

Inquiry into trolley collection services procurement by Woolworths Limited

A report by the Fair Work Ombudsman under the *Fair Work Act 2009*

June 2016

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Executive summary

For nearly a decade, the Fair Work Ombudsman (FWO) and its predecessor agencies have investigated allegations of serious non-compliance with workplace laws involving businesses providing trolley collection services to Woolworths Limited (Woolworths) [ACN 000 014 675].

In June 2014 we commenced an Inquiry into Woolworths' procurement of trolley collection services. This was because FWO had not seen Woolworths take steps to address non-compliance amongst its trolley collecting contractors, nor had we seen any improvement in compliance. FWO had also been provided with disturbing information suggesting violence towards workers at Woolworths' sites in Queensland and Adelaide.

The chief aim was to comprehensively identify and address the levels and drivers of non-compliance with Australian workplace laws by businesses involved in Woolworths' labour supply chains.

Examining 130 (or 13.5%) of Woolworths' supermarket sites across Australia¹, the Inquiry found:

- more than 3 in every 4 (79%) of sites visited had indications of some form of non-compliance with workplace laws
- almost 1 in every 2 (49%) of sites visited presented serious issues, that is multiple indicators of non-compliance
- deficient governance arrangements contributing to a lack of Award knowledge and sub-standard record keeping
- false, inaccurate or misleading records
- failure to issue pay slips to workers
- workers being paid rates as low as \$10 an hour
- cash payments which disguised the true identities of workers and actual amounts paid to workers
- manipulation of the identity card system implemented by Woolworths
- workers vulnerable to exploitation and often complicit in acts of non-compliance

¹ 164 sites were visited during September-December 2014. Thirty-four sites were determined to be outside the scope of the Inquiry because: employees were directly employed by Woolworths; the site was serviced through a United Trolley Collections Pty Ltd (UTC) contract; employees were employed by a sole trader in Western Australia; Fair Work Inspectors were unable to locate or interview employees.

- complex labour supply chains with networks of corporate structures and intermediaries to facilitate cash payments, recruitment of vulnerable workers and production of false records.

These characteristics are indicative of an entrenched culture of non-compliance in the Woolworths trolley collection supply chain.

The Inquiry narrowed its focus to 43 sites involving 11 principal contractors and 35 subcontractors where indicators of the most serious non-compliance were evident. At these sites, we found Woolworths' procurement and governance processes contributed to a culture of non-compliance by failing to:

- monitor and enforce its own contractual terms prohibiting subcontracting beyond the mandated one level of contracting
- effectively monitor who is performing work at which site and when, and that each worker is appropriately identified and inducted
- detect and correct contractors' inadequate time and record keeping systems which, in part, permitted poor or false record keeping practices and resulted in underpayment of workers.

At the time of publishing this report, the Inquiry has resulted in enforcement action by the FWO against a number of businesses involved in various Woolworths' labour supply chains, including:

- legal proceedings being commenced (and not yet concluded) against:
 - Civic National Pty Ltd and its Director Said Sabbagh for allegedly providing false and misleading records to the FWO
 - Green World Management Pty Ltd and its Director David Kim for allegedly underpaying one worker over \$25 000
- possible future legal proceedings against a number of other businesses providing labour to Woolworths for similar alleged contraventions, including provision of false or misleading records and underpayments to a number of employees totalling over \$110 000
- the issuing of nine letters of caution for various Award contraventions, failing to adequately keep records, and misclassifying employment as an independent contracting arrangement
- ongoing investigation of two further businesses in relation to alleged serious non-compliance.

The infographic below summarises our work in the trolley collection service subsector, in the lead up to this Inquiry and as a direct result of it.

INQUIRY INTO TROLLEY COLLECTION SERVICES PROCUREMENT BY WOOLWORTHS

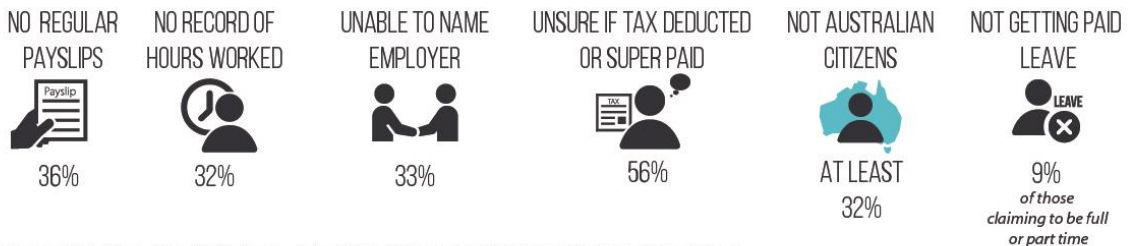
LEADING UP TO THE INQUIRY JAN 2007 — APR 2016



THIS INQUIRY



TROLLEY COLLECTORS INTERVIEWED REPORTED:



ENFORCEMENT ACTIVITIES RESULTING FROM INQUIRY FINDINGS:



The FWO recommends Woolworths publicly demonstrate its commitment to ensuring compliance with Australian workplace laws within its trolley collection services. This would involve Woolworths doing the following, amongst other initiatives:

- review current contracting arrangements to ensure:
 - arrangements and contract prices permit employee entitlements to be met throughout the life of a contract
 - tender processes give preference to contractors who demonstrate employees are paid via EFT or personal cheque, that PAYG is remitted on behalf of employees to the Australian Tax Office and superannuation payments are made
- implement systems and processes to ensure local Woolworths management:
 - know and record entities and individuals responsible for trolley collection on a daily basis
 - have access to records that accurately record times worked and payments owed
- ensure its *Speak Up* helpline is accessible to people whose first language is not English
- take direct responsibility for investigating and resolving all grievances relating to the employment of its trolley collectors
- establish and maintain a reserve fund of \$1 million to cover payments to trolley collectors who've been denied their lawful entitlements if the subcontractor employing entity fails to rectify the underpayment
- conduct regular and frequent audits of its contractors and subcontractors (verified by third party accounting, legal or workplace relations professionals).

FWO recommends that Woolworths enter into a formal, transparent and binding arrangement with the FWO that commits to these actions.

We acknowledge Woolworths has made positive changes to procurement and governance systems over recent years, however those changes have not been sufficient.

Woolworths has adopted a business strategy that sought to transfer risk associated with engaging employees and failed to acknowledge or accept its responsibility to monitor compliance. They have instead appeared to attribute this responsibility to Australia's strong rule of law and the taxpayer funded regulators such as the FWO, to enforce those laws².

² Official Committee Hansard Senate, Education and Employment References Committee *Australia's temporary work visa programs*, 18 May 2015 Melbourne pp 1,13

Woolworths has asserted that the Australian labour market presents a low compliance risk. This is a sweeping oversimplification. The FWO's work and our public statements show that pressures in certain sectors and industries, such as trolley collection, create an environment where non-compliance with workplace laws are likely to occur unless robust governance is in place to stop it. Those factors include: areas of low skill work, highly competitive outsourced labour markets and low profit margins. When migrant workers are involved, exploitation is even more likely.

Adoption and implementation of our recommendations by Woolworths would promote and build a culture of compliance, avoiding further exploitation of trolley collectors on its sites.

Background

Since 2007, the FWO and its predecessor agencies have regularly received requests for assistance from trolley collectors servicing major supermarket retailers. We also often receive information from members of the public who are genuinely concerned about perceived unfair or unlawful working conditions for trolley collectors at local supermarkets.

In the period 1 January 2007 to 30 April 2016 we have recovered more than \$700 000 in unpaid wages and entitlements for at least 544 trolley collectors at supermarket sites across Australia.

In the same period we filed 13 matters before the courts alleging underpayment of trolley collectors at Woolworths, Coles and Costco sites. At least eight of these matters involved trolley collecting services at Woolworths' sites. Of the ten matters finalised, penalties totalling \$642 907 have been handed down.

