) contraventions relating to agreement making, bargaining orders, industrial action or right of entry;
- (ii) contraventions of the general protections contained in Part 3-1 of the FW Act;
- (ii) contraventions giving rise to significant underpayments (upward of \$5,000 in total (not per employee)) particularly where there is evidence the employer knowingly contravened their obligations or did not properly discharge their duty to ascertain their obligations;
- (iii) contraventions giving rise to underpayments (including those less than \$5000 in total), where special circumstances exist. Examples of such circumstance may include underpayments in respect of vulnerable workers, numerous employees, or where the employer is a repeat wrongdoer (whether or not taken to court) or where there is evidence the employer knowingly contravened its obligations (e.g. deliberate exploitative behaviour) or did not promptly acknowledge their obligations and remedy them when they were brought to the employer’s attention by the FWO; and
- (v) failure to comply with a Compliance Notice issued by a Fair Work Inspector.

It can be expected that in most circumstances the FWO will consider that there is public interest in commencing proceedings to obtain a civil penalty in respect of such contraventions.

Where an alleged contravention is considered to be of a less serious nature, the FWO will consider appropriate enforcement or dispute resolution mechanisms and alternatives to litigation including, where appropriate, mediation, Compliance Notices (see 13.4 below), enforceable undertakings, letters of caution or small claims procedures (which may include Fair Work Inspector assisted small claims).

- (b) the actual or potential consequence of the alleged contravention;
- (c) the prevalence within the community of the alleged contravention;
- (d) mitigating or aggravating circumstances;

Generally, and by way of example, mitigating circumstances might include:

- (i) where the matter has come before the FWO through a complaint or audit, there is no evidence admissible in a court that the employer either deliberately or recklessly underpaid its employees, but, rather, there is evidence that the employer had a genuine misunderstanding (having made reasonable attempts to understand its legal obligations) and, when it was brought to the employer's attention by the FWO (or before the FWO's investigation began), the employer readily rectified the contravention, made good the underpayments and put in place systems to ensure that no contraventions will occur in the future; or
- (ii) where the employer has sought advice from the FWO, or a relevant professional, provided accurate information in seeking the advice and has relied and acted on that advice; or
- (iii) where the employer has approached the FWO to make admissions of contravention and worked with the FWO to readily rectified the contravention, made good the underpayments and put in place systems to ensure that no contraventions will occur in the future.

Conversely, an aggravating circumstance might include those where, although the underpayment is less than \$5,000 or the employer has approached the FWO to make admissions but, the employer has failed to

comply with an agreed payment plan or has refused, impeded or delayed attempts at voluntary compliance; and

- (e) any other relevant circumstances.

12.2. Characteristics of the alleged wrongdoer

- (a) the degree of culpability of the alleged wrongdoer in connection with the contravention. This may include, for example:
 - (i) the degree or extent to which the alleged wrongdoer acted in accordance with any advice given by the FWO or other statutory authority in relation to complying with a duty or obligation under Commonwealth workplace laws;
 - (ii) the relevant compliance history of the alleged wrongdoer (including the alleged wrongdoer's response to previous enforcement and prevention activities undertaken by FWO or its predecessors); and
 - (iii) the attitude of the alleged wrongdoer (including any relevant proactive measures taken to comply with Commonwealth workplace laws).
- (b) history and other relevant characteristics of the alleged wrongdoer including:
 - (i) individual, characteristics, for example age, intelligence, physical health, mental health, or special infirmity;
 - (ii) the size of the alleged wrongdoer's business, including the ability to continue trading if proceedings are commenced, and the extent of access to internal human resources expertise;
- (c) subject to any rights or privileges (such as the privilege against self-exposure to penalties), whether the alleged wrongdoer is willing to co-operate in the investigation or litigation, including the investigation and prosecution of others, or the extent to which the alleged wrongdoer has done so;
- (d) the level of contrition demonstrated by the alleged wrongdoer; and

- (e) the degree of involvement of senior management of the employer in the alleged contravention, or the degree of involvement by office holders or members of a registered organisation or other association.

12.3. Impact of the contravention

- (a) the attitude to the commencement of proceedings which is held by the person who was injured or otherwise affected by the alleged contravention;
- (b) the impact of the alleged contravention on such persons or on any other relevant persons (e.g. family members); and
- (c) any other relevant impact of the alleged contravention.

12.4. Effect of litigation

- (a) the likely outcome in the event of a finding of a contravention, having regard to the penalty options available to the court;
- (b) the availability and efficacy of any alternatives to litigation; and
- (c) whether the consequences of any resulting finding of a contravention would be unduly harsh and oppressive.

12.5. Characteristics of the alleged aggrieved party

- (a) the degree to which the alleged aggrieved party has the available resourcing to commence proceedings on their own behalf in respect of the contravention.

12.6. Level of public concern

- (a) whether the nature of the alleged contravention is of considerable public concern. The FWO assumes that, in all cases, the public is concerned about compliance with Commonwealth workplace laws.

12.7. Deterrence

- (a) the likely impact of proceedings on:
 - (i) general deterrence (i.e. reducing the likelihood that other workplace participants will commit similar contraventions or otherwise contravene Commonwealth workplace laws); and

- (ii) specific deterrence (i.e. reducing the likelihood that the alleged wrongdoer will commit a further contravention of Commonwealth workplace laws).

12.8. Administrative considerations

- (a) the necessity to maintain public confidence in the administration of Commonwealth workplace laws;
- (b) the likely length and expense of litigation;
- (c) whether the commencement of proceedings would be perceived as counter-productive, for example, by bringing the law into disrepute; and
- (d) the staleness of the alleged contravention.

13. Determination of appropriate enforcement mechanism

13.1. After consideration of all the relevant criteria (i.e. sufficient evidence and public interest), a FWO investigation may result in:

- (a) the commencement of litigation;
- (b) the issuing of a Compliance Notice;
- (c) the giving of an Enforceable Undertaking by the wrongdoer;
- (d) the issuing of a letter of caution;
- (e) a referral to small claims procedures;
- (f) a referral to other dispute resolution mechanisms (i.e. mediation); or
- (g) no further action.

13.2. Commencement of litigation

Where sufficient admissible evidence exists of a contravention, and the commencement of proceedings is in the public interest, the FWO may make a decision to commence proceedings in accordance with this Guidance Note.

