



Australian Government
**Fair Work Building
& Construction**

FWBC OPERATIONS GUIDE



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Section 1 Knowledge

Key areas of FWBC enforcement

Purpose of this chapter

This chapter briefly describes the key areas of FWBC enforcement that inspectors will need to identify and investigate and suggests additional references for each knowledge area.

Industrial action

Industrial action is action that an employee, industrial association or employer may take when trying to resolve a workplace dispute. Industrial action includes strikes, work bans and lockouts. Participating in industrial action may contravene the Fair Work Act 2009.

For more information see the [Industrial Action Investigator Guide](#).

Right of entry

The Fair Work Act 2009 (FW Act) confers a number of powers and functions on unions and their officials. In particular, union officials can obtain permits under the FW Act and other workplace laws so they can enter workplaces without an employer's consent.

Part 3-4 of the FW Act sets out the rights and responsibilities of both permit holders and employers in cases where a permit holder seeks to enter a workplace using their permit.

For more information about the rights and responsibilities set out in Part 3-4 see the [Right of Entry Investigator Guide](#).

Coercion

While coercion is also not defined in the FW Act its meaning in an industrial context is derived from case law.

Coercion is forcing or compelling someone to do something against their will, for example, through fear, intimidation and/or threats. It requires wrongful, illegitimate or illegal action or, at any rate, the negation of choice.

For more information see the [Investigator Guide - Coercion](#).

Freedom of association

All employees and contractors have the right to join (or not join) a union. This is called freedom of association. Unions and employers cannot pressure workers to make a decision about joining, not joining or leaving a union.



Freedom of association also extends to employers, allowing them to choose whether or not to join an employer association.

The FW Act protects workplace rights regarding freedom of association. It is unlawful to take or threaten adverse action against a person because:

- they are (or are not) a member of a union or employer association
- they engage (or do not engage) in industrial action
- they choose (or do not choose) to have union representation.

For more information see the [Freedom of Association Fact Sheet](#).

Contravention of Fair Work Commission orders (s.418)

Industrial action that does not meet the requirements of Part 3-3 of the [FW Act](#) is not protected. Under [s418 of the FW Act](#), the Fair Work Commission has the power to order any unprotected industrial action to cease or not occur.

Any contravention of the terms of such an order may be subject to civil penalties, [damages](#) or [injunctions](#).

For more information see the [Contravention of Section 418 Orders Investigator guide](#).

Workplace rights and adverse action

People working in Australia are entitled to general workplace protections under relevant federal workplace laws. As part of this entitlement, the FW Act protects employees from action that is taken for a prohibited reason. This is called adverse action.

Section 342 of the FW Act sets out the various circumstances in which adverse action may occur. Adverse action could be taken in the following situations:

- an employer against an employee
- a prospective employer against a prospective employee
- a principal who has entered into a contract for services against the independent contractor, or a person employed or engaged by an independent contractor
- a principal proposing to enter into a contract for services against the independent contractor, or a person employed or engaged by an independent contractor
- an employee against their employer
- an independent contractor against a person who has entered into a contract for services with the independent contractor
- an industrial association, or an officer or member of an industrial association, against a person.

For more information see the [Adverse Action Investigator Guide](#).



Discrimination

[Section 336 of the FW Act](#) states that the object of Part 3.1 of the Act includes protection from workplace discrimination.

FWBC has powers to investigate (and potentially litigate against) employers in cases of workplace discrimination. FWBC may investigate a matter of discrimination that is:

- lodged through a complaint
- raised by FWBC while working on other matters
- cited in the media or via other external sources.

FWBC can initiate an investigation into discrimination matters without a formal complaint.

For more information see [the Discrimination Investigator Guide](#).

Other contraventions

Other contraventions that may be examined when investigating a building matter include:

- Sham contracting
- Wages and entitlements.

Legislation and jurisdiction

Purpose of this chapter

This chapter outlines the legislation that created the Fair Work Building Industry Inspectorate (FWBC), defined its role and functions and empowered the FWBC Director and inspectors to perform their duties. It also examines how the rules of natural justice impact an inspector's work and decisions.

Creation of FWBC

The Fair Working Building Inspectorate, commonly called Fair Work Building & Construction (FWBC), was created by the Fair Work (Building Industry) Act 2012 (the Act).

[Section 9 of the Act](#) created the Office of the Director and [Section 10 of the Act](#) defines the Director's functions.

Objects of the Act

[Section 3 of the Act](#) defines its object to "provide a balanced framework for cooperative, productive and harmonious workplace relations in the building industry." The section defines the means to achieve this object by:

- ensuring compliance with workplace relations laws by all building industry participants



- providing information, advice and assistance to all building industry participants about their rights and obligations
- providing an effective means of enforcing those rights and obligations
- providing appropriate safeguards of the use of the enforcement and investigative powers, and
- improving the level of occupational health and safety in the building industry.

Functions of the Director

[Section 10 of the Act](#) outlines the functions of the Director, which include:

- providing education, assistance and advice to building industry participants
- monitoring compliance with designated building laws and the Building Code
- inquiring into and investigating alleged contraventions of the Act or Building Code
- commencing proceedings in a court or making applications to the Fair Work Commission (FWC) to enforce designated building laws.

This is the work inspectors perform on a daily basis: investigations, audits, education and the provision of material to assist the FWBC legal team to commence proceedings.

Jurisdiction

FWBC jurisdiction covers matters that involve the conduct of, or conduct that impacts on, a building industry participant involved in building work. A number of sections of the Act define and qualify this jurisdiction.

Building work

Building work is defined in [section 5 of the Act](#). The definition is broad and includes virtually all commercial, major residential and infrastructure projects (including all major road and rail projects).

The exclusions to this definition are found in section 5(1) (e), (f) and (g) of the Act and include work associated with the construction of a project of less than five dwelling houses, drilling for oil or natural gas or the extraction of minerals (mining).

Building industry participants

Building industry participants are defined in [section 4 of the Act](#) and broadly covers anyone involved in building work including building employers, building employees, building contractors, building associations (e.g. MBA or union) and representatives of a building association.

Appointment of inspectors

[Section 59 of the Act](#) authorises the Director to appoint Fair Work Building Industry (FWBI) Inspectors and grants those inspectors a range of powers to perform their various functions.



[Section 59c of the Act](#) gives inspectors the “same functions and powers as a Fair Work Inspector” but these can only be exercised in relation a “building matter”. A building matter must relate to a building industry participant (see above).s

The functions and powers of an inspector may have certain conditions or restrictions. These are specified as part of the particular inspector’s appointment.

Identity card

[Section 59b of the Act](#) requires the Director to issue each inspector with an identification card. Inspectors must carry this card with them at all times when performing functions or exercising powers.

Purpose for which inspectors can exercise their power

[Section 706 of the Fair Work Act 2009 \(FW Act\)](#) defines the purpose for which inspectors may use their powers, indicating that the compliance powers available may be exercised for compliance purposes. These compliance purposes are defined at section 706(1) of the FW Act and include determining whether the FW Act or a fair work instrument has been complied with.

The powers conferred by the FW Act can generally only be exercised during working hours except where an inspector believes it necessary to do so for compliance purposes. Inspectors should seek guidance before exercising compliance powers outside working hours.

Powers of an inspector

Sections 708 to 712 of The Fair Work Act 2009 (FW Act) set out the powers available to a Fair Work Inspector. By virtue of Section 59c of the Fair Work (Building Industry) Act (the Act), these powers are also available to FWBI Inspectors but only within the jurisdiction of a “building matter”.

Power to enter premises

[Section 708 of the FW Act](#) defines the powers of an inspector to, without force, enter premises, if they have a reasonable belief that the FW Act applies to work being performed on those premises or if they reasonably believe there are records or documents relevant to compliance purposes on those premises.

[Section 708\(3\) of the FW Act](#) states that either before, or as soon as possible after, entering premises an inspector must:

- show their identity card
- introduce themselves by name, and
- identify themselves as an FWBI Inspector.

It is best practice to do this whenever an inspector intends to enter premises during the course of an investigation, audit or site visit.



[Section 709 of the FW Act](#) states that while on premises an inspector may exercise one or more of the following powers:

- inspect any work, process or object
- interview any person
- require a person to tell the inspector who has custody of or access to a record or document
- require a person who has custody of or access to a record or document to produce the record or document while the inspector is on the premises or within a specified period
- inspect and make copies of any record or document that is kept on the premises or is accessible from a computer on the premises
- take samples of any goods or substances.

Name and address

[Section 711 of the FW Act](#) provides inspectors with a power to ask a person's name and address if the inspector believes the person has contravened a civil remedy provision.

Requirement to produce a record or document

[Section 712 FW Act](#) provides inspectors with a power to require a person to produce a record or document.

While an inspector's primary power is in relation to entering premises (see 'Power to enter premises' above) there may be instances where people who have control over documents or information are not willing to cooperate with an inspector's request under these provisions.

In these cases, an inspector is authorised under section 712 of the FW Act to issue a notice requiring a person to produce the document or record. The notice must:

- be in writing
- be served on the person, and
- require the person to produce the document or record at a specified place and time.

A person must be given a minimum of 14 days to comply with the notice.

Failure to comply with a notice may be a contravention of section 712(3) the FW Act.

The wording and content of a notice must be in an appropriate format. Inspectors should seek advice before issuing a notice and, where a notice is issued to union, seek guidance from the FWBC legal team.

Building Code compliance

[Section 59\(e\) of the Act](#) provides inspectors with a specific power to monitor compliance with the Building Code.



Examinations

Under [Section 45 of the Act](#), the Director may make an application through an Administrative Appeals Tribunal member for the issue of an examination notice.

This notice requires the recipient to appear before a hearing and answer questions or provide documents. Failure to comply with an examination notice, take an oath or answer questions may result in the subject of the notice being charged and possibly imprisoned.

See [the Preparing the Director to conduct an examination chapter](#) for more information.

Application for orders through courts or tribunals

[Section 539 of the FW Act](#) provides inspectors with the power to seek orders through various courts and tribunals.