Our long held concern about exploitation of employees engaged in low skilled work 'at the bottom' of labour supply chains was outlined on 29 August 2014 by Ms Natalie James, the Fair Work Ombudsman, in a speech at the Australian Labour and Employment Relations Association (ALERA) Conference. Specifically referencing trolley collectors Ms James urged the nation's major supermarket chains to help stamp out exploitation of vulnerable trolley collectors.³

In that address, Ms James noted that trolley collection is a low skill and labour intensive enterprise, attracting large numbers of vulnerable workers. According to the 2011 census, of 1 500 trolley collectors across Australia, almost 50% are under 25 years of age and 40% do not have education beyond Year 10. We consider this number of trolley collectors an under-estimate, with Coles alone

³ <https://www.fairwork.gov.au/about-us/news-and-media-releases/2014-media-releases/august-2014/20140829-trolley-collectors>

reporting it has oversight of 2000 trolley collectors. Vulnerable workers are often unaware of their rights in the workplace and can also be reluctant to report their working conditions.

Ms James reminded businesses that under section 550 of the *Fair Work Act 2009* (FW Act), accountability and responsibility for exploitation of vulnerable workers extends up the labour supply chain to the lead business at the top. In the same address, Ms James opened the door to partnership with the FWO stating, “(if) a business is interested in looking down the supply chain and taking responsibility for what is going on within it, then the Fair Work Ombudsman would love to have a conversation about how we can help.”

More recently, in an address to the ALERA 2016 Conference on 27 May 2016, Ms James reiterated her invitation directly to Woolworths regarding the value of entering into a compliance partnership with the FWO⁴.

Accessorial liability – the involvement of others in a breach

Section 550 of the FW Act provides that a person who is ‘knowingly involved in’ a contravention of a civil remedy provision is taken to have contravened that provision and is exposed to penalties and other orders flowing from that contravention. A person is ‘involved in’ a contravention if they:

- aided, abetted, counselled, procured or induced the contravention
- conspired with others to effect the contravention
- were in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention.

The FWO uses section 550 to commence court proceedings against alleged ‘accessories’ to contraventions. Most commonly, accessories are individuals involved in running the employing entity that committed the contravention (the ‘primary contravener’). This includes company directors, company officers, and—albeit less commonly—human resources officers or professional advisors.

Accessories can also be other businesses in a position of power within the same supply chain as the employing entity, such as a head contractor or franchisor.

⁴ See ‘27 May 2016 - Australian Labour and Employment Relations Association National Conference’ at <https://www.fairwork.gov.au/about-us/news-and-media-releases/speeches>

In the matters of *FWO v Al Hilfi* (SAD 27/2012) and *FWO v Al Basry* (SAD 108/2012),⁵ FWO alleged various entities were liable under section 550 for underpayments of trolley collectors. The details of those proceedings were as follows:

- Coles Supermarkets Australia Pty Ltd (Coles) entered into contracts with Starlink International Group Pty Ltd and Starlink Operations Group Pty Ltd (in liquidation) for the provision of trolley collection services at various supermarket sites in Adelaide.
- Those middle entities in turn entered into subcontracts with Mr Ahmad Al Hilfi and Mr Ayam Al Basry at the bottom of the supply chain, who directly engaged workers performing trolley collection.
- The workers were significantly underpaid for the work that they performed.
- FWO alleged the contract price paid by Coles was not sufficient to cover the minimum entitlements of the trolley collectors and Coles was therefore liable as an accessory to the underpayment of wages.
- It was also alleged that Mr Nidal Albarouki and Mr Clency Ferriere, respectively the former owner and general manager of the mid-level contractor, were liable as accessories because of their involvement in the underpayments.

In October 2014, FWO executed an Enforceable Undertaking with Coles under which Coles:

- admitted a lack of visibility and transparency surrounding its former contract arrangements for trolley collection services
- acknowledged it had an ethical and moral responsibility to stamp out exploitation of vulnerable trolley collectors
- agreed to back pay \$220 174 to the 10 trolley collectors that were the subject of the proceedings
- agreed to implement a range of measures to ensure future compliance, including setting up a hotline for subcontractors to raise issues with Coles directly, auditing wages, establishing a fund to guarantee correct payment of subcontractors and moving towards a model where all trolley collectors will be engaged as employees directly by Coles.

As a result of its preparedness to sign the Enforceable Undertaking, we agreed to discontinue legal proceedings against Coles.

⁵ See joint penalty decision: *Fair Work Ombudsman v Al Hilfi* [2016] FCA 193

The legal proceedings continued against the remaining respondents, and the FWO ultimately obtained penalties of \$94 050 against each of Mr Albarouki and Mr Ferriere (the two managers from the middle contractor) in respect of their involvement in the underpayments.

The Court also made declarations of contraventions against the third-tier trolley collection service providers, Mr Al Hilfi and Mr Al Basry. No penalty orders were made or sought against them.

Another significant development in 2014 towards improved compliance within the trolley collection sub-sector was a compliance partnership between the FWO and United Trolley Collections Pty Ltd [ACN 115 542 946] (UTC). UTC is a major provider of trolley collection services throughout Australia. At the time they had more than 60 independent contractors and provided services to more than 700 Coles sites and some Woolworths sites.

Under the terms of the Deed, UTC agreed to undertake a range of proactive compliance activities designed to facilitate and ensure compliance with Australian workplace laws by its independent contractors, including providing training and auditing the pay-packets of a percentage of trolley collectors each year.

The FWO–UTC and FWO–Coles partnerships have enabled clearer oversight and regulation of the trolley collection supply chain, including some 60 trolley collection subcontractors and 2000 employees. Since commencement of the UTC Deed, UTC has consolidated a range of effective governance checks and responded promptly and effectively to information provided to UTC by the FWO. UTC reports directly to us about their investigation of allegations of non-compliance. On two occasions the FWO has exercised its option to directly investigate serious allegations.

During the first year of the FWO–Coles partnership Coles investigated 21 complaints from trolley collectors. Fourteen of those complaints came through the Coles ‘hotline’. Six were sustained and resulted in back payments to employees of \$40 440. Coles also audited UTCs subcontractors and detected underpayments totalling \$113 000. All affected employees have been paid the amounts owed.

Coles recently made a business decision to bring its trolley collection employees ‘in house’. This process is currently underway, providing more secure employment, career opportunities and fair entitlements for many workers.

The FWO–UTC and the FWO–Coles partnerships are illustrative of corporations:

- accepting responsibility for their obligations to provide effective governance of the supply chain through which they engage workers
- taking positive action to address non-compliance with workplace laws.

Woolworths operations

As at June 2015, Woolworths held a significant corporate and industrial footprint as Australia's ninth largest company. During the 2015 financial year Woolworths Ltd operated 3729 stores across Australia and New Zealand and employed approximately 197 000 employees. In addition to its 961 supermarkets in every Australian state and territory, Woolworths operates 1445 liquor outlets, 516 petrol stations, 330 hotels, 184 Big W stores, nine Thomas Dux stores, 58 Masters stores, 44 Home Timber and Hardware stores as well as a wholesale operation in home improvement servicing a further 452 stores⁶.

In 2014 (when the Inquiry commenced) Woolworths' sales totalled \$60.7 billion resulting in an after tax profit of \$2.5 billion. Woolworths has a long term target of opening 20–30 new Woolworths' supermarkets across Australia each year.⁷

⁶ Woolworths Limited Annual Report 2015:

http://www.woolworthslimited.com.au/icms_docs/182381_Annual_Report_2015.pdf

⁷ Woolworths Limited Annual Report 2014:

<http://www.woolworthslimited.com.au/annualreport/2014/index.html>

FWO history with Woolworths

The FWO has, since its inception, been working with Woolworths senior procurement management officers regarding reports of non-compliance in its labour supply chain.

Between 1 July 2011 and the commencement of this Inquiry, 12 principal contractors and 20 subcontractors providing trolley collection services to Woolworths have been investigated or audited by the FWO.

We were particularly concerned by two distinct but related investigations into trolley collection businesses engaged at Woolworths sites in Adelaide and North Queensland.

The investigation into the Adelaide site involved allegations of underpayments, failure to make superannuation contributions as well as pay slip and record keeping contraventions by a subcontractor. During the course of the investigation, allegations of intimidation by a subcontractor against a trolley collector were received by a Fair Work Inspector.

Similarly, the investigation into conduct at Woolworths sites in North Queensland involved allegations of underpayment, adverse action and intimidation of employees. We found the employer paid cash and a flat hourly rate that was insufficient to meet minimum rates of pay. Four employees sought assistance from the FWO alleging, among other things:

- underpayment of wages
- termination of their employment after making complaints to the FWO
- intimidation and coercion to withdraw their complaints.

