

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

Office of the Fair Work Ombudsman

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ISSN 1036–7632 (Print)

ISSN 2203–0352 (Online)

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

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

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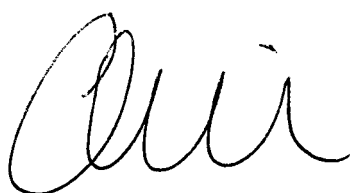
Canberra ACT
14 April 2025

Dear President
Dear Mr Speaker

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

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

Yours sincerely



Dr Caralee McLiesh PSM
Auditor-General

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

AUDITING FOR AUSTRALIA

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Audit snapshot

Auditor-General Report No.30 2024–25

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



Why did we do this audit?

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



What did we find?

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



Key facts

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



What did we recommend?

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

310,000

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

3,256

requests for assistance referred for investigation in 2023–24.

215 days

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

Summary and recommendations

Background

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

Rationale for undertaking the audit

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

Audit objective and criteria

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

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

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

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

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

Conclusion

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

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

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

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

Supporting findings

Governance arrangements

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

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

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

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

Prevention and detection of non-compliance

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

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

Enforcement

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

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

Recommendations

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

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

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

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

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

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

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

Summary of entity response

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

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

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

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

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

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

Key messages from this audit for all Australian Government entities

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

Governance and risk management

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

Performance and impact measurement

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

Policy/program implementation

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

Audit findings

1. Background

Introduction

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

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

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

Regulatory functions

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

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

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

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

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

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

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

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

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

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

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

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

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

Table 1.1: Compliance and enforcement tools

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

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

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

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

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

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

External review of the OFWO

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

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

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

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

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

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

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

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

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

Previous ANAO audit

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

Rationale for undertaking the audit

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

Audit approach

Audit objective, criteria and scope

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

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

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

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

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

Audit methodology

1.19 To address the audit objective, the audit team:

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

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

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

2. Governance arrangements

Areas examined

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

Conclusion

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

Areas for improvement

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

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

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

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

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

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

Has the OFWO developed a risk-based compliance strategy?

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

Statements of expectations

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

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

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

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

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

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

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

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

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

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

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

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

Compliance strategy and regulatory posture

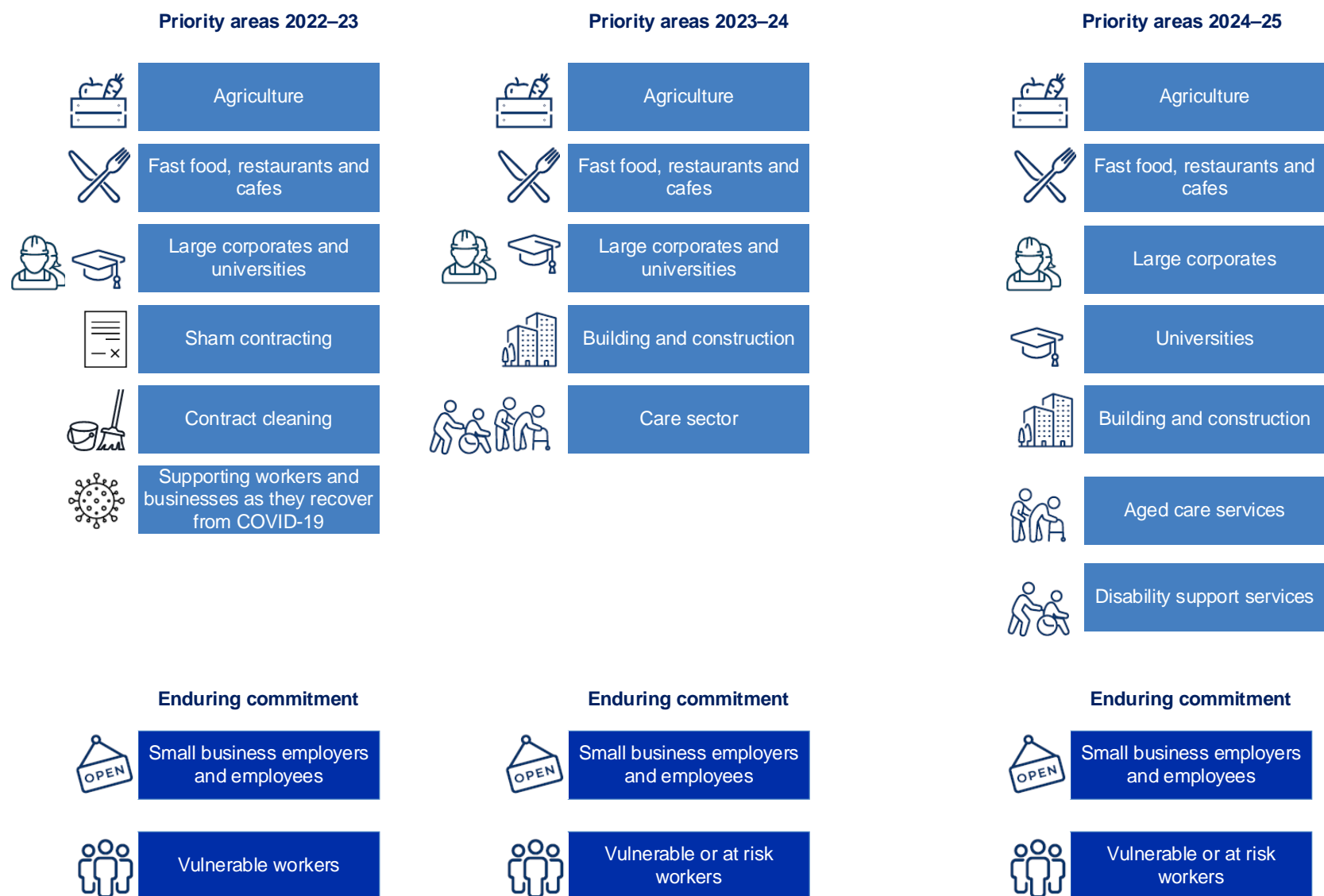
2.10 A compliance strategy and regulatory posture are mechanisms used by regulators to articulate their regulatory approach. For the OFWO, its compliance strategy should cover regulatory priorities, how it will balance education and advice, compliance activities and enforcement actions to maximise regulatory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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

Identification and management of risks and exposures

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

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

Risk management framework and processes

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

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

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

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

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

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

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

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

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

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

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

Recommendation no. 1

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

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

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

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

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

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

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

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

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

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

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

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

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

Forums and advisory groups

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

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

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

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

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

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

- higher education reference group.

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

Stakeholder feedback

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

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

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

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

Regulatory capture risk

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

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

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

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

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

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

2.44 The committee defined regulatory capture as:

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

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

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

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

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

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

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

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

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

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

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

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

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

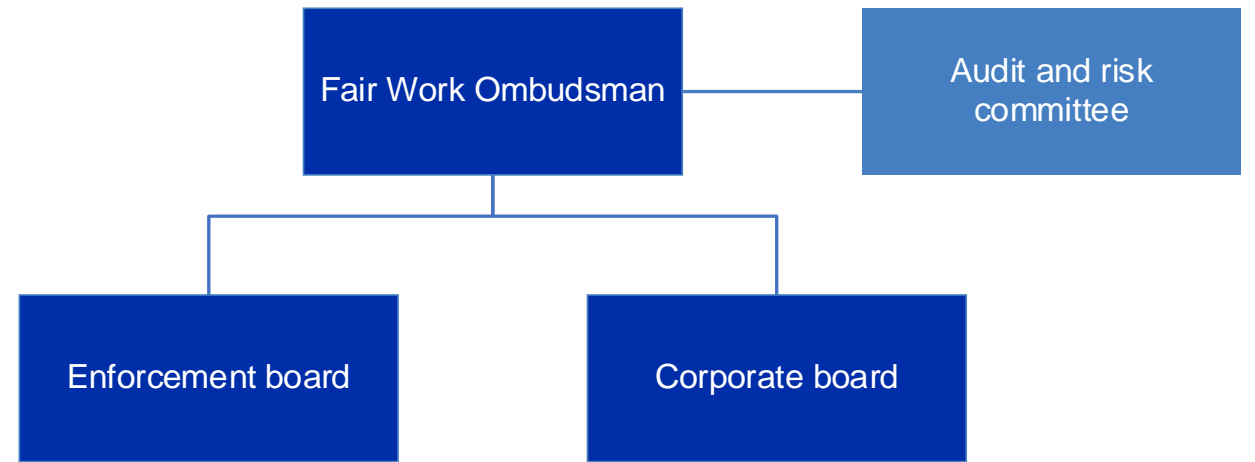
Does the OFWO effectively monitor and report on its performance?

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

Governance arrangements

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

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



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

Enforcement board

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

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

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


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

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

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

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

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

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

Key:  Fully discharged  Partially discharged  Not discharged

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

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

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

Corporate board

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

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

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

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

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

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

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

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

Key: ◆ Fully discharged ▲ Partially discharged ■ Not discharged

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

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

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

Recommendation no. 2

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

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

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

Governance reviews

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

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

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

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

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

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

Audit and risk committee

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

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

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

Performance reporting

Performance reporting as a non-corporate Commonwealth entity

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

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

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

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

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

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

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

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

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

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

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

Key: ◆ Achieved ▲ Partially achieved ■ Not achieved

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

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

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

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

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

Performance reporting as a Commonwealth regulator

2.79 RMG 128 sets out the three principles of regulator best practice which enable regulators to demonstrate how they are meeting the Australian Government's expectations.³⁷ RMG 128 encourages regulators to develop performance measures to allow reporting against each of the three principles of regulator best practice. The guide also encourages regulators to adopt outcomes-focused performance measures for reporting, and where practicable, use a mixture of qualitative and quantitative performance measures. RMG 128 states that regulators should reconcile performance outcomes in their annual performance statements with reference to the best practice principles.

2.80 The OFWO performance measures and targets included in its corporate plans and annual reports do not explicitly align to the best practice principles. Corporate plans for 2022–23 and 2023–24 included case studies to demonstrate how it was meeting the three principles. The 2024–25 corporate plan did not provide similar case studies and identified that the OFWO had 'reviewed our framework incorporating the government's principles of regulatory best practice into our measures and processes ...'. Some of the performance measures and targets identified in the 2024–25 corporate plan were still under development at December 2024.

2.81 The OFWO's annual reports for 2022–23 and 2023–24 include a range of case studies and information which outlines how the OFWO was implementing the principles of regulator best practice.

2.82 RMG 128 states that regulators should embed methodologies in its performance monitoring and reporting processes to understand the costs, impact and outcomes of regulation and collect evidence of this at a system-wide level, using insights to support and drive improved outcomes. As

37 Department of Finance, *Resource Management Guide No.128: Regulator Performance*, available from <https://www.finance.gov.au/government/managing-commonwealth-resources/regulator-performance-rmg-128> [accessed 15 November 2024]. See paragraph 2.5 for explanation of the three principles.

detailed in Table 2.2, the OFWO's understanding of resourcing and impacts as part of monitoring the implementation of annual regulatory priorities has been identified as a gap in the OFWO's strategic oversight arrangements.