Inspectors should not exercise this power without the authority of a senior legal officer.

Natural justice

Natural justice is a concept extending to all decisions where public power is exercised. The terms 'natural justice' and 'procedural fairness' are often used interchangeably and have developed as a safeguard to ensure that all decisions made by government (including government agencies) are fair and reasonable depending on the circumstances of each case.

In some instances, an inspector's actions may not be defined as 'decisions' in the strict legal sense. However, inspectors must abide by the principles of natural justice in undertaking their role.

At the simplest level, natural justice requires inspectors to use the following 'rules':

The bias rule

The bias rule requires inspectors to:

- be impartial and avoid conflicts of interest
- declare any potential conflicts of interest
- base decisions on a balanced and considered assessment of relevant information
- avoid apprehended bias, i.e. any action that suggests you have prejudged a matter.

The evidence rules

The evidence rule requires inspectors to:

- base decisions on relevant facts and evidence
- avoid basing decisions on speculation or suspicion.



You can draw inferences and form opinions but they must be based on proven facts and reliable evidence.

The hearing rule

The hearing rule requires inspectors to:

- provide a suspect with as much details of the allegations as possible
- give a suspect the opportunity to respond.

Inspectors must ensure that all matters are treated objectively and without bias and ensure that any person whose rights, interests or legitimate expectations are affected by a decision or determination has an opportunity to be heard.

To be heard appropriately, inspectors must provide a person with sufficient information so that (the person) understands the grounds on which any decision or determination will be made, and are able to address those grounds.

Decision making

Inspectors have a high degree of discretion on how an investigation or audit is undertaken. A number of factors can influence this discretion including:

- legislation
- natural justice
- policies and procedures
- management guidance and instructions.

During an investigation inspectors need to make many decisions about the conduct and ongoing management of the investigation. These decisions must be 'good' and, importantly, appropriately recorded.

What is a 'good' decision?

The following rules can be applied to making a 'good' decision:

- act lawfully and in good faith
- apply natural justice and procedural fairness
- gather all relevant, reliable information and evidence
- consider the material and assess relevant factors
- apply policies and procedures appropriately
- record your decisions and reasons
- communicate your decisions and reasons.

Decision points in an investigation



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Some 'natural' decision making points will occur in any investigation. These decisions generally focus on whether an investigation should be continued or closed. The obvious decision points include:



Stage of the investigation	Decision point
On receiving a complaint or information	Is the matter within jurisdiction?
On completing the complainant's statement	Is the matter within jurisdiction? Does the information disclose any contraventions of relevant legislation?
After interviewing witnesses and gathering material	Is there sufficient evidence to warrant conducting a record of interview with the suspect(s)?
On completing the record of interview	Has the suspect provided a reasonable explanation for their actions? Has the suspect provided a defence to the allegations? Is there sufficient evidence to warrant referring the matter to the FWBC legal team for further consideration?
After receiving advice from the FWBC legal team	Does the advice indicate reasonable prospects? Does the advice indicate additional inquiries are required? Does the advice indicate there are no prospects?
After receiving advice from an external legal advisor (if the matter is referred)	Does the advice indicate reasonable prospects of successful litigation?

Inspectors must record each decision made around these points. The team leader or manager must also justify and ratify each decision.

Recording decisions

During an investigation other questions will arise, which may have a significant impact on the future conduct of the investigation. For example, an inspector may need to consider abandoning a particular line of inquiry or commencing a fresh line of inquiry.

Inspectors must record these decisions and the factors that impacted them, in the case management system.



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You don't need to make a decision alone. As well as peers and managers, inspectors can consult senior managers and the legal team who have a wealth of expertise in investigations and the legal matters surrounding them.



Section 2 Investigations

Receipt of enquiries

Purpose of this chapter

This chapter details FWBC's process for dealing with enquires and complaints, timeframes for handling enquiries and complaints, and possible outcomes.

Definitions

When recording work in AIMS, inspectors should be aware of the distinction between 'enquiries', 'complaints' and 'investigations'.

Enquiries are matters that are either outside FWBC's jurisdiction (and are therefore referred to another agency) or are resolved by the provision of advice or information by the inspector. Enquiries have only two possible outcomes – they are either closed after the provision of information or closed after to referral to another agency.

Complaints are matters that appear to be within the jurisdiction of FWBC because they (i) relate to building work and (ii) appear to identify a potential breach of a building law. A complaint has two potential outcomes. It is either closed because it does not fall within FWBC jurisdiction or it is upgraded to investigation because it does fall within our jurisdiction and the complaint warrants further exploration. On receipt of a complaint an investigator has 7 working days in which to determine whether the complaint is within jurisdiction, close or upgrade. The decision and the reasons for reaching that decision are to be recorded in AIMS.

Investigations are matters that require further effort such as:

- undertaking more complex inquiries often dealing with other people
- seeking and reviewing documents
- conducting interviews
- taking statements
- attending sites.

Sources of enquiries and Complaints

Inspectors can receive enquiries and complaints from a wide variety of sources including industry participants and members of the public. Inspectors can also initiate their own complaint or investigation in consultation with their team leader.

Any advice that a building industry participant has made a Fair Work Commission (FWC) application under the provision of the FW Act should be viewed as a complaint and treated accordingly.



Registering an enquiry or Complaint

Register all enquiries and complaints on AIMS. For instructions on registering enquiries and complaints see the [AIMS Manual](#).

Register enquiries on AIMS within 24 hours of receipt. It is essential that the caller be contacted by an investigator within 24 hours of receipt of the enquiry. Enquiries should be satisfied and closed within three days.

Complaints should be registered in AIMS within 24 hours of receipt. It is essential that a complainant is contacted by an investigator within 24 hours of the receipt of the complaint. Investigators have 7 working days in which to determine that a complaint is within jurisdiction. A complaint can be upgraded to investigation or closed at any time within the 7 days allowed for initial consideration. It is essential the investigator document the actions taken and determinations made in AIMS.

Once a matter has been upgraded to an investigation, the relevant team leader will allocate the complaint to an inspector for investigation.

When dealing with enquiries, you may be required to answer questions that relate to FWBC's work. These enquiries may require the inspector to provide advice on:

- the Fair Work Act 2009 (such as right of entry, industrial action, coercion, freedom of association, discrimination and engaging contractors)
- the Fair Work (Building Industry) Act 2012
- the Independent Contractors Act 2006 and
- FWBC's complaints and investigation process.

An enquiry may also involve a request for a meeting to discuss workplace laws or a formal presentation. Inspectors should discuss how to provide these services to building industry participants with their team leader.

Often the questions raised in an enquiry are outside of the jurisdiction of FWBC. In these cases the inspector should:

- provide the enquirer with the contact details of the relevant agency having jurisdiction
- record this action in AIMS and
- close the enquiry.

Media

The FWBC's Office of the Director manages all media enquiries. If you receive a call from the media refer them to the Senior Media Adviser.

Do not make a comment to the media yourself.



Ministerial complaints

The FWBC Director's office manages all ministerial complaints and refers matters to a regional FWBC office for action as appropriate.

Referrals from other agencies

The FWBC has established information sharing relationships with other Commonwealth and state government agencies such as the Department of Immigration and Border Protection (DIBP), Office of the Fair Work Ombudsman (FWO), the Australian Taxation Office (ATO) and the Australian Securities and Investment Commission (ASIC). Some of these relationships have been formalised through memoranda of understanding (MOUs) or written agreements.

See current MOUs on the [Inspector Resources page](#).

Jurisdiction – in or out

Purpose of this chapter

This chapter explains the context in which FWBC conducts its investigations and other compliance activities and outlines FWBC's jurisdiction to investigate contraventions of commonwealth workplace laws.

Determining a constitutional connection

To be authorised to investigate a complaint under commonwealth workplace laws inspectors need to establish that:

- there is a constitutional connection between parties (the subject of the complaint) and
- the matter falls within FWBC's jurisdiction.

The Fair Work (Building Industry) Act 2012 defines a 'constitutional corporation' as:

- a corporation to which paragraph 51(xx) of the constitution applies or
- a body corporate that is incorporated in a territory.

The most common way to identify a suspect as a constitutional corporation is to check whether the organisation is incorporated. To do this conduct an Australian Securities and Investment Commission (ASIC) search.

Administrative staff in each state are responsible for undertaking paid company and director searches. Seek approval from an Assistant Director or State Director before to requesting a search.

State referrals

From 1 January 2010, workplace relations powers referred from New South Wales, Queensland, South Australia and Tasmania to the commonwealth created a national workplace relations system.



This national system includes all private sector employment, other than employment by non-constitutional corporations in Western Australia.

Employees in Western Australia who are not covered by the national system include state public sector employment and employees of non-constitutional corporations in local government and the private sector.

All employment in Victoria, the Northern Territory and the Australian Capital Territory is already covered under the national workplace relations system.

Employers and employees, other than in Western Australia, that were previously covered by state workplace relations systems (because the employer was not a constitutional corporation) are now covered by the national workplace relations system.

As part of the changes, some public sector and local government employment previously under the national system is now covered by state systems.

Employers and employees not covered by the national industrial relations system are covered by the applicable state industrial relations system.

Employers and employees in the national system have the same workplace rights and obligations, regardless of the state they work in.

Definition of 'jurisdiction'

In simple terms 'jurisdiction' means the right, power or authority to administer justice and the extent or range of the authority under judicial, law enforcement or other authority.

FWBC's jurisdiction

To establish if FWBC has jurisdiction over a matter you need to determine if:

- the parties to the complaint are 'building industry participants' (as defined in the [Fair Work \(Building Industry\) Act 2012 – Section 4](#)) and
- the matter involves 'building work' (as defined in the [Fair Work \(Building Industry\) Act 2012 – Section 5](#))

Once you have determined that the complaint falls within FWBC's jurisdiction the matter can progress to the next level of investigation.

FWBC's goals and objectives

FWBC has a clear mandate to ensure building work is carried out fairly, efficiently and productively to benefit all building industry participants and the Australian economy as a whole.