The allegations of intimidation and threatening behaviour were of particular concern to the FWO. One employee alleged the employer visited him at home to pressure him to withdraw his request for assistance.

During the course of both investigations, the FWO interviewed senior procurement officers of Woolworths and obtained extensive documentation relating to the supply chain. In both cases, we sought to determine the level of Woolworths' involvement in contraventions occurring in the supply chain.

Our assessment of these matters found insufficient evidence to support commencement of legal proceedings against Woolworths. Given the seriousness of the conduct involved and further requests for assistance from trolley collectors at Woolworths sites, the FWO decided broader examination of compliance within the Woolworths trolley collection supply chain was warranted.

Who is the subject of this Inquiry?

Our Inquiry involved a detailed examination of individuals and businesses engaged in facilitating and supplying trolley collection services to Woolworths.

At the time of the Inquiry, Woolworths engaged directly with 33 contractors for the provision of trolley collection services at Woolworths supermarkets, Big W, Dan Murphy's and Thomas Dux stores.

The FWO initially identified a sample of 164 sites to visit. Thirty-four sites (21%) were considered to be outside the scope of the Inquiry because:

- employees were directly employed by Woolworths
- the site was serviced through a United Trolley Collections (UTC) contract⁸
- employees were employed by a sole trader in Western Australia and therefore engaged outside the jurisdiction of the FW Act⁹
- Fair Work Inspectors were unable to locate or interview employees.

Accordingly, 130 sites were deemed within scope for the Inquiry.

Why did we initiate the inquiry?

We're able to inquire into any act or practice that may be contrary to the FW Act, a fair work instrument or a safety net contractual entitlement (section 682 (1) (c) of the FW Act).

FWO decided to focus on trolley collection at Woolworths for a number of reasons:

- UTC entered into a compliance partnership with FWO which effectively covered most trolley collection at Coles supermarkets.

⁸ On 24 April 2014, the FWO entered into a Compliance Partnership with United Trolley Collections Pty Ltd (UTC) [ACN 115 542 946] wherein UTC committed to undertake a range of proactive compliance activities designed to facilitate and ensure compliance with Commonwealth workplace laws by independent contractors who it had sourced to provide trolley collection services to major supermarket chains like Coles. A copy of the Deed of Proactive Compliance entered into between FWO and UTC is available at <http://www.fairwork.gov.au/about-us/news-and-media-releases/2014-media-releases/august-2014/20140829-trolley-collectors> Relevant information disclosed in visits to UTC contracted sites during the course of the Inquiry was referred to FWO personnel responsible for managing the UTC-FWO compliance partnership.

⁹ In West Australia only employees of constitutional corporations are within the relevant jurisdiction of the FWO.

- FWO commenced legal action against Coles and some of its contractors in Adelaide. As noted above, these proceedings resulted in significant penalties for the contractors. During the course of these proceedings, Coles agreed to enter into an Enforceable Undertaking to directly address issues in its supply chain.
- Based on our interactions with Woolworths, we did not have confidence that sufficient action was being taken to address non-compliance in its trolley collection supply chain.

The dual purpose of the Inquiry was to:

- determine levels of compliance by businesses engaging employees to provide trolley collection at Woolworths supermarkets
- recommend strategies to address non-compliance and begin building of a culture of compliance.

Factors driving or impeding compliance throughout the complex labour supply chain was a particular focus. This included Woolworths' role, both as 'price maker' at the head of the labour supply chain and in terms of employment practice governance.

It is important to note the FWO doesn't hold a view on the merits of operating models such as outsourcing or insourcing facility services including trolley collection, cleaning or security. Our interest extends only to whether a particular operating model is lawful and its impact on compliance in the labour supply chain.

Inquiry process

On 3 July 2014, the FWO met with senior officers at Woolworths to invite participation in the Inquiry and discuss its scope and objectives.

We issued a number of Notices to Produce Records or Documents (NTPs) to assist us to identify contracting and subcontracting entities providing trolley collection services at Woolworths sites. NTPs served on Woolworths also sought documents that would assist the Inquiry to verify contractor records and clarify contract relationships and pricing. Woolworths complied with the NTPs in a timely manner.

From September – December 2014, Fair Work Inspectors conducted announced visits at 164 Woolworths sites in:

- regional areas of all states and territories except Tasmania
- metropolitan sites in all capital cities except Adelaide.

When attending sites, Fair Work Inspectors engaged with trolley collectors to gather information about key aspects of their employment arrangements.

Following the site visits, NTPs were served on 11 principal contractors and 27 subcontractors seeking contracting arrangements and employment records for 43 Woolworths sites.

From February – June 2015, Fair Work Inspectors visited Woolworths sites and spoke with subcontractors and their employees, to verify employment and attendance records and monitor compliance.

On 11 June 2015, the FWO met with Woolworths senior procurement officers to brief them on the Inquiry's status and initial findings, including our:

- concern about the number of requests for assistance from trolley collectors
- view that Woolworths needed to assume a greater leadership role in the management of its labour supply chain.

On 17 September 2015, the FWO met with Woolworths Director of Corporate Social Responsibility to discuss the progress of the Inquiry and labour supply chain issues in general. At this meeting, we repeated our public position that lead businesses need to assume legal, moral and ethical responsibility for integrity and lawfulness of labour supply chain arrangements.¹⁰

On 1 October 2015, we provided Woolworths with a draft and preliminary copy of this report for comment.

On 26 October 2015, Woolworths made submissions to us on a confidential basis, responding to the draft and giving a view on the FWO's function and exercise of powers. Woolworths did not give permission to publish the submissions. However, the information provided has been helpful to the Inquiry, informing our analysis and reporting of findings.

We are encouraged by positive steps taken by Woolworths to detect non-compliance with workplace laws. Initiatives undertaken by Woolworths include:

- inspections and audits by Woolworths staff
- introduction of the 'Speak Up' program where employees can confidentially report unlawful practices
- third-party audits to assess compliance

¹⁰ The FWO notes with approval, the leadership demonstrated by Coles in this sub-sector – see <http://www.fairwork.gov.au/about-us/news-and-media-releases/2014-media-releases/october-2014/20141007-coles-eu-presser>

- a contractor education conference every two years
- termination of contracts based on sustained allegations of non-compliance.

These are clear steps in the right direction. However, the FWO is yet to be convinced Woolworths has established a sustainable self-monitoring and performance framework that will ensure compliance within its labour supply chain.

We have investigations ongoing as a result of the Inquiry. We reserve the right to take legal action against Woolworths for involvement in contraventions of the FW Act, if we find reasonable evidence and it is in the public interest.

The names of individuals and companies involved in alleged serious non-compliance are not used in this report to avoid compromising potential enforcement options.

Information gathering

Fair Work Inspectors spoke with trolley collectors during site visits and found the quality of responses varied significantly between sites and employees. Some declined to speak with Fair Work Inspectors at all. Some avoided or refused to answer certain questions that might indicate a breach of visa work conditions.

Most employees were prepared to answer questions about pay rates, pay slips, tax and superannuation. Questions requiring some knowledge of the workplace relations system, such as entitlements to leave, overtime and employment status, were not well answered.

Fair Work Inspectors noted that some employees seemed to be expecting our questions and gave prepared answers that gave a false impression of compliance during site visits. Many quoted precise Award wage base rates and affirmed receipt of pay slips and signed time sheets. Yet, when asked, these employees were often unable to provide copies of pay slips, say where time sheets were kept or in what form or demonstrate a genuine understanding of applicable penalty rates and loadings. Leaving aside language barriers and a general unwillingness to engage with the regulator, these interactions gave an impression employees at many sites had been coached.

Some employees also told us employers or their representatives had directed them to sign blank copies of time and wage record templates. These could then be completed by the employer and provided to Fair Work Inspectors and other auditors.

First Stage Findings

More than three in every four (79%) of sites visited had indications of some form of non-compliance with workplace laws, with almost one in every two (49%) presenting serious issues,

that is, multiple indicators of non-compliance. Indicators of non-compliance included reports of underpayments, some pay rates as low as \$10.00 per hour, and no time records kept or payslips provided to employees. More minor issues identified at other sites were generally addressed 'on the spot' with the employer.

Other findings based on employee interviews were:

- 36% of sites – pay slips not regularly received.

A significant finding given it is a legal requirement to provide employees with a pay slip within one working day of being paid. In isolation this may simply indicate poor administration. However, combined with other concerns, it makes it difficult to identify and correct underpayment of wages.