2.83 Auditor-General Report No.14 2012–13 *Delivery of Workplace Relations Services by the Office of the Fair Work Ombudsman* assessed the effectiveness of the OFWO's administration of education and compliance services under the Fair Work Act. The report found that:

the KPIs do not directly measure the effectiveness of FWO's program in achieving its objective and contributing to FWO's outcome. Although developing measures of effectiveness can be challenging, it is important that they are established for internal management and external accountability purposes, including gauging the impact of changes in delivery approaches over time.

2.84 The ANAO recommended that the OFWO establish key performance indicators to measure the effectiveness of its services in supporting compliance with workplace laws; and develop measures of the efficiency of its service delivery, which relate to the number, type and cost of resource inputs, and the level of workplace relations services delivered.³⁸ The recommendation has not been implemented and these findings from 2012–13 continue to be issues for the OFWO and its approach to performance measure development and monitoring. The OFWO performance reporting arrangements do not provide insight into the ongoing efficiency and effectiveness of regulatory outcomes and impacts.

38 Auditor-General Report No.14 2012–13, *Delivery of Workplace Relations Services by the Office of the Fair Work Ombudsman*, ANAO, Canberra, 2012, pp. 96–97, available from <https://www.anao.gov.au/work/performance-audit/delivery-workplace-relations-services-the-office-the-fair-work-ombudsman> [accessed 30 January 2025].

3. Prevention and detection of non-compliance

Areas examined

This chapter examines whether the Office of the Fair Work Ombudsman (the OFWO) has established effective arrangements to encourage voluntary compliance and detect non-compliance with the *Fair Work Act 2009* (the Fair Work Act).

Conclusion

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

Areas for improvement

The ANAO identified one opportunity for improvement aimed at implementing arrangements to provide insight into whether the balance of preventative and detective compliance and enforcement activities is appropriate.

3.1 Section 682 of the Fair Work Act outlines the functions of the Fair Work Ombudsman. The functions are aimed at both preventing and detecting non-compliance with the Fair Work Act and fair work instruments.

3.2 Prevention activities are those used to promote harmonious, productive and cooperative workplace relations and compliance. The OFWO's prevention activities include: providing education and advice to employees, employers, outworkers, outworker entities and organisations through its Fair Work Infoline³⁹ and fairwork.gov.au website including a suite of resources and digital products and services; producing best practice guides and tools; and publishing a compliance and enforcement policy.

3.3 Detection activities are those used to monitor compliance with the Fair Work Act and fair work instruments. The OFWO's detection activities include: gathering and reviewing intelligence and evidence; monitoring and analysis of workplace trends; exchanging information and intelligence with other regulators and government agencies; responding to requests for assistance; proactive investigations⁴⁰; and monitoring and investigating self-reported non-compliance.

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

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

Are the OFWO's arrangements for the prevention of non-compliance effective?

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

Education, best practice guides and advice

Education and best practice guides

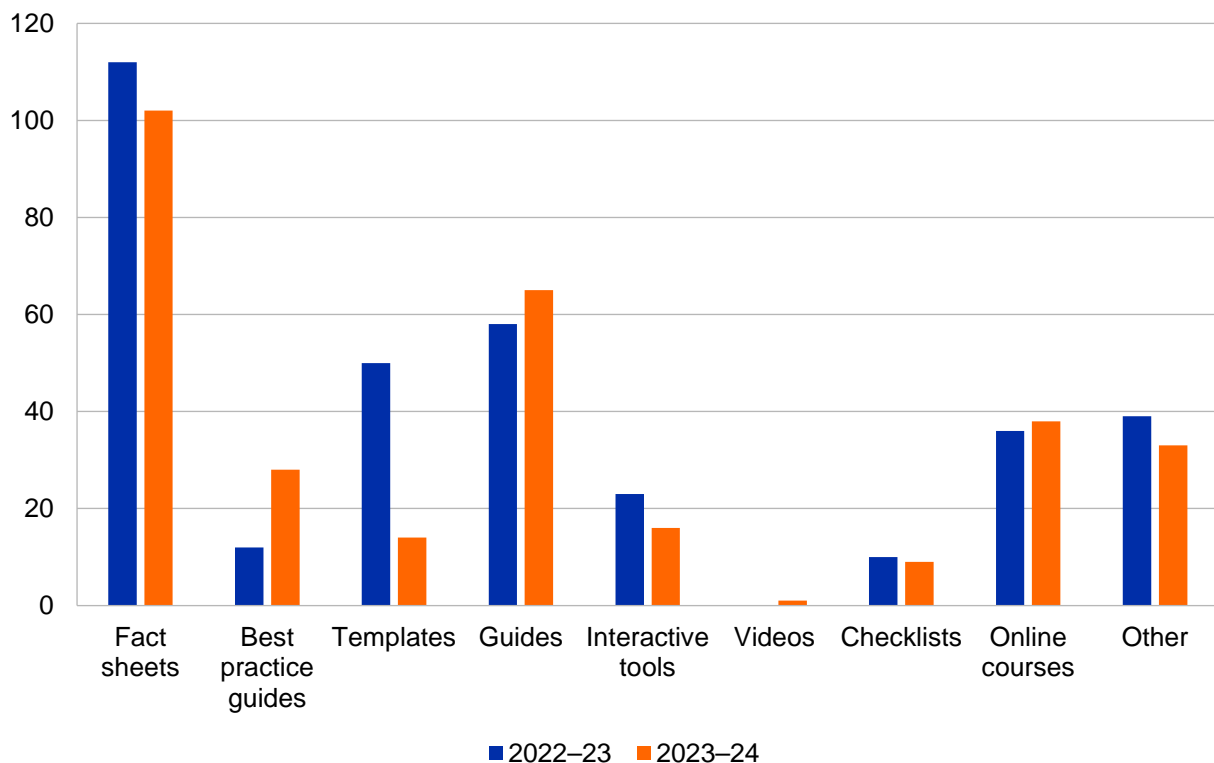
3.4 The OFWO provides education resources and guidance to assist employers and employees to understand their rights and obligations under workplace laws and to support the Fair Work Ombudsman's strategic priorities and regulatory posture.

3.5 The fairwork.gov.au website enables access to materials related to the exercise of the OFWO's regulatory functions. The OFWO maintains a strategy for planning, managing and delivering content on fairwork.gov.au to guide how information is accessible, reliable and fit-for-purpose. The strategy was last updated in October 2023 and the key objective of the strategy is to ensure a seamless digital experience across fairwork.gov.au. The OFWO has also prepared a behavioural economics and education team strategy 2020–23, which outlines how the OFWO creates and maintains a suite of over 300 education tools and resources. Both strategies include statements about how the OFWO will measure success.⁴¹ These documents do not identify performance measures, targets or baselines in which the success of the education regulatory functions can be measured or monitored by the OFWO.

3.6 The type and number of education and guidance materials maintained and published by the OFWO is summarised in Figure 3.1. The OFWO maintains information on how many existing resources are updated, new resources are developed and old resources are decommissioned each month.

41 For example, the measures of success in the behavioural economics and education team strategy are: our work is clearly aligned to the OFWO's annual strategic priorities; our work applies best practice behavioural economics and human centred design approaches; our work is valued by stakeholders and the community alike; our work is co-designed with customers as well as internal and external stakeholders; we measured the impact of our initiatives in accordance with the techniques outlined in this strategy.

Figure 3.1: Education and guidance materials maintained and published by the OFWO in 2022–23 and 2023–24



Source: ANAO analysis of management reporting on education and better practice guides.

3.7 The enforcement board receives quarterly information on education and communication activities which have been undertaken by the OFWO. The 2023–24 annual report also includes information on the education and communication activities undertaken in some of the priority areas.

3.8 In March 2024, the OFWO commenced a project to perform a comprehensive review of education and guidance resources to determine whether they were relevant, fit-for-purpose, effective and aligned with the entity’s brand and priorities.

3.9 As part of its corporate plan performance measures, the OFWO has established processes for collecting and reporting customer satisfaction levels through surveys to determine the percentage of digital tool users who report that the tools improved their understanding of workplace rights and obligations. The survey results indicate that more than 80 per cent of customers were satisfied or better in 2022–23 and 2023–24.

Employer Advisory Service

3.10 The Employer Advisory Service (EAS) became operational in July 2021 and was established to provide free, tailored written technical advice to eligible small business employers to assist them to understand and meet their obligations under the Fair Work Act. Small business employers can contact the service using an online enquiry form, online account or by calling the Fair Work Infoline and requesting a referral. In 2023–24 the EAS provided 3,142 tailored, written pieces of advice.

3.11 In July 2023, the EAS established an internal customer service charter and customer service level standards. The standards set internal expectations that customers are to be contacted within

one to two days of enquiry allocation when additional information is required to prepare the advice, and premium enquiries⁴² are to be closed within 10 business days of gathering information from the customer. In 2022–23, 77 per cent of premium enquiries were resolved within 10 business days and 90 per cent of all enquiries were responded to in 15 business days or less. To facilitate the operation of the service, the OFWO has established a complexity matrix which outlines when an enquiry requires escalation to a supervisor or other quality assurance process based on technical complexity, nature of the customer and nature of the enquiry.

3.12 The OFWO has also established processes to monitor feedback from recipients of the written advice and internal quality assurance processes to confirm advice is consistent, accurate and to a high quality, and to identify technical and other training needs. In 2022–23, 86 per cent of feedback respondents agreed or strongly agreed that they were satisfied with the advice provided.⁴³ Quarterly reporting is prepared to monitor the type of advice provided by the EAS and to identify any trends in information which may warrant additional education tools being developed. This information also includes a breakdown analysis showing to which industries the enquiries relate.

3.13 The OFWO responds to all EAS enquiries. An internal audit of the operation of the EAS was undertaken in February 2024. The audit found that the service was effective and governance provided an appropriate balance between risk management and efficient customer services. It noted:

as reflected by the significant uptake by small business employers of the EAS since its inception, the current level of resources and manual processes involved may impact the level and quality of the service provided. The FWO will need to closely monitor the capacity of the EAS as demand is rapidly increasing and develop effective strategies to meet those demands.

3.14 One agreed management action was identified in the report which stated that by the end of August 2024 the OFWO would conduct an annual assessment to analyse the demand for the service and evaluate resources, staff, processes and tracking tools to ensure that the service can meet future levels of demand. This action included a requirement to document strategies to address the increased demand and to formulate action plans for enhancing workplace capability. The Director Assurance (Executive Level 2) approved the closure of the management action as completed in August 2024.