The Fair Work (Building Industry) Act 2012 aims to provide a balanced framework for cooperative, productive and harmonious workplace relations in the building industry by:



- ensuring all building industry participants comply with workplace relations laws
- providing information, advice and assistance to all building industry participants about their rights and obligations
- providing an effective way to enforce those rights and obligations
- providing appropriate safeguards on the use of enforcement and investigative powers and
- improving the level of occupational health and safety in the building industry.

Handling matters that fall within FWBC's jurisdiction

If a matter falls within FWBC's jurisdiction inspectors can either:

- provide information or advice at the enquiry level or
- upgrade the matter to the investigation level.

Investigations are matters that require further effort such as:

- undertaking more complex inquiries often dealing with other people
- seeking and reviewing documents
- conducting interviews
- taking statements
- attending sites.

For instructions on registering enquiries see the [AIMS Manual](#).

Handling matters that do not fall within FWBC's jurisdiction

If a matter falls outside FWBC's jurisdiction inspectors should refer the matter to the appropriate state or federal agency.

Record details of all inquiries conducted and any other factors considered during the decision making process on the hard copy file and note the decision in AIMS.

Any decision to refer a matter to another agency must be made in consultation with your Assistant Director.

For more information about referrals see [Investigations – Receipt of enquiries and complaints – Referrals from other agencies](#).

Statutes of limitations

Inspectors need to be aware that FWBC's capacity to litigate is restricted by time limits (six years) set within the [Fair Work Act 2009](#).

Beyond the Fair Work Act, unless an Act states otherwise, there are no limitations on time.

If there is any doubt about the limitation period to apply to a contravention seek advice from FWBC Legal Group.



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Record of decision to investigate

Definitions

An **investigation** involves obtaining, managing and evaluating evidence to determine whether a contravention of federal workplace laws has occurred.

FWBC has adopted a nationally consistent process that identifies uniform points of escalation and management intervention during an investigation.

Inspectors must ensure that the evidence obtained during an investigation is critically evaluated both before a matter is completed (investigative evaluation) and before any recommendation to litigate is made (evidential evaluation).

A **contravention** is established when there is sufficient evidence to prove a contravention of federal workplace laws. Inspectors cannot make this determination until all available evidence has been collated and assessed.

Determining a contravention requires an investigative evaluation of the evidence obtained to assess whether that evidence supports each of the points of proof of the alleged contraventions. Ensure that all available evidence has been collated and assessed before making a final determination.

Investigative evaluation involves critically evaluating the material gathered to determine whether a contravention of federal workplace laws can be supported by the evidence. It can also provide intervention and escalation points to raise matters with Assistant Directors.

Why do we need a Record of Decision to Investigate?

On 1 June 2012, the Director formally delegated his functions, under section 10(c) of the Fair Work Building Industry Act 2102, to inspectors to inquire into, and investigate, any act or practice by a building industry participant that may be contrary to a designated building law, a safety net contractual entitlement or the Building Code.

This delegation is an important step to ensure the validity of investigations and any subsequent use of examination notices.

On 13 June 2012, the Director issued a direction to all inspectors to create a record of each instance where they exercise the above delegation.

Completing a Record of Decision to Investigate

Inspectors must complete a [Record of Decision to Investigate template](#) in the following instances:

- at the start of each investigation
- when making an application for the use of examination powers



- when transferring investigations between FWBC staff
- where additional potential contraventions have been identified that were not listed on the original document.

A Record of Decision to Investigate is reviewable internally and externally. It provides a formal record if the matter proceeds to litigation and you are required to give evidence about the decisions that you made and the rationale and timing of these decisions.

While a decision to investigate is at an inspector’s discretion, this decision should be made in consultation with a team leader.

Once you have analysed the material and determined there is sufficient information to upgrade the matter to an investigation you must:

- complete a Record of Decision to Investigate form within seven days of commencing an investigation
- get the Record of Decision to Investigate approved/actioned by a team leader and
- attach the record to AIMS and a place a copy in the TRIM file.

When a file is transferred between investigators or additional potential contraventions are identified, this decision should be recorded in a Case Decision Record CDR and in the Investigation Plan.

See the [AIMS User Guide](#) for instructions to action and attach the Record of Decision to Investigate to the AIMS case management system.

Investigation planning and evidence matrix

“Investigators must be able to manage themselves and their time effectively in order to be able to successfully manage all aspects of an investigation.” 1

Purpose of this chapter

This chapter summarises how to successfully plan, prepare and manage an investigation that follows best practice and is nationally consistent.

This chapter is not a comprehensive set of instructions. Instead, it identifies the key elements of planning and the benefits of using the Investigation Plan and the Evidence Matrix.

Why do we plan?

Agency	Operational
Our strategic and operational planning has impact	Managers can quickly and comprehensively review investigations



Our organisation becomes more resilient and we can better exploit opportunities	Inspectors can readily provide briefings on the status and progress of an investigation
We are more confident about our decisions	Quality investigations are conducted and concluded in a timely manner
Our stakeholders are more confident in our decisions	

Process for planning and set-up

Within **7 days** of an investigation commencing, the lead case officer will develop an [Investigation Plan](#) and [Evidence Matrix](#).

The lead case officer will work in consultation with their Assistant Director and/or State Director.

After creating the plan:

- save it to the document centre
- link it to the relevant AIMS investigation on the administration page
- hyperlink to the Evidence Matrix within the plan at the relevant section.

The Investigation Plan

The Investigation Plan should identify and outline the:

- objectives of the investigation
- risks and how these will be managed
- contraventions and elements to be proven
- lines of inquiry and methods to secure evidence
- work phases, timelines and milestones
- structure of the investigation
- options for resolution.

The Evidence Matrix

The Evidence Matrix will also help you with planning. Use this document to inform critical decisions during the investigation. It is a useful tool to:

- facilitate your planning
- direct and focus an investigation
- adjudicate the sufficiency of evidence
- create a Record of Interview Plan
- create briefings



- manage the review process.

The matrix should identify the:

- objectives of an investigation
- elements or proofs of the offence(s)
- avenues of inquiry and actual inquiries undertaken
- evidence secured at any point of an investigation.

Vary the matrix to reflect the changes that inevitably occur during the course of an investigation.

¹Practice Advice on Core Investigative Doctrine – Second Edition, p176.

Evidence

Purpose of this chapter

This chapter explains the role of evidence, including:

- what is evidence
- types of evidence
- collecting and using evidence
- responsibilities of inspectors and lawyers
- relevant legislation.

What is evidence?

Evidence is admissible material that is collected and produced in an attempt to prove or disprove a fact in issue. It should prove each element of the allegation.

Evidence can be:

- documents
- testimony
- diaries
- photographs
- maps
- other material.

When you create the [Investigation Plan](#) and the [Evidence Matrix](#) you will need to consider the evidence.

Investigation Plan

The Investigation Plan should identify sources where evidence could be gathered. This may include:



- complainants
- witnesses
- suspects
- third parties
- government agencies
- work premises
- suspect and non-suspect databases (for example, telephone, banking and credit card records).

Gathering and producing evidence

Investigators will obtain signed witness statements as the preferred and best means of recording evidence from witnesses. The statement will include reference to and a description of any material produced by the witness as part of their evidence. As an inspector, you must gather all lawfully obtainable material about what occurred. Don't limit this to what you believe occurred. There may be further allegations. Later in court, there may be something that is more important than first thought.

Example:

In an Office of the Australian Building and Construction Commissioner (ABCC) case, there was a time stamp on a facsimile. This became important because it fixed the time when a conversation had occurred.

FWBC is a model litigant^[1] and therefore has an obligation to:

- seek all information that is relevant to the alleged contravention
- place all evidence before the court, irrespective of which side the material supports.

[The Brief of Evidence](#) has instructions and a checklist on how to produce evidence so the FWBC legal team can review the case.

Admissibility and relevance

To test whether evidence is admissible, ask:

Is it relevant?

To be relevant, evidence must prove or disprove a disputed fact. Evidence may also be relevant if it relates to the credibility of a witness.

Evidence that is relevant is admissible in a proceeding, unless excluded by some specific rule.



Hearsay evidence

Oral or written statements from a person who is not called as a witness are generally not admissible in evidence. This is because the person who made these statements cannot be tested in court through cross-examination. This is the “hearsay rule”.

The court makes the ultimate decision on admissible evidence. So if the status of a statement as hearsay is unclear, include the evidence.

Best evidence

There used to be common law rule called the “best evidence rule”. This excluded evidence that was not in original format. These days, you can usually tender a copy of the document. The preference for FWBC investigations is to sight original documentation and take clear copies.

Don’t confuse best evidence with direct evidence. Direct evidence includes, but is not limited to:

- eyewitness accounts in witness statements (“I did/saw/heard...”)
- photographs
- signed correspondence between parties.

Covert recordings

If you become aware that a person has made a covert recording of a conversation you must raise this with your team leader. In some states and territories it might be a criminal offence if you take possession of the recording.

Ask the person who has the recording to keep it safe until you have consulted with your assistant director.

Evidence of identity

When individuals are the subject of litigation, the establishment of the identity of the person allegedly responsible for committing the breach is essential. Where a witness is unsure of the identity the suspect but is able to identify the suspect from a photograph, then the inspector should prepare a photoboard for examination by the witness. [Instructions on the creation and use of photoboards to identify suspects are available here.](#)

Documentary evidence

Site induction records and site diaries are the most common form of documentary evidence gathered by inspectors. But don’t limit the investigation to this type of material.

The [Evidence Act 1995](#) defines a document very broadly to include any record of information.

For example:

- anything on which there is writing



- anything on which there are marks, figures, symbols or perforations having a meaning for someone qualified to interpret them
- anything from which sounds, images or writings can be reproduced with or without the aid of anything else
- maps, plans, drawings or photographs.
- Documentary evidence may include:
 - original documents
 - electronic formatted documents
 - parts of documents
 - copies, reproductions or duplicates of documents.