- 34% of sites – rates of pay insufficient to cover minimum entitlements.

Suggesting that the Cleaning Services Award 2010 (Modern Award) entitlements were not fully paid, which is a breach of the FW Act.

- 32% of sites – employers not keeping record of hours worked.

At some sites employees were asked to sign the Woolworths Visitors Book, but the employer did not keep its own records of hours of worked. The Visitors Book often did not accurately confirm when trolley collectors were on site. Failing to record employee hours of work may contravene the FW Act and Fair Work Regulations (FW Regulations), and makes assessing entitlements difficult or impossible.

- 33% of sites – employees unable to name their employer or named an entity different to that in information provided by Woolworths.

Confusion about the employing entity at so many sites hampered our ability to map the supply chain, identify employers and determine the extent of sub-contracting.

- 56% of sites – employees unclear if tax was deducted from wages or superannuation contributions made by their employer.

While tax and superannuation are chiefly the responsibility of the Australian Taxation Office (ATO), the absence of clear tax records makes it difficult for us to assess if amounts paid to employees are gross or net payments. A failure to meet these obligations often indicates unwillingness or inability to pay correct entitlements, particularly at the bottom of the labour supply chain.

- 32% of sites – employees who answered questions about their citizenship status, self-identified as not being Australian citizens.

This figure is most likely higher and not reflective of the true nature of the workforce given a number did not respond or ended the interview before this question could be asked.

- 9% of sites – employees self-identified as full time or part time employees who were not receiving paid leave entitlements, ‘no work = no pay’.

Indicating a possible failure to meet the National Employment Standards, and a breach of the FW Act.

The Inquiry also found contracting arrangements beyond the Woolworths mandated one level of subcontracting were in place in at least 5% of sites.

Investigations

Following these preliminary findings, we commenced investigations into 43 Woolworths sites, involving 11 principal contractors and 35 subcontractors. The investigations were conducted in accordance with the principles detailed in our [Compliance and enforcement policy](#).

NTPs were served on principal contractors and subcontractors for each site to confirm contracting arrangements between parties and employee time and wage records.

Fair Work Inspectors conducted follow-up visits to:

- obtain records from Woolworths and shopping centre management to corroborate the time and wage records provided by subcontractors
- obtain closed circuit television (CCTV) footage and Woolworths Visitors Books
- speak with people of interest to validate records.

During the investigations Fair Work Inspectors identified poor or non-existent records and cash payments.

Several challenges were faced by Fair Work Inspectors carrying out investigations:

- suspected false or misleading records provided
- conflicting information and records making it difficult to determine contraventions
- resistance by some contractors to comply fully or at all with statutory notices to produce, which created significant delays.

Case study: conflicting information

Fair Work Inspectors visited a large regional Woolworths supermarket on several occasions to speak with trolley collectors about their work and conditions of employment. Information gathered during site visits indicated workers at this site were paid in cash at rates around \$10–12 per hour.

The employer (a subcontractor) produced time and wage records in response to a NTP. The records specified only two employees collected trolleys at this site (one male and one female).

Local Woolworths staff told Inspectors that more than two trolley collectors worked at the site and they were all male.

None of the employees interviewed by Fair Work Inspectors or observed on CCTV footage were accounted for in the time and wage records provided.

Submissions by principal contractors

Woolworths directly engaged 33 contractors at the 130 sites within the scope of the Inquiry. We invited 31 contractors to participate voluntarily in an interview. Two contractors weren't invited as one could not be located and the other, UTC, is a party to a Deed with the FWO.

15 contractors volunteered to be interviewed. They included a mix of contractors serving large numbers of dispersed sites and others serving a small number of sites and not engaging in subcontracting.

Contractors were asked to provide details about:

- the history, experience and nature of their business activities and their involvement in trolley collecting
- the role of the principal contractor in the Woolworths supermarket sector
- procurement / tendering processes with Woolworths and subcontractors
- their understanding of workplace laws and responsibilities for monitoring compliance at their contracted Woolworths sites
- fairness and competition in the provision of trolley collection services
- perceptions of compliance levels at contracted sites and the factors influencing or driving non-compliance.

Key themes emerging from these discussions included:

- Tendering is competitive with price, service and safety the key elements to developing applications. Principal contractors consistently said communication from Woolworths about why tender submissions are successful or unsuccessful is non-existent or poor. In the absence of feedback from Woolworths, principal contractors assume price is the determinative factor in winning contracts. Fear of losing a contract or not being invited to tender for renewal is a significant motivator for submitting competitively priced tenders.
- The profitability of trolley collection is marginal. If principal contractors underestimate coverage hours they must either not provide the contracted coverage hours or run the contract at a loss. The majority are reluctant to raise issues of price or coverage hours with Woolworths.
- Non-compliance with workplace laws is emerging as a key risk to ongoing relationships with Woolworths. Principal contractors are aware that unsatisfactory findings in Woolworths and/or third party compliance audits can result in lost contracts and blocked opportunities for future contracts. They noted Woolworths are more active since the Inquiry: conducting internal audits; inviting contractors to participate in third-party compliance audits; and, requiring statutory declarations confirming minimum payment adjustments are passed through to employees.
- Principal contractors look to make five to eight percent profit per site.
- Principal contractors add 27–35% to casual hourly rates to determine a fair tender price for each hour of labour.
- The cost of compliance is increasing each year as regulatory scrutiny increases, including the cost to contractors of recommended third-party audits. Principal contractors express concerns about the affect on profitability of marginal sites.

Principal contractors were divided on the issue of delivering coverage hours stipulated in Site Service Agreements (SSA). Some said they always supplied the required hours. Others said the only way they could operate profitably was to make a judgement call about reducing coverage hours, or conflating hours between neighbouring sites.

Some principal contractors were very knowledgeable of the FW Act and the Modern Award and appeared to have systems in place to monitor compliance. Others had a very concerning lack of knowledge. They knew the base rate of pay for full-time trolley collectors, but couldn't name the Award covering their employees or the employees of their subcontractors.

Most submissions indicated principal contractors had concerns about compliance within the sector. Examples were provided of rumours circulating about low rates of pay and illegal workers. No one was prepared to provide evidence to help substantiate those allegations. Some said they understood the temptation to underpay because margins are so low and labour is the highest cost.

For instance one contractor told the FWO:

'Price is a major consideration. Someone doesn't have to underpay their employees by much to have a huge advantage. Underpay them by \$1 per hour and suddenly their price is \$80 cheaper per week on an average site, that's over \$4000 per year. The trolley collection work is tendered out every 2–3 years. If you are unsuccessful, you are out of business.'

The FWO acknowledges that Woolworths, as the lead business in the labour supply chain, holds a different perspective on some of the key themes above.

Key issues driving non-compliance

Record keeping

Accurate record keeping is paramount in ensuring employers meet their obligations and assuring employees that their entitlements have been met. Making, maintaining and keeping accurate records in accordance with the FW Act and FW Regulations provides security for employers and employees that obligations and entitlements are met. The FWO regards good record keeping as the bedrock of compliance.¹¹

Fair Work Inspectors understand record keeping errors inadvertently occur, particularly by small business employers without dedicated administration staff. We assist employers address these minor errors through education.

On the other hand, we are concerned about employers who make no or little attempt to keep records, or indeed produce false records.

Since 2007 we've carried out regular, frequent compliance and enforcement activity, engaging directly with employers in this sub-sector. Consequently, they should be aware of their obligations to employees under the FW Act, the Modern Award and the regulatory requirements of record keeping.