3.15 In the 2024–25 OFWO corporate plan, a new performance measure was identified which related to the quality of written information and advice provided by the EAS. The target was identified as ‘greater than 75 per cent’ customer survey responses ‘demonstrating a rating of satisfied or better where small business customers identified that the information they were provided helped them to understand their workplace rights and obligations’.

Advice in response to enquiries

3.16 The OFWO received around 320,000 phone or online enquiries in 2022–23 and around 310,000 in 2023–24. Responding to enquiries allows the OFWO to assist people to access workplace advice. Enquiries may be responded to by the OFWO in a number of ways including:

42 The EAS procedure manual defines premium services as those enquiries that require in-depth research by the OFWO.

43 In 2023–24 no analysis of the feedback was prepared by the OFWO.

- no involvement and referral if the enquiry is best handled through another agency (for example the Australian Taxation Office);
- the provision of educational resources and tools;
- the provision of advice to support the enquirer to resolve the issue directly at the workplace level (referred to internally as 'dispute assistance');
- the provision of free written technical advice to assist small business employers through the EAS;
- the classification and handling of the enquiry as an employer self-reported instance of non-compliance⁴⁴; or
- classifying the matter as a formal 'request for assistance' involving a workplace dispute which may require further involvement, analysis and/or investigation by the OFWO to resolve.

3.17 An enquiry can become a formal request for assistance if the following elements exist or if an enquirer has been assessed by the OFWO as not being able to resolve the issue on their own:

- the enquiry is within the OFWO's jurisdiction;
- allegations relate to a minimum entitlement within an applicable industrial instrument;
- the enquirer has attempted to resolve the issue directly at the workplace level, yet the issue remains unresolved;
- the enquirer understands the OFWO will assess the allegations and decide what (if any) response the OFWO will take; and
- any decision will be based on the evidence and information provided to the OFWO (generally, the enquirer must be willing to participate in the process and for the relevant employer to be contacted).

3.18 In 2022–23 approximately 16,390 enquiries were classified as formal requests for assistance. This remained consistent in 2023–24 with approximately 16,440 enquiries classified as formal requests for assistance. Formal requests for assistance represent approximately five per cent of total enquiries received.

3.19 The OFWO customer service charter outlines the nature of the services the public can expect from the OFWO. The charter is principles-based and does not make any claims related to the timeliness of responding to enquiries or service delivery by the OFWO. In its frequently asked questions about the dispute assistance service: *You've asked for our help with a dispute — what happens now?* the OFWO notes that the 'dispute assistance service is tailored to each dispute, so timeframes vary. However, most parties resolve their dispute, or choose to take alternative action, within 2-4 weeks'.

3.20 Internally, performance information related to the receipt and handling of enquiries is monitored by management and the enforcement board. Information that is monitored by the enforcement board on a fortnightly basis includes:

44 Self-reported non-compliance is usually by employers who report underpayments to workers. The OFWO provides advice on, investigates and monitors these self-reports. The processes and procedures for the management of self-reports is further discussed in paragraphs 3.56 to 3.63.

- number of enquiries answered;
- call wait times; and
- percentage of abandoned calls.

3.21 This information is monitored by comparing information to relevant prior year to date actual results. The OFWO has internal performance measures for the average speed of answer for calls (average call wait times) to not exceed 15 minutes and a maximum call abandonment rate of 25 per cent. In addition, initial response to online enquiries had an internal benchmark of two working days. Where appropriate, the enforcement board requested management take corrective action.

3.22 Enforcement board meeting papers identified that in June 2023, year to date average call wait time was 15 minutes 57 seconds and the percentage of abandoned calls was 24 per cent. In June 2024, year to date average call wait time was 23 minutes 29 seconds and the percentage of abandoned calls was 30 per cent.

3.23 In 2022–23 and 2023–24 feedback on the quality of advice and assistance provided by the OFWO as part of responding to enquiries was gathered and analysed as part of the OFWO's corporate plan performance measures and included in the annual performance statements. A sample of customers who interacted with advisers through the Fair Work Infoline were asked to participate in surveys. The percentage of responses by customers who reported a rating of satisfied or better with OFWO services met the target of being greater than 75 per cent.

3.24 To facilitate the provision of advice, the OFWO has established the following policies:

- Principles and Customer Service Reference;
- Incorrect or Erroneous Advice Policy, July 2023;
- Feedback and Complaints Management Policy, October 2022 and the Feedback and Complaints Guide, July 2024; and
- internal framework, policies and procedures related to the ongoing training, coaching and development of staff.

3.25 The Principles and Customer Service Reference is the online repository which contains guidance and information to assist OFWO staff to respond to customers. The Incorrect or Erroneous Advice Policy provides staff with guidance and direction to manage instances where the provision of erroneous or incorrect advice by the OFWO has occurred. This also includes capturing areas for improvement.

3.26 The Feedback and Complaints Management Policy outlines the mechanisms to address customer dissatisfaction with the service they received or the information that was provided. The policy outlines the approach to provide feedback, service complaints or requests for review⁴⁵ to the OFWO. The Feedback and Complaints Guide provides internal protocols on how to manage, review and communicate feedback from complaints against the OFWO. In 2022–23 the OFWO received 597 instances of constructive feedback, service complaints and requests for review. This increased to 866 (45 per cent increase) in 2023–24. In addition, in 2023–24 there were 88 instances of customers highlighting their positive experience with the OFWO up from 55 (60 per cent increase)

45 A request for review is a request for the OFWO to reassess a decision and to consider whether a matter was handled in accordance with OFWO policies and procedures.

in 2023–24. The OFWO has established processes to identify potential business improvements arising from feedback and complaints.

3.27 In August 2024, the Fair Work Ombudsman provided internal communication to staff to outline a more structured approach to responding to enquiries and how the OFWO would assist with dispute resolution. This change in emphasis on dispute resolution was foreshadowed in the OFWO's strategic objectives set out in its corporate plan 2024–25. The change in emphasis included the proposed adoption of a 'regulatory triangle'. The OFWO proposed to use this model to guide how matters should be dealt with by the OFWO.

3.28 The regulatory triangle has three levels:

- Voluntary compliance — encouraging voluntary compliance. The OFWO will provide information, education and advice to support cooperation between employers and employees.
- Guided compliance — guiding compliance where required. Such guidance typically involves fair work inspectors, having conducted an investigation, determining it is appropriate to formally direct employers requiring them to undertake certain specified actions and to demonstrate compliance with workplace laws. The most common forms of guided compliance include issuing compliance notices and contravention letters. Failure to comply with requirements can lead to court proceedings.
- Enforced compliance — enforcing the law when it is in the public interest. These are the minority of matters that typically involve serious non-compliance. Enforced compliance includes enforceable undertakings, civil proceedings to seek financial penalties and criminal proceedings.

Compliance and enforcement policy

3.29 The OFWO has published a compliance and enforcement policy on its website. The policy was initially published in July 2020 to outline the Fair Work Ombudsman's approach to exercising their statutory functions and assessing each matter to determine the appropriate response. The compliance and enforcement policy was updated in January 2025. There were no changes to the compliance and enforcement policy between July 2020 and December 2024. During this period, the compliance and enforcement policy was not updated to reflect:

- the minister's expectation for an external, public facing compliance and enforcement policy to be published in response to the October 2021 Statement of Expectations;
- a key change in regulatory posture and approach to using compliance and enforcement tools in 2021–22 when the use of compliance notices became the Fair Work Ombudsman's primary enforcement tool;
- the full breath of OFWO compliance and enforcement activities including the use of targeted and proactive investigations;
- a new regulatory function effective from 14 June 2024 under section 682 of the Fair Work Act for the Fair Work Ombudsman to publish a compliance and enforcement policy,

- including guidelines relating to the circumstances in which the Fair Work Ombudsman will, or will not, use enforceable undertakings or cooperation agreements⁴⁶; or
- the adoption of dispute resolution techniques as well as compliance and enforcement tools as part of its changed regulatory posture outlined in the 2024–25 corporate plan which was published in August 2024.

3.30 In August 2024, the OFWO announced to its staff that it would be reviewing the compliance and enforcement policy.

The purpose of the review is to work together to create a C&E policy that supports our Agency's new strategic direction and is informed by the experiences of all FWO teams. A review of the C&E Policy is in line with the various ongoing initiatives to evolve the direction of how the FWO goes about its work. These initiatives include our new organisational structure, the new Corporate Plan, our Statement of Intent and our response to the independent KPMG report.

3.31 A compliance and enforcement policy review consultation and communication plan was prepared in August 2024. This plan outlined the approach to internal consultation and communication to update the policy. An external communication and consultation plan was not prepared. In December 2024, the OFWO consulted with members of its Advisory Group (peak tripartite forum) to obtain feedback from external stakeholders. This included requesting feedback from the Australian Council of Trade Unions, Australian Chamber of Commerce and Industry, Australian Industry Group, Business Council of Australia and Council of Small Business Organisations Australia. An analysis of feedback (internal and external) was prepared and used to inform changes to the compliance and enforcement policy.

3.32 The OFWO published its new compliance and enforcement policy in January 2025. This policy includes information on the regulatory triangle (see paragraph 3.28). The purpose of the model is to outline the OFWO's 'compliance and enforcement approach to allegations, evidence and suspected instances of non-compliance'. It also outlines the OFWO's compliance powers.

3.33 The compliance and enforcement policy is intended to meet the OFWO's obligation to publish a compliance and enforcement policy and to guide its staff. The OFWO's decision to produce a compliance and enforcement policy to meet both internal and external stakeholder needs means that the document must meet the needs of a diverse group of external users (both employers and employees), and be sufficiently directive to support the day-to-day work of internal users. The new compliance and enforcement policy does not contain:

- a complete description of all regulatory functions, including how priorities determine the type of compliance and enforcement actions (for example use of intelligence and proactive investigations);
- sufficient information for internal users to guide how they weigh up a wide range of factors to support decision-making; and
- a clear and concise outline of what the OFWO does and how it will, or will not, respond to individual lines of enquiry for external users.

46 Cooperation agreements provide a person with the opportunity to access 'safe harbour' from potential criminal prosecution. It is a written agreement between the Fair Work Ombudsman and a person (an individual, corporate entity or Commonwealth agency).

Are the OFWO's arrangements for the detection of non-compliance effective?

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

Proactive detection

3.34 The key proactive⁴⁷ detection mechanisms used by the OFWO include: gathering and reviewing intelligence and evidence; monitoring and analysing workplace trends; and proactive investigations.