14. The commencement and conduct of FWO litigation

- 14.1. In many cases the evidence will disclose a number of potential contraventions of Commonwealth workplace laws. The FWO will take care to identify the contraventions which adequately reflect the nature and extent of the offending conduct disclosed by the evidence and which will provide the court with an appropriate basis for deciding upon a penalty.
- 14.2. The contraventions proceeded against will be those disclosed by the admissible evidence. Consequently, there may be cases where there is public interest in pleading a number of contraventions. However, under no circumstances will the FWO assert contraventions with the intention of providing scope for subsequent “breach bargaining”.
- 14.3. All litigation commenced by the FWO will be conducted honestly, fairly, consistently and in accordance with *The Commonwealth’s Obligation to Act as a Model Litigant* (Appendix B to the Legal Service Directions).

15. Breach bargaining

- 15.1. Breach bargaining involves negotiations between the defendant/respondent and the FWO in relation to the contraventions to be proceeded against. A breach bargaining decision may only be made with the consent of the Fair Work Ombudsman or an Authorised SES Officer.
- 15.2. While the FWO must demonstrate care and consideration in identifying the contraventions that will be alleged, circumstances may change or new facts come to light which make it appropriate to proceed on fewer contraventions or to accept admissions to only some of the contraventions. It may be in the interests of justice or it might be in the public interest that the FWO accepts an offer by a person to admit to some of the contraventions and discontinue others.
- 15.3. Before such an agreement is reached the FWO must be satisfied that:
 - (a) the contraventions to be proceeded with bear a reasonable relationship to the nature of the offending conduct of the wrongdoer;
 - (b) the contraventions provide an adequate basis for an appropriate penalty in all the circumstances of the case; and
 - (c) there is evidence to support the contraventions alleged.

- 15.4. In many cases, the interests of justice will be served if a defendant/respondent pleads to agreed contraventions in the circumstances described above and the community is not put to the burden of funding a long and expensive hearing.
- 15.5. Accordingly, the FWO will promptly consider any proposal and put its position to the defendant/respondent. However, the process is not one of "negotiation". The FWO is concerned with appropriately reflecting its perception of the public interest and its position in relation to disposition of the matter generally.
- 15.6. A proposal by the defendant/respondent that it will agree to particular contraventions or accept a lesser number of contraventions may include a request that the FWO not oppose a submission made by the defendant/respondent to the court that the penalty falls within a nominated range. The FWO will consider such a request provided the range of penalty nominated is considered to be within acceptable limits having regard to the FWO's desire to balance its aims of general and specific deterrence with those circumstances which, in individual cases, constitute relevant penalty considerations.
- Note: this paragraph is currently under review. It must now be read in conjunction with the decision of *FWBC v CFMEU*
- 15.7. Under no circumstances will the FWO entertain a breach bargaining proposal if the defendant/respondent maintains their innocence with respect to the contraventions it has offered to concede. The defendant/respondent must genuinely accept wrong-doing on their behalf and be prepared to admit that publicly and to the court.
- 15.8. If the breach bargaining might affect the substantive interests of the person who was injured or otherwise affected by the contravention, then, where possible, they will be consulted before any breach bargaining decision is made.

16. Discontinuance of proceedings

- 16.1. Consistent with the objective of ensuring that only appropriate cases are brought before the courts, the FWO will discontinue proceedings if appropriate.

However, having regard to the considered assessment undertaken by the FWO as to the public interest before the commencement of proceedings and the usual opportunity afforded to wrong-doers to allow for voluntary compliance, discontinuance is not usually countenanced. For example, the making good of large underpayments (especially involving vulnerable workers) either immediately before or just after proceedings are commenced will not likely result in a decision

not to commence proceedings or to discontinue them. However, the making of the payment and the admissions made would be relevant to the question of penalty in a matter.

- 16.2. The decision whether or not to discontinue proceedings rests with the Fair Work Inspector and their Executive Level 2 Manager in consultation with relevant Executive Director and the Group Manager, Operations (subject to the need to obtain consent from the Fair Work Ombudsman or an Authorised SES Officer).
- 16.3. Where appropriate the person who was injured or otherwise affected by the contravention will be consulted before any decision is made to discontinue proceedings.

17. Submissions on penalty

Note: Paragraphs 17.1 to 17.5 are currently under review. These paragraphs must now be read in conjunction with the decision of *FWBC v CFMEU*

- 17.1. Where litigation results in a finding that Commonwealth workplace laws have been contravened the court will move to consider what penalty, if any, should be imposed.
- 17.2. Where appropriate, the FWO will seek penalties that are proportionate, and that balance its aims of general and specific deterrence with those circumstances which, in individual cases, constitute relevant penalty considerations.
- 17.3. The FWO notes that where wrong-doers have co-operated with the FWO and also made admissions early in the course of an investigation or soon after the commencement of proceedings it is appropriate to allow a discount on penalty (in the vicinity of up to 25-30%). However, consistent with the decision in *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 (at 74 - 76 per Stone and Buchanan JJ),

“...the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability:

(a) has indicated an acceptance of wrongdoing and a suitable and credible expression of regret; and/or

(b) has indicated a willingness to facilitate the course of justice”.

- 17.4. The comments of Federal Magistrate Mowbray in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 (16 January 2007)¹⁸ are also to be considered carefully,

¹⁸ Note, this decision relates to the *Workplace Relations Act 1996*, as the predecessor to the FW Act.

“[22] It is also relevant to note that the maximum penalty has been increased very significantly in the last two years. It was raised from \$10,000 to \$33,000, an increase of 230 per cent. In view of this large increase the following comments of Merkel J in a slightly different context at [72] in *Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847 are apposite – also noting that the maximum penalty for each contravention that Merkel J was considering was \$10,000

Finally I note that the penalties imposed in the present case ... greatly exceed penalties imposed under the WR Act or its predecessors in previous cases. It may be that breaches by unions and employers of industrial legislation from time to time have been accepted as part of the give and take of industrial disputation. However, in recent years industrial legislation has increasingly codified and prescribed what is acceptable, and what is unacceptable, industrial conduct. The legislature has, over time, also moved to increase the penalties that may be imposed in respect of unlawful industrial conduct. In my view, any light handed approach that might have been taken in the past to serious, willful and ongoing breaches of the industrial laws should no longer be applicable.