¹¹ Note recent judicial comment on the importance of accurate record keeping *Fair Work Ombudsman v Liquid Fuel Pty Ltd & Ors (No. 2)* [2015] FCCA 3139 at 35

In January 2015, Woolworths produced an internal report¹² outlining findings from its assessment of 'current roster arrangements, completion of timesheets and the reconciliation of payroll documentation (among other things).'¹³ The report says, '(a) random sample of sites and contractors was selected for review and cover(ing) 62 locations and 23 contractors nationally, with 77 Trolley Collection Employees interviewed by (the) Business Review.'¹⁴

Regarding record keeping, Woolworths observed:

Time and wages records not maintained to the required level. *Of the 62 sites visited and 77 Trolley Collection Employees interviewed, it was found that 66% of sites had one or more of the following issues identified:*

- *27 (44%) sites – Attendance records (e.g. timesheets) had not been maintained to a standard that allowed accurate calculation of paid hours.*
- *20 (32%) sites – The terms of employment had not been communicated to the Trolley Collection Employee in writing.*
- *13 (21%) sites – Trolley Collection Employees have not been paid in accordance with the Award, including incorrect base rates, overtime penalties and shift-loading penalties.*
- *12 (19%) sites - Trolley Collection Employees are not provided with a roster stating their scheduled work hours.*
- *9 (15%) sites – Trolley Collection Employees have not been paid superannuation at the prescribed rate (minimum 9.5% of gross pay).*
- *9 (15%) sites - Trolley Collection Employees interviewed stated that they do not receive a payslip, or only receive a payslip on an ad hoc basis.*
- *2 (3%) sites – The contractor or sub-contractor did not respond to Business Review requests for information (e.g. requests for employee payslips, attendance records etc.)¹⁵.*

¹² We received the redacted report in response to a Notice to Produce relating to a particular contractor.

¹³ January 2015 Woolworths Limited *Business Review Report Trolley Collection Contractor Review (Employment Conditions)* p.3

¹⁴ Ibid p.3

¹⁵ Ibid p.4

Woolworths concluded:

*'Controls put in place by the business to address previously identified concerns over Trolley Collection Employees' welfare and pay have been generally adequate in reducing the risk of underpayment and mistreatment of these employees to an acceptable level', noting the maintenance of time and wage records by contractors was an 'opportunity for improvement.'*¹⁶

The report also concluded there was '... no evidence of systemic underpayment, exploitation or mistreatment of trolley collection employees in the sample of sites reviewed.'¹⁷

We respectfully challenge this conclusion. The audit found almost half (44%) of the sites did not maintain timesheets 'to a standard allowing accurate calculation of paid hours' and at 21% of the sites 'Trolley Collection Employees have not been paid in accordance with the award, including incorrect base rates, overtime penalties and shift loading penalties.'¹⁸

Accurate records of time worked by an employee are fundamental to determining whether an employee, particularly those paid an hourly rate, are paid correctly. Given that at nearly half of the audited sites, Woolworths' own review found that records failed to enable an accurate calculation of hours worked, we cannot see how Woolworths can have confidence that workers at those sites were correctly paid.

Our Inquiry identified many instances of inconsistencies between records obtained from employers and information gathered during site visits. This casts further doubt on conclusions based on records that appear sufficient. Our experience at local sites suggests the accuracy of those records cannot be taken at face value.

Where possible, time records provided by employers were cross-checked with Fair Work Inspector observations and other attendance information (notations in Visitors Books, discussions with employees and employee evidence of work hours). In several cases, this process uncovered discrepancies in terms of specific individuals, specific hours of work and specific days working. Woolworths expects trolley collectors to record their attendance onsite in the relevant store Visitors Books.¹⁹ These are not an accurate record of time worked given they do not necessarily document

¹⁶ Ibid p.5

¹⁷ Ibid p.5

¹⁸ Ibid p.4

¹⁹ Woolworths maintains a Visitor's Book at each site to record the names and dates of people visiting that site. Trolley collectors are required to sign the Visitor's Book each time they attend. The Visitor's Book is not an employee record for the purposes of the FW Act.

start and finish times. They are only an indication of who was present at that site on a particular day.

Again, we see accurate records of employee work hours as fundamental to determining employees are paid correctly, especially where hourly rates, penalties and overtime rates are payable. Without reliable time and wages records, and in light of other information suggesting employees were not paid correctly, FWO respectfully suggests that Woolworths' conclusion is optimistic at best.

More than a year on it remains unclear what, if any, steps were taken at the time (or since) by Woolworths to address the serious record keeping failings identified by its own audit.

Case study: record keeping

Fair Work Inspectors interviewed a trolley collector at a Woolworths supermarket site.

The subcontractor responsible for trolley collection services during the relevant period subsequently produced time and wage records in response to a NTP. The records showed three employees, two part-time and one full-time, working the same hours each week and being paid precisely the minimum Award pay rates. One was a 15 year old male who apparently worked alone 9:00 am to 10:00 pm every Saturday and Sunday.

The trolley collector interviewed by Fair Work Inspectors was not recorded in the subcontractor's employment records.

A review of Visitors Books provided by Woolworths showed 13 other trolley collectors signing in and out during the period who were also not included in the subcontractor's employment records.

The director of the subcontracting entity, which has contracts at over 15 Woolworths sites, hasn't engaged with the FWO's investigations.

The subcontracting company was placed into voluntary liquidation in June 2015.

Case study: employee records

We issued a NTP to a subcontractor employer to produce time and wage records for trolley collectors at three regional Woolworths supermarkets.

Two days prior to the NTP due date we received an anonymous report alleging the employer was making false records to provide to the FWO. The records would include employees who did not work at the site during the relevant period. The caller also alleged some employees

were directed to sign blank time sheets and pay slips. Our investigation substantiated these allegations.

Fair Work Inspectors interviewed four employees across the three sites whose names did not appear in the records produced. One was the only employee working on the day of the site visit and claimed to be the only employee who had worked at that site for several weeks. This employee reported he worked seven days a week, nine hours a day.

Woolworths requires all trolley collectors to complete an online induction process before commencing work and that they are issued a photo ID card. However, the Inquiry found a lack of rigour in the official induction process, which means:

- Woolworths does not have accurate knowledge of people performing work on their sites at any particular time
- we had difficulty determining the identity of employees performing trolley collection work at some sites.

There were several instances of trolley collectors being issued cards by their employer without undertaking the online induction process. We concluded it wasn't difficult for someone else to complete the induction process on behalf of the inductee.

It was also noted in some instances the name recorded on ID cards was not that provided by the employee.

Assessment of available records and the Woolworths internal report raised concerns about poor record keeping at a significant number of sites.

We became concerned that some employers provided false or misleading records to the Inquiry and possibly Woolworths auditors. This impedes the ability to confirm trolley collectors were receiving their minimum entitlements.

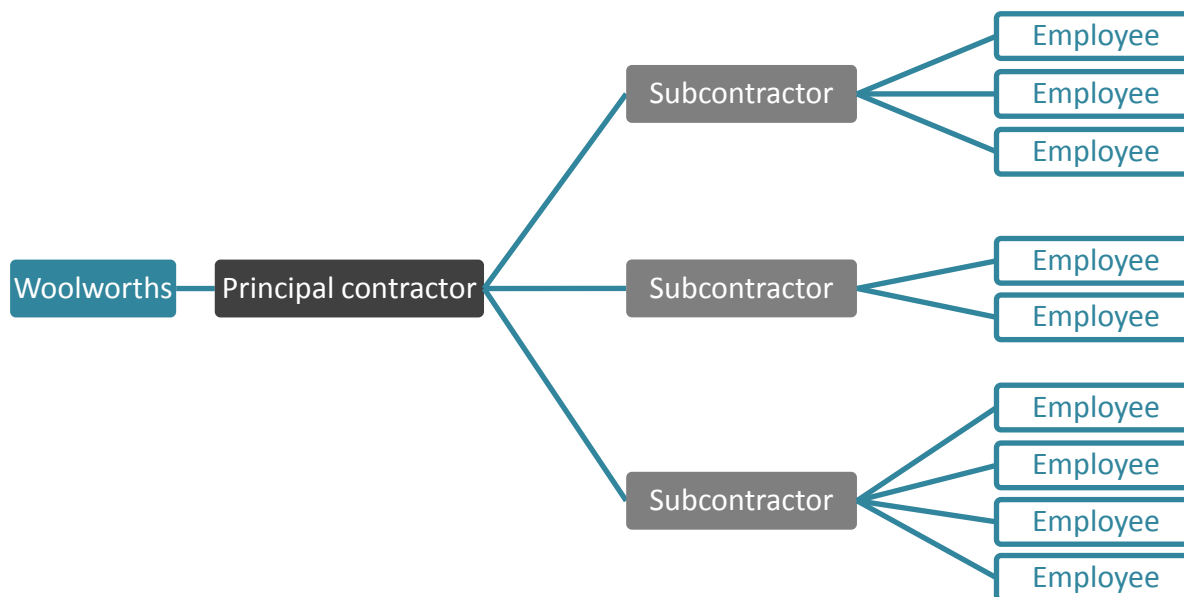
Failure to keep records is a contravention of the FW Act and can arise for a range of reasons, including employers being unaware of their obligations.

