

1. General Principles

1.1 Introduction

The **FWO Operations Manual** (the Manual) provides a framework for the conduct of formal dispute resolution and compliance activity undertaken by staff of the Office of the Fair Work Ombudsman (FWO), including its Fair Work Inspectors.

In accord with the business imperatives of the [FWO Strategic Plan 2012-2016](#), the Manual details the key principles that underlie the dispute resolution and compliance activity of the FWO, and updates the content contained in previous versions of the Manual.

The Manual is to be read in conjunction with public agency documents such as the [FWO Guidance Notes](#).

1.2 Purpose of the Manual

In describing certain features applicable to all dispute resolution and compliance activities conducted by FWO staff, and Fair Work Inspectors in particular, the Manual seeks to provide an overview of the principles that reinforce key concepts and techniques held in common.

To ensure best practice and national consistency in all of the FWO's formal dispute resolution and compliance activities, the Manual contains links to internal Guides and other material contained on the FWO intranet.

The integrity and transparency of the decision making process in all its formal dispute resolution and compliance activities is critical to both the efficacy and reputation of the FWO. For this reason, the Manual provides clear boundaries within which Fair Work Inspectors are expected to operate while at the same time deliberately empowering Fair Work Inspectors to exercise discretion based upon their experience and knowledge.

The Manual does not map a step-by-step approach for Fair Work Inspectors to follow strictly, but is intended to provide best practice standards for responding to all matters. In acknowledging the breadth of the FWO's role, it is noted that the Fair Work Ombudsman and relevant senior executive staff may provide direction to Fair Work Inspectors in addition to, or ancillary to, the Manual, regarding the conduct of formal dispute resolution and compliance activities.

1.3 Background: The Fair Work Ombudsman

The Fair Work Ombudsman is a statutory office holder pursuant to the [Fair Work Act 2009](#) (Cth) (FW Act). The Fair Work Ombudsman is appointed to promote harmonious and co-operative workplace relations¹ and to protect and enforce the rights of workers and employers under Commonwealth workplace laws (as defined in section 1.5 of this Manual). In so doing the Fair Work Ombudsman contributes significantly to creating fair Australian workplaces.

¹ FW Act; s 682.

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In accordance with the functions of the Fair Work Ombudsman, the FWO has certain functions,² including:

- to promote compliance with the FW Act and fair work instruments, including by providing education, assistance and advice to employees, employers and organisations
- to monitor compliance with the FW Act and fair work instruments
- to inquire into, and investigate, any act or practice that may be contrary to the FW Act, a fair work instrument or a safety net contractual entitlement
- to commence proceedings in a court or to make applications to the Fair Work Commission (FWC) to enforce the FW Act, fair work instruments and safety net contractual entitlements
- to refer matters to relevant authorities
- to represent employees who are or may become a party to proceedings in a court or a party to a matter before the FWC under the FW Act or a fair work instrument, if the Fair Work Ombudsman considers that representing the employees will promote prompt compliance with the FW Act or the fair work instrument
- any other functions conferred on the Fair Work Ombudsman by an Act.

The FWO has broad jurisdiction extending to most parts of the FW Act and to certain parts of legislation regulating independent contractors. In addition, the FWO acts to ensure overseas workers are fairly treated when at work in Australia.

FWO's jurisdiction extends to parts of the FW Act where there may not be applicable penalty provisions. A significant role of the Fair Work Inspector is to provide forms of assistance to persons where no formal penalty provision exists. This assistance may include inquiring into any action or practice that may be contrary to law, even though the Fair Work Inspector may have no direct standing formally to proceed.

It is important to note every employee of the FWO contributes to the efficacy and overall success of audits, complaint treatments and investigations conducted by Fair Work Inspectors.

1.4 Understanding the role of the FWO

The FWO operates in a unique regulatory environment. Since 1934, an inspectorate of one form or another has existed in the Commonwealth workplace relations arena. The FWO's role is to provide education regarding, and ensure compliance with, specific provisions set out in the Commonwealth workplace laws.

The FWO is an agency of the highest ethical and professional standards and is publicly accountable for every decision it makes. Accountability is one of the values of the Australian Public Service (APS), helping to define its role as a key institution in Australia's democratic system.³ As APS employees, everyone at the FWO is accountable to the public and parliament for the decisions they make. FWO employees are also accountable for their actions through performance management systems and frameworks such as this Manual.

² FW Act; s 696(2).

³ Australian Public Service Commission, [APS Values](#).

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APS employees are required to make reasonable, fair, just and transparent decisions.⁴ This obligation necessitates that procedural fairness is an essential element of any formal dispute resolution and compliance activity. The FWO will be responsive to the needs of clients and stakeholders, and is committed to the delivery of public value and the provision of exceptional customer service (see the [DRC Business Plan](#)).

The FWO undertakes many pro-active activities in the areas of education, information and compliance, including targeted campaigns and audits (see section 4 of this Manual). The FWO also is able to investigate matters of its own volition.

In addition, the FWO receives complaints from the public regarding wages, conditions of employment and workplace rights. Within the FWO, a “complaint” is defined as any matter received by the FWO (whether in writing or verbal) involving an allegation of non-compliance and an expectation of redress which requires the intervention of the FWO. In general, the FWO refers to the parties to the complaint as the “complainant” and the “employer” even if the matter did not arise from a direct contact by an aggrieved person (e.g. as in a referral of a matter from a Member of Parliament or the Department of Immigration and Citizenship). For completeness, it is noted that complaints about the FWO (called “requests for review”) are covered in section 1.9 of this Manual and the [Feedback and Requests for Review Guide](#).

Any inquiry, complaint treatment or investigation into an alleged contravention of Commonwealth workplace laws will be undertaken promptly, conscientiously, efficiently and effectively. Employees of the FWO including Fair Work Inspectors will demonstrate honesty, integrity, determination, responsiveness, objectivity, proficiency, respect and professionalism. They will draw on their professional knowledge and expertise and the FWO as an agency will continue to strive to maintain both national and international best practice.

The functions of the Fair Work Ombudsman as a statutory office holder extend beyond determining underpayment of wages complaints, and successful performance of the FWO’s functions cannot be achieved by adopting a restrictive focus.

In addition, all Fair Work Inspectors are appointed on authority of the Fair Work Ombudsman⁵ and are bound to comply with any Directions made by the Fair Work Ombudsman, certain of which are published by the Fair Work Ombudsman as a legislative instrument.⁶ The FWO also has a Policy for Fair Work Inspector Appointments that provides instruction to people appointed or being considered for appointment as Fair Work Inspectors.

1.5 Legislative framework and powers of Fair Work Inspectors

Fair Work Inspectors are appointed and empowered to perform certain functions under the FW Act. The functions include protecting and enforcing the rights of workers and employers under Commonwealth workplace laws including:

⁴ Australian Public Service Commission, [APS Values and Code of Conduct in practice: A guide to official conduct for APS employees and agency heads](#), section 2.6 Working with the public.

⁵ See FW Act; s 700(1).

⁶ See FW Act; s 704(1) and [FWO Directions to Fair Work Inspectors](#).

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- provisions of the FW Act and the *Fair Work Regulations 2009* (Cth) (FW Regulations)
- provisions of the *Independent Contractors Act 2006* (Cth), including those regarding prohibited conduct in relation to reform opt-in agreements entered into from 11 December 2006
- entitlements under transitional instruments and other provisions that are in operation under the *Fair Work (Transitional and Consequential Amendments) Act 2009* (Cth) (the Transitional Act or T&C Act)
- certain orders of the Fair Work Commission.

In addition, Fair Work Inspectors are empowered to commence or continue the inquiry into or investigation of suspected contraventions of the *Workplace Relations Act 1996* (Cth) (WR Act) regarding conduct that occurred before 1 July 2009.⁷

Throughout this Manual, the legislative instruments specified above are referred to collectively as “Commonwealth workplace laws”.

1.6 Natural justice and procedural fairness

Natural justice is a concept extending to all decisions where public power is exercised. The terms natural justice and procedural fairness frequently are used interchangeably, and have developed as a safeguard to ensure that all decisions made by government (including government agencies) are fair and reasonable depending on the circumstances of each individual case. In some instances, the actions taken by Fair Work Inspectors may not be characterised as “decisions” in the strict legal sense; nonetheless Fair Work Inspectors must abide by the principles of natural justice in undertaking their role. This is particularly important as the core function of the FWO is to determine whether the requirements of Commonwealth workplace laws are being observed, and in this context the Fair Work Inspector’s actions may affect the legitimate expectation of both employers and employees that all parties will act in accordance with the law.

At its simplest level, natural justice requires the decision-makers to ensure that:

- they have no personal interest in a matter (the bias rule)
- they act only on the basis of logically probative evidence (the no-evidence rule)
- they fully inform interested parties of the nature of the decision to be made and the basis upon which that determination will be made
- they allow persons about whom a decision is to be made to be heard on the relevant points (the hearing rule).⁸

Whenever a Fair Work Inspector, or other employee of the FWO, intends to take action that may affect the legitimate rights or interests of a party, they must ensure that natural justice is afforded. This applies to all advice and assistance provided by the FWO as well as the actions taken during every audit, complaint treatment and investigation. Fair Work Inspectors who make decisions or determinations without considering all sides of the matter have not acted in

⁷ Transitional Act; schedule 18, part 3, item 13.

⁸ *Good Conduct and Administrative Practice – Guidelines for state and local government (2nd edition)*, NSW Ombudsman, May 2006.

a procedurally fair manner, irrespective of whether or not the decision itself is legally correct. The absence of procedural fairness during the decision making process may open up the decision to challenge.

Fair Work Inspectors therefore must ensure that all matters are treated objectively and with an absence of bias; and that any person whose rights, interests or legitimate expectations are affected by a decision or determination is given an opportunity to be heard. This also means that, in order to allow a person to be heard appropriately, the Fair Work Inspector must provide the person with sufficient information so that they understand the grounds on which any decision or determination will be made, and are able to address those grounds.

1.7 Fair Work Inspector discretion

One of the most significant ways a Fair Work Inspector contributes to the proper functioning of government is by appropriately exercising discretion, particularly in deciding upon individual cases. The decisions made by a Fair Work Inspector can have a direct impact upon the level of public confidence in the FWO.

Compliance with the law is a fundamental requirement of good decision making and the exercise of discretion. When exercising statutory powers and making decisions, Fair Work Inspectors must understand the specific requirements of the legislation, the interaction with other relevant legislation and legal principles, the requirement of procedural fairness, and the relative degrees of responsiveness to, and independence from, the views of others, including ministers and agency management.⁹

The discretion of the FWO and its Fair Work Inspectors is detailed several times in the public [FWO Guidance Note 8 - Investigation Process \(GN8\)](#). The principles as contained in GN8 include that:

- in following natural justice, Fair Work Inspectors continue to be invested with discretion to make determinations about the process or outcome of an investigation¹⁰
- the FWO may exercise discretion regarding the matters it chooses to investigate or not investigate.¹¹

The principle of Fair Work Inspector discretion is acknowledged and supported within this Manual.

1.8 Decision making

Decision making is an integral skill that is utilised throughout management of all dispute resolution and compliance activities. A Fair Work Inspector makes decisions on the basis of information and evidence disclosed during the life of a complaint. This information includes, for instance, each and every material conversation with a party to a dispute. The ability to

⁹ Australian Public Service Commission, [APS Values and Code of Conduct in practice: A guide to official conduct for APS employees and agency heads](#).

¹⁰ See GN8; section 4.3(d) and (e).

¹¹ GN8; section 4.4(a).

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explain and justify the decisions made is critical to the accountability and transparency of the FWO and its Fair Work Inspectors.

A key concept for all stages of audits, complaint treatments and investigations is the requirement to maintain contemporaneous file notes. All FWO employees who have contact to any party in relation to a FWO audit, complaint treatment or investigation are required to make a file note containing details of the event (e.g. a phone call to a complainant, or a meeting with an employer). An exception applies in the case of the Mediation team, who do not keep file notes due to the confidential nature of the mediation process.

File notes are recorded in Nexus (when in the office) or in the Fair Work Inspector's Notebook (when in the field). The [Fair Work Inspector Notebook Guide](#) provides additional instruction in the use of the Fair Work Inspector Notebook.

Decision Records (DRs) are used at specific points of all dispute resolution and compliance activities, to detail the actions already taken and the proposed next steps.

This Manual works together with the [Nexus User Guide](#) and agency training materials to provide Fair Work Inspectors with an overview of the use of DRs. The procedure for creating DRs in Nexus is explained in the Nexus User Guide. The DRs in Nexus have superseded the need for Fair Work Inspectors to create a hard copy DR or to use another type of electronic DR template.

DRs are recorded in Nexus contemporaneously, as a matter of best practice. However, if a Fair Work Inspector is in the field at the time a decision is made, the decision should be recorded in a Fair Work Inspector's Notebook, and noted in Nexus later.

The use of DRs does not replace the requirement for Fair Work Inspectors to gather evidence or to follow the other procedures of an audit, complaint treatment or investigation.

