

A PRACTICAL GUIDE TO ASSESSING IR RELATED NON-COMPLIANCE

The following assessment of non-compliance uses plain language and is intended as a guide only to assist Procuring Agencies in assessing a specific type of non-compliance.

Generally speaking, common areas of non-compliance in the IR space is one of three categories:

- 1 **Employee entitlements**
- 2 **Superannuation**
- 3 **Contravening a condition of a workplace agreement**

Although different in many aspects, determining non-compliance across those categories follows a similar pattern to gather facts and evidence. The points listed below outline how to analyse and assess articles of evidence that may be supplied to you when a matter is referred to your agency from the CCR team.

It is recommended that you refer to Appendix 3 – Categories of non-compliance: reference table. Published in Guidelines: Ethical Supplier Mandate. This table (amended to published) provide a clear overview of examples of non-compliances, evidence required etc.

5. Industrial relations (IR) – including BPP commitments			
Types of non-compliance	a) Commitment to Best Practice Principles (BPP)	b) Commitment to standards	Related resources
<i>Examples of non-compliance areas</i>	<ul style="list-style-type: none"> Superannuation Wages Modern awards Enterprise agreements Enforceable undertakings Sham contracting 	<ul style="list-style-type: none"> Industrial relations Industrial relations management plans (IRMP) Employee entitlements Superannuation Wages Modern awards Enterprise agreements Enforceable undertakings Sham contracting 	Fair Work Act 2009 Queensland Procurement Policy 2021 Ethical Supplier Mandate 2021 Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020 (Old)
Applicable evidence types	Example evidence	Source of commitment	Regulator contact details
<ul style="list-style-type: none"> ✓ Compelling evidence and/or ✓ Regulator outcome 	<ul style="list-style-type: none"> Compelling evidence and/or a regulator decision may be considered where the breach relates to these non-compliance areas: <ul style="list-style-type: none"> Underpayment of wages Underpayment of superannuation Certain instances of sham contracting FWO/ABCC compliance history (e.g. Contravention letter, Letter of caution, Infringement notice, Compliance notice, Court order, FWO notice etc.) Pay records (e.g. pay slips, timesheets etc.) Bank statements Superannuation information and supporting records Industrial relations management plan Site personnel register Site personnel register summary report Site personnel classification/engagement register Employment contracts/engagement letters Industrial instrument (e.g. EBA, Modern Award etc.) Induction records 	<ul style="list-style-type: none"> Tender documents Contract Fair Work Act 2009 (Cth) 	Fair Work Ombudsman Ph: 13 13 94 Australian Tax Office (ATO) Ph: 13 10 20 Queensland Police Ph: 131 444 Australian Building and Construction Commission (ABCC) Ph: 1800 003 338

FACT GATHERING

Determine the source of commitment (for example, BPP project)

- This will be in the form of a contractual agreement between your agency and supplier, or a subcontractor agreement. Ideally, there will be a clause in the contract that speaks to a commitment to Best Practice Principles, or a commitment to comply with the Ethical Supplier Threshold or the Queensland Procurement Policy.
- This should be considered the baseline of your assessment.

Identify the relevant workplace instrument

There are many types of workplace instruments that are applied in remunerating employees including: Awards, Enterprise Agreements, Project Greenfields Agreement; etc.

- Firstly you should identify the type of instrument that relates to your allegations
- This is best managed by asking the supplier the instrument they apply.
- An industrial award is the legislated instrument that applies more broadly to a particular industry/sector and outlines the minimum level of payments and conditions that relate to that industry/sector.
- Enterprise agreements are specific to business/employer and are negotiated between that business/employer and the employees (often with the employees represented by an applicable union). Enterprise agreements will include higher rates of pay and improved conditions over the award that applies to the sector.
- Enterprise agreements must be 'approved' by the Fair Work Commission before they can be applied in the workplace.
- Enterprise agreements include an 'application' section that provides detail around when it should be applied and who it applies to.