- 17.5. The FWO may make submissions as to an appropriate penalty. The FWO will seek appropriate penalties in the circumstances. Defendants/respondents should note that an eligible court will be guided, but not bound, by any submission the FWO makes in relation to penalty.

18. Publishing and utilising enforcement activity

- 18.1. Fair and accurate publication of the nature and outcome of enforcement activities (whether litigation, Enforceable Undertakings, Compliance Notices or letters of caution) draws attention to the consequences of contravening Commonwealth workplace laws. It is a valuable tool both for educating workplace participants and deterring non-compliance.
- 18.2. Therefore, the FWO may decide to publish (including on its website) and/or utilise information about its enforcement activities to leverage the outcome of inspection and enforcement activity, including litigation.

For example, the FWO may:

- (a) in respect of a litigation matter, publicise the decision to commence proceedings, the lodgement of court processes, directions hearings, decisions (whether the litigation results in a penalty being imposed or not), penalty hearings and the final penalty, if the FWO determines that publicising any (or all) of these stages will support compliance with Commonwealth workplace laws;
- (b) publish information about its enforcement activities to enhance specific and general deterrence;
- (c) inform workplace participants in the same and similar industries of the nature and outcome of enforcement activities and provide advice in relation to how to prevent similar contraventions; and
- (d) utilise information from enforcement activities to inform future inspection activity particularly on a systemic level.

Compliance and Enforcement Policy

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Australian Government

Fair Work
OMBUDSMAN

The Fair Work Ombudsman [FWO] is an independent statutory agency created by the *Fair Work Act 2009* [the Act]. The role of the FWO is to promote harmonious, productive and cooperative workplace relations, and to monitor, inquire into, investigate, and enforce compliance with relevant Commonwealth workplace laws.

This policy explains how we seek to ensure compliance with Commonwealth workplace laws. By Commonwealth workplace laws, we mean the Act, its regulations and the awards and agreements that set wages and conditions for Australian workplaces.

1. Our guiding principles

We want to promote a culture of compliance by equipping Australian workers and businesses with the information and support they need to make good choices in their workplaces.

Our work is guided by the following principles:

Principles	We:
Clear and effective communication	<ul style="list-style-type: none"> ■ listen to the workplace concerns of workers and business ■ provide advice that is easy to access, understand and apply
Professional customer service	<ul style="list-style-type: none"> ■ deliver a consistent and professional experience in every customer interaction ■ offer multiple ways to connect with us ■ provide practical advice and assistance that is responsive, professional and impartial
Consistency	<ul style="list-style-type: none"> ■ give practical advice which can be relied upon ■ ensure a level playing field where the same rules apply to everyone ■ apply the same assessment principles to each request for assistance ■ consider the same range of factors in deciding how to treat a matter
Risk-based and proportionate	<ul style="list-style-type: none"> ■ focus our compliance and enforcement efforts where there is serious non-compliance and where we can deliver the greatest benefit ■ consider risk in terms of potential impact on the community, as well as the relative risk of exploitation individuals face ■ encourage and empower employees and employers to resolve issues in their workplace, where appropriate

	<ul style="list-style-type: none"> ■ offer a range of dispute resolution tools and resources
Open and transparent	<ul style="list-style-type: none"> ■ remain neutral and impartial ■ give the parties the right to review all our decisions ■ publish information on our compliance and enforcement activities in a format that is clear, understandable and accessible ■ ensure our customers' private details are kept confidential
Collaborative	<ul style="list-style-type: none"> ■ build relationships with stakeholders and the community based on trust and respect ■ work with stakeholders to find solutions to workplace issues and opportunities to collaborate ■ harness intelligence and insight from a range of sources including other government agencies to inform our compliance and enforcement activities ■ listen to the community's expectations of us
Continuous improvement	<ul style="list-style-type: none"> ■ measure the impact of our interactions with customers and use this information to improve our services ■ seek feedback on our processes, policies and practices and make changes to improve them ■ adopt leading technologies to transform our services to be more efficient and effective
Affect cultural change	<ul style="list-style-type: none"> ■ develop solutions to address structural and behavioural drivers that lead to widespread non-compliance in certain industries and sectors ■ focus our efforts on supporting productivity by preventing workplace disputes

2. Advice, support and assistance

A core part of our role is providing practical workplace relations advice and assistance that is easy to access, understand and apply. Helping the community understand the workplace relations system is one of the ways that we support compliant, productive and inclusive workplaces.

This is why we provide the Fair Work Infoline and Small Business Helpline. We also provide information, tools and resources through our website (fairwork.gov.au), Facebook, Twitter, LinkedIn and YouTube. These free tools and resources (which we continue to develop) are available 24/7 on our website and include:

- An [online learning centre](#) that has video-based interactive courses to teach businesses and workers skills and strategies to help them at work
- [fact sheets](#) about the minimum rights and obligations of businesses and workers, including information on the National Employment Standards, record-keeping and pay slips
- [best practice guides](#) to help small to medium-sized businesses with implementing best practice workplace policies and procedures
- [templates](#) that simplify the work in keeping employment records
- our [Pay Calculator](#) to help calculate modern award pay rates
- [My account](#) which allows users to save tailored information such as pay rates and conditions of employment specific to their circumstances. Users can log into My account and view saved information at any time.

We encourage people to use our self-service tools and resources to find answers and have conversations in their workplaces. For most people, understanding workplace rights and obligations means that issues can be resolved at the workplace level without intervention from us. If we can't help you because the issue falls outside of our area of responsibility, we will refer you to the people who can.

CASE STUDY – Self help tools:

Jim is a mechanic at a local garage. Driving home from work, he heard on the radio that award rates of pay had recently gone up. Jim knew he was paid the old award rate, and he had not received an increase yet.

When he got home, Jim went to fairwork.gov.au to check his rate of pay. Using our pay calculator, he got the new award rate and printed a copy for his boss Miguel. Jim also completed our *Difficult conversations in the workplace* online learning course to prepare himself for a discussion with Miguel.

The next day at work, Jim found a good time to talk to Miguel about his pay. Miguel did not know about the increase, so Jim told him about the pay calculator and gave him the print out.

Miguel said he would need to check for himself. The following day, Miguel used the pay calculator and confirmed that Jim was right. As a result, Miguel organised for Jim's pay to be increased to the new award rate. Miguel also registered for My account and subscribed to our email updates to receive information on future pay increases.

3. Campaigns

Campaigns help us check, improve and maintain compliance with Commonwealth workplace laws in a targeted way.