1.9 Public accountability, feedback and stakeholder complaints

FWO employees must treat the public with respect and courtesy and without harassment. The community expects prompt and high-quality service from the APS and it is important that the FWO's work contributes to maintaining these standards.

Fair Work Inspectors should provide reasonable assistance to parties, and help the public to understand their entitlements and obligations. However being responsive does not mean Fair Work Inspectors can overlook legal entitlements or provide a benefit to which a person is not entitled. Fair Work Inspectors must administer the law fairly and equitably and provide responsive, efficient and effective services.¹²

The FWO formally offers parties the opportunity to provide feedback in key communications, including in particular the correspondence sent to parties at the completion of a matter. Feedback is welcome on any topic. At times, feedback will include some grievance.

¹² Australian Public Service Commission, [APS Values and Code of Conduct in practice: A guide to official conduct for APS employees and agency heads](#), section 2.6 Working with the public.

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The FWO defines complaints regarding the conduct of its employees or the outcomes of dispute resolution and compliance activities as “requests for review”. The FWO treats requests for review seriously and, as such, it is important both for the reputation of the FWO and the Fair Work Inspector that those requests for review be dealt with effectively and appropriately. The FWO has an effective and consistent system for handling requests for review, providing a mechanism for obtaining feedback from clients, resolving grievances, and refining agency practice.¹³

The FWO applies nationally consistent processes and procedures when requests for review are received. If a Fair Work Inspector receives a request for review regarding either the conduct or outcome of a matter, the request for review must be taken seriously, escalated and appropriately actioned. Requests for review must be dealt with in an appropriate and timely manner. All dispute resolution and compliance activities, including audits, are subject to the review procedure. However, due to the confidential and legally binding nature of FWO mediation, review of a mediation is limited to the process (not the outcome). For more information on the feedback and requests for reviews, see the [Feedback and Requests for Review Guide](#).

Various pieces of legislation provide for parties to seek external review of the decisions made by APS employees. The *Ombudsman Act 1976* (Cth) in particular provides for the investigation of actions of APS employees (including Fair Work Inspectors) in making decisions that affect members of the public. Where relevant, the FWO will refer parties to the Commonwealth Ombudsman as the final tier of the FWO’s review process.

There may be occasions where FWO staff identify that a formal apology from the FWO may be warranted. As at 3 September 2013, [FWO’s Guidance Note 9 – FWO Apology Policy](#) is provided to FWO staff for their reference, and the final version will be made available to the public in the near future.

Although not directly related to reviews of decision making, the *Freedom of Information Act 1982* (FOI Act) also provides every person with the right to request access to relevant information held by a Commonwealth agency. The FWO in addition encourages the release of documents in accordance with its public [FWO Guidance Note 2 - Document Access Policy](#) where appropriate, without requiring parties to make a formal request under the FOI Act.

The FWO has a duty of care to provide a safe workplace. In the context of all dispute resolution and compliance activities, supervisors and directors must remain aware of the obligations towards their staff and take appropriate measures to ensure these obligations are met.

1.10 Media interaction

The FWO Media team has the primary responsibility of responding to media enquiries. When a FWO employee (including a Fair Work Inspector) is contacted by a media outlet, they must provide the FWO’s media advisor’s contact details as the primary liaison point. Further, they

¹³ Council of Australian Standards, *Australian Standard AS ISO 10002-2006 Customer Standard-Guidelines for complaints handling in organisations*, 2006.

must then alert the media advisor that a call from the media is expected, along with any information about the journalist (e.g. name and media organisation) and the background to the enquiry, including the business or case subject to dispute resolution or compliance activity and the relevant issues involved.

In order to ensure that information released is both appropriate and consistent, staff of the FWO are **not** authorised to answer enquiries received from the media unless they have obtained express permission to do so. Permission may only be granted by the Fair Work Ombudsman or one of the primary media contacts, as detailed in the FWO [Media Policy](#).

Further, staff of the FWO are not authorised to initiate contact with media regarding the work of the FWO unless they have obtained express permission from the above persons.

In addition, Fair Work Inspectors should remain aware that only the Fair Work Ombudsman in his or her capacity as agency head can authorise agreements with parties to FWO matters about the nature of the FWO's media statements. This provision applies to all matters at any of their stages, and extends to matters that are mediated or otherwise resolved by any FWO staff. Where appropriate a Fair Work Inspector and/or Legal Group lawyer may work in consultation with the Media team to settle the content of media releases which may be developed.

1.11 Conflicts and competing interests

All FWO dispute resolution and compliance activities must be conducted in an impartial and objective manner. Public confidence in the integrity of the FWO is vital and any perception of a conflict of interest is a serious matter.¹⁴ Confidence may be jeopardised if the community perceives that the actions of FWO employees may have been unduly influenced by conflicts of interest.

APS officers have a responsibility to always serve the public interest in performing their duties. Fair Work Inspectors need to be aware that their private interests, both financial and personal, could conflict with their official duties. Personal interests, whether these are financial, or relate to family, friends or associates, should not influence the performance of that public duty.

Fair Work Inspectors and their managers must not have, and must not be perceived to have, any conflict of interest in relation to any aspects of a dispute resolution or compliance activity, or with any parties involved. It is the obligation of all APS employees to declare and/or avoid potential conflict of interest in accordance with the [APS Code of Conduct](#) and the *Public Service Act 1999* (Cth). It is important for all Fair Work Inspectors to comply with the FWO's [Outside Work](#) policy and the [FWO Practical Guide 8 – Gifts and Sponsorships](#).

It is not always possible to avoid a conflict of interest, particularly in small communities.¹⁵ A conflict of interest in itself is not necessarily wrong or unethical. However, identifying and managing the situation appropriately from the outset is critical. Although supervisors have a

¹⁴ Victorian Ombudsman, [Conflict of Interest – Victorian Ombudsman's Concerns](#), October 2007.

¹⁵ Independent Commission Against Corruption and Crime and Misconduct Commission, *Managing Conflicts of Interest in the Public Sector: Guidelines* (2004).

particularly important role in ensuring conflict of interest situations are managed appropriately within the FWO, identifying a conflict of interest is an individual's responsibility.

All FWO staff must document and report any real or apparent conflict of interest to their supervisor and other relevant persons as per the agency's protocols. The FWO's [Declarations of Interest](#) intranet page contains relevant forms and guidance.

1.12 Quality management

The FWO is committed to principles of quality management, including both quality control and quality assurance. These principles apply across all aspects of the work undertaken by the FWO, including formal dispute resolution and compliance activities, education and support functions.

While it remains an obligation of Fair Work Inspectors, team leaders and assistant directors to ensure that quality management mechanisms are an established and a routine part of any formal dispute resolution and compliance activities, directors are ultimately responsible for ensuring that quality principles are followed.

The FWO's Quality and Information Policy (QIP) team deliver the Quality Assurance (QA) program which aims to promote high performance, including individual judgement and decision making abilities, across the agency. The program is delivered through three streams: administrative QA; functional QA; and Issues based QA (as is detailed on the QIP team's [intranet page](#)).

In addition, the FWO's feedback and review process is an important part of the FWO's interaction with the public to provide parties the opportunity to give feedback and seek a review of the FWO's decisions (see section 1.9 of this Manual and the [Feedback and Requests for Review Guide](#)).

1.13 Statutory time limits

Fair Work Inspectors should bear in mind that there are statutory time limits imposed by the FW Act, for which an action can be taken in respect of a contravention. Currently, it is a requirement of the FW Act that court proceedings commence within six years of a contravention of civil remedy provisions,¹⁶ and that actions to recover underpayments through the courts must be commenced within six years of when the payment was due to be made.¹⁷ Therefore, while the FWO may inquire into or investigate alleged contraventions that occurred more than six years ago, there is no capacity to litigate or enforce rectification of these matters.

Determining when a contravention occurred sometimes can be difficult and may depend on the wording of the particular legislation or instrument in question. Fair Work Inspectors should speak to their team leader or manager if they believe a contravention may have occurred near to or more than six years ago. This is to ensure that appropriate resolution or compliance options can be considered and suitable priority is given to matters with alleged contraventions that may be approaching the statutory time limit.

¹⁶ FW Act; s 544.

¹⁷ FW Act; s 545(5).

1.14 Unclaimed money

Under the FW Act (s 559), an employer may make payment to the Commonwealth of the amounts owing to an employee, in specified circumstances. Therefore, the FWO may be required to accept money on behalf of employees under certain situations.

As an interim measure, guidance on this topic is found in the [interim guidance on unclaimed money document](#). In addition, template documents and details of process change are located on the FWO's [Complaints and investigations](#) intranet page.

2. Infoline, Dispute Resolution and Compliance (IDRC)

2.1 The role of IDRC

Infoline, Dispute Resolution and Compliance (IDRC) is the group within the FWO that is primarily responsible for monitoring and ensuring compliance with the FW Act.

At present, much of the direction relevant to Infoline staff is contained in the [Infoline Manual](#), while most guidance for Dispute Resolution and Compliance will be found within this Operations Manual and associated Guides and materials. Over time, further integration of IDRC is expected to result in a greater commonality of resources.

The Dispute Resolution and Compliance (DRC) operating model focuses on:

- resolving disputes in a timely manner and ensuring easier dispute resolution for workplace participants
- ensuring compliance – focusing on matters that align with the FWO’s strategic enforcement priorities via complaint investigation and auditing services
- promoting harmonious, productive and cooperative workplace relations
- educating workplace participants to effect behavioural change
- delivering enhanced customer service.

DRC works closely and collaboratively with all FWO groups, and is committed to delivering the [FWO Strategic Plan 2012-2016](#) through the [DRC Business Plan](#).

The two arms of DRC, and their component teams, are described in this chapter.

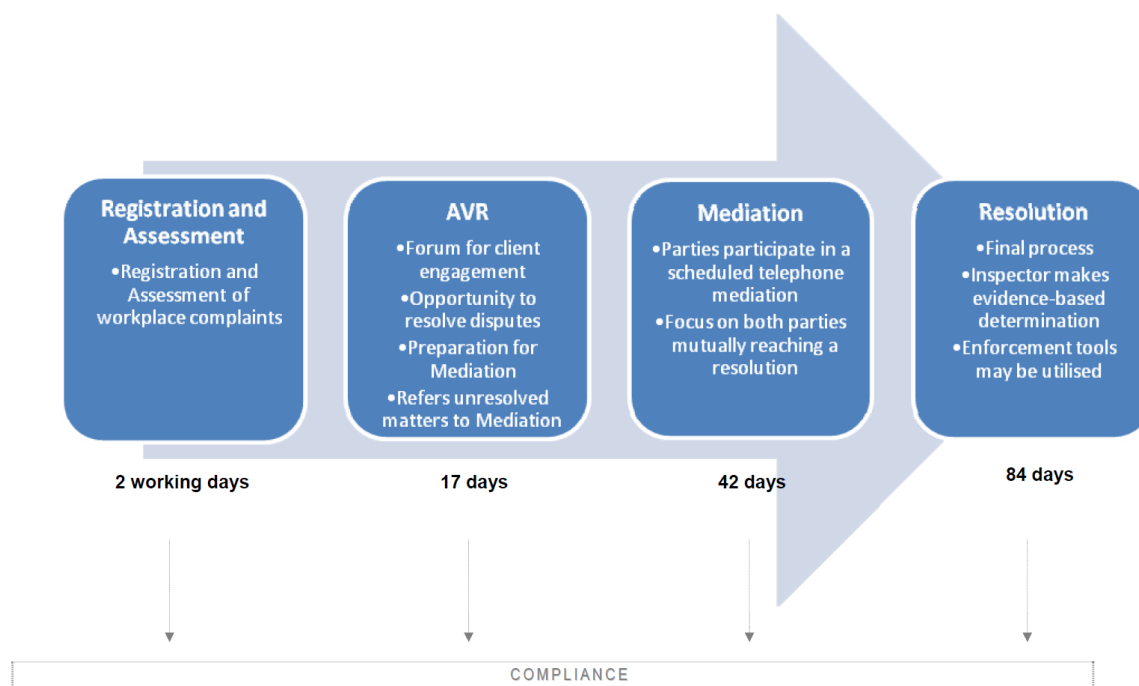
2.2 Dispute Resolution

Dispute Resolution incorporates the work of four teams:

- Registration and Assessment
- Assisted Voluntary Resolution (AVR)
- Mediation
- Resolution.

Dispute Resolution will complete the majority of complaints. The aim is for Dispute Resolution to provide parties with sufficient information and advice to promote early resolution.

The Dispute Resolution pathway is chiefly a linear process, but the FWO has the discretion to refer a complaint to Compliance Branch for a comprehensive investigation at any stage. There are indicative timeframes within the pathway, which are internal milestones only and are subject to change. Fair Work Inspectors also should remain mindful of the key performance indicator for completions set out in the Portfolio Budget Statement (see section 3.4 of this Manual for more information).



The FWO Dispute Resolution process is designed to achieve the following:

- easier and timely dispute resolution
- deliver a fully integrated and easy to understand pathway to complaint resolution
- augment the FWO's brand as an impartial regulator committed to fairness and timeliness
- enhance AVR as a forum for client engagement and education, particularly for employees and for small and medium enterprises
- provide Mediation as a timely, flexible and effective dispute resolution service offering which encourages parties to find mutually acceptable solutions to workplace disputes.