Provide a receipt to the owner if you collect original documents or material that will be returned. The owner is allowed to access the item while it is in the possession of FWBC.

Witness statements and interviews

[Witness statements](#) are taken by inspectors during investigations. These statements will usually form the basis of the affidavit evidence prepared for court. In general, affidavit evidence is only collected when a matter proceeds to litigation.

Signed witness statements are the preferred and best means of recording evidence from witnesses.

Statements must be comprehensive. In NSW, several cases ran in the Federal Court where the statements were tendered without affidavits.

Don't limit the statement to facts that are only relevant to court proceedings. Include information that will help the reader to understand the background to the allegation.

Examples:

Explain words such as "alimak" or "reo"

Give some detail about the hierarchy on a building site

Make a record if you speak to someone who may have been a witness, but does not make a statement (for example, they may not have actually seen anything). Record why the person did not provide a statement. This will help if the other side claims that FWBC did not contact them because they had evidence that was unfavourable to our case, when in fact the person may have refused to make a statement.

Records of Conversation (ROCs) may be an appropriate method in the first instance to collect relevant information if the witness has limited availability to provide an immediate statement.

A ROC may be obtained by an investigator using a recording device which will provide a contemporaneous account of information from the witness. This information will assist the investigator in obtaining a statement from the witness at a later time.



Recorded ROCs must be overt and made with the witness' knowledge.

Investigators will exercise their judgement in determining the most appropriate method of collecting information and evidence from witnesses based on the circumstances. The Investigator should seek advice from a Team Leader if guidance is required.

Importantly, ROCs must not be viewed as a substitute for obtaining a witness statement.

[Records of interviews \(ROIs\)](#) conducted with the alleged respondent are admissible as “statements adverse to the maker’s case”. Check the transcript for accuracy when it is first received. This evidence will usually be given by the inspector who is tendering the transcript in the proceedings.

Discovery

Discovery is an order by the court. It allows a party to request all documents which relate in some way to the proceedings from the other party. Discovery is a procedure used in civil cases.

The FWBC lawyer will manage the process. However keeping your files up to date and easy to access is important. You may need to provide a copy of every document. This can be time consuming and could include hard copies, electronic files and emails.

Some documents may be protected by legal professional privilege (LPP). FWBC lawyers will make this assessment. However when you brief internal lawyers, you should maintain your role as the decision maker. LPP will only exist if the FWBC lawyer is acting independently of the investigation.

The evidential burden and standard of proof

The inspector is responsible for supplying sufficient evidence to the FWBC Legal Group to establish a case against the suspect.

The existence of a *prima facie* case is not sufficient evidence to prosecute a case.

The test is:

- Is there *prima facie* evidence of the elements of the offence and a reasonable prospect of obtaining a finding of liability?

In making this decision, the lawyers must evaluate how strong the case is likely to be when presented in court. As part of their assessment, they will consider:

- lines of defence open to the respondent
- other factors that could affect the likelihood or otherwise of proving the contravention.

Limitations of legal power

Make sure that evidence is gathered in accordance with the provisions of the law. The [Fair Work Act 2009](#) places some limits on the [legal power of inspectors](#) to obtain material.



Evidence obtained in contravention of the Fair Work Act 2009 may be inadmissible in any FWBC litigation action. This would jeopardise the case and violate FWBC’s model litigant obligations[2]. It may also mean that you are personally liable to legal action.

[1] Commonwealth Attorney General’s Department – *Legal Services Directions 2005*

[2] Commonwealth Attorney General’s Department – *Legal Services Directions 2005*

Record of interview

Purpose of this chapter

This chapter provides guidance on recording an interview with a suspect. It highlights the natural justice requirements for interviewing suspects and emphasises the need for planning and preparation.

What is a record of interview?

A record of interview (ROI) is a formal record of a conversation between an inspector and a suspect that is about matters under investigation.

Natural justice

Someone who is suspected of contravening the law must be offered the opportunity to respond to the allegation. This is an essential requirement of the rules of “Natural Justice”.

This process has some practical benefits. The suspect may have a ready defence to the allegation. This may remove the need for expensive external legal advice.

Rules and obligations

Before you start interviewing a suspect, you should understand and adhere to best practices, regardless of the type of investigation. Pay particular attention to rules regarding interviews being voluntary, fair and reasonable.

Example:

When interviewing people of Aboriginal or Torres Strait Islander descent, it is important to respect the Anunga Rules.

There is no legal requirement that the offer to record an interview must be in writing. However for FWBC investigations, a request for an ROI with a participant such as union officials or organiser should be in written form.

Preparing for the interview

Planning and preparation are critical to the success of a record of interview.



Importantly, you should know and understand the essential elements that comprise the contravention before you start the interview. Also make sure that your corroborator understands the material.

As a first step, agree on a plan for the conduct of the interview. The plan doesn't need to be a detailed set of questions. Rather, it is a guide to what the interview will cover.

As a result of planning, both the interviewer and corroborator should understand in advance:

- the contraventions(s) being investigated
- possible defences open to the respondent
- alleged involvement of the respondent
- roles of the interviewer and the corroborator during the interview
- documents or other evidence to be put to the suspect during the interview.

Introducing the interview

Clearly explain the suspect's rights and obligations at the start of the interview. This includes their right to not answer any or all of the questions put to them during the interview.

Caution the suspect that anything they say will be recorded and may be used in evidence against them.

Put the allegation against the suspect in clear and unambiguous terms. Don't simply state the contravention of a particular section of an Act. After advising the suspect of the allegation, question them to check that they understand both the caution and the allegations against them.

The suspect is entitled to have a legal representative present for the interview. During your introduction, make this right clear and offer them this opportunity.

Recording and transcribing the interview

Wherever possible, you must create an electronic recording of the interview. Provide the suspect with a copy as soon as practicable.

Convert the recording into a transcript following completion of the interview. You will need the authority of an Assistant Director for this step. Also provide a copy of the transcript to the suspect.

Inspectors are responsible for making sure that the transcript is an accurate reflection of the conversation that occurred between the inspector and the suspect.

In consultation with the Assistant Director, you may decide that it is unlikely that the investigation will result in litigation. In this case, transcription is not necessary. Instead, prepare a summary of the interview and its major points. Record this summary on AIMS and the TRIM file.



Witness or suspect?

During the course of an interview with a witness, you might realise that the witness could be responsible for committing a contravention of the legislation. If this happens:

1. stop the interview immediately
2. explain to the witness that they may have committed a contravention
3. explain the nature of the breach
4. caution the witness.

If the witness is not already represented by a legal adviser, you must make it clear that they have the option of having one present during the remainder of the interview.

Preparing the Director to conduct an examination

Purpose of this chapter

This chapter explains the process involved in the decision to issue an Examination Notice and how an examination is conducted.

What is an Examination Notice?

An Examination Notice compels a person to provide evidence to the Director.

Before applying for an Examination Notice, inspectors must exhaust all possible avenues to obtain evidence voluntarily or through their available information gathering powers.

When an inspector believes that an Examination Notice is needed, the inspector will raise the matter with the relevant Assistant Director and State Director who will consider whether or not to consult the FWBC legal group.

A [Record of the Decision to Investigate](#) must be completed at the start of each investigation and should record your delegation to commence the investigation. This is an important prerequisite to issuing an Examination Notice.

The issue of an Examination Notice is serious because a failure to comply with an Examination Notice is a criminal offence which carries a maximum penalty of six months imprisonment.

Examination Notices will not be sought to conduct a ‘fishing expedition’ for information.

Examination Notice

There are three different types of Examination Notices that can be used to compel a person to:

1. answer a series of written questions included in an Examination Notice
2. produce documents
3. attend an interview and answer questions.



The Director can apply to the nominated Administrative Appeals Tribunal (AAT) presidential member for an Examination Notice. The Director will only apply for an Examination Notice to be issued when:

- the Director, or authorised delegate, has [started an investigation](#) and FWBC is not a part of any proceedings that have started
- the investigation is not connected with a building project where a determination by the Independent Assessor is in force - see sections 38 to 43 of the [Fair Work \(Building Industry\) Act 2012](#)
- there are reasonable grounds to believe that a particular person has information or documents relevant to the investigation
- the information or documents will help the investigation
- the information or evidence it is likely to be important to the progress of the investigation
- other methods of obtaining the information, documents or evidence have been attempted and have been unsuccessful or are not appropriate
- the seriousness of the suspected contravention makes it reasonable to require the person to respond to the Examination Notice and that the impact of the Examination Notice is unlikely to have a negative effect on that person.

An Examination Notice should never be issued to a person who may be a respondent to any resulting enforcement action. This is because any evidence of the witness is not admissible against them.

Document preparation

The inspector is responsible for drafting:

- [the application](#)
- [the affidavit](#) and
- [the Examination Notice](#).

FWBC Legal can help with the draft documents. Once this has been done, the documents are ready to go to the Director for review.

If the Director thinks that the draft application and the affidavit warrant the issue of an Examination Notice, the inspector will:

- [prepare a cover letter](#) to accompany the Examination Notice
- request that an Examination Notice number be issued
- liaise with all relevant parties to determine a suitable date for the information or documents to be received, or the date which the witness will be required to attend to answer questions
- determine the venue for the examination to be held
- book a transcription service to record the examination and ensure there are video facilities available
- advise the Director Conformance so that any potential security issues may be addressed.



When these details for the Examination Notice are confirmed, the inspector will send the application, affidavit, proposed Examination Notice and cover letter to the Director for review and signature.

Once the Director has signed the documents an application is made to the AAT to issue the Examination Notice.

The inspector will arrange for the personal service of an Examination Notice and cover letter at least 14 clear days before the examination. An Examination Notice and cover letter can be served in a number of ways but personal service is preferred. If the inspector wants to serve the notice another way, this should be discussed with their assistant director.