On the other hand, the deliberate creation of false records is viewed very seriously, particularly when done in response to a request from a Fair Work Inspector. It may indicate a cover up of workers being underpaid.

Complex labour supply arrangements

In July 2014, Woolworths informed the Inquiry it permitted only two levels (principal contractor and subcontractor) of contracting to provide trolley collection services at its supermarket sites.

Figure 1. Two levels of contracting as permitted by Woolworths



This is made clear in the Woolworths standard *Trolley Collection Services Agreement* at clause 5.2:

‘... for the avoidance of doubt, this means that the Supplier must subcontract the Services at no more than 1 level.’²⁰

In September 2014, Woolworths provided a list of the principal contractors and subcontractors (where relevant) for each of its supermarket sites.

There’s no law prohibiting multiple layers of subcontracting. Outsourcing parts of an operation is a legitimate and common arrangement that suits many businesses. However, it is our experience that multiple layers of contracting in highly competitive markets for low-skilled services performed by often vulnerable workers can contribute to non-compliance with workplace laws.

The Inquiry identified that in many cases there were multiple layers of contracting between Woolworths and trolley collecting employees (despite the stipulation in service agreements that this not occur). In fixed priced contracts this increases the risk that insufficient funds flow down through the supply chain to meet employee entitlements. Another risk associated with multiple levels of subcontracting is that neither the lead business nor employees know the identity of the trolley

²⁰ Woolworths: Trolley Collection Services Agreement Clause 5.2 p.1

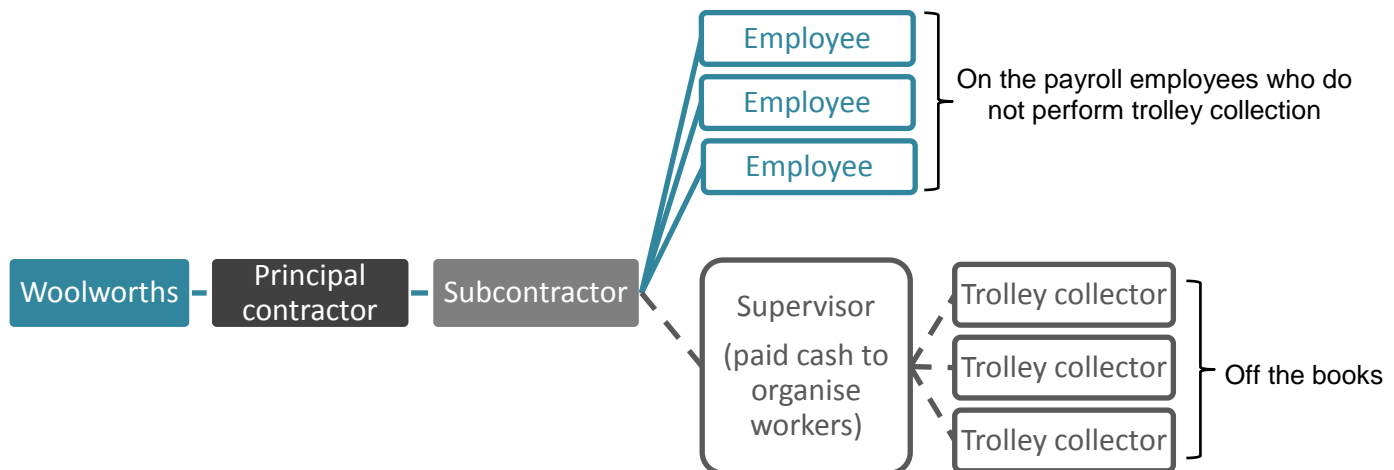
collection employer on site. This creates difficulties in pursuing enforcement outcomes if the employing entity is unclear or unknown.

We found a number of complex labour supply chain models in operation, which are summarised and depicted in diagrams below.

- Multiple layers of subcontracting at at least 7 sites (beyond two levels of outsourcing).
- People acting as supervisors or consultants to manage or assist the management of various sites. They do not appear as employees on the records of principal contractors or subcontractors. They are discrete from the contractors and represent another layer in the labour supply chain between Woolworths as the lead business and the trolley collectors.
- Use of a franchise model at several sites, adding a further level of complexity to the supply chain.
- Subcontractors operating as a network, creating fluidity of workers and contract monies across multiple sites and making it difficult to clearly identify employment arrangements.

Figure 2. Supervisor organises trolley collectors off the books

Fair Work Inspectors found several instances where employee records indicated contracting arrangements in place that complied with Woolworths' permitted contracting model. Further investigation revealed that while employee records were technically correct, the subcontractor used those records to disguise true labour arrangements. Trolley collection workers were actually 'off the books' and paid in cash.



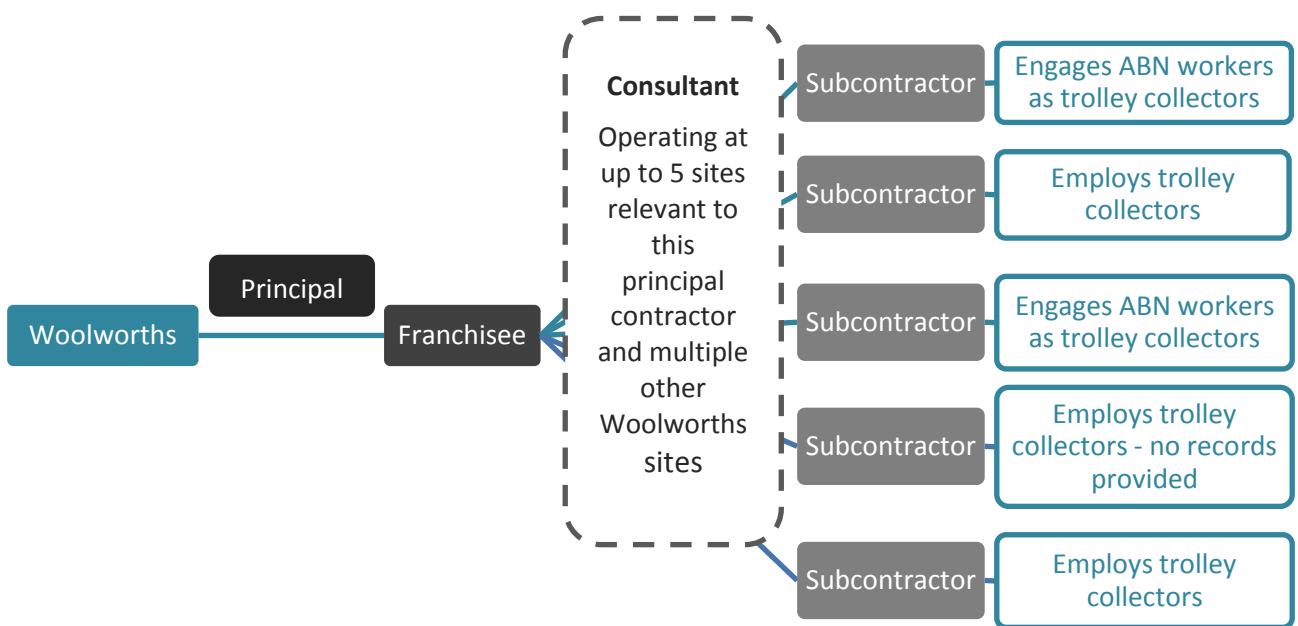
Case study: supply chain layers

Fair Work Inspectors visited sites in regional locations where a principal contractor had sold a franchise for the provision of trolley collection services in the area. In this case, the franchisee had engaged a consultant and paid them a significant fee to source and supervise the trolley collection workers at multiple sites.

The franchisee was assisted by the consultant to engage subcontractors who in turn arranged trolley collection workers. The subcontractors worked long hours as individual contractors and engaged other workers who were paid as 'ABN workers' to assist in the collection of trolleys.

Figure 3. Additional supply chain layer added through 'franchise' arrangement

The following diagram illustrates the additional layers of subcontracting inserted through a franchising arrangement implemented by one principal contractor in various regional locations. The FWO is also aware of another principal contractor who uses a similar model.