Intelligence and analysis

3.35 Under the Department of Finance *Resource Management Guide No.128: Regulator Performance*⁴⁸ (RMG 128), the OFWO must model the regulator best practice principle of being risk-based and data-driven. This requirement is also detailed in the ministerial Statements of Expectations. To facilitate this, the OFWO has established an intelligence and analysis function to:

- collect and assess information from anonymous reports and external tip-offs⁴⁹;
- identify and assess emerging trends and issues relevant to the OFWO's regulatory functions, such as preparing regular analysis of the labour force;
- develop intelligence products to provide insights into possible non-compliance with workplace laws;
- prepare information to support the targeting of proactive investigations relevant to priority areas;
- support reactive investigation activities, such as with the collection of information to support the analysis and monitoring of self-reported non-compliance; and
- collect and assess information to support strategic and business planning activities, such as preparation of information to identify potential priority areas.

3.36 To support the performance of these functions, and to provide relevant governance and planning for intelligence activities, the OFWO has prepared the following instruction documentation for staff.

47 In the context of OFWO's regulatory functions, proactive means where the OFWO takes the initiative to commence an investigation or inquiry. Reactive means where the OFWO responds to enquiries/requests for assistance it receives from an external party.

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

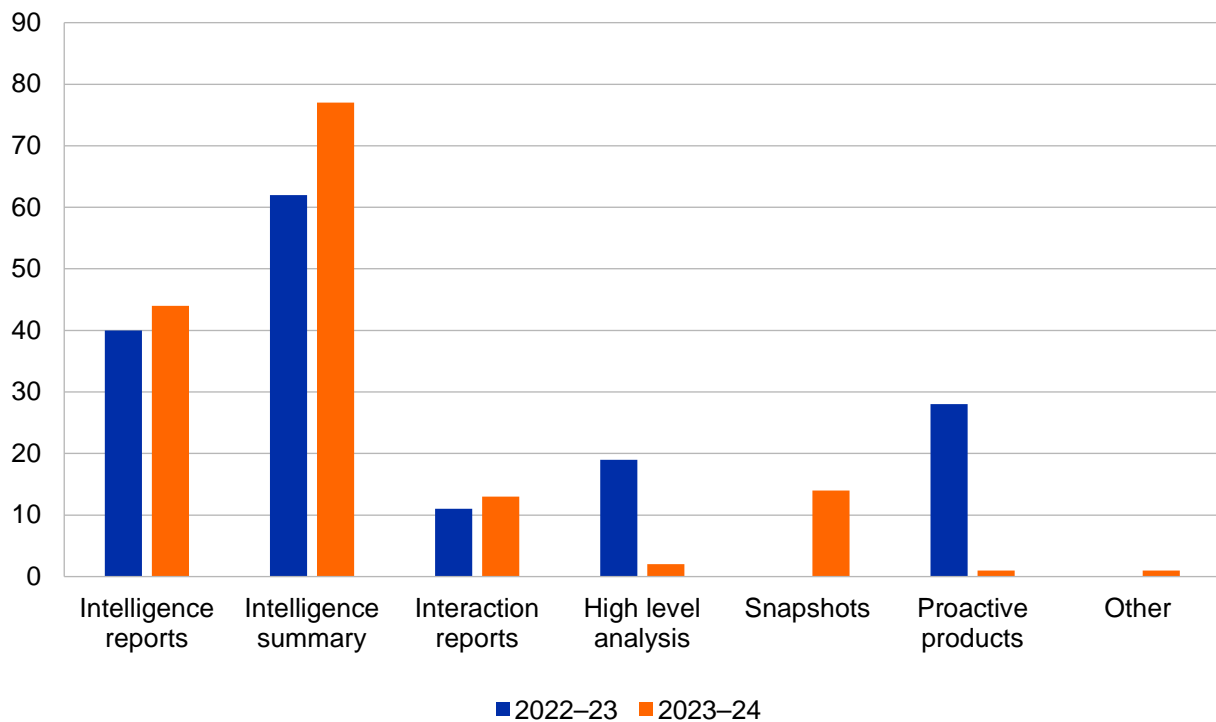
49 The OFWO receives anonymous reports and tip-offs which allows members of the public to discreetly report suspected breaches of the Fair Work Act, a specific award or enterprise agreement. The OFWO received 17,021 anonymous reports in 2023–24 compared to 14,309 in 2022–23.

- Intelligence Governance Framework September 2023 — outlines key roles and functions within the intelligence team and how decisions and information will be reviewed.
- Operational and intelligence workflow approaches — outlines how intelligence reports will be prioritised and prepared. This prioritisation approach relies on prioritisation/urgency of information being determined by other operational areas requesting intelligence reports. The OFWO does not document consideration of budgets or operational constraints when responding to requests for intelligence and analysis.
- Anonymous Report Assessment Guide April 2024 — provides an overview of processes and considerations including when and how information should be referred to other business areas, such as for investigation.

3.37 In June 2022, an internal audit report on the management of intelligence reports was discussed at the audit and risk committee. The report considered the processes in place to compile intelligence reports, and the approach used to inform and incorporate intelligence products into operational activities. Overall, the report identified that there were some weaknesses in the design and application of controls and opportunities to increase efficiencies in the management of intelligence reports.

3.38 The internal audit report identified two medium rated findings and eight agreed management actions. The management actions related to: updating policies and workflow approaches; developing a formal feedback mechanism; standardising the peer review/approval processes; and identifying training needs of staff. The audit and risk committee monitored the implementation of the agreed management actions and noted closure of all actions by March 2023.

3.39 The OFWO prepares monthly reports on anonymous report trends, quarterly reporting on intelligence feedback received and a monthly dashboard to provide information on case statistics and a summary of requests on-hand. In 2022–23 the intelligence team responded to 160 intelligence requests from line areas, this decreased to 152 (five per cent decrease) in 2023–24. The average number of intelligence requests on-hand at the end of each month was 12 in 2022–23 and 15 (25 per cent increase) in 2023–24. Key intelligence deliverables for 2022–23 and 2023–24 are summarised in Figure 3.2.

Figure 3.2: Key intelligence deliverables 2022–23 and 2023–24

Note: Deliverables are categorised as follows.

Intelligence reports provide detailed tactical and operational analysis of specific businesses and/or persons of interest, including analysis of compliance history across OFWO data sources and other relevant sources.

An intelligence summary includes concise analysis of specific businesses and/or persons of interest, including compliance history across OFWO data sources and other relevant sources to support preliminary decision-making.

Interaction reports provide operational insights with a focus on OFWO data source analysis and specific targeting of identified issues.

High level analysis includes a concise narrative analysis of OFWO data sources and relevant open sources.

Snapshots are short, rapid response summaries including analysis of OFWO data sources to support preliminary decision-making.

Proactive products include information to support the development of targeting for proactive investigations.

Source: ANAO analysis of intelligence team monthly and quarterly reporting.

3.40 An intelligence product is provided to the enforcement board annually to assist its consideration and setting of regulatory priorities. The intelligence and analysis team does not prepare or report to the enforcement board on the level of compliance with the Fair Work Act and fair work instruments for priority areas or for the Australian environment more generally. In its 2024–25 corporate plan, the OFWO has indicated that it is re-developing a performance measure and target related to where ‘serious and systemic non-compliance is detected and addressed by the OFWO’.

Proactive investigations

3.41 The OFWO undertakes a range of proactive investigations and targeted investigation programs to detect and monitor non-compliance with the Fair Work Act and fair work instruments. Proactive investigations are usually based on intelligence and are targeted at specific industry sectors, issues or organisations in accordance with the OFWO priorities. These activities provide an opportunity for the OFWO to identify non-compliance, use compliance and enforcement tools,

recover underpayments for workers, provide education and conduct joint site inspections with other agencies.

3.42 The annual regulatory priority work plan includes information about proactive investigations planned to occur in priority areas during the year.⁵⁰ The plan does not identify how many organisations would be investigated, the timing of activities or budget associated with undertaking proactive investigations.

3.43 Between July 2022 and December 2024, the OFWO did not set performance targets for the number of proactive investigations to be undertaken or how many investigations should be undertaken in each priority area. Information on the number of proactive investigations commenced, conducted and on-hand in 2022–23 and 2023–24 is summarised in Table 3.1.

Table 3.1: Information on the number of proactive investigations 2022–23 and 2023–24

Key information	2022–23	2023–24
Number of proactive investigations brought forward from prior years	473	366
Number of proactive investigations commenced	870	963
Number of proactive investigations finalised	977	940
Number of proactive investigations on-hand	366	389

Source: ANAO analysis of reporting provided by the OFWO for the period 2022–23 and 2023–24.

3.44 The proactive investigation caseload represented approximately 20 per cent of the total investigation caseload for the OFWO. Fifty-eight per cent of proactive investigations were finalised with the use of enforcement tools in 2023–24. This was an increase from 53 per cent in 2022–23.

3.45 To oversee proactive investigations, the enforcement board received project plans and investigation outcome reports for ‘key and/or significant’ proactive investigations. There are no frameworks, policies or procedures which identify what information should be included in proactive investigation project plans or when project plans should be prepared and/or reported to the enforcement board. The proactive investigation project plans reviewed by the enforcement board included information on: objective of the program and link to the regulatory priorities work plan; analysis of intelligence information gathered to support the performance of the investigation; scope of the investigation including types of non-compliance to be targeted and expected outcomes; deliverables; progress reporting; and risks.

3.46 Between July 2022 and December 2024, there was no systematic monitoring of progress of proactive investigations, including timeliness and return on investment.

3.47 Between July 2022 and December 2024, the enforcement board endorsed, and the accountable authority approved, the publication of proactive investigation outcomes to be included on the OFWO website. The publication of proactive investigation outcomes included copies of

⁵⁰ Annual priority work plans are discussed in paragraph 2.14 to 2.15.

proactive investigation reports and/or media releases related to the compliance issues identified, compliance and enforcement tools used and recoveries made from proactive investigations.

Reactive detection

3.48 Key reactive detection mechanisms include: responding to requests for assistance; monitoring and investigating non-compliance self-reported by employers and responding to requests from ministers and departments to inquire or investigate.

Requests for assistance

3.49 Formal requests for assistance received through enquiries are referred to an OFWO assessment team to confirm that the request for assistance may result in a dispute resolution or compliance and enforcement intervention by the OFWO. During 2022–23 and 2023–24, this intervention centred around the use of compliance notices as the ‘default enforcement tool for responding to standard underpayment matters’.⁵¹ The use of compliance notices was considered by the OFWO to be ‘an efficient and effective way of enforcing the law and getting more money back into the hands of workers’.

3.50 From July 2024, the assessment of a request for assistance should no longer focus on the use of compliance notices as the primary intervention tool. The OFWO intends to provide a broader range of dispute resolution services related to:

- dispute resolution techniques;
- diverting employers and employees to appropriate options to continue their dispute if it remains unresolved or if the OFWO cannot assist (such as small claims court or to the Fair Work Commission); and
- the use of the OFWO’s full range of compliance and enforcement tools.

3.51 As at December 2024, the policies and procedures to guide the new dispute assistance approach were in draft. In December 2024, the OFWO advised the ANAO that since July 2024 the OFWO has been operating under an interim model of dispute assistance pending the finalisation of policies and procedures.