An overview of the work of Dispute Resolution teams is provided below.

2.3 Registration and Assessment

The Registration and Assessment Team has two components, and provides for an integrated front end process that benefits other business groups within FWO by being a gatekeeper of incoming complaints, keeping tight control of where matters are allocated, and actioning those matters that have no or limited strategic significance.

The main function of the Registration component is to register all incoming complaints received by the FWO. These include complaints on workplace complaint forms, and correspondence with sufficient information to be regarded as a complaint.

The main function of the Assessment component is to evaluate the significance of each complaint and decide the best case treatment within two working days of receipt of the complaint.

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The Registration and Assessment team performs the following functions:

- categorising complaints in accord with the **Case Categorisation Model** (see section 2.3.1 of this Manual), including comprehensive compliance history checks, considered analysis and early decision making as to the nature of a complaint and the appropriate treatment
- action and closure of matters that are outside jurisdiction or unmeritorious
- identification and direct allocation to Compliance teams of matters identified as strategic imperatives for investigation
- direct allocation of matters identified throughout the FWO as requiring a specific treatment (i.e. complaints subject to a pro-active compliance deed or enforceable undertaking)
- identification and escalation of complaint trends for evidence based decision making, including the sharing of information with other business groups, thus enhancing visibility for other FWO business groups.

The task of identifying whether a complainant is vulnerable is an important one for officers in Registration and Assessment. Assessment of a complainant's vulnerability is ongoing throughout the life of the resolution and/or investigation process. A "vulnerable worker" is defined in [FWO Guidance Note 1 - Litigation Policy](#) as follows:

"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.

There will be many occasions when an investigation will not be used to resolve a complaint. These situations include where the agency's priorities and/or the nature of the complaint indicate that other methods of treating the complaint (including dispute resolution offerings) are the best method of dealing with the matter.

Typically, the outcome of matters undergoing assessment will be:

- about 80% of complaints progress to AVR (the next stage of Dispute Resolution)
- about 10% of complaints are referred directly to Compliance
- the remaining 10% are closed at the assessment stage.

The Registration and Assessment team does not issue letters but relies upon more immediate forms of contact (such as phone, email and sms) when there is a need to communicate with

parties. Accordingly, where a complaint proceeds to AVR or Compliance, it is incumbent on the AVR or Compliance officer who is allocated the complaint to understand that the parties have not received any correspondence and that the “first call” they make will set the scene and expectations for the parties.

It is the decision of the FWO (not the complainant) whether a matter will be investigated¹⁸ or resolved by other means, or where no action will be taken in regards to a complaint. Common instances where the FWO will not take action include where:

- the FWO does not have jurisdiction
- a court, commission or other agency has dealt with or is actioning the same complaint
- the matter is outside statutory time limits (see section 1.13 of this Manual).

Where the decision is made not to action a complaint, the Fair Work Inspector must inform the complainant of the reasons the FWO is unable to action their complaint. In cases where another agency has jurisdiction, the Fair Work Inspector also must advise the complainant of the relevant agency where they may lodge their matter. Where appropriate, the Fair Work Inspector should involve their team leader in making such decisions.

On occasion, Fair Work Inspectors may find that a complainant is being advised or assisted by a representative (such as a solicitor or union delegate) but the complainant is not taking formal court action in relation to the complaint. In these cases, the Fair Work Inspector should discuss with their team leader the merits of the FWO actioning the matter. For instance, if the complainant’s representative is actively making submissions to the employer (such as sending letters of demand, or seeking payment of additional amounts as calculated by the representative) or where the representative is advocating for the complainant to the employer, it may be appropriate for the FWO to cease its activity.

In addition, if a complainant will not participate in dispute resolution or compliance procedures, then it may be suitable for the complaint to be closed at that time.

2.3.1 The Case Categorisation Model

The Case Categorisation Model (the Model) recognises that an investigation by Compliance staff attracts a significant investment in both time and resources. A full use of investigation tools is not warranted in all complaints received, as it is inappropriate to apply a “one size fits all” treatment methodology.

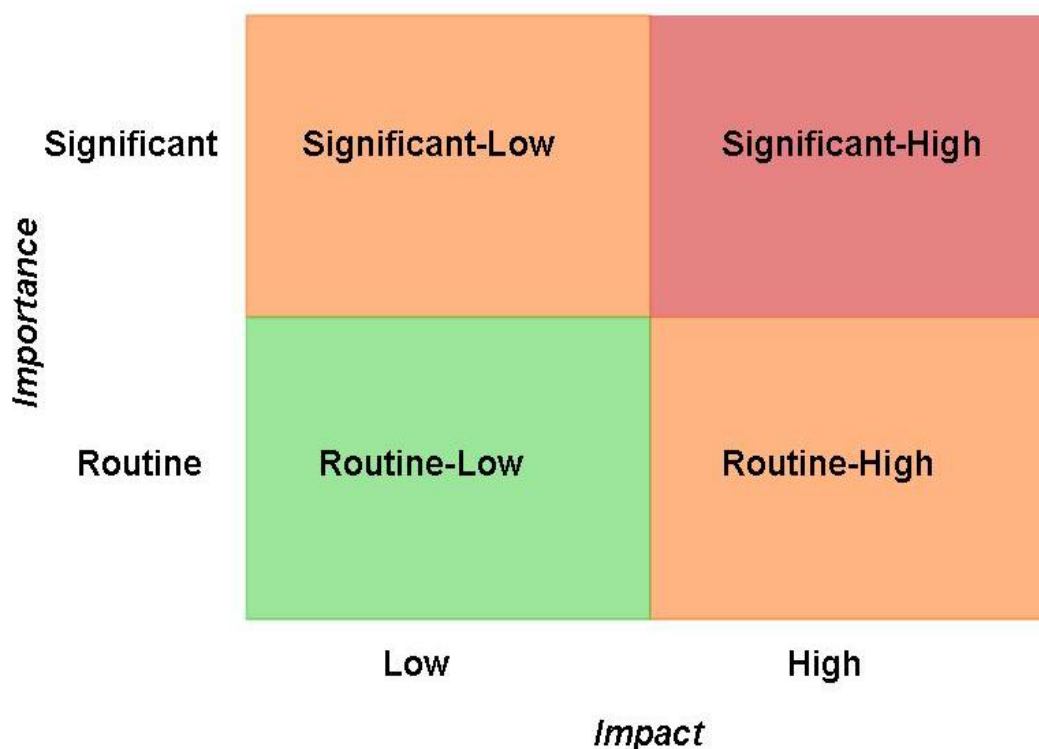
The FWO utilises Case Categorisation when making decisions about how it should treat a complaint. The Model provides a principles-based framework for categorising complaints. Fair Work Inspectors apply quality assessment, discernment and judgment in determining the most appropriate complaint treatment method with each particular complaint being assessed on an individual basis. For example, this will include consideration of the circumstances behind the alleged workplace contraventions (i.e. why did the situation arise?) and the practical

¹⁸ GN8; section 4.4(a).

significance of the alleged contraventions on a worker rather than just consideration of whether or not the worker is potentially vulnerable.

The Model deliberately considers the treatment of a particular complaint following its categorisation noting the different treatment options available which include AVR, mediation, resolution, audit, investigation, education and/or closure.

FWO Case Categorisation presents as follows:



The two-factor Case Categorisation based on assessments of “importance” and “impact” provides for four permutations of case category, summarised as follows:

Routine-Low: Routine-importance, and low-impact. These cases make up the majority of entitlements matters. They typically involve minor underpayment cases. Examples may include matters that involve a single course of conduct, a single worker, or an employer with no history of complaints lodged with the FWO or no litigation activity in the last twelve months.

Routine-High: Routine-importance, high-impact. These cases involve more significant underpayments, industrial action resulting in significant loss or disruption, or other high-impact contraventions that do not involve the additional element of significant external scrutiny, and are not considered strategically important. Examples may include matters that involve systemic non-compliance, multiple employees or multiple contraventions, but where the general deterrence message has been addressed elsewhere.

Significant-Low: Significant-importance, low-impact. These matters are low on the impact scale but have attracted significant external scrutiny or else are considered a strategic priority. An example would be a relatively minor underpayment matter that has been referred by a

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Member of Parliament (MP), or one that involves an area of compliance risk that has been deemed to be a strategic priority.

Significant-High: Significant-importance, high-impact. These cases represent the most serious of the matters the organisation deals with. They involve contraventions of workplace laws that have a high impact on workplace participants (especially young workers and visa holders) or the general public, and have attracted (or are likely to attract) significant external scrutiny.

2.3.2 Case Categorisation triggers

High impact and significant importance categorisations are activated by “triggers” as detailed below. The FWO chiefly focuses its investigation resources on matters that have both high impact and significant importance. Such matters are also considered for potential litigation (see sections 3.4 and 5.5 of this Manual for more information).

High-Impact Triggers	Rationale for High Impact Triggers
Matters likely to involve underpayment quantum of >\$20,000 for an individual, and >\$50,000 for a collective	Significant underpayment amount. The threshold of \$20,000 and above is consistent with the current small claims maximum under s 548 of the FW Act.
Matters involving vulnerable workers (with particular reference to young workers and visa holders) involving underpayment quantum	Underpayments for a vulnerable worker attracting public interest and the role of the regulator to ensure fairness and wage justice.
Sham arrangements	Sham contracting has an adverse effect on job security, work health and safety (WHS) regulation, terms and conditions of employment (including superannuation) and tax revenue. Sham contracting also creates an unfair competitive disadvantage for employers who do not engage in such practices.
Significant underpayments involving organisations with a large number of employees	There is an expectation that large organisations should have advanced Human Resources practices.
Unlawful industrial action (UIA) resulting in significant disruption or economic loss	Significant disruption includes major inconvenience to the public, or the halting of business operations for a significant period. A useful measure could include person days lost. For example, more than 50 person days lost (assuming an 8 hour working day) might constitute a significant disruption. Quantifiable economic loss in excess of \$50,000 might qualify as significant economic loss. Opportunistic minor but repeat (wild-cat) UIA would also fall into this category.
Discrimination	Ongoing discrimination may cause harm to an individual. Systemic discrimination adversely

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	affects productivity.
Contravention of bargaining orders	Contraventions of bargaining orders threaten the standing and integrity of Fair Work institutions if not addressed.
Contravention of FWC orders	Contraventions of FWC orders threaten the standing and integrity of Fair Work institutions if not addressed.
Failure to comply with enforceable undertakings, compliance notices and notices to produce records or documents	Failure to comply with enforceable undertakings, compliance notices and notices to produce threatens the standing and reputation of the FWO as a regulator if not addressed, and threatens the successful resolution of a contravention that is reasonably believed to have occurred.
Adverse action matters	Adverse action matters generally relate to a deliberate attack on the workplace rights of others.
Right of entry abuses (not involving technical breaches which could better be addressed by an educative response)	The right of entry provisions of the FW Act impose strict requirements on permit holders and occupiers. Provided entry is properly made, right of entry permits allow access to premises and documents in circumstances that might otherwise constitute a trespass. To preserve the integrity of the right of entry framework, the FWO has an obligation to regulate right of entry matters to ensure it is not abused.
Significant Importance Case Triggers	Rationale for Significant Importance Triggers
Matters that have been raised in parliament	Significant external scrutiny requires increased vigilance to prevent reputational harm and the risk of damage to the standing of the regulator.
Referrals from a Member of Parliament (MP)	Significant external scrutiny requires increased vigilance to prevent reputational harm and the risk of damage to the standing of the regulator.
Matters that have attracted media attention	Significant external scrutiny requires increased vigilance to prevent reputational harm and the risk of damage to the standing of the regulator.
Matters referred from an industrial organisation	Matters escalated by members to their industrial organisation may result in additional external scrutiny. These matters are regularly simultaneously reported to relevant ministers.
Strategic priority	Matters that are part of a targeted effort

	against areas of identified compliance risk.
Executive decision	The FWO's Executive may, from time to time, determine a case to be organisationally significant for reasons other than those listed above.

2.4 Assisted Voluntary Resolution (AVR)

Assisted Voluntary Resolution (AVR) provides a sophisticated client management forum wherein AVR staff will engage meaningfully with clients by:

- advising and assisting parties in relation to their workplace rights and obligations
- providing a forum for parties (particularly small business) to “tell their story”
- preparing parties for mediation as the “next step”
- providing parties with the opportunity to resolve their dispute prior to mediation.

Although AVR staff are Fair Work Inspectors, the AVR process is characterised by the non-use of coercive powers as contained in the FW Act.

AVR further assesses complaints as new intelligence comes to hand, and this ongoing assessment informs the subsequent stage of the complaint handling process.

AVR will refer the majority of its unresolved matters to Mediation (the next stage of the Dispute Resolution pathway).

On occasion, AVR may refer matters to Resolution. Examples include:

- where an employer cannot be located to participate in Mediation
- where the employer is in administration
- where a particular compliance or technical issue needs to be determined.