We take a risk-based and proportionate approach to determining which industries, locations and workplace relations issues to focus on. This includes gathering intelligence to ensure our campaigns are evidence-based and deliver the greatest benefit.

An important part of our campaigns is gaining the support of, and working with, groups such as industry associations, employer representatives, unions and community groups.

During a campaign, we communicate with employers and employees about Commonwealth workplace laws. This communication can be through letters, phone calls, visits from our Fair Work Inspectors, social media, or our website fairwork.gov.au.

We also look at employee time and wage records to check compliance with Commonwealth workplace laws.

If we find that employers are not meeting their obligations, we work closely with them to help them fix any errors.

After each campaign, we release a report showing the results, insights and further actions on our website.

CASE STUDY - Campaign:

We conducted extensive research to identify industry sectors of non-compliance and/or those with a high number of vulnerable employees. The research indicated a need to focus on apprentices. We worked closely with industry stakeholders in planning and designing a national campaign targeting apprentices. The purpose of the campaign was to help businesses across a variety of industries understand and comply with workplace laws and to test levels of compliance.

Robert employs an apprentice in his hairdressing salon in Sydney. Through Facebook he saw that we were starting a national campaign targeting apprentices and requested our assistance to check he was complying with the law. As part of the campaign Fair Work Inspectors contacted more than 700 businesses, by mail and in person, to ensure employers like Robert were aware of their workplace obligations and to examine pay records.

Fair Work Inspectors checked that employers were paying the correct minimum hourly rate, penalty rates and allowances and were complying with pay slip and record-keeping requirements. These checks included site visits and where businesses were found to have made a mistake, Inspectors worked with them to fix errors and make any necessary back payments to employees. The most serious instances of non-compliance were considered for further action.

Fair Work Inspectors also took the opportunity to assist employers to use the tools and resources available to help them manage their workplace and understand and comply with their obligations. In response to his request, Robert also received this assistance.

The campaign provided a useful snapshot of issues which will influence our decisions regarding apprentices. A campaign report containing a number of findings and recommendations was published on our website and provided to industry stakeholders.

4. Compliance partnerships

We encourage employers that want to publicly demonstrate their commitment to creating compliant, productive and inclusive Australian workplaces to enter into partnership agreements with us.

Compliance partnerships give employers, and importantly their staff, certainty that their systems and processes are working effectively and help build a culture of compliance. Their public commitment to compliance is also a competitive advantage that helps attract talent, instil confidence in customers and appeal to organisations in their supply chain. For example, compliance partnerships provide an opportunity for franchise operators and head contractors to work with franchisees and sub-contractors to drive workplace improvements throughout their supply chain.

Compliance partnerships can be tailored for individual businesses and circumstances and can include:

- employer initiatives to engage with employees
- self-audits
- the monitoring of contractors and franchisees
- ensuring effective dispute resolution processes
- implementing workplace relations training for key managers and staff.

Compliance partnerships are becoming increasingly popular with businesses who wish to make a strong and public commitment to their employees, contractors, customers and the broader community about compliance with workplace laws. Names of enterprises and/or their brands that have entered into a compliance partnership with the FWO can be found [on our website](http://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/proactive-compliance-deeds): (<http://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/proactive-compliance-deeds>)

CASE STUDY – Compliance partnership:

Franchisor Pty Ltd read about compliance partnerships on fairwork.gov.au and thought it would be a good program to be in to make a positive and public statement of its commitment to compliance with Commonwealth workplace laws.

Franchisor Pty Ltd approached us to find out what the arrangements would be.

After some discussion about the structure and relationships within the brand, Franchisor Pty Ltd entered into a compliance partnership which involved:

- establishing an employee enquiry line available to both direct employees and employees of franchisees
- establishing systems and processes to promote compliance and report on these
- conducting self-audits of employee entitlements of direct employees
- facilitating self-audits of employee entitlements of a sample of franchisees
- working with us to resolve workplace disputes if a request for assistance was received by us from an employee of a franchisee, and reporting the outcome to us
- reporting annually on the status of the compliance partnership.

Franchisor Pty Ltd's compliance partnership was published on the our website and was also the subject of a FWO media release, resulting in positive messages for Franchisor Pty Ltd's brand.

As a result of the compliance partnership, franchisees reported that they found compliance with workplace laws easier. They said that by better understanding their obligations they were able to focus on 'running their business'. The head franchisor also reported feedback that it had improved its public standing as an 'employer of choice' resulting in lower staff turnover costs because employees were confident that their employer was providing all their entitlements.

5. Early involvement

We receive a large number of telephone requests for assistance. Callers include employees and employers who have a concern about their workplace. In these situations we find that if we get involved early, we can help the parties resolve issues at the workplace level. We encourage and empower employees and employers to self-resolve issues in their workplace where possible. We can also offer a mediation service where both sides come up with solutions together that will work for them.

CASE STUDY – Early involvement:

Nadia called us and said she was being underpaid by her employer Robin. Nadia was unsure about how to raise this issue and did not want to upset her relationship with Robin as she was still working for the business.

We helped Nadia by advising her on the award and hourly rate of pay that applied. We encouraged Nadia to have a discussion with Robin to address the wages issues by giving her practical tips and guiding her through our online self-resolution tools, such as the *Difficult conversations in the workplace* online learning module.

Nadia emailed Robin with her concerns and met with Robin to discuss her situation. Robin wasn't sure about her obligations so she rang our Small Business Helpline to check what she had to do. After speaking with us, and Nadia, Robin raised Nadia's wages to the correct amount and back paid Nadia to fix the underpayment.

Our practical assistance empowered Nadia to resolve the issue directly with Robin without escalating it further. This also meant that Nadia was able to maintain a positive relationship with Robin.

6. Assessing requests for assistance involving workplace disputes

We receive many requests for assistance from workers who have a dispute about their wages or other issues with their employer. We describe the worker and the business in these cases as the parties to the request for assistance.

6.1 Assessment

When we receive a request for assistance or we are alerted to a possible workplace dispute, we consider how best we can help through an assessment of the issues by experienced officers.

We understand that not everyone needs the same type of assistance. Depending on the individual's circumstance, the issues at the workplace and the situation more generally, we provide a tailored response appropriate to the matter.

6.2 What do we consider?

In deciding how we will act, we consider the seriousness of the alleged conduct and the circumstances of the parties, as well as the practical issues involved in resolving the matter.