3.52 If a request for assistance may result in the use of a compliance notice and/or infringement notice, the OFWO classifies the matter as an investigation and it is considered by a Fair Work Inspector. Of the 16,390 formal requests for assistance received in 2022–23, 3,805 were referred for investigation. This represents approximately 23 per cent of requests for assistance. In 2023–24, of the 16,440 formal requests for assistance received 3,256 were referred for investigation. This represents approximately 20 per cent.

3.53 If a request for assistance may result in the use of a compliance notice and/or an infringement notice, a Fair Work Inspector must establish a reasonable belief that an employer has

51 The compliance notice focus was articulated in OFWO’s internal policies and procedures related to responding to requests for assistance.

contravened one or more provisions of the Fair Work Act or fair work instruments, based on the evidence collected.⁵²

3.54 To support decision-making related to compliance notices and infringement notices, the Fair Work Inspector must generate a 'reasonable belief document' on the matter. The reasonable belief document provides: a summary of the matter; lists the evidence obtained and considered; describes threshold issues; and details the analysis of each allegation and finding. The reasonable belief document also contains a formal declaration by the Fair Work Inspector on the matter.

3.55 A recommendation for a compliance notice and/or infringement notice must be reviewed by a team leader (APS Level 6). Team leaders are also responsible for the monitoring of workflows and the allocation of requests for assistance for investigation to staff. The OFWO does not assess requests for assistance in terms of how much effort (budget) or lapsed time will be required to resolve the dispute through an investigation. The team leaders receive weekly spreadsheets reporting on the number of open requests for assistance involving investigations that have exceeded 120 days and 150 days.

Self-reported non-compliance

3.56 The OFWO encourages employers to voluntarily report non-compliance with the Fair Work Act and fair work instruments, particularly in relation to the underpayment of employees. The July 2020 OFWO compliance and enforcement policy states that isolated payroll errors resulting in underpayments to employees over a short period of time (up to 12 months) do not need to be actively reported to the OFWO as long as:

- employees are appropriately informed of the underpayment;
- employees are back paid in full as soon as practicable; and
- changes are implemented to ensure the error does not happen again.

3.57 Upon self-reporting, the OFWO undertakes analysis and/or investigations to verify the underpayments, confirm that the entity is taking appropriate action to remediate identified issues and, where appropriate, take compliance and enforcement action. The types of compliance and enforcement activities related to self-reported non-compliance include:

- enforceable undertaking⁵³;
- compliance notice⁵⁴;
- infringement notice⁵⁵;

52 Section 716 the Fair Work Act and regulation 4.04 of the Fair Work Regulations 2009 outline the requirements that determine whether a Fair Work Inspector 'reasonably believes' contraventions have occurred.

53 An enforceable undertaking is a written agreement between the employer and the OFWO in relation to a contravention. An enforceable undertaking is often used where a contravention has occurred and the employer is prepared to voluntarily fix the issue and has agreed to prevention actions for the future. Enforceable undertakings are an enforcement tool outlined in section 715 of the Fair Work Act.

54 As specified by section 716 of the Fair Work Act.

55 As specified by regulation 4.04 of the Fair Work Regulations 2009.

- contravention letter⁵⁶;
- caution letter; or
- litigation/court proceedings.

3.58 In July 2020, internal protocols for the management of self-reported non-compliance were developed by the OFWO. These protocols outline that the treatment and investment of resources in each self-reported matter is considered on a case-by-case basis and that new self-reports are recorded centrally. Intelligence may also be used to support the analysis and/or investigation of a self-reported matter. During 2022–23, the total self-reports caseload was 215. This increased to 291 (35 per cent increase) in 2023–24.

3.59 If a self-report may result in the use of a contravention letter, compliance notice and/or infringement notice, it is allocated to a Fair Work Inspector to complete a reasonable belief assessment that a contravention has occurred. If a self-report involves the use of an enforceable undertaking, staff involved in approving an enforceable undertaking, withdrawing or varying an undertaking or identifying a contravention with the terms of an undertaking require formal delegation from the Fair Work Ombudsman. Delegation instruments related to these powers and functions under the Fair Work Act have been made by the Fair Work Ombudsman. These delegated powers and functions sit at the branch manager level (SES Band 1) and above.

3.60 In 2022–23 and 2023–24 the enforcement board was provided with: project plans for ‘significant’ self-reported non-compliance; requests to commence enforceable undertaking negotiations for self-reports; requests to finalise enforceable undertakings related to self-reports; requests to finalise investigations with a caution letter and requests to commence litigation. These documents were provided to the enforcement board for endorsement and accountable authority approval as they related to ‘significant’ matters. It was also a way to promote consistent decision-making in self-reported matters.

3.61 The protocols for the management of self-reported matters state that significant self-reported matters require enforcement board oversight. Although the protocols outline a definition of what constitutes a significant matter, the spreadsheet used to manage and record self-reported matters does not classify individual matters as significant or otherwise, or record all matters that have been reported to the enforcement board.

3.62 The enforcement board is provided with a range of operational information related to self-reports including:

- quarterly reporting on matters received, referred for investigation and the level of underpayments identified; and
- a listing of all self-report enforcement outcomes approved by Chief Counsel (SES Band 2), the Deputy Fair Work Ombudsman (SES Band 2) and Executive Directors – Operations (SES Band 1).

56 A contravention letter is issued by a Fair Work Inspector under regulation 5.05 of the Fair Work Regulations 2009 if the inspector is satisfied that the employer has failed to observe a requirement of the Fair Work Act, regulations or fair work instrument. The contravention letter informs the employer of the contravention, requires the employer to take specified action, within a specified period, and to notify the Fair Work Inspector of action taken to comply with the notice.

3.63 Reporting provided to the enforcement board does not identify the budget associated with, or the timeliness of monitoring and finalisation, of the self-reports caseload.

Responding to requests from ministers and other government departments

3.64 The OFWO received a number of requests or referrals from ministers, Parliament (via Senate motions) and other government departments to investigate potential non-compliance with the Fair Work Act and fair work instruments. There were no processes associated with these types of requests. The requests were discussed at the enforcement board. This included approval of project plans for the relevant investigations. Project plans did not identify the budget, timing and/or risks associated with these investigations.

3.65 Overall, for both proactive and reactive detection of non-compliance, the OFWO has established protocols and procedures for the allocation of work to staff and to identify when the use of an enforcement tool may be required. Although work is allocated, there is no consideration of risk for the activities undertaken, or visibility of the budget and costs associated with detection activities.

Opportunity for improvement

3.66 The OFWO could implement arrangements to provide insight into whether the balance of preventative and detective compliance and enforcement activities is appropriate.

4. Enforcement

Areas examined

This chapter examines whether the Office of the Fair Work Ombudsman (the OFWO) has established effective arrangements to enforce compliance with the *Fair Work Act 2009* (the Fair Work Act).

Conclusion

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

Areas for improvement

The ANAO made one recommendation aimed at ensuring there is adequate documentation, review and quality assurance of investigations.

4.1 Section 682 of the Fair Work Act outlines the functions of the Fair Work Ombudsman including: to monitor compliance with the Fair Work Act and instruments; to inquire into and investigate any act or practice that may be contrary to the Fair Work Act, a fair work instrument or a safety net contractual requirement; and to commence proceedings in a court, or to make applications to the Fair Work Commission. Section 715 of the Fair Work Act sets out the legislative basis for enforceable undertakings, section 716 outlines the legislative basis for compliance notices and regulation 4.04 of the Fair Work Regulations 2009 outlines when an infringement notice may be given.

Are there effective arrangements to manage non-compliance cases?

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

Management of non-compliance through the use of enforcement tools

4.2 As set out in paragraph 2.10, regulatory posture refers to how the OFWO will approach and prioritise the exercise of its regulatory functions. It includes the emphasis placed on the use of compliance and enforcement tools and how it will make decisions about resource allocation and risk. The OFWO's regulatory posture evolved over recent years. During 2022–23 and 2023–24, the

OFWO considered the use of compliance notices as the primary enforcement tool (compliance notice focus). From July 2024, the Fair Work Ombudsman changed this approach to provide greater emphasis on the use of a broader range of dispute resolution services (dispute resolution focus).

4.3 The change in regulatory posture was partly reflected in the internal management performance information prepared for and monitored by governance bodies such as the enforcement board. In 2022–23, performance targets were set for the use of some enforcement tools (these tools are described in Table 1.1). Numerical performance targets — included in Table 4.1 — highlight the use of compliance notices as the primary enforcement tool to be used.

4.4 In 2024–25, performance targets were not set for the use of compliance and enforcement tools. Management information compared year to date results of the use of compliance and enforcement tools to prior year results rather than to established targets.

4.5 In November 2024, the OFWO proposed internal performance targets for the use of some enforcement tools. Table 4.1 illustrates the difference between the published enforcement tool performance targets in 2022–23 and 2023–24 and the proposed internal targets for 2024–25.

Table 4.1: Summary of performance targets related to the use of compliance and enforcement tools

Compliance and enforcement tool type	Performance targets for 2022–23 and 2023–24	Proposed internal performance target for 2024–25
Compliance notices issued	2,000–2,500	1,000–2,000
Infringement notices issued	550	700
Enforceable undertakings	15	15
New litigations filed	65–85	55–65

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

4.6 In 2024–25, performance measures included in the corporate plan were altered to reflect the OFWO’s changed approach, as it moved away from numerical enforcement tools performance targets and instead set targets in terms of ‘the percentage of investigations finalised in the reporting period using one or more enforcement tools’. The target for this performance measure in 2024–25 was set at greater than 40 per cent. The compliance and enforcement tools included in this performance measure were infringement notices, compliance notices, enforceable undertakings and court proceedings. No performance targets were set for the use of contravention letters, caution letters or other dispute resolution compliance tools. No performance targets were set for reactive investigations or proactive investigations.

4.7 Between July 2022 and December 2024, the enforcement board received regular information on the tracking of the achievement of performance measures. Performance information was monitored monthly by the enforcement board and included information on:

- number of compliance tools used during the period;
- number of investigations on-hand;
- number of investigations on-hand greater than 150 days and average days on-hand;
- enforcement tools on-hand aged greater than 150 days (e.g. compliance notices not resolved or infringement notices not paid); and

- monies recovered.

4.8 In addition, the enforcement board was provided with dashboard information about priority areas between March 2023 and April 2024. The dashboards included information on the number of investigations completed, number of compliance notices issued, number of infringement notices issued and anonymous reports received.

4.9 Information on activities in each of the priority areas was described in the 2023–24 annual report. This included descriptive information about the number of disputes completed, the number of compliance notices issued and recoveries made. It did not provide a basis for comparison across priority areas or against targets (as no targets were set). The information was also not reported for each priority area in the annual report.