AVR can send matters identified as having high impact and significant importance to Compliance. The Case Categorisation Model and associated triggers will assist AVR staff in identifying such cases. In the event that such matters are identified, the AVR Fair Work Inspector will discuss the case with the team leader or assistant director, to decide the appropriate action or referral for the matter.

If a matter proceeds from AVR to another dispute resolution or compliance process, then the AVR Fair Work Inspector must (to the extent operationally possible) inform relevant parties of the change in status.

2.5 Mediation

Mediation is a flexible and generally confidential dispute resolution process conducted by a FWO mediator. Mediation brings the parties to a workplace complaint together through a telephone mediation process, typically lasting between ninety minutes and two hours. There is the option for face-to-face mediations in most metropolitan offices where both parties consent.

In mediation, the focus is on reaching a mutually acceptable resolution of the complaint that will accommodate both parties' interests, rather than making a decision as to who is right or wrong. Mediation is a voluntary process and the expectation is that the parties will enter into mediation in good faith with the goal of reaching an agreement.

The primary responsibility for the resolution of disputed workplace issues rests with the parties. The FWO mediator will support the parties to reach any agreement freely, voluntarily, without undue influence, and on the basis of informed consent. The FWO mediator will suspend or terminate a mediation if parties seek to misuse the mediation or reach an agreement that the mediator believes is unconscionable or illegal.

FWO mediators are professionally trained and have extensive dispute resolution and workplace relations experience. FWO mediators are independent and serve as the neutral third party i.e. the FWO mediators do not take sides but instead help the parties to achieve agreed resolution of the complaint where possible. The FWO mediator does not act as a judge, provide legal advice, make a determination on who is right or wrong, or impose decisions on the parties.

Where parties to a mediation seek technical workplace relations information, there is the facility for them to contact a FWO Technical Liaison Officer, or to suspend the mediation while specific advice is sought from a Fair Work Inspector in Resolution.

FWO mediators are usually members of FWO's specialist Mediation unit which ensures the mediators are independent and separated from the FWO inspectorate in the performance of their duties. The role of FWO mediators is limited to the mediation process and FWO mediators do not conduct or have involvement in any subsequent treatment or investigation of the complaint in the event that no agreement is reached at mediation.

Where agreement is reached at mediation it is generally recorded in a deed of settlement which is confidential, final and binding to the extent provided by law. Should either party fail to abide by the deed of settlement, the aggrieved party may choose to take their own legal action to enforce the deed of settlement. The FWO cannot enforce the deed of settlement.

The Mediation team refers matters where no agreement is reached to the Resolution team.

2.6 Resolution

Resolution is a condensed evidence-based process involving Fair Work Inspectors applying high level discernment and experience. Resolution is the "last step" or "end point" for completing complaints in the dispute resolution pathway. Most matters referred to Resolution occur where mediation was attempted, but no agreement was reached. As noted in section 2.4 of this Manual, there also are situations where referrals to Resolution are made from AVR.

The Resolution process involves Fair Work Inspectors gathering information from the parties and producing a findings report, typically including a set of recommendations to the parties which will effect compliance with Commonwealth workplace laws. The findings report acts primarily as a solution-based mechanism to break any impasse between the parties.

In Resolution, Fair Work Inspectors do use the powers under the FW Act, including in particular the issuing of infringement notices (INs). In limited circumstances (and with assistant director approval), notices to produce (NTPs) and compliance notices also may be issued.

After the findings report is provided to both parties, they are given an opportunity to respond. Parties are given assistance to carry out the recommendations as appropriate (e.g. an employer might be advised how to calculate the amount owing to the complainant).

If either the employer or complainant disagrees with the findings report, the parties are to be advised that it remains open for the complainant to take their own action to secure any outstanding entitlements. Such action may include small claims procedures under the FW Act (where the amount sought is less than \$20,000). At this stage, the parties should also be offered the opportunity to participate in mediation (where appropriate) to resolve the matter.

If a matter remains unresolved, and the parties choose not to participate in mediation, then the matter should be closed on Nexus (providing there are no outstanding INs, NTPs or compliance notices that require action).

2.7 Compliance

The FWO's compliance strategy recognises that specialisation delivers efficiency and effectiveness through enhanced capability. Based upon complaint analysis and the dictates of justice and fairness, national subject based compliance teams have been established to address allegations of serious non-compliance:

- **General Protections team:** which primarily investigates complaints that do not relate to wages and conditions, including industrial action, freedom of association, right of entry, unpaid work, duress and discrimination.
- **Misclassification team:** which investigates matters where it appears that an employment relationship (or contract of service) has been misrepresented as a contractor and principal arrangement (or contract for services); and may investigate and determine if there are elements of sham contracting (a deliberate disguising of an employment relationship), and if any underpayments result from those arrangements.
- **Overseas Workers team:** which focuses on investigations from visa holder complaints that have significant importance and high impact.
- **Regional Services:** which provides dedicated and tailored services to local communities, including the investigation of complaints relating to serious non-compliance.
- **Young Workers team:** which concentrates on serious non-compliance involving the underpayment of wages, overtime, penalty rates and allowances of young workers, with a focus on apprentices and trainees.

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The teams reflect an intervention strategy that recognises vulnerable workers stand in special need of the protection of the State and the FWO can make a leading contribution to several whole of government concerns such as revenue protection, a skilled workforce and enhanced productivity. The strategy does not preclude the FWO from the option to focus on a particular industry or geographical area if required.

The main work common to many of the Compliance teams is that of investigation, the principles of which are described in section 3 of this Manual.

Other Compliance teams have a separate focus:

- **Governance Unit:** which comprises the Administration and Calculations team, the Performance program, and a Project team.
- **Targeted Campaigns Unit:** which coordinates and implements national, state and local education and compliance campaigns in areas and industries of strategic priority. The audit and targeting work of the FWO and this unit is described in section 4 of this Manual.

3. Investigation

3.1 Investigation framework

An investigation is the formal term used to describe the objective gathering of information by Fair Work Inspectors, to determine:

- whether there have been any contraventions of Commonwealth workplace laws
- if so, who is responsible for the contravention(s)
- what rectification (if any) is required for the contravention(s).

The FWO conducts investigations, with no bias toward one form of outcome over another. The outcome of any investigation depends on the particular facts and circumstances of the matter in question. The investigative framework within which Fair Work Inspectors operate and the method of investigation adopted should not vary irrespective of the likely outcome.

The Fair Work Inspector does not commence an investigation with the assumption that the parties are right or wrong in their assertions. In an investigation, the primary function of a Fair Work Inspector is to objectively determine whether applicable provisions of Commonwealth workplace laws are being observed (see section 1.5 of this Manual). It is important that Fair Work Inspectors understand and appreciate that, due to the complicated nature of the workplace relations investigation process, there are a range of outcomes that may occur as a result of an investigation (see section 3.7 of this Manual).

During all phases of an investigation, the Fair Work Inspector is expected to adopt a probative approach, with a view to gathering as much relevant information as is reasonable to enable the investigation to progress. Broadly speaking, the probative approach is an objective examination of all evidence with an aim to discovering the truth about whether, to what extent, and with what effect, a contravention of the Commonwealth workplace laws may have occurred.

3.2 Types of investigations

The FWO has a broad jurisdiction. The types of investigations and activities conducted by Fair Work Inspectors undertaking compliance work can vary greatly and include wages and conditions investigations and general protections cases, as well as audits.

In the course of investigations, Fair Work Inspectors may encounter matters that are not within the FWO's jurisdiction to enforce. Fair Work Inspectors should encourage voluntary compliance with these matters wherever possible. In the interests of promoting fairness in the workplace and in accord with the terms of the memoranda of understanding (MOUs) the FWO has with several agencies, Fair Work Inspectors also should consider referring appropriate matters to other authorities, or directing complainants to a relevant court or tribunal.¹⁹

Individual investigations will vary according to the complexity and seriousness of the alleged contravention(s). However, the investigative process and stages within an investigation will be

¹⁹ A link to relevant guidance materials will be added when complete.

consistent for all investigations. For example, in wages and conditions investigations most of the information a Fair Work Inspector requires may be provided by the employment records. In these investigations it may not be necessary to obtain written statements. The decision to take statements can be made in consultation with the team leader. However, if the decision is made that a statement is required, then the statement is to be taken in accordance with this Manual and accompanying Guides and materials.

3.3 Information gathering principles

Guidance has been provided to government agencies regarding the exercise of their coercive powers to gather information. A report from the Administrative Review Council²⁰ detailed twenty best practice principles. A review of the FWO by the Commonwealth Ombudsman²¹ also commented on the FWO's performance against these principles.

This Manual notes the relevance of these principles to the work of the FWO, and highlights and summarises three principles in particular. As best practice, Fair Work Inspectors should:

- only gather information for the purposes of the relevant legislation (i.e. Commonwealth workplace laws)
- consider other means that could be used to obtain the information sought and weigh up whether the probable importance of information obtained through using coercive information-gathering powers is justified, having regard to the cost of compliance for the notice recipient
- make a written record that describes the basis on which the threshold trigger for the use of powers was deemed to have been met (also see section 1.8 of this Manual).

To assist Fair Work Inspectors in the use of coercive information-gathering powers, an internal [Notice to Produce Guide](#) has been developed regarding issues such as scope, service, expectations and requests.

3.4 Timeliness of investigations

During the early stages of an investigation, it is beneficial for the Fair Work Inspector to assess the likelihood of the potential contraventions being suitable for litigation as per [FWO Guidance Note 1 - Litigation Policy](#). Fair Work Inspectors should also consider the [FWO Strategic Plan 2012-2016](#), which details that the agency will be “identifying, investigating and filing” litigation matters “within 12 months of matters coming to our attention.”

Consistent with the [Enforcement Strategy 2012-2016](#), the Fair Work Inspector needs to allow Legal Group four months to prepare the matter for court, effectively providing the Fair Work Inspector with a maximum of eight months to have a matter ready for Legal Group to progress.

²⁰ Administrative Review Council, [The Coercive Information-Gathering Powers of Government Agencies](#), Report no. 48, May 2008.

²¹ Commonwealth Ombudsman, [Fair Work Ombudsman: Exercise of Coercive Information-Gathering Powers](#), Report no. 09-2010, June 2010.

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Accordingly, a matter's litigation potential is first assessed at the time of receipt. The expectation is that matters with significant importance and high impact (see sections 2.3.1 and 2.3.2 of this Manual) are the matters most likely to result in litigation. The litigation recommendation process for Fair Work Inspectors is detailed in section 5.5 of this Manual.

As for Dispute Resolution treatments (see section 2.2 of this Manual), Fair Work Inspectors undertaking compliance are guided by performance benchmarks that indicate the number of investigations that should be completed in order for the FWO to action all incoming complaints. The benchmarks are a key factor in a Fair Work Inspector's management of their team's caseload.

Internal key performance indicators (KPIs) and performance benchmarks are regularly reviewed and updated. Fair Work Inspectors must remain mindful of all timeframes in conducting investigations of complaints in a timely manner and according to agency standards. Early awareness of key time factors and potential outcomes will enable Fair Work Inspectors to better plan the gathering of records and additional evidence such as formal witness statements and records of interview.

The FWO also has a KPI for the investigation and completion of complaints set out in the Portfolio Budget Statement. This KPI for investigations is that 80% of investigations into complaints about breaches of federal agreements or awards are completed within 90 days. The FWO's performance against this KPI is reported, and Fair Work Inspectors should consider measures to achieve this KPI in planning any investigation.

3.5 Investigation management and additional guidance

During the investigation, the Fair Work Inspector will obtain and manage information and evidence in accordance with both the legislative requirements and this Manual. It is important to ensure that original evidence received is properly receipted (see the [Notice to Produce Guide](#) for further information). Additionally, an investigation requires the Fair Work Inspector to ensure that the evidence obtained is subjected to ongoing evaluation or further evaluation before any recommendations to litigate are made.

Having conducted an evidence-based investigation, the Fair Work Inspector will advise the parties of the contraventions (e.g. through a contravention letter and/or compliance notice) or confirm that there were no contraventions identified.

Throughout the course of an investigation, Fair Work Inspectors should consider ways of increasing the workplace relations knowledge of parties to an investigation, particularly where it appears that allegations or contraventions have arisen from misunderstanding the legislation. An educative approach can assist parties in such cases to avoid future contraventions.

The Investigation Principles Guide²² contains additional assistance for Fair Work Inspectors, and covers:

- investigation management

²² Relevant material will be revised into the new Investigation Principles Guide.

- the investigative mindset
- investigative evaluation
- deductions from entitlements
- offsetting of entitlements.

3.6 Managing the expectations of the parties

A common source of criticism about the conduct of an investigation is that an investigator did not give sufficient and ongoing feedback to the complainant.²³ Complainants and employers should be kept up to date and advised, in general terms, of the progress in investigating or dealing with complaints and the time frames that apply. Fair Work Inspectors must advise all relevant parties to an investigation of any key developments and provide them with updates particularly where there are unforeseen delays in completing a matter. It is the expectation of the FWO that Fair Work Inspectors liaise regularly with relevant parties (unless the parties have been notified previously of significant delays). Updates may be written (letter, fax or email) or verbal. However, Fair Work Inspectors must ensure that all contact is noted. In general, notes should be made in Nexus. Where the Fair Work Inspector is in the field, these notes will be recorded in a Fair Work Inspector's Notebook.