This includes whether the request for assistance involves:

- public interest (where the community would expect us to be involved)
- a party facing significant barriers to resolving the matter themselves, for example, low levels of literacy or comprehension
- a small business owner, who has limited access to a human resources expert
- a party who has had previous issues with compliance
- an alleged breach appears to be deliberate
- sufficient information to support an argument that a breach has occurred
- confidentiality (where the employee does not want us to tell the business that a request came from them)
- the parties having made any attempts to resolve the matter
- breaches of monetary entitlements where the amount is significant
- minimum entitlements as opposed to above award conditions (we give priority to minimum entitlements, that is, entitlements set out in the Act, a Modern Award or Enterprise Agreement)
- an employment relationship that has ended, including how long ago the employment ended (we generally do not pursue matters that are more than two years old).

As an example, we would act differently in a case where a young person is being paid less than the minimum wage than in a case where an employee on above award wages hasn't received the bonus they are entitled to.

6.3 What action are we likely to take?

Where a request for assistance concerns wages or conditions and there appears to be no exploitation or deliberate non-compliance, we help the parties resolve the issue quickly and informally.

We have found that in most cases the issue can be resolved between the parties with some help from us. We want parties to resolve these matters with minimal expense, time and stress. A formal investigation is generally not the best approach in these cases. Rather we help the parties work through their issues together.

Typically this involves speaking to both parties and understanding each side's view. We help them understand how Commonwealth workplace laws apply to their situation and give both sides information about relevant awards or parts of the Act.

A request for assistance about a workplace dispute usually results in us taking one or more of the following actions:

- using the information provided in future education and compliance activities
- giving tailored advice to help parties deal with the matter and get a better understanding of Commonwealth workplace laws
- helping people to resolve an issue quickly and informally in the workplace by providing access to employment tools and resources
- referring the information to another government agency
- conducting an inquiry
- offering mediation
- conducting an investigation
- placing parties on notice about our concerns and the possibility of future action if the conduct continues or happens again
- assisting an employee to take their own action (such as through a small claims court)
- determining that there is no action required at this time.

In all cases the information given to us is important, and helps us to determine our current and future activities.

We find that most matters can be resolved through mediation.

7. Mediation

Mediation is a free, simple, confidential and voluntary process conducted by an accredited impartial mediator.

Mediation is a two-way process that gives parties the opportunity to discuss their dispute and find mutually acceptable solutions. Many requests for assistance we receive are suitable for mediation and most mediations lead to a resolution.

As a guide, mediation is suitable where:

- the employee still works for the employer
- there is conflicting evidence (e.g. one word against the other)
- there is little or no evidence (e.g. no records of additional hours worked)
- there are issues about final entitlements (e.g. payment in lieu of notice and annual leave)
- the employee is award-free or there are issues about common law contracts or above award entitlements
- the employer has withheld money or made deductions from wages
- there are allegations of property taken from the employer
- there is a classification dispute, or
- the employee and employer seek a quick solution to an issue.

Mediation is an easy process held over the telephone. It usually takes less than 90 minutes. The mediator takes a neutral stance while helping parties to reach a settlement on the day of the mediation; however it is the parties who control the outcome. For more information visit the [mediation page](http://www.fairwork.gov.au/mediation) on our website (www.fairwork.gov.au/mediation).

CASE STUDY - Mediation:

Fatima worked at Ying's hairdressing salon and says that Ying owes her one week's wages. Fatima and Ying were friends before this issue arose, and both wanted to mediate the issue. In mediation, Fatima said that she was disappointed with Ying. Ying explained that her ex-husband looked after the payroll and when they divorced, she was left to deal with everything without any help and had been unable to fix Fatima's wages.

After discussion, Fatima said she was upset because she wanted Ying to take some responsibility for what happened. Ying apologised and said the business was struggling. Fatima and Ying agreed that it was hard to earn money as a business or as an employee. Through mediation, Fatima and Ying agreed to resolve this matter by having the wages paid in instalments to Fatima. Both were happy with this outcome.

8. Promoting compliance – what to expect

One of our main roles is to promote compliance with Commonwealth workplace laws.

Our inquiries and investigations are important ways we obtain evidence of serious non-compliance. We measure the seriousness of non-compliance by the potential impact it has on an individual, group or market. We may decide to conduct an inquiry or investigation where the available evidence suggests there is:

- exploitation of vulnerable workers (e.g. aged, young, overseas)
- significant public interest or concern (e.g. pregnancy and age discrimination)
- blatant disregard for the law, or a court or commission order
- deliberate distortion of a level playing field to gain a commercial advantage (e.g. large scale non-compliance that distorts the labour market), or
- an opportunity to provide an educative or deterrent effect.

We regularly review our compliance priorities to meet the changing needs of the Australian community. These are the areas we consider to be **serious non-compliance priorities**.

While we focus on these priority areas, we continue to monitor compliance more broadly and take action where needed. Deliberate or repeated breaches of Commonwealth workplace laws are treated seriously.

CASE STUDY – Promoting compliance:

Lina went on unpaid parental leave following the birth of her child. After six months, she advised her employer Justine that she was ready to return to work. Justine told Lina that she had been replaced with another person, and there was no job for Lina.

Lina requested our assistance. We investigated the matter and explained the relevant workplace laws to Justine, including the pregnancy discrimination provisions of the Act. As a result, Justine made changes to her business so that she followed the law. These changes included training her managers, guaranteeing that employees would return to their old position after parental leave, communicating better with pregnant employees, and developing internal policies and a toolkit to help all her staff understand parental leave. As a result of Justine's response, we did not need to take any further enforcement action.

8. Inquiring into a matter

We sometimes receive information from the media or the public which suggests non-compliance. We often decide to inquire initially into the matter rather than commence an investigation. In doing so, we encourage all parties involved to speak with us and provide information that supports their point of view. Our focus is on helping the parties, where possible, to comply with the law and resolve the matter quickly and informally.

During such an inquiry we may ask parties to provide evidence such as time and wage records, or other documents. Where an inquiry finds deliberate or repeated breaches of Commonwealth workplace laws, the matter will be treated seriously and investigated. Where evidence is disputed, parties may be encouraged to resolve the matter through a small claims procedure.