An Enterprise Agreement can be assessed by identifying sections relevant to the nature of your complaint / allegation.

- For example, a referral regarding underpayment of an allowance.
- In this section you should note what the applicable allowance is under the agreement and compare it to the evidence.
- Consider, was there an underpayment? You should confirm if the agreement is current and relevant to the employee at the time of the event.

Payslips and Timesheets

Payslips can form part of compelling evidence that a breach of the EST has occurred.

- Continuing with the example of an allowance underpayment, allowances are generally itemised on payslips. Missing allowances or generic payslips could potentially be an indicator that extra payments have not been properly allocated to the employee.
- Timesheets should also be used when determining underpayments of other entitlements (shift work application etc and overtime).
 - Review timesheets and payslips to validate hours worked and relate the requirements to the relevant agreement.
 - To establish that an employee is subject to that agreement workplace agreements / contracts are also required.

Employee and Employer Bank Statements

A bank statement can be used as evidence to verify a payment or underpayment. In terms of superannuation contributions to an employee, a statement will either prove or potentially disprove payments between the employee and employer.

- Review bank statements and employee payslips.

Statements / letters & documents / emails / conversations

Information or correspondence provided by the complainant or alleged offending company containing facts relevant to your referral. These can be initial responses to the allegation, admissions or defences, other emails and attachment supplied to you as part of your investigation.

- Review and assess information provided and validate against other evidence.

Assessment of the evidence against the EST

When conducting investigations, the first step is to identify the issue that needs to be investigated or the allegations brought to you that require investigating. To continue as part of the above example, the officers should consider the following:

1. Has an employer breached a condition of an enterprise agreement?
2. What is the employer required to pay for an allowance and what type of allowance? Where in the agreement does it state this requirement – is there a section that applies?
3. Do I have a payslip that shows that this allowance was not paid? What is the date range of the allegation, and do I have evidence relevant to those time periods?
4. How do I know if the employee is on the correct agreement? Are they an employee?
 - a. What evidence do I need to validate this?
Employee agreement etc
5. What else do I need to consider? If John Citizen has been underpaid for allowances, is it possible that other employees on this project were also underpaid?
6. What further considerations should I make?
Possibly underpayment of overtime etc. or superannuation contributions?
7. Is there a WHS breach?
8. Whatever the issue is, it must be identified and clearly stated so that an investigation can move forward.

The second step is to identify the legislation, policy or procedural documents which provide the rules around the issue. In this case it is Section 5 of the Ethical Supplier Mandate. A non-compliance can fall into minor, moderate, substantial, and aggravated (deliberate or repeated). The decision rests with your agency as to what severity the non-compliance falls under.

Investigation Findings – in this part of the process you determine the findings that relate to the each of the non-compliances.

Basic Summary example of CCR Referral

Overtime has not been correctly calculated for an audited group of employees. Fair Work Act 2009 (Cth) s50 states a Person must not contravene a term of an enterprise agreement namely the “John Smith” Enterprise Agreement. “John Smith” Enterprise Agreement 2020 s26.1. The evidence obtained, namely timesheets and payslips from John Smith and Jane Doe indicated that overtime was paid at \$27.50 per hour instead of the agreed amount of \$35.50 per hour.

The contract between the principal contractor and supplier includes a commitment to comply with Best Practice Principals whilst working on the project and has formed part of the evidence in the investigation. The employer was asked to rectify the issue in the form of a corrective action notice and the employer responded by emailing a reconciliation spreadsheet, payslips for the affected employees and a bank transfer statement to demonstrate all underpayments were rectified.

The evidence was assessed under section 5 of the Ethical Supplier Mandate as EST type of non-compliance which carries a 20-demerit penalty. The evidence gathered, along with corrective action suggests a breach of the EST and is also evidence against a non-compliance with the Greenfields Agreement, and a breach of s50 Fair Work Act 2009. The matter will be reported out and referred to the Tripartite advisory panel for consideration.

The identified breaches will also be reported to FWO in a form of a referral.