A [Guide to Claiming Witness Expenses](#) is included with the notice. The claim form is for fees and allowances to cover reasonable expenses they incur for attending the examination. A witness can claim allowances for travelling, accommodation, loss of earnings and towards meeting the costs of having a lawyer represent them. The claim forms state what the witness must do to make a claim.

Attendance at the examination

The inspector who is also the investigation case officer is expected to attend the examination. The case officer and the FWBC lawyer have a critical role to play at the examination. This involves:

- helping the Director prepare for the examination
- briefing counsel to assist (when required)
- assessing the evidence provided by the witness
- suggesting further lines of questioning for the Director
- documenting responses from the witness
- advising the Director where FWBC has information or evidence that confirms or contradicts the evidence being given.
- Witnesses have the right to legal representation at examinations.

After the examination has concluded

Maintaining the confidentiality of information obtained as a result of an Examination Notice is important. The rules governing the management and recording of this information are located in the [s. 45 Examination Information Management Protocols](#). These protocols must be adhered to at all times.

Examinations must be video-recorded and a [transcript of the evidence](#) will be hand-delivered to the witness. Witnesses will be asked to make amendments or written comments in relation to the transcript.

The Commonwealth Ombudsman

The inspector will consult the FWBC lawyer to prepare the [documentation for the Commonwealth Ombudsman](#). As soon as practicable after an Examination Notice has been issued, the Director must



notify the Commonwealth Ombudsman that an Examination Notice has been issued, and provide to the Commonwealth Ombudsman a copy of:

- the Examination Notice
- the affidavit that accompanied the application for the Examination Notice
- any other information in relation to the Examination Notice that was given to the nominated AAT presidential member who issued the notice.

As soon as practicable after an examination of a person is completed, the Director must give the Commonwealth Ombudsman:

- a report about the examination
- a video recording of the examination
- a transcript of the examination.

The report must include:

- a copy of the Examination Notice under which the examination was conducted
- information, including the:
 - time and place at which the examination was conducted
 - the name of each person who was present at the examination
 - any other information prescribed by the regulation.

Investigation management

Purpose of this chapter

This chapter outlines the role of team leaders in investigation management and details FWBC's investigation decision-making processes, tools and recording of decisions.

Role of team leaders

Team leaders help FWBC to reach organisational goals and KPIs. Their role also includes overseeing issues that arise within an investigation and they play a key role in ensuring investigations are conducted in a timely and proper manner. However, the investigator remains the primary person responsible for conducting an investigation.

Team leader guidance

Team leaders carefully review their team's investigations and provide guidance on the conduct of the investigation. Team leaders are some of the most experienced investigators in the FWBC.

An investigation review is more than a mechanical exercise to make sure the correct forms or documents are present. A review looks deeper into the conduct of the investigation to ensure it is legal, ethical, fair, transparent and complete.

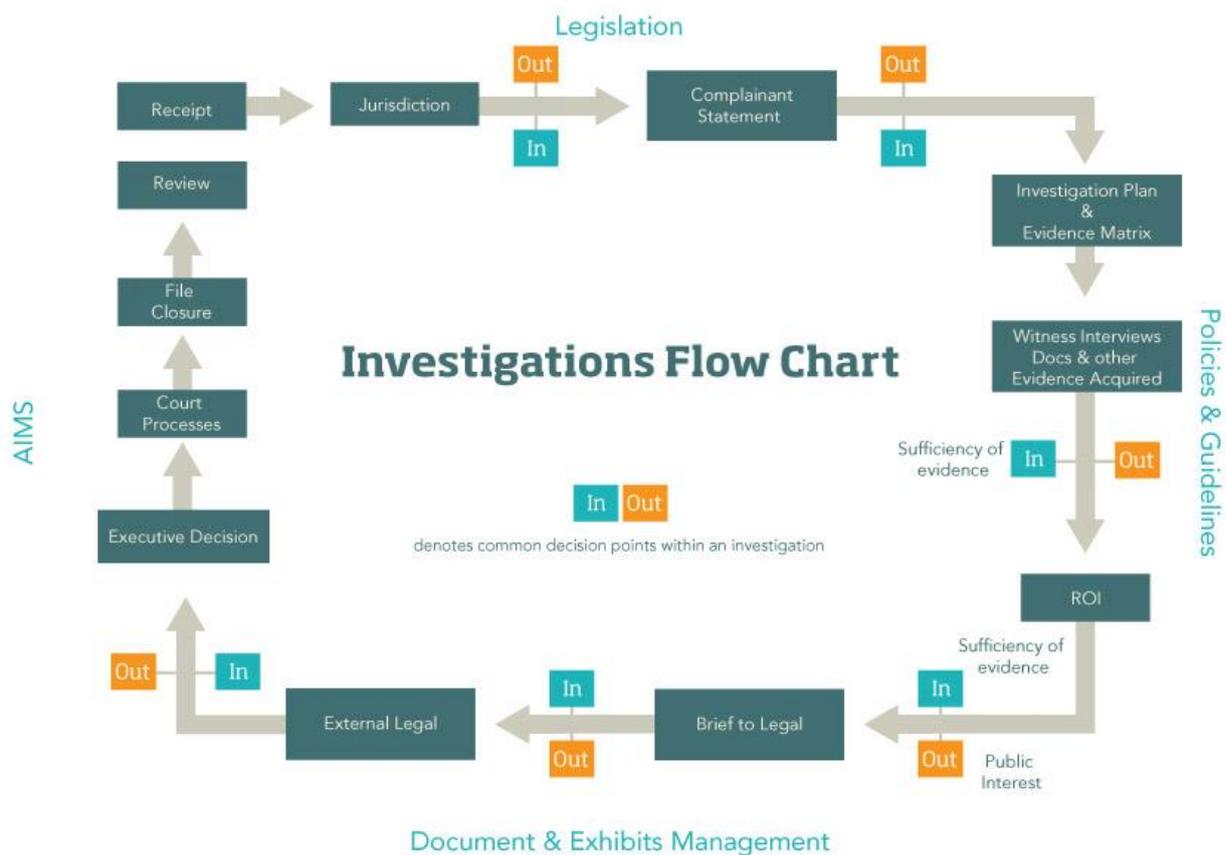


Team leader input into investigations and the mentoring of new and experienced investigators is crucial for each investigator's development.

Investigation reviews

The team leader must review individual investigations at least once every two weeks. Beyond this it is up to the team leader to use their discretion on a case-by-case basis as to how often they review cases.

The following diagram illustrates the investigation process and identifies critical decision and review points.



Note: the diagram outlines the minimum requirements of the team leader and does not intend to portray the investigation as a strictly linear process. The team leader is expected to provide mentoring and advice at and beyond the key stages identified in the diagram.

Investigators use their discretion to conduct and manage their investigations. It is best practice to consult with assistant directors and other investigators during the investigation. A team leader also uses their discretion to conduct their review and will consider the following:

- the investigation plan
- recording decisions



- identifying critical decisions in an investigation
- communicating decisions to the complainant.

Investigation plans

The team leader will consider if the Investigation Plan:

- is appropriate
- has been reviewed consistently throughout the investigation
- has been changed to reflect the progress of the investigation.

An investigation plan prepared at the start of an investigation is intended to:

- identify potential contraventions
- set the objectives and direction for the investigation
- use the evidence matrix to determine how the objectives are to be achieved.

[For more information see Investigation Planning and Evidence Matrix](#)

Preparing and updating an Investigation Plan and the associated Evidence Matrix is critical to the success of an investigation. The evidence gathered during the course of an investigation will usually lead to changes in the objectives and direction of an investigation. For example, contraventions may be added or eliminated depending on the evidence gathered.

The investigation plan and evidence matrix are 'living documents' that need to be changed and updated as the investigation progresses to accurately reflect the current state of the investigation.

Have the objectives identified in the plan been achieved?

This is particularly important when reviewing a file prior to closure. If the objectives have changed or have not been achieved, is there an explanation? Has the plan been amended accordingly?

Has FWBC's legal obligations been satisfied and were the actions and activities lawful?

A range of legal constraints govern investigations and the methods used to conduct them. The following activities are governed by legislation or interpretation of legislation through various courts and tribunals:

- the exercise of powers to enter a site
- the acquisition of documents
- the interviewing of witnesses and potential respondents.

It is essential that FWBC can clearly demonstrate that its actions during an investigation are lawful and justified.

Has FWBC requested legal advice and, if so, did it comply with that advice?



It is common during an investigation to request advice from internal legal about:

- whether or not a given set of circumstances is a contravention
- what additional information might be required to support an assertion that a particular contravention was committed.

When legal advice is sought and provided it is essential that the advice is followed or at least considered when making decisions on the conduct of the investigation. Case Decision Records (CDRs) should reflect that consideration.

Has FWBC satisfied and complied with its policy obligations?

Internal policy documents significantly impact on the way FWBC works and investigators must do investigations within the policy framework. Failure to comply with policies, many of which could be 'discovered' during a court process, may jeopardise an otherwise sound litigation action. This will undoubtedly bring internal and possibly external criticism of the individual investigator and FWBC. Investigators must record a decision to investigate, prepare an investigation plan and maintain a comprehensive chain of case decision records.

Can the investigation withstand internal and external scrutiny?

Internally, investigations can be scrutinised by the Executive, and the Professional Standards Unit (PSU).

Externally, investigations can be scrutinised by the Commonwealth Ombudsman, the public and the Parliament via Senate Estimates.

For this reason, it is important that team leaders thoroughly consider decisions investigators make.

Recording decisions

Decision making is an integral skill used throughout the investigation management process. As federal government employees, when investigating and enforcing compliance, investigators take on the role of administrative decision makers. The investigator's role as an administrative decision maker is to document and justify their decisions. Every investigator will make administrative decisions during the course of an investigation.

An investigator's actions and decisions are recorded in a way and to a standard that can withstand internal and external scrutiny. The appropriate recording and maintenance of an investigation not only provides a comprehensive and accurate record of an investigation, it also offers a high level of protection to FWBC and to the individual investigator if questions are raised about their actions or decisions.