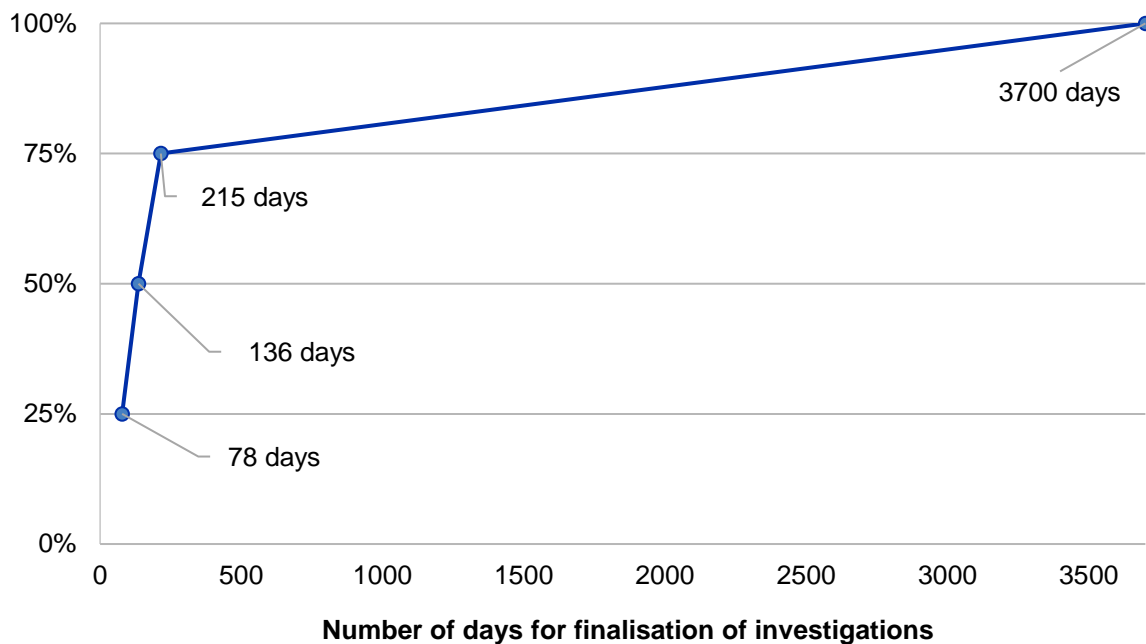
4.10 Between July 2022 and December 2024, performance targets were not established for all types of compliance and enforcement activities and tools. For example, the OFWO did not set or monitor targets for the number of proactive investigations or number of proactive investigations in each priority area. The enforcement board did not determine or monitor the balance between reactive and proactive detection mechanisms used or whether this supported its regulatory posture or priority area work plans.

4.11 The enforcement board received quarterly reporting on compliance notices which detailed the number of compliance notices issued, and information on levels of adherence with compliance notices by the due date; and number of compliance notices which had been referred to the legal team for failure to comply with requirements. The enforcement board used this performance information to monitor and address perceived performance issues. For example, in September 2022 the enforcement board was informed of a trend in compliance notices issued in 2021–22 where 48 per cent had been complied with by the due date. The enforcement board required that additional effort and processes be directed at monitoring adherence to compliance notices by the due date. For compliance notices issued in the first three quarters of 2023–24 that had passed their due date, 1,451 (69 per cent) had been complied with, of which 49 per cent had been complied with by the due date.

4.12 Information is provided to the enforcement board on the number of investigations greater than 150 days. The board did not receive information about the timeliness of regulatory activities such as the ageing of requests for assistance and proactive investigations on-hand. No timeliness performance targets were set for investigations.

4.13 The ANAO analysed investigations finalised between July 2022 and September 2024 to identify the length of time taken to complete investigations. The finalisation of an investigation includes the time to confirm that the requirements of any compliance and enforcement tool had been met and the completion of any subsequent litigation/court proceedings. This analysis identified that 75 per cent of the investigations took 215 days to be finalised. Figure 4.1 provides the outcome of the analysis and identifies the number of days to finalise 25 per cent, 50 per cent and 75 per cent of the finalised investigations caseload.

Figure 4.1: Number of days to finalise investigations closed between July 2022 and September 2024



Note: The data used to prepare this analysis was drawn from OFWO management information. The integrity, completeness and accuracy of the information has not been validated by the ANAO. The purpose of the figure is to illustrate the time taken to finalise investigations. The data reflects cases closed between July 2022 and September 2024.

The length of time required to finalise investigations in the fourth quartile reflects that many of the longer-term cases are subject to litigation/court proceedings. Two-hundred and twenty-five cases (two per cent) took more than 730 days (two years) to finalise.

Source: ANAO analysis of OFWO management and caseload information for investigations closed between July 2022 and September 2024.

4.14 In November 2024, the enforcement board received performance information for the first quarter of 2024–25 under the new dispute resolution regulatory posture. This report included information on the timeliness of finalising the caseload. The report noted that for the first quarter the average age of on-hand requests for assistance in investigation teams had increased to 298 days – up from 123 days (142 per cent increase) in the previous year. At the end of September 2024 there were 92 matters aged over 600 days. This represents 14 per cent of the request for assistance caseload in investigation teams. In the previous year, this represented three per cent of the request for assistance caseload.

Assessment of the effectiveness of compliance and enforcement activities and outcomes

4.15 The enforcement board is provided with information about the use of compliance and enforcement tools. This information was primarily focused on whether the OFWO was meeting its numerical targets for the various types of compliance and enforcement tools. The board did not receive information on the broader impacts of enforcement actions on the achievement of its regulatory objectives. Department of Finance *Resource Management Guide No.128: Regulator Performance* (RMG 128) states that ‘regulators are encouraged to adopt outcomes focused

performance measures for reporting'.⁵⁷ The OFWO is currently reviewing its performance measures with the intention of providing greater information on the outcomes of the OFWO's regulatory functions (refer to paragraphs 2.72 to 2.84).

4.16 The enforcement board does not receive information about the adequacy of the use of compliance and enforcement tools across the OFWO. As detailed in Table 2.1 the enforcement board receives operational decision-making information. The enforcement board has not determined how the appropriate use of enforcement tools should be assessed and monitored strategically or to achieve its terms of reference to ensure that compliance and enforcement activities are in line with the priorities as well as the purpose and functions set out in the Fair Work Act.

External reporting of enforcement outcomes

4.17 The OFWO publishes a range of information on its website to promote transparency of its compliance and enforcement activities and outcomes. This includes:

- all enforceable undertakings⁵⁸;
- litigation outcomes, including penalties awarded⁵⁹; and
- outcomes of proactive investigations, including extracts of reporting and/or media releases.⁶⁰

Are enforcement actions undertaken in accordance with relevant standards?

In July 2024, the OFWO assessed and agreed deviations from the Australian Government Investigations Standard, October 2022 (AGIS 2022). One 'notable deviation' from AGIS 2022 was the decision not to implement a quality assurance framework. Prior to July 2024, the OFWO did not use the relevant AGIS to inform the development of its policies, procedures, staff roles and staff qualifications. At November 2024, 50 per cent of OFWO staff conducting or overseeing investigations did not hold the relevant certification as required by AGIS 2022. The OFWO's decision records did not evidence that compliance and enforcement activities

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

58 For example, enforceable undertakings published 2023–24 are included on the OFWO website at <https://www.fairwork.gov.au/about-us/compliance-and-enforcement/enforceable-undertakings/2023-2024-enforceable-undertakings> [accessed 27 November 2024].

59 For example, litigation outcomes from July 2023 to March 2024 are included on the OFWO website at <https://www.fairwork.gov.au/about-us/compliance-and-enforcement/litigation/2023-2024-litigation-outcomes> [accessed 27 November 2024].

60 The OFWO maintains website pages which include downloadable reports and media releases for proactive investigations. This can be found at <https://www.fairwork.gov.au/about-us/compliance-and-enforcement/reporting-outcomes/proactive-investigations-reports> [accessed 27 November 2024] and at <https://www.fairwork.gov.au/about-us/compliance-and-enforcement/reporting-outcomes/activity-reports> [accessed 5 January 2025]. From April 2023, the publication of proactive investigation reports was discontinued. Outcomes continued to be communicated to the public by the OFWO through media releases and published on the website's Newsroom.

were performed adequately. For example, case monitoring meeting and approvals were not consistently recorded in OFWO's records management systems.

4.18 The OFWO has established a range of policies, procedures and protocols for undertaking compliance and enforcement activities. At December 2024, these policies, procedures and protocols were being updated to reflect the new dispute resolution focus and changes in the organisational structure which came into effect in July 2024.

4.19 Any matter referred to a Fair Work Inspector is classified as an 'investigation'. This is because a Fair Work Inspector has the legislative authority to form a 'reasonable belief' regarding non-compliance and contraventions and has the powers to issue compliance and enforcement tools such as compliance notices, infringement notices and contravention letters. A Fair Work Inspector also has powers to enter premises and to require a person or entity to produce any records or documents relevant to a compliance matter.⁶¹

4.20 Table 4.2 identifies the type and number of compliance and enforcement activities which the OFWO classified as an investigation in 2022–23 and 2023–24.

Table 4.2: Type and number of investigations in OFWO's caseload in 2022–23 and 2023–24

Type of investigation	2022–23	2023–24
Reactive investigations	5,518	5,238
Proactive investigations	1,343	1,329
Total investigations caseload	6,861	6,567

Source: ANAO analysis of reporting information provided by the OFWO for the purposes of this audit.

Alignment to Australian Government Investigations Standard

4.21 The Australian Government Investigations Standard, October 2022 (AGIS 2022) articulates the Australian Government's policy for entities who conduct investigations relating to government programs and legislation. Non-corporate Commonwealth entities are required to comply with AGIS 2022 noting that it is principle-based and provides flexibility for entities to apply the standards relevant to their own operations.

4.22 AGIS 2022 applies to non-corporate Commonwealth entities which conduct administrative, civil or criminal (type) investigations.

An investigation can be broadly described as an activity to collect information or evidence to a particular standard of proof related to an alleged, apparent or suspected breach. An investigation gathers information across a broad spectrum to assist entities to determine a course of action, which may also be preventative and/or disruptive action instead of prosecutorial.⁶²

4.23 The OFWO is a non-corporate Commonwealth entity and conducts 'investigations' to collect information and evidence to a particular standard of proof (to form a reasonable belief as outlined

61 Section 708 of the Fair Work Act outlines the power of inspectors to enter premises. Section 712 outlines the power to require persons to produce records or documents.

62 Australian Federal Police, *Australian Government Investigations Standard*, October 2022, p. 1, available from <https://www.ag.gov.au/sites/default/files/2022-12/Australian-Government-Investigations-Standard-2022.pdf> [accessed 11 January 2025].

in the Fair Work Act and Fair Work Regulations 2009) related to an alleged, apparent or suspected breach of the Fair Work Act or fair work instruments. The OFWO monitors entities' adherence with a compliance and enforcement tool issued. If the enforcement tool is not complied with by the entity, it may result in litigation/court proceedings.