Fair Work Inspectors should ensure parties understand that the role of the FWO is to enforce minimum entitlements and that in carrying out this role, Fair Work Inspectors do not represent or advocate for either party. Fair Work Inspectors could consider referring parties to the [About the Fair Work Ombudsman](#) fact sheet for more information about the role of the FWO.

When dealing with parties to an investigation, Fair Work Inspectors must not speculate on the likely outcome of an investigation at an early stage. Until all relevant evidence has been gathered and assessed, the Fair Work Inspector must remain open-minded regarding the potential outcome of the investigation.

A Fair Work Inspector must be certain that the conduct of their investigation is fair and proper and in accordance with the principles of natural justice and procedural fairness (see section 1.6 of this Manual).

Investigations that proceed to litigation require the Fair Work Inspector to regularly liaise with the people with a legitimate interest in the complaint (e.g. the complainant, employer, witnesses). Fair Work Inspectors should keep all parties informed of the progress of any court hearings and outcomes.

As specified in section 1.8 of this Manual, all FWO employees who have contact with any party or stakeholder in relation to a FWO investigation are required to make a contemporaneous file note containing details of the event (e.g. a phone call to a complainant, or a meeting with an employer). The note should include the full specifics of any discussions, direction or advice provided, and be recorded in Nexus (when in the office) or in the Fair Work Inspector's Notebook (when in the field).

²³ NSW Ombudsman, [Investigating Complaints: A manual for investigators](#), June 2004, page 75.

3.6.1 Managing the expectations of complainants

Fair Work Inspectors should not imply to complainants that there will be a quick resolution, that the recovery of underpayments is guaranteed, or that non-compliance will necessarily result in FWO litigation action. In relation to general protections investigations in particular, Fair Work Inspectors should ensure that complainants understand that a contravention does not necessarily result in payments or compensation for the complainant.

Fair Work Inspectors must ensure that a complainant's expectations are as realistic as possible. If a complainant develops unrealistically high expectations, they may become dissatisfied with the way in which the complaint is handled, the manner in which an investigation is conducted or the outcome of any investigation.

All information provided to the complainant, whether in writing, by telephone or face-to-face, should be in plain English.²⁴ Fair Work Inspectors should avoid complicated technical or legal language.

3.6.2 Managing the expectations of employers

Managing relations with the employer is equally vital. It is important for a Fair Work Inspector to remain sensitive to the concerns of the employer and, as when dealing with a complainant, regularly inform the employer of progress of the investigation. Procedural fairness requires that, at an appropriate stage, the employer has the opportunity to reply to the substance of an alleged contravention.

Fair Work Inspectors should avoid giving the impression to employers that voluntary compliance will always result in a complaint being closed. Although voluntary compliance is an acceptable outcome in most wages and conditions cases, there are occasions where litigation or other enforcement action still might be pursued. In such cases, Fair Work Inspectors are to seek the advice of their team leader in the first instance.

3.7 Determination and outcomes

Following the collation and assessment of all evidence, a determination is required to be made as to whether or not there are substantiated contraventions of Commonwealth workplace laws. This is done using investigative evaluation, which involves the assessment of all the material gathered, whether or not it is evidentially admissible, and the investigative mindset.²⁵

Involving team leaders and assistant directors is encouraged at this specific point of the investigation management process. This involvement allows team leaders and assistant directors to objectively assess an investigation and enable them to give recommendations and advice to Fair Work Inspectors as to the appropriate determination.

The range of potential outcomes of investigations includes:

²⁴ NSW Ombudsman, *Investigating Complaints: A manual for investigators*, June 2004, page 74.

²⁵ [Add link to new Investigation Principles Guide when complete.](#)

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- no further action (including where no contraventions are found)
- directed voluntary compliance through the contravention letter process
- issuing a letter of caution
- issuing a compliance notice (to be complied with)
- issuing an infringement notice (to be paid)
- a referral to small claims procedures
- entering into a pro-active compliance deed
- entering into an enforceable undertaking
- FWO litigation
- seeking an injunction.

On occasion, referral to the Mediation team may be considered. Mediation usually is canvassed prior to an investigation being conducted, but can be utilised after an investigation has commenced.

3.8 Contraventions

A contravention is established when the Fair Work Inspector determines that there is sufficient evidence to prove a contravention of Commonwealth workplace laws. The determination of a contravention should not occur until the Fair Work Inspector has collected and considered all available evidence.

Where a complainant fails to provide relevant evidence they hold, the Fair Work Inspector should formally advise the complainant that if they do not supply evidence within a specified timeframe, the Fair Work Inspector must continue with the investigation on the evidence that is available. The [Notice to Produce Guide](#) provides instruction on gathering evidence from an employer and other persons.

To find whether a contravention has or has not occurred, the Fair Work Inspector must complete an investigative evaluation of all the available evidence obtained and assess whether or not that evidence supports each of the points of proof of the alleged contraventions. Investigative evaluation involves the Fair Work Inspector critically evaluating the material gathered and can provide intervention and escalation points for team leaders, assistant directors and directors.

3.9 Where no contravention is established

Sometimes, after considering the evidence, a Fair Work Inspector determines that no contravention is established. If the investigation was started in response to a complaint (as is often the case), the Fair Work Inspector should contact the complainant to explain why no contraventions were detected and give the complainant the opportunity to supply any further evidence which could substantiate their complaint.

If no further evidence is supplied, the alleged contraventions and the complaint are not sustained. Completion letters must be sent to both parties.

3.10 Where a contravention is established

Once a contravention is established it must be recorded.

When a Fair Work Inspector is satisfied that a person has contravened Commonwealth workplace laws, the Fair Work Inspector is authorised to issue a contravention letter, or such other notification as may be appropriate (including a compliance notice or IN).

A contravention letter is a written notification that:

- informs the employer of the failure including what provisions have been contravened, how the provisions have been contravened, and the information the Fair Work Inspector has relied on to make their determination
- requires the employer to take specified action within a specified period to rectify the failure (if appropriate)
- requires the employer to inform the Fair Work Inspector of action taken to rectify the contravention (if appropriate)
- advises the employer of the potential consequences of failing to comply with the contravention letter.

A contravention letter should be addressed to the correct legal entity (not just the business or trading name) and should advise that the writer is a Fair Work Inspector. Best practice provides that contravention letters are sent by registered post to the employer's registered office. Additional copies may be sent to company directors or contact persons at preferred addresses (including by email or fax).

The contravention letter is authorised by the FW Regulations²⁶ and forms part of the ongoing process of procedural fairness provided to an employer by advising the employer of the contravention and its potential consequences, explaining the evidence that was used in reaching the determination, and providing the employer with the opportunity to respond.

The employer might respond to the notification with full voluntary compliance, in which case the investigation usually will be completed (unless litigation is appropriate).

The employer may respond to a contravention letter (for example) by providing new evidence that disproves some or all of the alleged contraventions. In such cases, the Fair Work Inspector would consider the new evidence and advise the employer if the contravention letter stands in full, stands in part, or is withdrawn. The employer will be advised in writing to comply with any remaining items of the contravention letter.

On occasion, the Fair Work Inspector may determine that an optional final letter (following the contravention letter or other notification) would assist in resolving the investigation. Where appropriate in the circumstances of the case, the Fair Work Inspector (in consultation with their team leader) might issue a final letter that provides the employer with a further seven days to rectify the contraventions. The final letter also will detail the consequences of continued non-compliance.

²⁶ FW Regulations, chapter 5, part 5-2, division 3, regulation 5.05.

Sometimes, the employer will not comply in full with the notification of contraventions, in which case the next step is to consider an appropriate enforcement mechanism, including litigation where appropriate (see section 3.7 and chapter 5 of this Manual).

3.10.1 Calculation of entitlements

It is the responsibility of all employers to pay every employee in accordance with the relevant legislation. Therefore, wherever possible, the onus should remain on employers to calculate the amounts owed to a complainant or other employees. When dealing with large organisations, calculations may be straightforward. However, in cases where it is evident that an employer does not have the expertise to perform calculations or is unable to undertake the task accurately in a reasonable timeframe, it may be more efficient for the Fair Work Inspector to perform the calculations.

Fair Work Inspectors should use their judgement to decide whether to perform calculations. Calculating entitlements can be a time consuming task, particularly when dealing with various penalty rates, allowances, or overtime. However, a Fair Work Inspector should consider performing calculations if it is likely to produce a more accurate and timely result. A Fair Work Inspector also might provide calculations of amounts owed upon request of an employer, if this assists in obtaining a timely and fair outcome to the complaint. Providing a copy of calculations to the employer and answering questions is another way in which Fair Work Inspectors can educate employers on their responsibilities under the FW Act.

If the employer disputes the calculations sent by a Fair Work Inspector, the employer should be asked to provide evidence in support of their position and/or calculations of their own made in accordance with Commonwealth workplace laws.

Although it is not necessary to quantify the amount of an underpayment in order to issue a contravention letter, a Fair Work Inspector should have at least a rough idea of how much is outstanding to assist in resolving the complaint (where possible).

In some cases, it may be useful to ask the complainant how much they believe they are owed and the reasons why (depending on whether all the alleged contraventions have been proven, and the complainant's own ability to successfully determine their own entitlements). Having this information also can assist a Fair Work Inspector in managing the complainant's expectations, particularly where the complainant's calculations appear to be well above the amounts owed under the legislation.

If a matter proceeds to litigation, detailed and accurate calculations will need to be constructed by the Fair Work Inspector, in a format suitable for presentation to the court. The FWO's Calculations team also may be able to assist in these circumstances.

3.11 Voluntary compliance

Voluntary compliance is the most common way in which complaints are completed following an investigation. When it is determined that one or more contraventions have occurred and a contravention letter or other notification is issued, a Fair Work Inspector must give the employer a reasonable opportunity to voluntarily rectify the matter.

Where a contravention notification stipulates an underpayment amount, the employer may achieve voluntary compliance in one of three different ways:

- full provision of all outstanding entitlements
- payment by instalments, or
- offers to settle.

3.11.1 Full provision of all outstanding entitlements

Full provision of all outstanding entitlements is the payment in full by the employer of all amounts owing to the complainant, as determined or confirmed by the Fair Work Inspector. Record of the payment being made (gross and net) should be provided to the Fair Work Inspector by the employer and confirmed with the complainant.

3.11.2 Payment by instalments

On occasions, employers will indicate that they are unable to make full provision of entitlements immediately. Rather than embark on a course of action that may jeopardise the viability of the business and the livelihood of both employers and employees, Fair Work Inspectors are to exercise a flexible and common sense approach to recovering entitlements. This includes payment arrangements, whereby an employer enters into an arrangement to pay the outstanding amount over a specified period of time. A payment arrangement can be proposed by either party or by the Fair Work Inspector, although the request to pay by instalments usually is made by the employer.

The proposal needs to be approved via Decision Record by a team leader who will take into consideration:

- the reason for payment by instalments
- whether immediate payment would jeopardise the employer's ability to carry on its business
- the amount to be paid and the period the employer proposes to take for full provision of all outstanding entitlements
- the employer's history
- the solvency of the employer, which can be confirmed via Australian Business Number (ABN) and ASIC data
- the complainant's views.

If the instalments are approved, a detailed instalment plan needs to be signed by the employer. Confirmation of approval of the instalment plan must be sent to both parties. The employer should be advised that any default on an instalment payment may be followed by further action from the FWO, including action to recover the remaining amount owing.

The complainant should be advised that following the first instalment (which will be confirmed by the Fair Work Inspector), the complainant will have to monitor the remaining instalments and advise the Fair Work Inspector if a payment is not received. Importantly, the complainant should also be advised to confirm with the Fair Work Inspector when the full payment of all amounts has been received. Matters approved to be settled by instalments should remain open in Nexus until confirmation of all payments has been received from the complainant. The total amount of the instalments is entered into the monies recovered in Nexus.

If a complainant does not accept a payment schedule that appears reasonable (in all the circumstances), Fair Work Inspectors should seek the advice of their team leader. It is also appropriate for the Fair Work Inspector to advise a complainant who is owed outstanding entitlements of their rights of recovery under the FW Act, including under the small claims procedures where the complainant's outstanding underpayment is \$20,000 or less.

3.11.3 Offers to settle

An offer to settle is an amount proposed (often by the employer) in settlement of any underpayment resulting from the complaint. In general terms, it is acceptable for a complaint to be resolved via the acceptance of an offer to settle. This section of the Manual describes the considerations when an offer to settle arises during the investigation process (not Dispute Resolution).

An offer to settle can be made by either party at any stage of the investigation process. The Fair Work Inspector is responsible for ensuring that the integrity and progress of the investigation is not undermined or unduly delayed by any offers to settle.

The Fair Work Inspector should be open to parties resolving a matter on suitable terms, considering that a settlement may be an appropriate solution to a complaint. For example, a settlement may be fitting where an employer has made an honest mistake or it is difficult to determine the exact amount owed. A complainant may also prefer to accept an immediate payment that is less than the full entitlements owed instead of waiting for the completion of an investigation or receiving the complete amount under an instalment arrangement.