In other situations, where we believe that the information we have received from the public warrants detailed research, we may decide to conduct a comprehensive Inquiry. This type of inquiry reviews allegations of serious non-compliance with Commonwealth workplace laws by looking at information about what has happened or is happening in a particular workplace, industry, supply chain or labour market. After our review, we form recommendations and actions based upon our findings, including the possibility of an enforcement outcome. We also publish the findings from this type of inquiry on our website.

CASE STUDY – Inquiry:

We launched an Inquiry following a significant increase in the number of requests for assistance received from hotel housekeepers. The focus of the Inquiry was the misclassification of hotel housekeepers as independent contractors, when in fact they were employees.

We sought to identify the scale and cause of the misclassification, and determine how to ensure hotel operators correctly classify housekeepers in the future.

The Inquiry included unannounced visits by Fair Work Inspectors to several major hotels, interviewing housekeepers, issuing Notices to Produce documents, assessing contracts and interviewing procurement managers.

At two of the hotel groups, the Inquiry found evidence of contraventions of the Act concerning misclassification. The housekeepers at these hotels were being denied applicable penalty rates, regular patterns of work and accrual of leave entitlements due to their misclassification as independent contractors.

The Inquiry also found evidence of sham contracting arrangements at a major hotel group involving contracted cleaners. The cleaners were predominantly international students on visas working solely for a particular hotel with no autonomy in their day to day work. They were receiving a flat rate of pay and having to pay for the cost of chemicals, uniforms and administration fees.

In our preliminary findings report we recommended a range of compliance and enforcement outcomes including Letters of Caution, Compliance Notices, an Enforceable Undertaking and litigation against the respective hotel brands.

The report also recommended steps to improve compliance such as how hotels can enhance the management of their procurement practices within their supply chain including ensuring the principal contractors and sub-contractors comply with the law.

9. Investigating a matter

In circumstances which involve serious non-compliance we may conduct an investigation. This happens only in a very small number of cases.

An investigation is where a Fair Work Inspector considers allegations and gathers and examines evidence to determine if there have been breaches of Commonwealth workplace laws.

We do not represent any party. All investigations are impartial and the Fair Work Inspector will rely on the evidence available when making a decision.

We will always provide each party the opportunity to be heard during an investigation. We also use discretion to decide on the best process or reach the best outcome for an investigation.

In an investigation, a Fair Work Inspector can use powers under the Act to visit workplaces, interview people or require records or documents to be provided.

During an investigation, we expect all people to:

- always tell us the truth
- fully disclose all relevant matters from the outset of the investigation
- provide us with relevant information as it comes to hand
- respond in a timely manner to our requests.

The Fair Work Inspector handling the investigation will update the parties with developments at regular intervals.

The Fair Work Inspector will advise parties of investigation findings in writing and include details of how the outcome was decided. The findings will be provided within seven working days of the Fair Work Inspector's decision.

We seek to be reasonable and proportionate when conducting investigations. The average duration of an investigation is three months.

CASE STUDY – Investigation:

Ishan's employees had taken unprotected industrial action and he was successful in obtaining an order from the Fair Work Commission that required the employees to return to work. The industrial action caused his business significant economic loss.

However, Ishan kept paying his employees during the unprotected industrial action, which is not allowed under the Act. We investigated and Ishan said that due to the nature of the industrial action, it was hard for him to tell which employees had participated. We found that Ishan's business had a history of responding to industrial action by requesting certain orders from the Fair Work Commission, but the business itself did not have proper processes and systems in place to identify the people who took part in unprotected industrial action.

We were mindful of the cost to the business that had been caused by the industrial action. We also needed the business to fix the issue, and not breach the Act again.

Ishan formally agreed to introduce processes and systems to manage compliance with industrial action obligations, so that he would comply with the Act in future. This outcome reinforced the importance and integrity of the industrial action provisions of the Act, while acknowledging no formal penalty was needed to seek compliance from Ishan.

Our responses following an investigation typically include:

10.1 Findings letter

A findings letter is sent to the parties setting out what we found from the evidence gathered in an investigation. It tells a party what we have found, what they need to do next, and what we intend to do.

For instance, we may find there was no evidence of any breaches. At other times, we may find breaches and will ask the party to fix these (e.g. by back paying an employee).

CASE STUDY – Findings letter:

Pauline, a part-time employee, had worked for a coffee shop for over 12 months. Pauline asked us for help because she received less than the award pay rate and was not paid extra for working on the weekend.

A Fair Work Inspector investigated the matter, gathering evidence including documents and statements from Pauline, her employer Chris, and a witness. The Fair Work Inspector assessed the evidence and found a number of breaches. The Fair Work Inspector sent a findings letter to Chris and Pauline. The findings letter detailed the award obligations on minimum pay rates, and the penalty rates for weekends and evening work. The findings letter also explained the website tools that could help Chris to pay staff correctly, and asked Chris to back pay Pauline \$850 to make good the underpayment. Chris paid Pauline and now knows about the tools on the website that will assist compliance in the future.

10.2 Tailored small claims assistance

Sometimes a request for assistance involving a workplace dispute is assessed as suitable for an employee to seek their own recovery of unpaid entitlements through specified courts.

These small claims applications have low fees and are dealt with by the courts less formally than other applications made to courts. The small claims process is a fast and efficient way of resolving a dispute.

When deciding whether to refer an employee to a small claims process we consider:

the amount of money being claimed

how serious the allegations are

whether the money being claimed is related to a common law contract or an above award payment

whether attempts at voluntary recovery (such as mediation) have been made

whether evidence is being disputed or there are written records

the employee's ability to follow the small claims process

whether the employment period ended more than two years ago.

When parties are referred to the small claims process we assist by directing them to tools and resources that explain the small claims process and help them to calculate minimum employment entitlements. These resources are available [on our website \(www.fairwork.gov.au/smallclaims\)](http://www.fairwork.gov.au/smallclaims).

In some cases where we have found that an employee is owed money, we may assist them through the small claims procedure, for example, by helping with the small claims application. The level of assistance is considered on a case by case basis. For example, we may give greater help to a person with low literacy skills or from a culturally and linguistically diverse background.

CASE STUDY - Small claims:

George is a sales representative and earns \$60,000 per year which is significantly higher than the minimum award entitlement for his job. George advised us that he was owed \$2,000 for working extra hours.

George kept diary notes for some of the extra hours and said he was told to work these hours by his employer Mariana. Mariana disputed that the business owed George any money or that George was directed to work the extra hours. They were unable to agree on a resolution.