4.24 AGIS 2022 stipulates what non-corporate Commonwealth entities 'should' and 'must' do to achieve the Australian Government's standards. Both 'should' and 'must' are considered best practice. If a component 'must' be undertaken, the activity is required by law or there may be 'significant' consequences of non-compliance with that requirement. AGIS 2022 states that the risk to an entity's investigation performance is greater if this level of directive is not followed.

4.25 The four principles set out in AGIS 2022 are:

- ethics and professionalism are applied and performed to the highest order in investigations;
- investigations support the business and reputation of government;
- a continuous cycle of review is applied to investigations; and
- entities are responsible for investigation information management of their entity.

4.26 These principles are connected to four streams of core requirements outlined in AGIS 2022 related to: personnel; information and evidence management; investigative processes; and quality assurance.

4.27 Prior to July 2024, the OFWO 'encouraged compliance' with AGIS 2011 requirements for qualifications and training as part of its 2013 Professionalisation Project.⁶³ AGIS 2011 was not used by the OFWO to inform the development of its policies, procedures, staff roles and staff qualifications. Instead, the OFWO advised the ANAO in January 2025 that it 'commissioned and leveraged independent advice to endeavour to achieve best practice arrangements'.

4.28 When the revised AGIS was released in October 2022, the OFWO used this as a catalyst to determine the OFWO's level of compliance with AGIS 2022. In November 2022, the OFWO established a working group to undertake a gap analysis of the extent to which the OFWO's investigation activities aligned with AGIS 2022, and identify where there were 'notable deviations'.

4.29 In July 2024, the findings of the working group were provided to the corporate board for consideration, and for approval by the accountable authority. The analysis considered compliance related to its civil investigation activities. Those relating to the new criminal underpayments jurisdiction, which came into effect from January 2025, were not considered. AGIS 2022 requirements which may apply to these new investigation processes are being considered separately by the OFWO.

4.30 A summary of the analysis prepared by the OFWO in July 2024 on AGIS 2022 compliance is in Table 4.3.

63 A previous version of AGIS was in force from August 2011. This defined an investigation as 'a process of seeking information relevant to an alleged, apparent or potential breach of the law, involving possible judicial proceedings. The primary purpose of an investigation is to gather admissible evidence for any subsequent action, whether under criminal, civil penalty, civil, disciplinary or administrative sanctions. Investigations can also result in prevention and/or disruption action.' These standards were mandatory for all agencies required to comply with the *Financial Management and Accountability Act 1997*.

Table 4.3: OFWO assessment of application of AGIS 2022 mandatory requirements to non-criminal investigations

AGIS 2022 streams	Requirement category	OFWO self-assessment
Personnel	1.1 Professional role	Meets/in progress
	1.2 Ethics and responsibility	Meets/in progress
	1.3 Qualifications and learning	Meets/in progress
	1.4 Competencies and mindset	Meets/in progress
Information and evidence management	2.1 Disclosure management	Notable deviation to be accepted by the OFWO
	2.2 Information sharing	Meets/in progress
	2.3 Investigation management system	Notable deviation to be accepted by the OFWO
Investigation practices	3.1 Risk management	Meets/in progress
	3.2 Investigation governance	Partially meets and in progress
	3.3 Investigation planning	Notable deviation to be accepted by the OFWO Partially meets/in progress ^a
	3.4 Investigation activities and tools	Partially meets/in progress
Quality assurance framework	4.1 Quality assurance policy	Notable deviation to be accepted by the OFWO
	4.2 Quality reviews and audits	Meets/in progress
	4.3 Scope for quality activities	Meets/in progress
	4.4 Quality reports/outcomes	Meets/in progress

Note a: The OFWO's finding against this section had multiple conclusions.

Source: ANAO analysis of the OFWO corporate board meeting papers and minutes.

4.31 For matters where the criminal jurisdiction was not applicable, the accountable authority approved the instances where the OFWO had notable deviations from the mandatory requirements in AGIS 2022. Notable deviations related to:

- the electronic investigation management system not being delivered in accordance with all Australian government standards;
- no quality assurance policy/framework; and
- no disclosure management policy related to recording, retaining, registering, reviewing, revealing and producing investigative information.

4.32 In the findings provided to the corporate board in July 2024, the OFWO states that it 'meets' the mandatory requirements related to qualifications set out in AGIS 2022. Staff conducting or overseeing investigations are required by AGIS 2022 to hold a vocational and educational training qualification (such as a Certification IV). As at November 2024, 50 per cent of OFWO staff conducting or overseeing investigations did not hold the relevant certification. The largest deviation from AGIS qualification and learning requirements is for supervisors where 63 out of 75 have not met the minimum training requirement. Supervision and review (weekly monitoring and approval of

decisions by supervisors) are key controls within investigation processes as described in paragraph 4.34. The ANAO identified deficiencies related to: risk management (refer to paragraphs 2.21 to 2.30); and investigation practices and records management (refer to paragraphs 4.33 to 4.55).

Evidence to support transparent and consistent decision-making

4.33 To assess whether the OFWO's enforcement activities and the use of compliance and enforcement tools were performed appropriately, consistently and transparently, the ANAO reviewed the policies, procedures and protocols and the key controls that support investigation decision-making. The ANAO also undertook walkthroughs of the decision-making for a selection of 17 decision records across reactive and proactive investigations to assess the extent to which key controls were evidenced in the OFWO's records management systems. The walkthroughs related to requests for assistance, proactive investigations and self-reported non-compliance investigations. The walkthroughs included demonstration of how records were maintained to support key decisions, evidence of supervision, evidence of decision approvals and use of mandatory templates as prescribed in policies and procedures.

Request for assistance investigations






4.34 Policies and procedures for request for assistance investigations outline the following key controls:

- Allocation for an investigation — the reason for the allocation of a request for assistance to be investigated must be documented and align to the compliance and enforcement policy.
- Weekly monitoring — team leaders must conduct weekly case meetings with fair work inspectors to discuss the progress of investigations, evaluate evidence and review record-keeping. Case meetings must be documented in TITAN (the investigation case management system) as a key task. The task must be used to record the summary of evidential evaluation, next steps and directions for the Fair Work Inspector.
- Reasonable belief record (evidence) — a reasonable belief document must be prepared to clearly articulate how a reasonable belief was formed and the recommendation for the use of a compliance and enforcement tool. A recommendation for the use of a compliance notice or infringement notice must be made by a Fair Work Inspector (a legislative function). This is recorded in the reasonable belief document and the notice itself.
- Approval of decisions — decisions made by fair work inspectors to issue a compliance notice or infringement notice must be approved by team leaders (APS Level 6). If team leaders are also the Fair Work Inspector issuing a compliance notice or infringement notice, these decisions should be approved by an assistant director (Executive Level 1). Team leaders should check that the reasonable belief document is complete and accurate, in particular: threshold issues; evidence collected is documented and uploaded to TITAN; evidence relied on to form a reasonable belief is referenced appropriately; any decision not to rely on evidence is documented; and contraventions are accurately identified. The review should confirm that the draft notice and cover letter are accurate and formatted correctly.

- Finalisation of matters — fair work inspectors must record their decisions to finalise matters and should record their notes of conversations with employers and employees advising them of the findings of the investigation and reasons for closing matters.

4.35 Table 4.4 sets out the results of the analysis of the request for assistance investigation documentation.

Table 4.4: Analysis of request for assistance investigation documentation

	Allocation for an investigation	Weekly monitoring	Reasonable belief record	Approval of decisions	Finalisation of matters
Assessment result					

Key:  Fully compliant  Partially compliant  Not compliant

Source: ANAO analysis of a selection of transactions.

4.36 Case notes which summarise why a request for assistance was allocated to an investigation team were recorded within TITAN. This information often referred to the reasons for an investigation as outlined in the compliance and enforcement policy.

4.37 Weekly monitoring and supervision of investigations was not adequately documented. There was no evidence of any case meetings or discussions about next steps recorded in TITAN. There were no records of discussions or monitoring of the timeliness of undertaking and finalisation of investigations.

4.38 The reasonable belief documents recorded the analysis of evidence and the rationale for a recommendation to use a compliance and enforcement tool.

4.39 TITAN maintains a record of team leader and other approvals of a reasonable belief recommendation. These approvals are included in workflows with no connection to the actual documents reviewed. Other findings are set out below.

- It was unclear which documents were the subject of the review and approval by team leaders. While TITAN links the approval to relevant documents, the documents themselves are not locked in TITAN and can be modified after approval. This resulted in the inability to establish which documents were approved at a specific point in time. There were instances where documents linked to approvals were drafts, contained different information to what had been approved or had been modified after the approval date. In these instances the OFWO was unable to verify the version of the document at the time of approval.
- Approvals did not record what was being approved. Sometimes team leaders included notes in approval records to indicate what they had reviewed and why the approval was provided, others did not include any information other than 'approved'. As it was not clear what was being approved, the OFWO was unable to demonstrate that the decisions were being made consistently across fair work inspectors and across different enforcement teams.
- Approval workflows were manually added to TITAN and the records management system did not require decisions to be reviewed. There were instances where the issue of compliance notices was not subject to second level review. In one instance the compliance

notice was issued without second level review and contained errors. This compliance notice was subsequently withdrawn and reissued.

4.40 Records did not adequately detail the basis for the decision to finalise a matter and/or confirm that employers and employees, where relevant, were advised of the investigation findings and reasons for closing the matter.

4.41 As described in paragraph 4.31, the OFWO does not have a quality assurance policy/framework for investigations. AGIS 2022 states that the benefits of implementing a quality assurance framework for investigations include:

- ability to consistently provide products that meet applicable legislative, statutory, and regulatory requirements
- addressing risks and opportunities associated with activities
- implement preventative controls to minimise risks
- corrective action and continual improvement process.

Proactive investigations

4.42 The execution of a proactive investigation follows the same policies, procedures and processes as a request for assistance investigation except for initiation and reporting. To initiate a proactive investigation, a project plan should be prepared and, for key proactive investigations, reviewed by the enforcement board. The ANAO's examination of decision records for proactive investigations centred on identifying whether decision records appropriately linked the rationale for the proactive investigation outlined in the project plan, to the investigation decision documentation.

4.43 Proactive investigations sometimes changed from the initial approach/purpose of the proactive investigation with no documented rationale for the change. Proactive investigations are based on intelligence, and once in the field, different contraventions, entities and employees may be identified and different approaches to gathering and analysing evidence may be required. There is no policy or process requirement to document when and why a proactive investigation changes direction nor is there a requirement to continue to reassess whether the investigation represents efficient and effective use of resources.

4.44 Proactive investigations that were connected with a broader campaign did not include links to documents related to the project plan for the broader proactive investigation campaign.