The Fair Work Inspector should discuss the suitability of any party's offer to settle with their team leader. The Fair Work Inspector should refer all offers made by the employer to the complainant (and vice versa). In so doing, the Fair Work Inspector (in conjunction with the team leader) should take care to ensure the other party (typically the complainant) understands the nature of the offer and their entitlements, and that no undue influence has been placed on a party to settle. During an offer process, the Fair Work Inspector must maintain impartiality and a facilitative role. The Fair Work Inspector should provide all parties with information as to the appropriate obligations and entitlements, in order that an informed decision can be made by the parties. The Fair Work Inspector should disclose to the parties whether the amount of an offer is more or less than is estimated to be owed by the FWO (if known). The Fair Work Inspector should also recommend that the parties seek their own legal advice as to whether it is in their interests to accept an offer to settle. The Fair Work Inspector must make notes of all involvement in an offer to settle.

Where an offer to settle has been accepted by the complainant, the Fair Work Inspector should obtain written confirmation from the complainant of their acceptance of the offer to settle. Where possible, this confirmation should include the terms of settlement and the actual amount (gross and net) to be paid to the complainant.

In practice, settlement may result in resolution of the complaint, but not necessarily full compliance with Commonwealth workplace laws. Should this situation occur, the Fair Work Inspector must seek authorisation from their team leader of the action to be taken by the FWO. If any contraventions are evident, regardless of the settlement, the employer should be advised of the contraventions in writing, and these should be recorded.

A settlement by the parties will not prevent the FWO from pursuing other action (including audit activity, further investigation, or litigation) if such action is appropriate. For example, it is appropriate for a Fair Work Inspector to consider further action with respect of the employer where:

- the employer has a previous complaint history
- the employer's engagement with the current complaint, including whether the employer understands or acknowledges their obligations, was poor.

Where further action is intended, it is important that all parties are made aware of such an intention by the Fair Work Inspector.

However, in most cases, where the complainant has accepted an offer to settle and has been provided with the full settlement as agreed between the parties, the FWO's investigation will have been completed.

3.11.4 General principles of voluntary compliance

Irrespective of the method of voluntary compliance, Fair Work Inspectors should obtain confirmation of the payments made to employees, including:

- the gross and net amounts paid (including the reason for any deductions)
- details of the electronic transfer or cheque number
- a photocopy of any cheques
- confirmation of receipt from the complainant (where appropriate).

A [record of payments made to employees form](#) (completed and signed by the employer) is the best method to confirm the payment information. The form may be sent to the employer to complete in response to the contravention notification if appropriate.

In some circumstances, enforcement (including litigation) will be considered the most appropriate action in response to the contraventions and act as a deterrent to others. This may occur even if there has been voluntary compliance. (See the available outcomes and enforcement options as detailed in section 3.7 and chapter 5 of this Manual.)

3.12 Completion after investigation

When the matter is completed, the complainant and employer must be notified in writing of the final outcome of the investigation, and the investigation closed. This correspondence should be provided to the parties within seven working days of the Fair Work Inspector's decision. Fair Work Inspectors and team leaders must be satisfied that the criteria for closing a complaint have been justified before the team leader approves the final outcome.

The Fair Work Inspector could also consider enclosing educative resource material along with the completion letter which is relevant to the nature of allegation, or to assist the parties to an investigation with the ongoing understanding of their workplace rights and responsibilities. The [Educative Tools and Resource Spreadsheet](#) contains details of the resources available.

4. Targeted campaigns and audits

4.1 Definitions

A targeted campaign is a proactive FWO initiative aimed at assessing and improving compliance with Commonwealth workplace laws in industries or areas that have been identified as needing education and/or intervention.

The term “campaign” describes the total process of stakeholder engagement, an information and awareness phase, a compliance audit phase, reporting, and evaluation. Campaigns often are industry-wide and involve a number of employers.

The term “audit” or “compliance audit” refers to specific activities carried out by the Fair Work Inspector in respect of a targeted employer’s business, in particular the examination of the employer’s records. An audit is only one phase or component of a campaign. The term “audit program” refers to targeted activities that consist of an audit and reporting phase only (see section 4.2.3 of this Manual).

For subjects not specifically explained in this chapter, refer to the relevant descriptions of these situations or processes detailed elsewhere in this Manual, Guides and associated materials.

4.2 Targeted Campaigns

In undertaking targeted campaigns, the FWO works proactively with specific industry sectors. Generally the key objectives of a campaign are to:

- engage with relevant industry associations to encourage their support and cooperation in regard to the campaign
- provide all identified employers in the sector with information and tailored on-line resources to assist them to comply with Commonwealth workplace laws
- undertake a communication strategy to reach as many employees in the sector as possible and to provide them with information about their rights
- assess a sample number of employers’ employment records to identify the scope and nature of contraventions in the sector
- work with non-compliant employers to assist them to comply and to encourage them to rectify their contraventions voluntarily
- publish a report with findings and recommendations to the targeted sector.

Audits undertaken as part of proactive targeted campaigns or audit programs have an educational focus. The Fair Work Inspector will explain to the non-compliant employer what they need to do to become compliant, provide them with self-help tools, and encourage them to voluntarily rectify any contraventions.

In addition, the Fair Work Inspector remains mindful of enforcement while conducting audits. Where cases of serious or wilful contraventions are identified during an audit, there is the option to escalate the audit for further investigation, and the use of enforcement options

including litigation (see chapter 5 of this Manual). Therefore, targeted campaigns bridge FWO's educational and compliance functions.

Targeted campaigns are implemented by the National Targeting Team which has dedicated Fair Work Inspectors in all states. They are supported by a Cross Agency Group with members from other branches, who provide additional and specialised support.

Information on targeted campaigns is made available to the public via the [audits and campaigns](#) section of the FWO website and through smart uniform resource locators (URLs) developed for each campaign. The URLs are designed to help targeted employers find on-line resources suitable for their sector. A report on the findings of each campaign providing statistical results, other findings and trends is published on the FWO website when the campaign is completed.

There are several types of targeted campaigns and activities:

- national campaigns
- state or territory (regional) campaigns
- audit programs.

4.2.1 National campaigns

The FWO implements four national campaigns each year, in accordance with the Portfolio Budget Statement. The sectors targeted as part of the national program are agreed to by the whole of FWO. The program is based on evidence gained from comprehensive industry research including a detailed analysis of FWO complaints. The program is endorsed by the Executive Committee. Stakeholder engagement and formal documentation including project briefs, action plans, process guidelines, recording tools, and public reports are features of national campaigns.

The project brief is developed by the Targeting Campaigns Unit (TCU) based in Adelaide and is circulated internally to other branches and the Cross Agency Group for comment. The TCU coordinates the campaign activities including liaison with other branches as required. The audits are managed by Campaign Coordinators responsible for Fair Work Inspectors in three geographical areas:

- Queensland, New South Wales and the Australian Capital Territory
- Victoria and Tasmania
- Western Australia, South Australia and the Northern Territory.

4.2.2 State or territory (regional) campaigns

The FWO implements a minimum of two state based campaigns per state each year, as per the Portfolio Budget Statement. These campaigns may be state wide, or focus on a specific region of the state. In some cases where states have similar issues, there will be joint campaigns across one or more states or territories.

The program of state based campaigns also is evidence-based, taking into account industry research including FWO complaint analysis, and is endorsed by the Director of Targeted Campaigns. State or territory campaigns are managed by the relevant Campaign Coordinators and the audits are carried out by Fair Work Inspectors in the geographical teams.

The features of state or territory campaigns in regard to stakeholder engagement, processes and reporting mirror those of national campaigns.

4.2.3 Audit Programs

Occasionally a program of audits only is undertaken. The programs can be:

- proactive programs, e.g. to see if there are compliance issues in an industry sector and to determine the need for a more comprehensive targeted campaign
- reactive programs, e.g. to respond to intelligence that needs immediate action (these are usually undertaken by DRC teams other than the National Targeting Team).

4.3 Conducting targeted campaigns

The process of conducting a national targeted campaign has six phases:

- proposal
- planning and design
- stakeholder engagement
- information and awareness
- audit
- reporting.

The proposal phase involves the identification of the industry or area that is to be targeted in the campaign and preparation of a formal targeted campaign brief and action plan. This phase is completed by the TCU for national campaigns and Campaign Coordinators for state based campaigns.

The planning phase involves liaison with other branches such as the Education Team and Communications Team to assist with the design of the particular audit methodology, the development of tailored on line self-help resources, and the creation of a communication strategy. Knowledge Services provide technical input and Fair Work Inspector briefings.

Stakeholder engagement involves making contact with key industry associations and unions to inform them of the campaign, check design objectives and intelligence, and co-opt their support in promoting the fair work message.

Information and awareness includes undertaking a comprehensive communication strategy to provide the whole of the sector with on-line resources to assist employers to comply and workers to understand their rights.

Audit (or assessment) involves selecting a sample number of employers from the sector and assessing their records to determine the level of compliance. This phase is described in section 4.4 of this Manual.

The reporting phase includes compiling and assessing the results and writing final reports for internal and external stakeholders. A public report is posted on the FWO internet site and the findings are presented to the relevant parties. This phase also is completed by the TCU.

4.4 The audit phase

The audit phase commences when a sample number of employers are notified of their selection for audit and requested to send in (or make available for inspection during a site visit) employment records and other information for specified periods of time. The type of records and information requested will be determined by the criteria specified in the campaign proposal.

The main involvement of Fair Work Inspectors in targeted campaigns is in the audit phase - when the documentation is received from the employer for analysis, and any necessary remedial action is identified. The analysis of records is carried out by Fair Work Inspectors in a similar way that investigations of complaints are conducted (see chapter 3 of this Manual), except that the focus of the assessment is determined by the aim of the campaign rather than allegations made by a complainant.

There are two compliance models used by the FWO in actioning audits. These are the desk-based compliance audit and the field compliance audit.

4.4.1 Desk-based compliance audits

The audit phase typically begins with the National Targeting Team issuing an [audit notification letter](#) and a “targeted campaign entity information form” to each of the employers being audited. These documents include an informal request that the employer provides records for a specified two week period, as described by the campaign objectives. The specified period often includes a public holiday. In addition, standard practice is that if the full workforce of an employer is up to twenty (20) employees, records for all employees will be requested. Otherwise a sample of records for employees is requested, with instruction given to the employer to include in the sample employees with a range of ages and classifications.

If the employer fails to respond to the informal request for a sample of employment records (or else fails to provide the full sample of records that are requested), the Fair Work Inspector should confirm coverage and make direct contact with the employer. Where necessary as a last resort, a formal request for the relevant documents or records that are sought can be made (see the [Notice to Produce Guide](#)).

On occasion an employer may respond to the initial request for information and records claiming:

- they had no employees during the period of the audit
- they are not covered by Commonwealth workplace laws.

If the Fair Work Inspector has concerns that the employer's claims regarding employee numbers or coverage are unconfirmed or unlikely, the matter can be progressed for a field visit or investigation (see section 4.5 of this Manual). In confirming coverage, the Fair Work Inspector should refer to the ASIC site to establish whether or not the entity is incorporated, or use ABN Lookup to check the owner of the ABN. If the Fair Work Inspector confirms that the employer is not within the jurisdiction of the FWO, they will advise the employer that the audit is closed. The employer usually is advised through direct communication, or if necessary via the [not suitable for audit](#) letter.

When records have been received from the selected employers a team of Fair Work Inspectors conducts an initial assessment during the triage process. The team assesses each employer's records to determine whether or not any contraventions have been identified. The [triage process map](#) lists the tasks, relevant timeframe and decision points in undertaking the initial triage assessment phase. The [audit triage checklist](#) is used to assist Fair Work Inspectors in identifying contraventions of the record keeping and pay slip requirements under the FW Act and FW Regulations, as well as any contraventions of fair work instruments.

If an employer has indicated that one or more of their employees is covered by an individual flexibility arrangement (IFA), Fair Work Inspectors should be guided by the [IFAs targeted audit checklist](#) in determining whether further audit or investigation is necessary.

If the employer is compliant with Commonwealth workplace laws, a [no contraventions letter](#) is sent to the employer by the Fair Work Inspector indicating that there were no contraventions in the samples provided and advising that the audit process is complete. The Fair Work Inspector should attach the triage checklist and letter as supporting evidence in Nexus.

If one or more contraventions are identified, the nature of the contraventions is assessed. The Fair Work Inspector first will contact the employer to discuss and confirm the findings, and then issue an [audit findings letter](#) to the employer. The audit findings letter contains a summary of the alleged contraventions, the remedial action required, and an explanation of the consequences of non-compliance. The issuing of an [audit findings letter](#) ensures that there is a record of the contravention having occurred, being detected, and being brought to the attention of the employer for rectification. Fair Work Inspectors may also consider enclosing educative resource material with the audit finding letter (e.g. the Best Practice Guide [Small business and the Fair Work Act](#)) or a link to the fairwork website to assist the employer in understanding the findings.