We explained the small claims process to both George and Mariana and encouraged them to try and resolve the issues once more between themselves in order to avoid the court process.

We showed George how to complete a small claims application form, how to present written evidence and how to set out calculations of what he believed was owing to him.

We advised Mariana on how to defend a small claims application and how to present written evidence.

We also explained to both parties that they may need to give verbal evidence in court about whether George was directed to work extra hours.

10.3 Letter of caution

A letter of caution is a written warning given to a party when we have found breaches and want to put them on notice that future breaches could result in us seeking financial penalties.

A letter of caution is typically used to encourage compliance in the dispute before us and to ensure future activities of the party are monitored in case of future non-compliance.

CASE STUDY - Letter of caution:

Peng worked in sales for five months, but did not receive a regular income during that time. He was told that he was engaged as an independent contractor on a commission-only basis. He received \$1,600 in commission over the five months.

We investigated and considered all the evidence. We found that Peng was an employee under an award, and not an independent contractor. His employer Bertrand had seriously breached the award, the Act and failed to provide many entitlements due to Peng including wages, allowances and annual leave. Bertrand claimed he had been unaware of the possibility Peng may have been an employee.

Bertrand agreed to pay the entitlements owing to Peng as an employee. Due to the significant breaches, we gave Bertrand a letter of caution, advising him that we would take any further breaches into account when deciding whether to start litigation or other enforcement action against him in the future.

10. Promoting compliance - enforcement outcomes

An enforcement outcome is where we decide that formal action under the Act is the appropriate response to breaches we have found.

There are four enforcement outcomes available to us at law. The Act sets out the legal requirements for each enforcement outcome, as well as things such as time limits and what powers courts have to make orders and impose financial penalties.

11.1 Infringement Notice

An Infringement Notice is a fine given for breaching the record-keeping or pay slip requirements of the Act and the Regulations.

Infringement Notices can be issued up to 12 months after the breach occurred.

We have discretion over whether an Infringement Notice is issued and the amount of the fine (up to the legal maximum). We will consider matters such as:

- whether the breach impedes a Fair Work Inspector's ability to find or calculate underpayments
- whether the breach meant that an employee did not have information needed to recover entitlements
- whether the employer has a history of breaching time and wage record-keeping or pay slip requirements
- whether the breach was deliberate to avoid obligations under Commonwealth workplace laws
- whether the breach had significant implications, for example an employee being unable to secure a loan due to lack of pay records.

The current maximum fines in Infringement Notices for each breach of a record-keeping or pay slip obligation are:

- \$510 for an individual or \$2,550 for a body corporate for breaches of the Act
- \$340 for an individual or \$1,700 for a body corporate for breaches of the Regulations.

If an employer thinks a mistake occurred and they have not breached record-keeping or pay slip obligations they can make an application to us to have the Infringement Notice reconsidered and withdrawn.

CASE STUDY - Infringement Notice:

Valentina worked for a company as a full-time administrative assistant. She was concerned that her pay had not increased after she turned 18. She thought she was still being paid the 17-year old rate, but she could not be sure as her employer Karl had not given her pay slips for seven months. She also worked some overtime, but was not always paid for this.

Valentina sought our assistance, and we found that Karl had not paid Valentina the correct entitlements. Karl paid Valentina the money owing, and agreed he had overlooked her award increase when she turned 18.

We also gave Karl's company two Infringement Notices for \$850 each, which represents one third of the maximum amount. This amount was settled on because Karl did not have a history of non-compliance. The first Infringement Notice was because Karl failed to keep proper records of Valentina's overtime hours, which may have caused Valentina to miss out on some entitlements. The second Infringement Notice was for failing to give Valentina pay slips, which meant she could not be sure of the gross wages or overtime paid to her each week.

These breaches of the Act by Karl's company resulted in total fines of \$1700 to be paid within 28 days. We also gave Karl information and templates to help him in complying with his pay slip and record-keeping obligations in the future.

11.2 Compliance Notice

A Compliance Notice is a written notice that legally requires a person to do certain things to fix breaches of the Act.

A Compliance Notice can be used where a Fair Work Inspector reasonably believes that a person has breached a term of the National Employment Standards, a modern award, enterprise agreement or other instrument that specifies wage rates and entitlements.

We typically issue Compliance Notices where an employer hasn't agreed to, or we suspect the employer won't, rectify an alleged breach. A person who has received a Compliance Notice may seek a review through the courts.

The decision to issue a Compliance Notice is not taken lightly, as a failure to do what the Compliance Notice requires in the time stated is likely to result in us starting legal proceedings in a court. We can take action for both the original breaches and the failure to comply with the Compliance Notice. A failure to comply can result in significant financial penalties of up to \$25,500 for a company and \$5,100 for an individual.

When considering whether to issue a Compliance Notice, a Fair Work Inspector will consider:

- the nature and extent of the breaches
- the level of cooperation from the employer
- whether the Compliance Notice will achieve a better and/or faster outcome
- the desire to bring about a cost effective and quick resolution to recover underpayments owed to individuals.

CASE STUDY - Compliance Notice:

A Fair Work Inspector investigated a matter involving Moshe, a 19 year old working in a child care centre. The investigation found that over six months his employer Stella had underpaid Moshe \$2,300 in wages and annual leave on termination.

Stella told the Fair Work Inspector that she would not pay as Moshe had not been a hard worker and did not deserve any more money. The Fair Work Inspector ensured Stella knew she legally had to make the payment, and explained that issues with Moshe's performance needed to be dealt with during her employment and were not a reason to pay less than the legal minimum. Stella still refused to pay the money owing.

The Fair Work Inspector then gave Stella a Compliance Notice that said she needed to make payment within a set timeframe. The Fair Work Inspector made it clear that if Stella did not make the payment by the due date she may face penalties in a court. Stella researched her obligations and realised that she did need to pay Moshe the minimum pay rates and annual leave, even if she had concerns about Moshe's work. Stella decided to pay Moshe the full amount owing by the due date in the Compliance Notice.

11.3 Enforceable Undertaking

When we believe that someone has seriously breached the Act, the breach is serious and they acknowledge this, accept responsibility and agree to fix the harm, we can accept a written undertaking from the person about the breaches.