The duty of the administrative decision maker is to be open and transparent and without bias or prejudice. Investigators must be accountable and able to justify their decisions. For a decision to be



transparent, it must be recorded. For this reason, FWBC requires that all decisions made, critical or not, be recorded. Review decisions and critical decisions must be documented in AIMS.

Identifying critical decisions in an investigation

Decisions that determine or change the course of an investigation are referred to as critical decisions. The [Australian Government Investigations Standards 2011](#) describe critical decisions as ‘those decisions made during the course of an investigation that:

- lead to a significant change or approach
- lead to a change in resources involved in the investigation
- affects any decision that may impact on the investigation achieving the stated outcomes for the investigation.’

Some examples of critical decisions made in an FWBC investigation include:

- decisions relating to the exercise of powers
- additional contraventions identified
- decisions to stop lines of investigation
- evidence that identifies a fatal flaw in the brief
- consideration of or action taken on receipt of legal advice
- referrals to other agencies.

This documentation should include:

- the decision itself including the reason for the decision, the person who made the decision and the date of the decision
- information relied on to make the decision
- any expected or potential significant impact of the decision.

Completing the final decision record

Critical decisions made during the course of the investigation should be distinguished from the final decision record. A team leader, state director or reviewer should have a clear picture of the investigation from the final Case Decision Record, including the critical decisions, evidence, analysis and decisions made.

The final decision record should provide a comprehensive account of the investigation and should include the following:

- a brief summary of the background to the complaint
- the allegations investigated
- the contraventions identified
- an analysis of the evidence, including the following:
 - documentation of the evidence obtained



- what was taken into account and why
- what was not considered and why
- how the evidence demonstrates that a contravention has or has not occurred
- facts and issues used as the basis for inferences and opinions
- the weight given to the facts and issues
- application of policies or why they were not followed
- recommendations for litigation or no litigation, including public policy considerations.

It is essential that the actual decisions made are clearly recorded.

The final decision record should be completed on the [CDR template](#) and attached to the Case Decision Record Action in AIMS.

Communicating decisions to the complainant

Administrative law dictates that a party to a complaint is entitled to receive clear, coherent and accurate reasons for decisions made by government decisions makers. The same consideration must be given to the final decision record when communicating in writing with parties to a complaint.

The decisions made and the outcome should be clear and should enable the person to decide whether or not to seek a review.

Investigation outcomes

Purpose of this chapter

This chapter outlines the possible outcomes of an investigation.

Potential investigation outcomes

The primary purpose of an investigation is to establish facts. When an investigation identifies a contravention of relevant legislation and the inspector gathers sufficient evidence, the FWBC legal team will consider litigation as an outcome.

Inspectors are not always able to gather sufficient information or evidence to support litigation action. An inspector's role is to present the information they have gathered about a suspected contravention to management and the FWBC legal team in a clear and comprehensive way. If management and the FWBC legal team think the information supplied is sufficient to determine a course of action, they can make an informed decision on the future of the investigation.

Litigation

The [FWBC legal team](#) manages the first step in the litigation process.



The legal team operates within the Legal Services Directions, a set of guidelines designed to ensure that there is a good chance of success if matters go to litigation and that it is in the public interest to proceed with litigation.

The Directions also require FWBC to seek external legal advice to make sure the proposed litigation is likely to be successful. The internal and external legal teams will base their decision on the material the inspector provides as the [Brief of Evidence](#).

The final decision on whether an investigation is to progress to litigation rests with the Director and Chief Counsel. They will consider all the written material available and may seek further information from the inspector or the relevant legal officer when deciding if litigation is the appropriate outcome.

There are a range of other 'non-litigation' outcomes to the investigations process. These are:

- no further action
- letter of caution
- referrals to other agencies.

No further action

There are a variety of reasons for adopting this outcome as the reason for closing of an investigation. These include:

- insufficient evidence
- no contravention identified.

Insufficient evidence

After considering a brief of evidence, the FWBC legal team may determine that while it is probable that a contravention has been identified, there is not enough evidence to litigate the matter. The FWBC legal team may also determine that there are less than reasonable prospects of successful litigation.

This outcome can only be determined after receiving legal advice. If this advice is received from the FWBC legal team then the decision should be recorded and normal file closure procedures undertaken. The closure record should identify 'insufficient evidence' as the reason for closure.

No contravention identified

There will be circumstances where the evidence accumulated during an investigation does not show that a contravention has been committed. In these circumstances, the inspector can make a recommendation on a decision with the approval of an assistant director or state director in operations. The decision can be made after legal advice is received, but legal advice is not required



to close an investigation in these circumstances. Normal closure processes should be implemented. The closure record should identify 'no contravention identified' as the reason for closure.

Letter of caution

An inspector can issue a letter of caution when the FWBC legal team has advised that the evidence indicates that a contravention has occurred but there are reasons why litigation will not go ahead. The reasons for such a decision are several and varied but can include:

- less than reasonable prospects
- the comparative seriousness of the contravention
- the degree of involvement of the suspect in the contravention
- surrounding circumstances such as the personal circumstances of the suspect or witnesses
- a range of other public interest matters including the priorities of FWBC.

A decision to use a letter of caution can only be taken following the receipt of legal advice and then only with the approval of the Director.

Referrals to other agencies

During the course of FWBC investigations, inspectors will often discover evidence of contraventions of legislation outside FWBC's jurisdiction. As Australian public servants, inspectors are required to advise the agency with the necessary jurisdiction of the potential contravention. The agency could be another Commonwealth agency, a state agency of a state or federal police force. Referrals are usually done in writing.

FWBC has entered into Memorandum of Understandings (MOUs) with a number of government agencies that act on these types of referrals. Where an MOU exists referral should be in accordance with the process agreed in the MOU. Referral should only be made with the approval of an assistant director.

When a referral to another agency is required and no MOU exists, the referral should be in writing and finalised with the approval of the relevant assistant director. Drafts for referral letters are included on the intranet's [Inspectors Resources Page](#).

Referrals to other agencies should only be made after consulting with and agreement from the relevant assistant director. It is essential that all referrals should be appropriately included in AIMS.

Brief preparation

Purpose of this chapter

This chapter explains how a brief is prepared for referral to the FWBC legal team.



What is a brief of evidence?

A brief of evidence is a collection of documents including:

- a brief coversheet
- a Potential Litigation Summary (PLS) minute that sets out:
 - the alleged contraventions
 - the suspects' details
 - the background to the matter
 - the recommendation and reasons to litigate
- a list of all witnesses and contact details
- a list of statements
- a list of exhibits not produced by a witness such as an inspector's Identification Card or Letter of Appointment
- the evidence obtained through the investigation that proves the elements of the alleged contravention such as statements, records of interview, maps etc.

The [Brief of Evidence template](#) provides inspectors with all the necessary tools and templates to prepare a brief.

Purpose of a brief of evidence

A brief of evidence aims to properly instruct the FWBC legal team to decide whether there are prospects of success to commence a proceeding.

A brief of evidence must be presented in an orderly and manageable format to assist FWBC's legal representative to easily and effectively:

- understand the allegation(s)
- assess the available evidence against the allegations
- ensure basic jurisdictional and other threshold requirements are met
- identify what further evidence is needed (if any)
- prepare the relevant court documents.

The briefing process

When the decision is made to recommend a matter for litigation, an inspector compiles a brief of evidence in consultation with the Assistant Director.

Once prepared, the brief is provided to the State Director for review.

If the State Director agrees with the inspector's recommendation, the brief is provided to the FWBC legal team.

Preparing a brief of evidence

Use the [Brief of Evidence template](#) to prepare a brief.

Ensure that the brief:



- is assembled in a ring binder or folder
- uses separate numbered dividers or tabs to order and identify documents
- is labelled (front and side) with the matter name and, if more than one folder is required, a volume number.

Documents should be hole punched and not placed in plastic sleeves.

Inspectors should keep any original documents. These are not provided to the legal team unless specifically requested. Find out more about [maintaining the chain of evidence](#).

Working with legal

Purpose of this chapter

This chapter provides guidance on working with the FWBC legal team once a matter has been referred for advice.

Definitions

In determining the **prospects of success** to prosecute a case there must be prima facie evidence of the elements of the offence and a reasonable prospect of obtaining a finding of liability. This is a two stage test. The existence of a prima facie case is not sufficient on its own. It is after this test is satisfied that any public interest factors are considered.

Role of the FWBC legal team

If an inspector needs legal advice on a matter they can approach a legal officer through their team leader.

If you are not certain if the investigation is ready to go to brief, you can set up a case conference with a legal officer. While a legal officer may give advice on the available options, only inspectors can make operational decisions in consultation with the Assistant Director.

When a brief has been referred to the FWBC legal team, the legal officer will provide advice on the prospects of success to commence a proceeding. A legal officer (who is a solicitor) is required to act on your instructions. You are the client.

Once a matter is with the FWBC legal team, inspectors will still need to provide on-going instructions to the legal officer and may also need to assist with other tasks such as witnesses management or obtaining further evidence (if required).

The brief to legal

The legal officer provides an assessment of the Brief of Evidence. This assessment should indicate if there is sufficient evidence to send the brief to an external legal service provider (ELP) for an advice on the prospects of success.



It is a statutory requirement that proceedings cannot commence without a written advice that there are reasonable grounds to start the proceedings.

At this stage, the legal officer may make a request for further evidence if it is required.

If the ELP advice indicates that there are prospects of success, the legal officer will consult with you to prepare a short minute to the Director recommending to commence proceedings. This minute will attach the advice from the ELP.

Inspector's role in litigation

During litigation, an inspector will:

- gather further necessary evidence to strengthen the case
- attend conferences with counsel and external lawyers
- liaise with and inform witnesses throughout the litigation process, including serving a subpoena to appear at the hearing
- attend a mediation
- attend contravention hearings and penalty hearings as required
- appear as a witness
- assist the lawyer with discovery.

Discovery is an order made by the court for a party to a proceeding to produce certain relevant documents. To disobey the order in any way is contempt of the court. This carries serious penalties, including jail.