If the contraventions are only minor or technical contraventions of the employer's obligations in relation to employee records and pay slips under the FW Act and FW Regulations, the Fair Work Inspector will decide whether a verbal or written commitment from the employer is required. A technical contravention that can be resolved at this stage might include non-monetary contraventions which do not disadvantage an employee, such as the employer's failure to record the full name of the employee when the employee's identity is not in dispute.

If a verbal commitment is sufficient, the Fair Work Inspector should call the employer, advise the employer of the contraventions, obtain a verbal commitment from the employer to comply

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in future, note the conversation in Nexus, and issue a [completion of audit](#) letter that details the employer's verbal commitment to comply in future.

Where a written commitment is appropriate, the Fair Work Inspector will issue a [compliance commitment form](#) with the audit findings letter. (The Fair Work Inspector may also enclose the fact sheet [Employee records and pay slips](#) and/or templates [Weekly time and wages records](#), [Employment records – details](#) and [Employment records – leave as appropriate](#)). The correspondence from the Fair Work Inspector will require the employer to rectify the contravention and to provide evidence of this rectification by completing and returning the [compliance commitment form](#) to the Fair Work Inspector within fourteen (14) days. When the employer returns the completed [compliance commitment form](#), the Fair Work Inspector will review the details. If the Fair Work Inspector is satisfied that compliance has been achieved a [completion of audit letter](#) will be issued to the employer and the audit will be closed. If compliance has not been achieved, the audit may need to be escalated (see section 4.5 of this Manual).

Where more significant contraventions have been found, usually underpayments, the Fair Work Inspector will issue a [payment made to employees form](#) with the audit findings letter. The correspondence from the Fair Work Inspector will require that the employer conducts a self-audit for all employees for a specified period of time, and to rectify any underpayments for all employees for that specified period. This specified period for self-audit and rectification of underpayments will be consistent with the parameters of the targeted campaign. It is commonly a period of twelve months until the current date. However, if the Fair Work Inspector identifies that underpayments are likely to have occurred for longer, the Fair Work Inspector (in conjunction with the Campaign Coordinator) can direct the employer to self-audit and rectify underpayments for greater time periods. The Fair Work Inspector should refer to section 1.3 of this Manual for guidance where contraventions and underpayments may have occurred over six years ago.

The employer needs to provide evidence that the self-audit process has been conducted and that rectification payments have been made to employees. The employer supplies this evidence by completing the [payment made to employees form](#) and returning it to the Fair Work Inspector within fourteen (14) days. The Fair Work Inspector then critically assesses the evidence provided by the employer. If there is insufficient information to confirm back payment, the Fair Work Inspector will send a [confirmation of back payment letter](#) to a sample of employees to confirm that they have received their back payment. When the Fair Work Inspector is satisfied that rectification has been achieved, the Fair Work Inspector will record the result and complete the matter. The employer is advised of the completion through the [completion of audit letter](#). (Where the employer proposes to pay amounts owing by instalments, refer to the procedures in section 3.11.2 of this Manual. Importantly, matters approved to be settled by instalments should remain open in Nexus until confirmation of all payments has been received by the Fair Work Inspector. The total amount of the instalments should be entered into the monies recovered in Nexus.)

If the employer does not comply with the audit findings letter or the employer has not responded to a formal request for documents and records such as a Notice to Produce, the matter may need to be escalated, and a standard investigation process will be implemented.

On occasion, the employer may respond to the audit findings letter with new evidence that disputes some or all of the alleged contraventions. In such cases, the Fair Work Inspector should consider the new evidence and advise the employer if they are still required to rectify any matters and/or comply with any or all of the items of the audit findings letter. If the Fair Work Inspector determines in consideration of the further evidence that there are no contraventions, this is detailed in the [completion of audit letter](#) and the audit is closed.

4.4.2 Field compliance audits

Field based audits can form part of a campaign or audit program that is designed to be field based, or can result from a decision made during desk based triage that an audit is best continued in the field.

Field compliance campaigns or audit programs are usually audits of employers' record keeping and pay slip requirements in a specified geographical area such as a shopping centre, industrial park, locality or industry sector.

Field compliance audits can be initiated by sending each employer an [audit notification letter](#) confirming a forthcoming visit by the FWO, and requesting that records are available at the time of the proposed visit. However, in some cases, cold calls are made, and the FWO may advertise the campaign through local media releases and networks. For example, if field audits target employers in a shopping centre complex, the centre management may be notified.

In essence a field based audit follows many of the conventions of the desk based model with one major difference. By virtue of being at the employer's premises, the Fair Work Inspector has the opportunity to review documents such as pay slips and employment records on the spot. During this visit, the Fair Work Inspector may provide the employer with a [self-audit check list](#). The Fair Work Inspector may also provide pay and record keeping templates and/or provide the [Employer obligations in relation to employee records and pay slips](#) Fact Sheet to help explain the compliance requirements, as well as best practice record keeping techniques, to the employer.

In the event that the records or documents requested by the Fair Work Inspector are not available, or there is a suspected contravention, the Fair Work Inspector should consider further audit activity or investigation. This may include reverting to the desk-based audit where a formal request for relevant records or documents may be initiated (see the [Notice to Produce Guide](#)).

At the conclusion of all field compliance audits that are resolved at the employer's premises, a [site visit document](#) will be completed by the Fair Work Inspector and jointly signed by both the Fair Work Inspector and the employer or their authorised representative. Where the employer or representative declines to sign the entry, the Fair Work Inspector should create and sign a note on the site visit report and record the same in Nexus. The site visit document acts as a record of the visit, and details the advice and instructions provided to the employer or representative by the Fair Work Inspector. During a field compliance audit, the Fair Work

Inspector may choose to direct the employer to the self-help resources on the fairwork website.

4.5 Matters that may require escalation to investigation

The Fair Work Inspector may identify matters during an audit that require escalation to an investigation process. For example, the Fair Work Inspector may become aware of the apparent contravention of the provisions of the FW Act that relate to general protections, or the Fair Work Inspector may believe that the contraventions identified are sufficiently serious to warrant enforcement action (including litigation), regardless of the employer's willingness to comply with the audit findings letter. Furthermore, where an employer refuses to engage in the audit process, asserts without evidence that they have no employees or are not within the FWO's jurisdiction, or does not respond to formal requests for documents or records, the matter should be escalated for investigation. In these cases, the Fair Work Inspector should discuss the matter with their Campaign Coordinator, and where appropriate the relevant Compliance team and/or Legal Group.

The Fair Work Inspector also may have contact with employees during an audit that can give rise to specific inquiries or complaints being made to the Fair Work Inspector about entitlements or the employer's alleged non-compliance. In such cases, the Fair Work Inspector should inform any such employee of the methods of obtaining information (such as visiting www.fairwork.gov.au or calling the Fair Work Infoline on 13 13 94). Where relevant, the Fair Work Inspector in addition should advise the employee of their ability to lodge a formal complaint with the FWO, to facilitate inquiry into any specific allegations from the employee. In this case, the Fair Work Inspector also should inform their Campaign Coordinator of the allegations, and seek the Campaign Coordinator's advice as to whether such matters would be considered as part of the audit, logged onto a follow up register for a subsequent audit, or examined separately through the FWO's dispute resolution or investigation methodologies.

5. Enforcement

5.1 Sophisticated deployment of enforcement tools

It is widely accepted amongst regulation experts that “deterrence measures, such as prosecution, should be coupled with more creative and strategic approaches to enforcement.”²⁷ Building upon the litigation and investigation policies detailed in [FWO Guidance Note 1 - Litigation Policy](#) and [FWO Guidance Note 8 - Investigation Process \(GN8\)](#), the FWO’s [Enforcement Strategy 2012–2016](#) seeks to achieve sustained and widespread compliance through an intelligent and sophisticated deployment of enforcement tools.

Within the formal compliance activities of the FWO, it is acknowledged the inspectorate can deploy a range of enforcement tools with more sophistication than it has historically. As there are key gradations of compliance responses, [Enforcement Strategy 2012–2016](#) details a progressive, enhanced and flexible deployment of the FWO’s enforcement tools and acts as a guide for managers to drive high performance by assisting Fair Work Inspectors to exercise their discretion in the selection of an appropriate option. Section 5 of this Manual should be read in conjunction with the guidance provided in the FWO’s [Enforcement Strategy 2012–2016](#).

These principles also apply to Dispute Resolution teams when using enforcement tools.

5.2 Summary of enforcement tools

There are a series of enforcement tools that the FWO can utilise without needing to make recourse to litigation through the courts. These are described below.

5.2.1 Letter of caution

A letter of caution is a warning issued to an employer in respect of a contravention where the Fair Work Inspector has determined that there is sufficient evidence to start FWO litigation but that litigation is not in the public interest (as detailed in [FWO Guidance Note 1 - Litigation Policy](#)). Consequently, a letter of caution is utilised at the end of a case where a person needs to be put on notice regarding future compliance.

Letters of caution are educative in nature and also have a tactical power in the areas of offsetting, misclassification, industrial action and to a lesser extent discrimination and adverse action. A letter of caution ordinarily is not issued if there are outstanding entitlements owed to the complainant (small claims referral or FWO litigation often would be considered instead).

A letter of caution:

- sets out the background to and the determination of a contravention (in a similar way to a contravention letter – see section 3.10 of this Manual)
- sets out the relevant public interest factors and states that the FWO has determined that it is not in the public interest to start litigation against the employer

²⁷ *The Use of Enforceable Undertakings as a Strategic Labour Law Compliance Strategy*, John Howe and Tess Hardy, Centre for Employment and Labour Relations Law, University of Melbourne (draft unpublished 2012), page 1.

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- issues a formal caution to the employer to comply with its obligations in future
- warns the employer that in the event of future non-compliance the issuing of the letter of caution will be relevant to the FWO's determination as to whether or not to litigate, and were that to occur, a copy of the letter of caution may be put before the court to demonstrate a history of non-compliance.

The Fair Work Inspector should draft the [letter of caution](#) and submit it to their assistant director or director, who should review the reasons supporting the issuing of the letter of caution (as set out in the letter), and make any necessary changes. While an assistant director can approve the letter of caution, it is preferable that a director signs and sends the letter of caution by registered mail.

The issuing of a letter of caution should be noted in Nexus, with the relevant outcome recorded as sustained.

5.2.2 Compliance notices

A compliance notice provides Fair Work Inspectors with another option to address non-compliance without pursuing court proceedings for contraventions occurring from 1 July 2009.

A compliance notice can only be used in certain circumstances, as detailed in [FWO Guidance Note 3 - Compliance Notice Policy](#) (sections 4 to 6 and 10). Where a compliance notice cannot be used to detail the contraventions, the Fair Work Inspector may need to rely on the contravention letter as the primary means of detailing the contraventions to the employer (see section 3.10 of this Manual).

A compliance notice must contain the information as specified in the FW Act, including the explanation that failure to comply with the notice may contravene a civil remedy provision, and the grounds under which the recipient may seek a review through the courts.²⁸ The compliance notice must include the following details:

- the specific action required to remedy the direct effects of the contravention; and/or
- the evidence required to be supplied by the person to show compliance with the notice; and
- the timeframe within which the person is required to comply (noting that the time allotted must be "reasonable").²⁹

An example of detailing the direct effects of the contravention would include the Fair Work Inspector specifying the particular employees who they reasonably believe have outstanding entitlements, and the monetary amount of such entitlements. [FWO Guidance Note 3 - Compliance Notice Policy](#) contains examples (at sections 6.3 and 6.4) of valid and invalid wording which may guide Fair Work Inspectors. It also is appropriate for a compliance notice to require evidence of a specific action being taken to comply with Commonwealth workplace laws, e.g. evidence of registration of an entity with FWC in accordance with Schedule F of the Textile, Clothing, Footwear and Associated Industries Award 2010.

²⁸ FW Act; s 716(3).

²⁹ FW Act; s 716(2).

If a person complies with the compliance notice, the FWO cannot commence proceedings in relation to the alleged contravention specified in the compliance notice. Therefore, it is necessary to consider the seriousness of the contravention before issuing a compliance notice.

The FWO's full compliance notice policy is found in the public [FWO Guidance Note 3 - Compliance Notice Policy](#).

Compliance notices will be issued in an ever increasing number of matters from 2013-2016, including for small to medium enterprises (SMEs) where non-compliance with FWO administrative determinations is anticipated. Compliance Notices are a persuasive tool in rectification of entitlements and, if used prudently, are an asset to the FWO's regulatory reach.

5.2.3 Infringement notices (INs)

An infringement notice (IN), formerly referred to as a penalty infringement notice (PIN), is a monetary penalty or fine imposed under the FW Regulations³⁰ as an alternative to litigation action in respect of particular contraventions of the FW Act relating to time and wage records and pay slips.³¹ The maximum penalty payable under the IN is 10% of the maximum penalty a court could impose for the same contravention.

The subject of INs is covered in the [Infringement Notice \(IN\) Guide](#).

INs will be issued in an escalating number over 2013-2016 where matters are impeded by incomplete or non-existent record keeping practices and there is the reasonable belief the employer was doing so to avoid Commonwealth workplace laws. Record keeping is the bedrock of compliance and INs serve as an excellent alternative to litigation, particularly with respect to SMEs.