4.45 In terms of weekly monitoring, reasonable belief records, approval of decisions and finalisation of matters, the same issues identified for the request for assistance investigations were present for proactive investigations (refer to paragraphs 4.35 to 4.41).

Self-reported non-compliance investigations

4.46 The protocols for the management of self-reported non-compliance identify the following key controls:

- recording of self-reports centrally — a spreadsheet is used to record the initial receipt of a self-report and to record the key characteristics of the matter to facilitate monitoring. This includes whether a matter has been referred to an investigations team; and

- record keeping — investigations teams are responsible for ensuring records and data are classified and maintained in approved business and case management systems in a timely manner to support accurate and consistent reporting.

4.47 The key controls outlined above for request for assistance investigations also apply to an investigation of self-reported non-compliance if it may result in the use of a compliance and enforcement tool.

4.48 Table 4.5 highlights the outcomes of the analysis of the self-reported non-compliance investigation documentation.

Table 4.5: Analysis of self-report investigation documentation

	Recording of self-reports centrally	Record keeping
Assessment result	▲	▲

Key:  Fully compliant  Partially compliant  Not compliant

Source: ANAO examination of a selection of transactions.

4.49 The centrally maintained spreadsheet of self-reported matters contained errors in data such as incorrect dates and finalisation outcome type. Using a spreadsheet to maintain management information may result in data quality issues due to a lack of data integrity controls, multiple users and version control issues.

4.50 Records management for self-reported matters is stored in two OFWO systems — Docbank and TITAN. The Investigations Teams Document Management Protocol states that all documents related to self-reported matters are to be stored in Docbank. The matter is to be recorded in TITAN to facilitate entity-level reporting and no activities or documents should be saved in TITAN. TITAN should only contain information on the characteristics of the matter and a general note in the summary page. For the transactions examined, the OFWO produced information to support the processes and decisions. Information was contained in a large number of documents and email trails saved within Docbank. Document indices were prepared by the OFWO to facilitate analysis of each matter.

4.51 The ANAO examined investigations which resulted in the use of caution letters, compliance notices, and enforceable undertakings. Only investigations which may result in the issue of compliance notices or infringement notices must be allocated to an investigation team which includes a Fair Work Inspector. If the OFWO forms the view that notices requiring a ‘reasonable belief’ will not be issued, the examination of the matters may be conducted by other OFWO staff.

4.52 In terms of monitoring of the self-reported matters, approvals from senior staff members, including by branch managers (SES Band 1) and Chief Counsel (SES Band 2) could take several weeks. One request for approval of a compliance notice took eight weeks to approve.

4.53 In terms of reasonable belief records, approval of decisions and finalisation of matters, the same issues identified for request for assistance investigations were also identified for self-reported investigations. These are described in paragraph 4.35 to 4.41.


Recommendation no. 3

4.54 The Office of the Fair Work Ombudsman ensures that there is:

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

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

4.55 *The OFWO recognises the findings of the fieldwork portion of the audit. A quality assurance framework for investigations will be implemented, and planning undertaken to support the effective operation of review and quality assurance processes. The specific policies and procedures relating to the conduct of investigations at the OFWO will be reviewed following the audit, as well as how the relevant IT systems can further support these processes.*



Dr Caralee McLiesh PSM
Auditor-General

Canberra ACT
31 March 2025

Appendices

Appendix 1 Entity response



Fair Work
OMBUDSMAN

Dr Caralee McLiesh
Auditor-General for Australia
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Dr McLiesh,

Response to the Proposed Audit Report – Effectiveness of the Office of the Fair Work Ombudsman’s Regulatory Functions

Thank you for providing the Australian National Audit Office’s (ANAO) proposed report pursuant to section 19 of the Auditor-General Act 1997 on the audit of the *Effectiveness of the Office of the Fair Work Ombudsman’s Regulatory Functions*. I appreciate the opportunity to respond to the report.

The Office of the Fair Work Ombudsman (OFWO) welcomes the findings of the report and accepts the recommendations. It is pleasing to note the finding that the OFWO is largely effective in the performance of our regulatory functions.

Where opportunities for improvement have been identified in the report, work has already commenced to ensure the recommendations are implemented in a timely fashion.

The OFWO appreciates the professionalism and constructive engagement by the ANAO Audit Team throughout the performance audit.

If you have any questions regarding the OFWO’s response, please contact Rebecca Price, Executive Director, Corporate Services Branch on (03) 9954 2582.

Yours sincerely,

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

Anna Booth

Fair Work Ombudsman

14 March 2025

Appendix 2 Improvements observed by the ANAO

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

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

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

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

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

- Enforcement board terms of reference, July 2024 (see paragraph 2.52).
- AGIS 2022 gap analysis, July 2024 (see paragraph 4.29).
- Compliance and enforcement policy review consultation and communication plan, August 2024 (see paragraph 3.31).
- Draft operational guide for dispute assistance at FWO, December 2024 (see paragraph 3.51).
- A care sector communication strategy, October 2024 (paragraph 2.16).
- Compliance and enforcement policy, January 2025 (see paragraph 3.29).

Appendix 3 OFWO's corporate plan performance measures and targets

1. The corporate plan performance measures and targets outlined in the OFWO's corporate plans for 2022–23 and 2023–24 are summarised in Table A.1. In its annual reports for 2022–23 and 2023–24 the OFWO reported that it met all of its performance measures and targets with the exception of KPI 8 in 2023–24. This performance measure required the OFWO to file between 65–75 new litigations. Sixty-four litigations were filed in 2023–24.

Table A.1: OFWO's performance measures and targets for 2022–23 and 2023–24

Performance measure reference and title	Performance measure description	Performance measure	Performance target
KPI 1: The OFWO has a positive impact on harmonious, productive, cooperative and compliant workplace relations.	The OFWO uses an annual survey to determine stakeholder satisfaction levels. Survey participants are determined by the OFWO Executive. The number of participants completing the survey ranged between 13 and 14 per year.	Percentage of stakeholder responses demonstrating a rating of satisfied or better	Greater than 75 per cent
KPI 2: The OFWO provides high quality advice and assistance.	The OFWO undertakes ongoing surveys to determine customer satisfaction levels. A sample of customers who have interacted with the OFWO through the Fair Work Infoline are asked to participate in the surveys.	Percentage of customer responses demonstrating a rating of satisfied or better	Greater than 75 per cent
KPI 3: The OFWO's digital tools are effective.	The OFWO undertakes ongoing surveys to determine customer satisfaction levels. A sample of customers who have interacted with the OFWO as digital tool users are asked to participate in the surveys to report whether the tools improved their understanding of workplace rights and obligations.	Percentage of customer responses demonstrating a rating of satisfied or better	Greater than 75 per cent
KPI 4: The percentage of requests for assistance involving a workplace dispute finalised in an average of 30 days.	The OFWO reports the percentage of requests for assistance finalised within an average of 30 days of the request for assistance being received. The measure is calculated by determining the percentage of requests for assistance that have been finalised in an average of 30 days. The measure does not report on the actual time taken to finalise requests for assistance.	Percentage of matters finalised within an average of 30 days	At least 85 per cent
KPI 5: The OFWO uses infringement notices as an enforcement action.	The OFWO reports the number of infringement notices used as an enforcement action.	Number of infringement notices issued	550

Performance measure reference and title	Performance measure description	Performance measure	Performance target
KPI 6: The OFWO uses compliance notices as an enforcement action.	The OFWO reports the number of compliance notices issued as an enforcement action.	Number of compliance notices issued	2,000–2,500
KPI 7: The OFWO enters into enforceable undertakings as an enforcement action.	The OFWO reports the number of enforceable undertakings entered into as an enforcement action.	Number of enforceable undertakings entered into	15
KPI 8: The OFWO uses litigation as an enforcement action.	The OFWO reports the number of new litigations filed as an enforcement action.	Number of new litigations filed	65–75
KPI 9: The OFWO develops regulatory priorities to guide its approach.	The OFWO develops regulatory priorities to guide its approach and activity.	Regulatory priorities developed and announced	Yes

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

2. The corporate plan performance measures and targets outlined in the OFWO's corporate plan for 2024–25 are summarised in Table A.2. These performance measures and targets were under development as at December 2024.

Table A.2: OFWO's performance measures and targets for 2024–25

Performance measure reference and title ^a	Performance measure description	Performance measure	Performance target
KPI 1: The OFWO will ensure increased awareness of its role.	Under development	Under development	Under development
KPI 2.1: The Fair Work Infoline provides high quality advice and assistance.	The OFWO undertakes ongoing surveys to determine customer satisfaction levels. A sample of customers who have interacted with the OFWO through the Fair Work Infoline are asked to participate in the surveys.	Percentage of customer survey responses demonstrating a rating of satisfied or better	Greater than 75 per cent

Performance measure reference and title ^a	Performance measure description	Performance measure	Performance target
KPI 2.2: The Employer Advisory Service (EAS) provides written information and advice that helps small business customers to understand their workplace rights and obligations.	The OFWO undertakes ongoing surveys to determine customer satisfaction levels. A sample of customers who have interacted with the OFWO through the EAS are asked to participate in the surveys to report whether the information they were provided helped them to understand their workplace rights and obligations.	Percentage of customer survey responses demonstrating a rating of satisfied or better	Greater than 75 per cent
KPI 2.3: The OFWO's digital tools are effective.	The OFWO undertakes ongoing surveys to determine customer satisfaction levels. A sample of customers who have interacted with the OFWO as digital tool users are asked to participate in the surveys to report whether the tools improved their understanding of workplace rights and obligations.	Percentage of customer responses demonstrating a rating of satisfied or better	Greater than 75 per cent
KPI 3.1: The OFWO will resolve requests for assistance involving workplace disputes in a timely manner to achieve compliance with workplace laws.	The OFWO reports the percentage of requests for assistance finalised within 60 days.	Time to finalise 80 per cent of requests for assistance involving workplace dispute	80 per cent finalised within 60 days
KPI 3.2: The OFWO will use enforcement tools to achieve compliance with workplace laws.	The OFWO reports on its approach to finalising investigations using one or more enforcement tools. The measure is to assess the effective use of compliance and enforcement tools.	The percentage of investigations finalised in the reporting period using one or more enforcement tools	Greater than 40 per cent
KPI 4.1: The OFWO develops and publishes its areas of priority.	The OFWO uses developed regulatory priorities to guide its approach and activity.	Priorities are published on the OFWO's website	Yes — by 31 July
KPI 5: Serious and systemic non-compliance is detected and addressed.	Under development.	Under development	Under development

Note a: This table does not include performance measures 6.1: OFWO employees are engaged, committed and prepared to achieve our objectives; and 6.2: OFWO employees feel supported by the OFWO, as these performance measures do not relate to the exercise of the OFWO's regulatory functions.

Source: ANAO analysis of the OFWO's corporate plan for 2024–25.