Discovery can be a time consuming process. It will save you unnecessary work if your files are in good order so that the FWBC legal team can, with your assistance, locate all the documents that are called upon for discovery. These documents may be hard copies or electronic files including emails.

File Management

Purpose of this chapter

This chapter outlines FWBC's policy on TRIM file compilation, keeping of records in the AIMS case management system and best practice for storing electronic evidence.

Why do we need records?

Explaining and justifying the actions and decisions made during an investigation is critical to the accountability and transparency of FWBC investigations.

Inspectors must maintain current, accurate records and be able to explain the rationale for all decisions. For this reason, inspectors must keep an auditable record of the rationale for a particular investigative action.



As well as meeting best practice investigation standards, accurate and timely record keeping also supports the integrity of the decision making process if a case goes to review.

Keeping records

All investigations must include [records of the inspector's decisions \(Case Decision Records\)](#) and the reasons for any actions taken. These records represent a chronological account of the investigation and may include actions, strategies, risk assessments and quality assurance conducted throughout the investigation.

As with material and evidence, investigation records may be stored in a variety of formats, including evidence matrices, running sheets, AIMS entries and field notebooks. The appropriate record keeping format will depend on the nature and complexity of the contravention being investigated.

Hardcopy files must be compiled chronologically and highlight the tools used during the course of the investigation, decisions made and actions taken to comply with the relevant legislation and/or instrument.

Managing TRIM investigation files

All investigations must have a separate FWBC file created in TRIM. See [Inspectors' Resources – ordering TRIM files](#).

The TRIM file is the investigation's primary record and care should be taken to ensure its completeness and integrity.

TRIM files should be created and maintained during the course of an investigation, it is easier than trying to create the file following the completion of the investigation.

The file needs to show:

- the chronology of an investigation
- the tools used during the investigation
- decisions made
- actions taken to comply with the relevant legislation and/or instrument.

The TRIM file should stand alone. Print and store all important documents in the hardcopy file to ensure the investigation can be easily understood from the start of a complaint to its completion.

Managing actions, records and attachments

The action record displayed on the file cover must be endorsed clearly and correctly. Instructions for recording actions are on the inside cover of FWBC files.

Update the file each time a relevant decision is made. In particular indicate how jurisdiction was determined and record the employing entity and industrial instrument.



All documents should be attached to the file based on when inspectors either create or receive them. Attach the oldest document first.

Maintain running sheets for all investigations on the AIMS system. Print copies of running sheets and attach these to the file at the end of the investigation or when the file is closed.

If contraventions are identified or the complaint is to be closed, ensure the record contains the decisions and any proposed or agreed actions. The Assistant Director must sign off the file.

Managing multiple files

Request a new file part when the existing file has reached its reasonable capacity to store documents without damage or loss. This is usually around 250 folios (pages).

Do not include multiple investigations in the one file. It is preferable to have one file for each investigation, even if there are several contraventions being investigated with multiple complainants.

Closing an investigation

Once an investigation has been finalised, complete a [File Closure Checklist](#). This should be the last document placed on the file.

When the investigation is closed, both the Assistant Director and Inspector must sign off on the investigation file. Where an Assistant Director has conducted the investigation the State Director should co-sign the file. In non-capital offices the Assistant Director can sign off the file by proxy.

Security classifications

Insert a page marked with the appropriate security classification - generally 'For Official Use Only' - as the top sheet of the TRIM file.

For more information on document security classification see the [Agency Security Information Classification and Handling Guidelines](#).

Working copies and original materials

Inspectors are encouraged to take working copies of relevant material. These may be placed in the investigation file and examined, marked or highlighted as required.

Any original material received should be kept as clean copies and:

- secured appropriately e.g. in a box or within plastic sleeves in a binder
- labelled (with a brief description of the item, the case name, the material source, the time and date it was obtained and the inspector's name)
- unmarked (including no pagination or hole punches)
- stored in a physically secure, limited access, storage area (such as a lockable filing cabinet).

Do not store original evidence on your working file: it must be stored in the secure location.



Do not mark or write on original material as the original file will be required if the matter is litigated and goes to court.

Some locations may have a designated secure storage space for original material and/or exhibits. Ask your Assistant Director about the most appropriate storage space.

Original material must never leave the office and must be kept secure at all times. Other records, e.g. inspector notebooks, diaries, notes etc, must also be kept secure in the event that a court orders discovery.

Storing electronic records

Electronic records include interviews, conversations, photographs, videos and other information stored on CDs, DVDs, USB storage devices and CCTV footage.

All discs must be recorded in a disk register that keeps a tracking number and AIMS reference, (i.e. interview 1/10 – XT000337).

Store all master disks together in the most appropriate storage space available and make copies to include in the working file, TRIM file and Brief of Evidence.

Record the storage location and any instructions for handing over of evidence to another person in the TRIM file and in AIMS.

Transferring electronic records to disk

Save any evidence obtained electronically to the I: Drive (the shared hard drive that is backed up across all locations) before copying it to CD or DVD.

Insert disk copies into a plastic sleeve and include these in the working file, TRIM file and Brief of Evidence.

Large digital files

If evidence is obtained in the form of large digital files during an investigation, consult the FWBC Information Technology (IT) Director about how to store the data.

The IT Director will advise on whether the data should be stored on the :I/Drive, or a remote hard drive.

Disposal of evidence

It may be appropriate to dispose of investigation materials when an investigation is closed and the relevant appeal periods (if any) have expired.

This practice aims to manage storage space so materials that have no further purpose are not held unnecessarily. Before disposing of any materials ensure that:



- this decision does not conflict with any court order (e.g. the courts may order that materials or items be returned immediately or be forfeited and destroyed, depending upon the circumstances)
- all potential owners of the materials have had an opportunity to lodge a claim for the item, goods or documents (this is especially important when there are rival claims to ownership).

Record any actions to ensure the above and the date and method of disposal in the investigation file and in AIMS.

Clear desk policy

The FWBC Clear Desk Policy requires employees to secure any information with a Dissemination Limiting Marker (DLM) or a classification, and other valuable resources, when they are absent from their work point, if this absence allows unauthorised access to information or resources.

This policy also requires employees to secure electronic information from unauthorised access.

During short absences, remove the smartcard from the reader, and during longer absences log off the computer.

- At the close of business each day:
- shut down all systems and networks
- secure all information requiring a DLM or a classification
- lock all security containers and safes
- secure all keys to security containers.

For more information on the Clear Desk Policy see the [Agency Security Information Classification and Handling Guidelines](#).

Review of investigations

Purpose of this chapter

This chapter explains the role, function and purpose of the Professional Standards Unit (PSU) and the Review of Investigations.

About the Professional Standards Unit

The PSU is part of the Office of the Director and reviews the investigations of the operations and legal branches of FWBC.

The PSU ensures FWBC decisions follow Australian Public Service (APS) values and are:

- reasonable
- fair
- timely
- transparent.



Handling complaints

A person has the right to ask for an impartial review of a FWBC decision. During an investigation when it is thought a person may be dissatisfied with the decision made by FWBC, all correspondence must advise the person of their right to seek a review.

When a person makes a complaint about a FWBC decision:

- discuss the reasons for that decision with the relevant case officer
- if necessary, discuss the decision with the state director
- communicate those reasons to the complainant.

Most complaints are resolved when the complainant receives more information on the reasons why a decision has been.

If the complaint is not resolved by providing more information about the decision, a written complaint can be submitted to the PSU to begin a formal review of the decision. This is called a 'File Review'.

There are three levels of procedural review:

- Tier One Review – establishes if the original decision was correct and if the inspector followed the correct FWBC policy
- Tier Two Review – the case is re-investigated by FWBC
- Tier Three Review – a review is conducted by or on behalf of the Commonwealth Ombudsman.

A File Review can be conducted prior to the finalisation of an investigation.

Quality and internal reviews

After an investigation review, the PSU recommends changes to operational activities as part of a continuous improvement process.

There are two types of reviews:

- quality reviews
- internal reviews.

Quality reviews

A quality review examines a cross-section of FWBC practices to identify and recommend improvements that can be made to existing procedures.

During a quality review individual decisions are assessed in order to:

- establish if agency procedures are followed



- determine if those procedures are effective
- recommend whether new procedures are necessary or existing ones be removed or simplified
- assess the quality, service and value of the matter.

Internal reviews

An internal review examines the details of a specific investigation to identify areas for improvement. Internal reviews are conducted on cases where FWBC has commenced litigation and has been unsuccessful, or obliged to discontinue the case because of flaws in the investigation that had not been identified earlier.



Section 3 – Engagement

Purpose of this chapter

This chapter outlines FWBC’s process for engaging with industry.

Education

Our education and advisory role includes:

- presentations
- site visits

The [‘Education Resources’](#) section of the FWBC intranet provides information and tools to help investigators carry out educational work. Work with your colleagues and Assistant Director when you plan your educational projects or activities.

Site visits

Site Visits - [A Better Practice Guide](#) has detailed protocols for the conduct and recording of site visits.

Site visits include any activities that involve visits to a building and construction site. An important purpose of site visit activities is to raise the profile of FWBC within the building and construction industry. Site visits must be recorded in AIMS for either **education** or **compliance**.

Site visits can be undertaken as either stand-alone via the Compliance Visit entity as the process currently stands or arising out of a primary activity such as an investigation or Code audit. Site visits undertaken during Investigations or Code Audits will be recorded as an “**On Site Activity**” through the primary activity record. Refer to the [AIMS Manual](#) for further information.

Education is a visit to a site:

- To better inform and educate industry participants, including provision of fact sheets or presentation;
- To gain a better understanding of the building and construction industry and how it operates; and
- To meet or find out about other industry participants, particularly subcontractors.

An education visit can be described as a **proactive** site visit.

Compliance is a visit to a site:

- To undertake an activity as part of an investigation or code audit. This may include the taking of a statement, the delivery of a Notice to Produce or the collection of documents.



- To monitor general compliance with the provision of Fair Work Act 2009 (FW Act) and / or Building Code 2013 (Building Code).