The key difference between an Enforceable Undertaking and a Compliance Notice is an Enforceable Undertaking involves not only the payment of all monies owed but admission

and contrition from the party who has breached the law. In addition, an Enforceable Undertaking covers a broader range of conduct and broader remedies.

We use Enforceable Undertakings where an employer has acknowledged they've breached the law, accepted responsibility and agreed to cooperate with us and fix the problem.

Many of the initiatives included in Enforceable Undertakings help to build a greater understanding of workplace responsibilities, motivate the company to do the right thing and help them avoid making the same mistake again.

Enforceable Undertakings are set out in a publicly available and legally binding document. Importantly, we can take legal action in a court to enforce the terms of an Enforceable Undertaking if it is not complied with.

Enforceable Undertakings typically operate for a period of between 2 – 5 years and often include terms about fixing loss or damage caused (e.g. by paying compensation or back pay). They also deal with future compliance and what the person will do in the future to prevent more breaches, such as training sessions for senior managers. Enforceable Undertakings also require people to report on compliance at specific times or when a particular action is undertaken, such as a self-audit.

We may offer a person the option to enter into an Enforceable Undertaking as an alternative to us starting legal proceedings. We also consider offers from people of entering into an Enforceable Undertaking in response to breaches we have found.

When deciding whether to enter into an Enforceable Undertaking, we consider:

- the nature, extent and seriousness of the breaches
- the prior compliance history of the person
- whether the person admits the breaches and what they propose to do to fix or prevent breaches, beyond just complying with minimum standards in future
- the attitude of the respondent
- whether the undertakings are relevant to the breaches and will achieve positive outcomes for employees and/or the community
- whether an undertaking is a superior outcome over litigation, including whether it brings specific and general deterrence and promotes compliance with the Act.

CASE STUDY - Enforceable Undertaking:

Jill had paid her employees flat rates of pay that did not meet the minimum award provisions. A Fair Work Inspector found that the total underpayments to Jill's employees over a year were more than \$50,000.

Jill cooperated with us during the investigation, and admitted all the breaches. She entered into an Enforceable Undertaking with us, in which she agreed to pay the full amounts owing to all employees under an instalment plan. She also agreed in the Enforceable Undertaking to make a written apology to employees, and take all reasonable steps to ensure that she met her workplace obligations in the future, including participating in workplace relations training.

Jill's actions were made public on our website through the terms of the Enforceable Undertaking.

11. Litigation

In the most serious instances of non-compliance we take cases to court to enforce the law or seek a penalty. We call these court cases litigations. Cases that are suitable for litigation typically involve a combination of the following factors:

- deliberate and/or repeated non-compliance, measured by the impact the non-compliance has on an individual, business, group or market
- exploitation of vulnerable workers
- failure to cooperate and fix breaches after being given the opportunity to do so
- parties with a prior history of breaches who have not taken adequate steps to ensure compliance despite being advised of the consequences in the past.

Litigation is an essential enforcement action for three reasons:

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

Legal action is taken where we have sufficient evidence and, on balance, we consider it is in the public interest and a proper response to the conduct. Detailed information about how we make decisions to start litigation is set out in our [Guidance Note 1 - Litigation Policy](#):

<http://www.fairwork.gov.au/about-us/policies-and-guides/internal-policies-and-plans#guidenote>)

Where a court determines that breaches have occurred, a range of outcomes are available to the court. We will ask the court for outcomes that balance our aims of general and specific deterrence with the issues relevant in a case. In addition to financial penalties, we may seek other orders including back pay or compensation, injunctions, and/or requirements to undertake training or implement other practices to address the breaches.

CASE STUDY – Litigation:

We had dealt with a number of requests for assistance from former employees about the same employer 12 months earlier. Underpayments had occurred and they were voluntarily fixed.

So when we were contacted again by employees from this employer the Fair Work Inspector organised a meeting with the business owner to get their side of the story. The employer acknowledged that employees had been underpaid and said they would provide the relevant time and wage records.

When the records were not forthcoming, the Fair Work Inspector made a formal request for the records in the form of a Notice to Produce documents under the Act. A few months later some records were provided.

The Fair Work Inspector contacted the employer in person, via phone and by email to access the rest of the records. After using what was available to calculate amounts owing, the Fair Work Inspector attempted to inform the employer of the findings by mail, email and phone.

In total, the Fair Work Inspector initiated 33 separate and largely unsuccessful points of contact with the employer over a 16 month period in an attempt to resolve the matter.

The employer blatantly refused to engage with us and rectify problems that the employer acknowledged did occur, leaving us with few options other than to progress to court.

In the end, nearly two years after the requests for assistance had been made, the Federal Court ruled that the employer needed to back pay over \$12,000 to nine staff, including two junior employees, as well as ordering the company to pay penalties of over \$19,000, and the Director almost \$4,500.

12. Publication of enforcement outcomes

We publish information regarding our enforcement activities on our website. This forms an important part of our role in ensuring compliance with Commonwealth workplace laws by:

- enhancing general and specific deterrence
- informing and educating the community, or people in the same and similar industries, of the nature and outcome of enforcement activities
- providing advice about how to prevent similar breaches.

Information we publish will be fair and accurate. We may decide to publish information on our website, including by issuing media releases. Information may also be used in reports, presentations or other educative material.

In litigation matters we may publicise the decision to commence proceedings, the lodgement of court documents, milestones during proceedings, directions hearings, and/or decisions (whether there are financial penalties or orders or neither). We will publish information if we believe that publicising any or all of these stages will support compliance with Commonwealth workplace laws.

We publish this information for two reasons:

- visibility of our enforcement activity sends a powerful message of deterrence to others
- clarification of the law and the level of penalties that certain breaches incur can help people understand the seriousness of breaking the law.

13. Working with other agencies

We are not always the agency best placed to deal with an issue. For example, a number of authorities specialise in handling superannuation, visa issues or bullying.

Where we believe another agency can provide greater assistance, we will refer the issue as early as possible.

We may share information with other government agencies or departments where authorised by the Act. For example, we may share information where disclosure is necessary, appropriate, or likely to assist administration or enforcement of a law of the Commonwealth, a State or a Territory.

Examples of agencies we may share information with include Fair Work Building and Construction, the Australian Taxation Office and the Department of Immigration and Border Protection. We also receive information from these government agencies at times which assists us do our work.

14. Feedback

We encourage feedback on any matter, and invite people to contact us at yourfeedback@fwo.gov.au

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