Figures 4 and 5 illustrate distortions to the Woolworths permitted contracting model, which may intentionally or unintentionally interpose additional layers within the labour supply chain. Our concern is that the contract price paid by Woolworths should take account of the supply chain models enacted by its contractors, so that the capacity of the end employer to lawfully pay workers remains unaffected.

Figure 4. Employees paid cash by subcontractor who provides false or misleading records to disguise underpayments

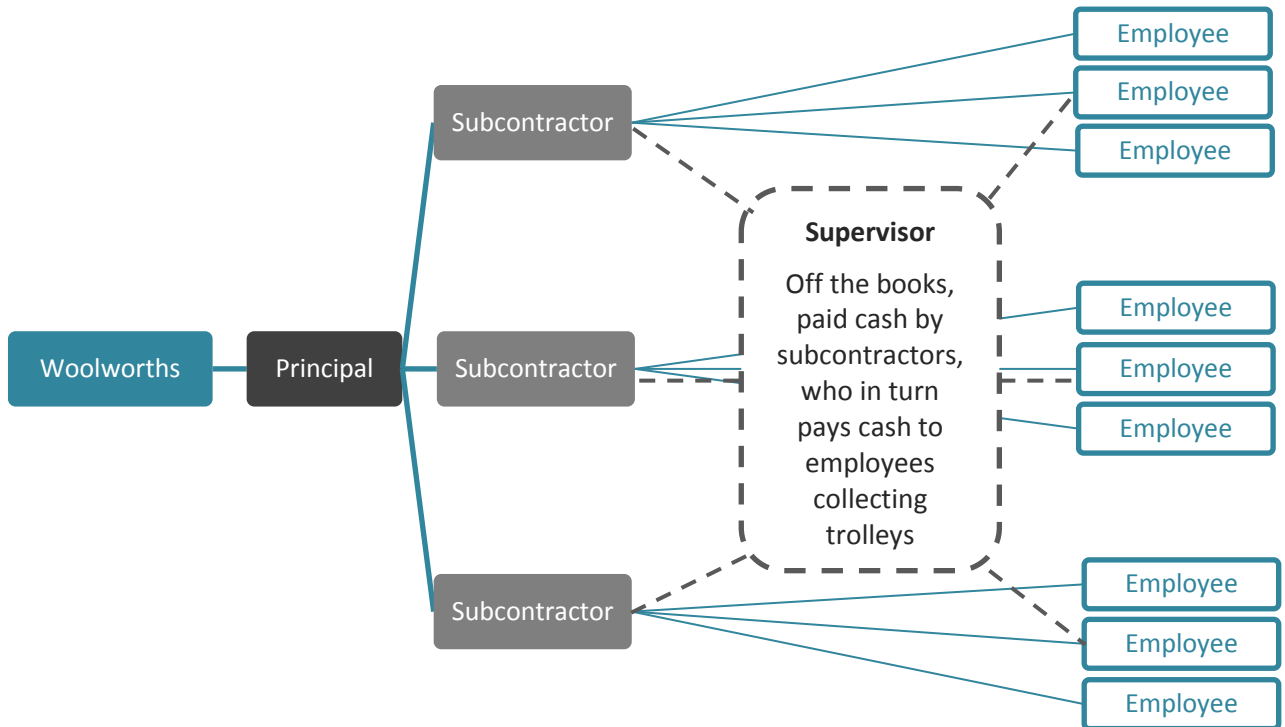
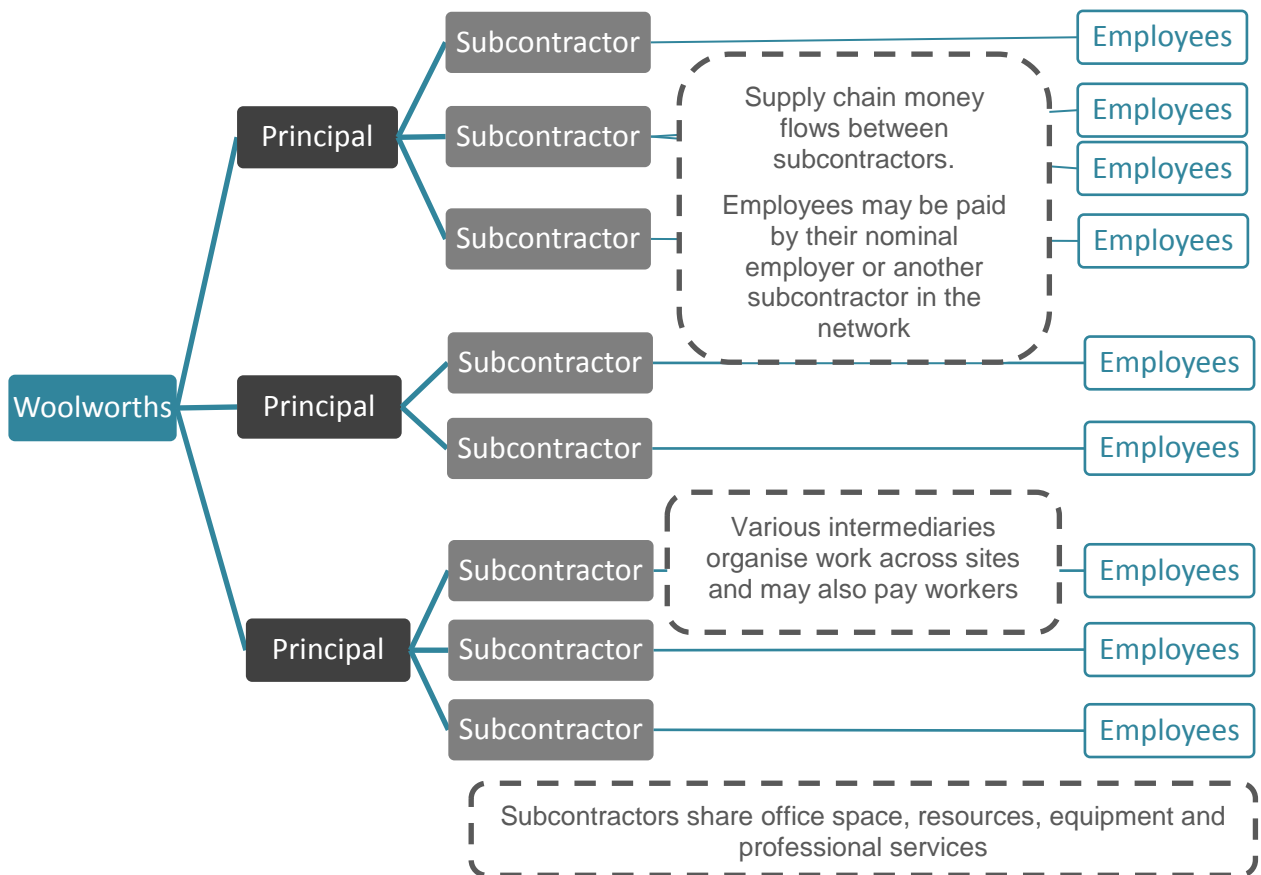


Figure 5. Fluidity of money and workers within a network of subcontractors



Contract price

We reviewed a range of contracts in various labour supply chains to assess the contract price, the number of labour hours required to service the contract, and times the labour would need to be performed (important because penalty rates and allowances apply under the Award).

In most cases the contract price agreed between Woolworths and a principal contractor would likely be sufficient to meet the minimum entitlements of employees. This is if only two levels of contracting were in place and the principal contractor passed on sufficient funds to enable the subcontractor to pay employees correctly.

However, we also found instances where the contract price appeared too low to enable the relevant subcontractor to make a profit and/or enable workers to be paid correctly.

There are legitimate reasons why contractors would propose or accept contract prices insufficient for the lawful payment of trolley collection workers. Businesses of a certain size and scope may be prepared to take a financial risk or loss to secure or augment a contract, as part of a broader strategy. In such cases, contractors and subcontractors may be prepared to use their own funds to supplement low priced contracts and meet employee entitlements. Such behaviour is evident in retail discounting where businesses subsidise or 'wear' losses on sales as part of a promotion or market share strategy.

In this case, given low contract process are not uncommon across Woolworths sites, the FWO is concerned parties are knowingly working within an unsustainable system that relies on underpayment of workers.

We continue to investigate instances where the contract price paid may have contributed to non-compliance.

Some scenarios encountered during the Inquiry are described in the following case studies.