A compliance site visit can be described as either a **proactive** or **reactive** site visit.

Code Inspections – The Building Code:

A Code Inspection is a visit to a site that is required to be Code compliant with a view to establishing the level of compliance on the site. One of the outcomes required from an inspection is determining whether the particular site requires audit activity.

A Code Inspection is a visit to a site that is required to be Code compliant with a view to establishing the level of compliance on the site. One of the outcomes required from an inspection is determining whether the particular site requires audit activity.

NB – For further advice on the conduct of Code related activities please refer to the '[Guide to Auditing and Implementing the Building Code 2013](#)'.

Business visits

Business visits are similar in nature and type to site visits. They are conducted on the business premises of subcontractors in an effort to increase the knowledge and understanding of FWBC, its role in the industry and to increase the subcontractors' knowledge of their roles and responsibilities under the FW Act. They may also be conducted as part of a Code audit. A business visit will be recorded as a compliance visit using the visit tab.

What is / is not a Site Visit?

A site visit includes any activity that involves visits to a building and construction site.

- Serving a notice
- Taking a statement
- Collection of documents
- Code Audit follow up outside an actual audit
- Sub-contractor interviews

By way of example and clarification, the following circumstances are examples of what must be recorded as a site visit.

- FWBC Investigators attend a site where industrial action is occurring. They oversee the activities at the site and liaise / provide guidance or information to the site occupiers. This would be recorded as a site visit.
- FWBC Investigators attend a site to gather evidence by way of statements from industry participants employed at the site. This would be recorded as a site visit. Where more than one team of Investigators attends the same site on the same occasion – then this would be recorded as ONE site visit only – not two or three.



- FWBC Investigators attend the yard of ABC Plumbing to speak to the proprietor of the company about his history/experience on building and construction sites and to explain his rights and obligations. This would be recorded as a business visit.

Visits to corporate offices of major construction companies or to the offices of industry associations will not be recorded as a business or site visits.

The primary purpose of an Investigator's conduct during a proactive site visit is to provide a two-way education process and make an initial assessment of compliance with workplace laws. In order to facilitate this in an effective manner, it is recommended that the lead Investigator generates discussion with the audience, whilst the secondary Investigator takes notes of the discussion and raises any further issues that aren't covered by the lead. A site visit should not be a 'tick and flick'. Rather it should generate a productive educative discussion.

Subcontractor Education

It is highly recommended that Investigators extend the educative function of Site Visits to subcontractors working at all levels on the relevant construction site. A means of achieving this goal is sending a subcontractor education email utilising the subcontractor list obtained during the site visit. A [template email](#) is available for use.

Presentations

Presentations are an important tool for FWBC to deliver key messages to building industry participants. They also help us to build meaningful relationships with our various stakeholders.

Arranging a presentation

When you arrange a presentation, ask the organisers to confirm:

- who will be in the audience – you must target the presentation to the particular audience;
- what the audience expects
- time, date and other event details.
- Presentation templates

The FWBC intranet has templates for [standard presentations](#). You can change and edit the templates to suit your purpose and audience.

- Topics include:
- Right of Entry
- Industrial action
- Role and functions of FWBC
- Building Code 2013.



Check any variations to the templates with your Assistant Director to make sure that your message is consistent.

In addition, the intranet contains a [standard PowerPoint template](#) that you can use to draft a presentation to suit a specific purpose. Remember to follow the [FWBC Style Guide](#) and have the presentation checked by your Assistant Director.

Managing enquiries

Media enquiries

Refer all media enquiries to the [FWBC Media Adviser](#). If you think that the media may cover an issue involving FWBC, always notify the media adviser as soon as possible.

Telephone enquiries

If a journalist calls, you must advise the caller that you are not authorised to comment but that you will pass on their request to FWBC primary media team. Make sure that you ask the journalist for their details in case the media team wants to follow up on behalf of FWBC. If a journalist calls, you must advise the caller that you are not authorised to comment but that you will pass on their request to FWBC primary media team. Make sure that you ask the journalist for their details in case the media team wants to follow up on behalf of FWBC.

FWBC investigators should not provide any information directly to reporters. If contacted by a journalist, advise your State Director immediately and they will pass on the request to the media team.

Enquiries in the field

If you are approached while in the field by a TV crew or journalist regarding an investigation, politely advise that you are unable to comment.

In this situation, reporters usually don't expect immediate comment. But they may use what you say as an investigator in their report.

Ask the journalist for their details in case the FWBC media team wants to follow up. Let them know that their request will be passed on to the relevant FWBC contact and will receive a timely response.

Stay professional and objective. Be mindful that the encounter may be recorded. When you've finished talking to the journalist, advise your State Director. They will pass on the request to the FWBC primary media contacts.

Investigations and material from media outlets

From time to time FWBC may need to obtain information, footage or evidence from a media outlet



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to progress an investigation.

Make sure that you check with your Assistant Director and seek advice from FWBC's Chief Counsel before obtaining evidence from a media outlet.



Section 4 - Building Code 2013

Purpose of this chapter

This chapter sets out the process for investigators monitoring compliance with the Building Code 2013 (the Building Code).

The Building Code 2013

The Building Code is designed by Federal Government as a means to ensure the best value for the taxpayers' dollar spent on building and construction. The Building Code sets out the expected workplace relations standards for head contractors and subcontractors who perform work covered by the Building Code. The Building Code achieves this by placing a series of obligations on contractors and subcontractors.

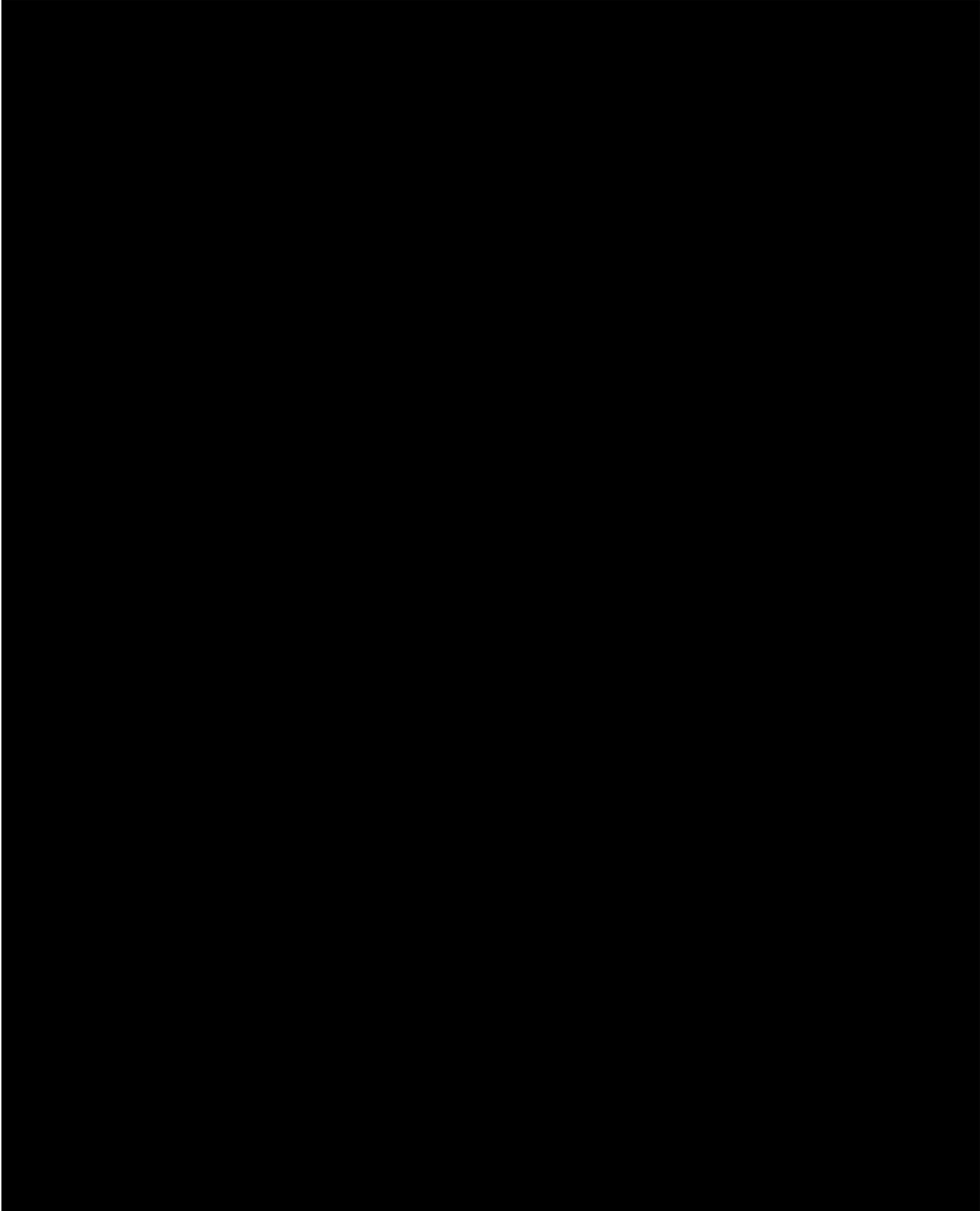
The obligations are defined at sections 7 to 22 of the Building Code 2013 and, in summary, cover the following:

- General responsibilities for compliance with the Code;
- The impact on subcontractors and related bodies;
- Compliance with laws, decisions, directions etc;
- Unregistered written agreements;
- Sham contracting;
- Engagement of non-citizens etc.;
- Workplace arrangements;
- Over award payments;
- Freedom of association;
- Right of entry;
- Dispute settlement;
- Work reform;
- Workplace Health & Safety;
- Security of payments;
- Compliance & monitoring arrangements.

Schedule 1 of Building Code 13 provides the definition of Building Work to which the Code of Practice applies.

A full overview of the way that the FWBC undertakes their Building Code work can be found in the Guide to Auditing and Implementing the Building Code.







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