5.2.4 Assisted small claims

Small claims action refers to a legal proceeding started by the complainant to recover certain unpaid entitlements owed under the FW Act, a fair work instrument, or a safety net contractual entitlement.³² The maximum that can be ordered by the court is \$20,000.³³ A small claims action is not an action taken by the FWO.³⁴ There is no penalty available under small claims procedures and any judgment awarded will be limited to recovery of the amount owed.³⁵ As an action taken under the FW Act, it is taken in a "limited costs" jurisdiction (subject to section 570 of the FW Act). In suitable cases, small claims action is an effective way of achieving a result for a complainant and completing a matter.³⁶

³⁰ FW Regulations; chapter 4, division 4, regulation 4.04.

³¹ FW Act; s 535(1), 535(2), 536(1), and 536(2).

³² FW Act; s 548. An employer might also take small claims action under s543 of the FW Act, as detailed in the *Fair Work Bill 2008 Explanatory Memorandum* (paragraph 2148). However, a Fair Work Inspector would not be involved in such an action.

³³ FW Act; s 548(2)(a).

³⁴ The FW Act does not explicitly include or exclude Fair Work Inspectors from commencing a small claims action. However, current FWO position is that such actions are not commenced by a Fair Work Inspector.

³⁵ Some courts may make an order that includes recovery of the filing fee and/or interest in addition.

Where appropriate, Fair Work Inspectors can assist parties to undertake small claims procedures under the FW Act through the appropriate court. It is important that Fair Work Inspectors understand that in assisting a complainant in a small claims matter, they are not representing them. Fair Work Inspectors should explain to the complainant that the Fair Work Inspector's role is to assist the court in arriving at the correct decision.

Assisted small claims will be employed where the FWO considers penalising a person is not warranted but recovery of entitlements is just. While resource intensive, the tool enhances the reputation of the FWO as an effective regulator committed to exceptional customer service.

5.2.5 Pro-active Compliance Deeds

A pro-active compliance deed is an agreement between an employer and the FWO that aims to help the employer ensure that employees are receiving the correct entitlements. Pro-active compliance deeds have no legislative backing. A pro-active compliance deed is not entered into by a Fair Work Inspector, but is accepted and signed on behalf of the Fair Work Ombudsman by the same persons with delegation for enforceable undertakings (see section 5.2.6 of this Manual).

A pro-active compliance deed is in effect a hybrid of an enforceable undertaking and a self-audit, with the added bonus of an ongoing compliance provision where all new complaints to FWO are treated in the first instance by the employer and then the outcome is provided to FWO for validation. While in 2013 the FWO will encourage good corporate citizens to continue in partnership, by 2016 systemic compliance achieved through a pro-active compliance deed will be an indicator of a fair Australian workplace. Generally signed pro-active compliance deeds are [published](#) on the FWO's internet site.

5.2.6 Enforceable undertakings (EUs)

An enforceable undertaking (EU) is written deed executed between a party (often the employer) and the FWO provided under the FW Act.³⁷ Typically, an EU contains:

- an admission of contraventions
- an agreement by the party to perform specific actions to remedy the contraventions (e.g. payment plan to rectify underpayments, making an apology, printing a public notice)
- a commitment to certain future compliance measures (e.g. regular internal audits, training for managers and staff, implementing compliance measures, future reporting to the FWO).

An EU is an alternative to the FWO taking litigation action. The purpose of an EU is to focus the employer on rectifying the contravention and on preventing similar contraventions in the future. A relevant consideration in determining whether an EU is in the public interest will be whether or not the objectives of litigation (rectification of the contravention, and general or

³⁶ A Small Claims Guide or other material will expand this topic.

³⁷ FW Act; s 715.

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specific deterrence) can be achieved or indeed enhanced through the EU, without the added expense and delay associated with litigation.

An EU cannot be entered into where:

- a compliance notice has been issued in respect of the contravention (as an EU cannot be accepted in these circumstances)
- the FWO seeks an order of the courts for contravention of a civil remedy provision in relation to the matter (as such action is not available if an EU is in effect).

A Fair Work Inspector does not enter into an EU. However, they should provide (in the [litigation summary minute](#)) a brief assessment of whether an EU would be suitable and in the public interest, taking into account factors such as the employer's level of cooperation, attitude, compliance history, and the seriousness of the contravention. Prior to an EU being offered to a party, an in-principle endorsement from the delegate is required.

All EUs must be accepted and signed by the Chief Counsel, Director – Legal Practice or Group Manager – Operations on behalf of the Fair Work Ombudsman. In addition, the Executive Director – Dispute Resolution and Compliance has delegation to sign EUs on behalf of the Fair Work Ombudsman where the number of employees is less than 100 and the collective underpayments are less than \$200,000.³⁸

The FWO's full EU policy is found in the public [FWO Guidance Note 4 - Enforceable Undertakings Policy](#). Usually signed EUs are published on the FWO's internet site.

An EU will be offered to a significantly increased number of employers (preferably early in the life of a matter) over 2013-2016. EUs will be progressively presented to SMEs as a default offering, recognising that SMEs typically do not have a dedicated human resources capability. As there "are few restrictions in the FW Act on when they can be made and what they can contain,"³⁹ EUs will involve a renewed emphasis on securing future compliance through novel approaches, including ensuring that a party's middle management attend training on the rights and responsibilities of duty holders. As a policy, parties will be given seven (7) days to consider the EU, contributing to more timely and less resource intensive outcomes.

5.3 Consequences of non-compliance with enforcement tools

Any request of a regulator must be clear to the respondent on what they are being asked to do. Where the compliance tools as described in section 5.2 of this Manual are not effective in securing compliance, then litigation may be the next stage. For example, failure to comply with a compliance notice or IN may lead to litigation. Refusal to enter into a pro-active compliance deed or EU also may leave litigation as the best remaining enforcement option available for the FWO.

³⁸ FWO [Delegation of Powers and Functions](#), 30 January 2013.

³⁹ *The Use of Enforceable Undertakings as a Strategic Labour Law Compliance Strategy*, John Howe and Tess Hardy, Centre for Employment and Labour Relations Law, University of Melbourne (draft unpublished 2012).

[Enforcement Strategy 2012–2016](#) endorses each instance of non-compliance with an enforcement tool be assessed against the two factor test contained in [FWO Guidance Note 1 - Litigation Policy](#) as to whether litigation is warranted.

5.4 Litigation

Litigation is used sparingly an enforcement measure by the FWO. Litigation is an option that causes significant cost, financial and otherwise, to any party and the decision to employ this option must be balanced and considerate of many factors including the severity of its impact. [Enforcement Strategy 2012–2016](#) contends this option will be reserved for those persons (legal and natural) who engage in deliberate and systemic non-compliance involving one or more of the following elements: vulnerable employees, significant underpayments, sham arrangements, wilful blindness and unlawful egregious industrial action, namely, when specific and/or general deterrence is required in the interest of public interest. FWO's best practice regulation will see all litigations filed in court within a year of receipt.

The [Enforcement Strategy 2012–2016](#) recognises there are likely to be only limited gains for compliance purposes in the FWO taking legal action against small businesses or sub-contracting employing entities who are in effect price takers and lack bargaining power. At best the FWO can remove non-compliant employers from the industry. If that occurs, entities that set or influence the market – sitting at the top of procurement chains – may simply replace those contractors with other non-compliant employers.

By strengthening the FWO's use of the accessorial liability provision contained in section 550 of the FW Act, the [Enforcement Strategy 2012–2016](#) seeks to change behaviour and ensure system wide compliance at the highest level of industry structures.

It is incumbent upon the FWO to use its full range of statutory powers in order to position itself within its authorising environment as an energetic regulator that can work with other government agencies, such as the Australian Taxation Office (ATO), the Department of Immigration and Citizenship (DIAC), the Australian Securities and Investments Commission (ASIC), and Fair Work Building and Construction (FWBC). This will enable the FWO to drive linked compliance activities so as to target widespread misclassification, sham arrangements, abuse of migration and taxation laws, and unlawful industrial action, and thus ensure a level playing field.

5.5 Litigation recommendation process for Fair Work Inspectors

The decision to recommend a matter for litigation can involve many intricate considerations. For detailed information, Fair Work Inspectors should refer to [FWO Guidance Note 1 - Litigation Policy](#). Fair Work Inspectors should also bear in mind that the [FWO Strategic Plan 2012-2016](#) details that the agency will “commence strategically aligned litigation” and “litigate failures to comply with compliance notices and INs to enhance their effectiveness.”

If a director is of the view that a particular matter presents as having reasonable grounds for litigation, the director is to conference early in the life of an investigation with the relevant principal lawyer and any other relevant personnel to consider the available information and

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evidence. If the Director and the Principal Lawyer are in agreement, the matter status will be recorded on Nexus by the relevant Fair Work Inspector as a “potential litigation.”

If, following further investigation and evidence gathering, an additional case conference is considered necessary, then the director requests an “identified litigation case conference” to be held, typically involving the Fair Work Inspector, team leader, assistant director, director, principal lawyer, Director – Legal Practice, and Executive Director – Dispute Resolution and Compliance. If there is agreement at this conference the matter is suitable for litigation, the matter status is recorded on Nexus by the Fair Work Inspector as an “identified litigation.”

This “identified litigation” case conference should occur as early in the life of an investigation as possible so as to avoid any unnecessary investment by a Fair Work Inspector in a matter that is not considered in the public interest as per the terms of [FWO Guidance Note 1 - Litigation Policy](#).

Once a matter is considered an “identified litigation”, the director is responsible for managing the investigation and preparing a [litigation summary minute](#) and a [brief of evidence](#). It is the director’s responsibility to submit the litigation summary minute to the Executive Director – Dispute Resolution and Compliance for consideration. If agreeable, the Executive Director – Dispute Resolution and Compliance will refer the litigation summary minute to Legal Group recommending the brief of evidence be considered by Legal Group with a view to determining its prospects if it would be filed in an eligible court (see section 5.7 of this Manual).

Where a matter is determined as being not suitable for litigation at either of the case conferences, the director may decide to use other enforcement options (including a letter of caution, compliance notice, IN, referral to small claims), to recommend proceeding towards reaching a pro-active compliance deed or EU with the party, or to seek an injunction (see section 5.8 of this Manual). The director may also exercise judgment and discretion to decide that no further action should be taken. In any case, the decision of the director should be recorded.

5.6 Evidential evaluation

Evidential evaluation occurs before or in conjunction with the initial case conference for a “potential litigation.” In an evidential evaluation, material collected by the Fair Work Inspector is tested for admissibility as evidence. The evidential evaluation provides an opportunity for Fair Work Inspectors to address material or evidence which can strengthen the case or that is detrimental to the case, and assists Legal Group to determine the likelihood of a successful litigation.

Legal Group evaluation will consider issues such as the strength of the matter, the relevant burden of proof, whether sufficient evidence exists against the employer to be able to proceed to litigation, and public interest considerations. A further evidential evaluation will be usually carried out in consultation with Legal Group after the submission of a [brief of evidence](#).

Where a determination is made that there is insufficient evidence or that it is not in the public interest to proceed to litigation, the recommendation to litigate should be withdrawn. In that

case, other available enforcement options should be considered, including a letter of caution, compliance notice, IN, referral to small claims or seeking to reach a pro-active compliance deed or EU with the party.

When a determination is made that no further action is required, the complainant and employer must be notified in writing of the outcome of the case.

5.7 Litigation processes for approved litigations

When a determination is made that it is appropriate for a matter to proceed to litigation, Legal Group will start their internal processes to prepare the case to be lodged in court. The Fair Work Inspector responsible for the matter is required to provide information and assistance to Legal Group as requested, as a priority (see section 3.4 of this Manual for further applicable principles regarding timeliness).

Throughout the litigation process, the Fair Work Inspector is responsible for monitoring the progress of the matter and keeping the complainant informed of developments. This includes not only providing updates and information to their team leader, assistant director and director, and responding to requests from the complainant, but also instigating regular contact with complainants to provide appropriate updates (see section 3.6 of this Manual on managing expectations of parties).

If a Fair Work Inspector has queries regarding the progress of a matter through the litigation process, they are encouraged to contact the FWO lawyer responsible for the file.⁴⁰

5.8 Injunctions

The FW Act, in relation to contraventions of civil remedy provisions, allows that the Federal Court or Federal Circuit Court (formerly known as the Federal Magistrates Court) may make “an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention.”⁴¹ The FW Act also allows for injunctions to be sought by Fair Work Inspectors in relation to various matters relating to industrial action.⁴²

However, the FWO is unlikely to seek injunctions on a regular basis. Where a director believes that an injunction may be appropriate, they should discuss the matter with the relevant principal lawyer, and formally detail the reasons that an injunction is appropriate as part of a briefing which will inform a case conference involving the Chief Counsel and Executive Director – Dispute Resolution and Compliance.

⁴⁰ Additional materials could be compiled into a Litigation Guide and/or other materials.

⁴¹ FW Act; s 545(2)(a).

⁴² FW Act; s 417(3), 421(1), and 421(3).