Case study: contractual agreements

From 1 July 2014, the base hourly ordinary time rate for a permanent full-time trolley collector under the Award was \$18.01 (\$20.71 for part-timers and \$22.51 for casual).

At one metropolitan supermarket, Woolworths paid a principal contractor the equivalent of \$22.18 per hour to cover contracted trolley collection hours.

The subcontractor invoiced the principal contractor the equivalent of \$19.40 per hour to cover the contracted trolley collection hours. Their employment records showed the contracted trolley collection hours were fulfilled and employees were paid at the minimum full-time Award rate (but the applicable part-time loading wasn't paid).

Comparing labour costs (including superannuation) for the contracted trolley collection hours against the contract price it is evident the subcontractor bears a loss of more than \$900 per week.

We continue to investigate this matter.

Case study: contractual arrangements

We examined correspondence and the Trolley Collection Service Agreement from 2011 relating to 17 NSW and ACT supermarket sites. By dividing the agreed price by the weekly labour hours required to deliver the service, we found the cost per labour hour was below minimum pay rates at 15 of the 17 sites.

For example at site 1:

120.5 collection hours including street hours per week

\$1750 price paid by Woolworths per week

\$14.52 price paid by Woolworths per collection hour

\$16.57 minimum pay rate

Given of the age of the documentation and multiple changes in contracting arrangements since 2011 it was difficult to establish contraventions and an investigation wasn't commenced. If further information indicating non-compliance arises, we may initiate an investigation to determine if contraventions occurred and if the contract price was a causal factor.

The contractor's cut

A key issue found to be affecting compliance is the flow of money through the supply chain to those employed to collect trolleys. There were significant differences across sites in the 'cut' contractors take from the contract price set by Woolworths, from three percent to 43%. Indeed, one contractor took much as 47%.

Principal contractors told us they expect to take a rate less than 10% from a trolley service contract. When preparing tender submissions they start with the casual Modern Award rates and add 27–35% to account for superannuation, insurances, leave entitlements and site equipment costs. Some said they were prepared to carry some less lucrative sites and apply economies of scale to remain in the market. Simply put, some principal contractors take a higher cut from profitable sites or other aspects of their business to support less profitable supermarket sites.

This behaviour may result in employees ultimately being underpaid by employers further down the supply chain. Our ongoing investigations of alleged contraventions at various sites includes the possible involvement of accessories to alleged contraventions.²¹

Smaller principal contractors who directly employ trolley collectors told us subcontracting was not a viable option. For these contractors there simply is not enough money in the contract to profitably subcontract.

Case study: contractor's cut

A Trolley Collection Service Agreement between Woolworths and a principal contractor relating to a regional supermarket site stipulated a specific number of trolley collection labour hours per week.

The principal contractor engaged a subcontractor, retained 10% of the price paid by Woolworths and passed 90% on to the subcontractor.

Subcontractor employment records given to the FWO showed they employed two full-time employees to collect trolleys.

Our investigation found the subcontractor took a cut of approximately 47% and significantly underpaid the employees.

²¹ s.550 *Fair Work Act 2009* and p.7–9 above.

Employees vulnerable to exploitation or complicity

We found a large number of trolley collectors were overseas workers or recent arrivals to Australia, mostly from India, Sudan, Korea, Lebanon, Syria, Iraq and Iran.

Often these workers provided information clearly indicating contraventions but were reluctant to provide their name or 'go on the record'. This greatly impedes our ability to advance an investigation and take any significant compliance or enforcement action.

In some circumstances workers appeared to accept lower rates of pay in cash and 'off the books' to avoid interference with obligations arising from tax law, visa conditions and/or Centrelink payments.

At one regional site student visa holders invoiced for 20 hours per week in accordance with visa restrictions, when they were actually working over 20 hours per week for cash. At another regional site employees refused to go on the record about pay rates well below Award standard because they did not want to jeopardise their Centrelink benefits.

Many workers are vulnerable to coercion, loyal to their cultural community and simply grateful to have a job in Australia no matter what it pays. When asked to provide information about obvious underpayments one employee said, 'Why would I speak against this man (employer) when he is the only one who will give me a job in this country?'

Effectiveness of Woolworths governance systems

Governance posture

Ms Armineh Mardirossian (Woolworths Group Manager - Corporate Responsibility, Community and Sustainability) made submissions as a witness at the Senate Education and Employment References Committee's inquiry into the impact of Australia's temporary work visa programs on the labour market and visa holders.

Her statements gave an insight into the governance posture Woolworths takes concerning compliance amongst its suppliers.

At the public hearing in Melbourne on 18 May 2015, Ms Mardirossian said:

'Australia has a strong rule of law and effective regulatory agencies to enforce the law. Woolworths expects that all of its suppliers will abide by the Australian laws, including the workplace laws, and that the relevant authorities, such as Fair Work Australia (sic) and the

*police, will enforce the law. In addition, Woolworths explicitly stipulates in its trading terms the requirement for our suppliers to comply with all relevant laws in the country’.*²²

Woolworths has an ethical sourcing policy which covers auditing to determine compliance with workplace laws. Ms Mardirossian explained that the policy relies on World Bank risk analytics, the Corruptions Perceptions Index and other tools and assesses Australia as low risk. Accordingly ethical sourcing auditing does not apply in Australia.²³

Ms Mardirossian and Mr Ian Dunn (Head of Trade Relations at Woolworths), reinforced this perspective by informing the hearing that because Australia is a ‘low risk’ country, Woolworths does not conduct compliance audits of suppliers. Woolworths expects its suppliers to abide by Australian law, seeks guarantees in writing from suppliers that the law is being complied with and if there is a breach of workplace laws it expects the regulator to investigate and take action.²⁴

Despite Ms Mardirossian’s comments we observe that, at least since the commencement of this Inquiry, Woolworths has conducted field audits of trolley collection service providers and invited principal contractors to participate in third party compliance audits.

Ms Mardirossian indicated that Woolworths had in the past and would continue to refer allegations of breaches of workplace laws within its supply chains to the FWO.²⁵

Governance of trolley collection suppliers

We gathered information about governance systems put in place by Woolworths via:

- information provided by Woolworths at meetings before and during the Inquiry
- discussions with principal contractors
- relevant documents provided by 38 principal contractors and subcontractors.

Key elements of Woolworths governance of trolley collection contracts are:

- A tendering process that has recently introduced a requirement to demonstrate audits have found compliance with workplace laws.
- The following contractual obligations imposed on suppliers:

²² Official Committee Hansard Senate, Education and Employment References Committee *Australia’s temporary work visa programs*, 18 May 2015 Melbourne pp 1,13

²³ Ibid p.4

²⁴ Ibid pp 1,3,4,7,8,9,10,13

²⁵ Ibid p.2

- service agreement term requiring employees are paid on time and no less than Award rates
- statutory declarations confirming Award rates are paid
- prohibition of subcontracting beyond one level and requiring contractors assess and monitor the suitability of subcontractors to be compliant with the agreement.
- Random field audits by Woolworths and an invitation to contractors to participate in annual independent third party compliance audits.
- Termination of contracts for serious breach of contract and/or the FW Act, as well as rectification of any underpayments caused by the breach.
- Communication to contractors about compliance obligations including a conference held every two years.
- A 'Speak Up' hotline for employees to report unethical or illegal activities.
- Woolworths informs principal contractors of increases to Modern Award rates and revises contract prices to pass on 90% of any annual Fair Work Commission increase to Award rates.
- Messaging that non-compliance with workplace laws will not be tolerated and will result in contracts being terminated.

It was apparent that some principal contractors provide clear information to subcontractors about workplace laws and execute regular site visits to check compliance. However, in general oversight by principal contractors was haphazard and focused primarily on compliance with workplace health and safety laws and reducing risk of injury to the public or damage to vehicles.

While there was evidence that Woolworths provided relevant information to principal contractors about changes to workplace laws and pay rates, this information was not always conveyed by principal contractors to subcontractors.

The Woolworths Trolley Collection Service Agreement provides at clause 12.2 that '*all Supplier Representatives who have access to any Woolworths Premises sign in and out in the Visitors Book for the start and finish of every shift.*'²⁶ Fair Work Inspectors found multiple instances of Visitors Books:

- not being used or being used inconsistently
- being used to record incorrect names and times of attendance

²⁶ Representative is defined in the TCSA as 'Representative of a party includes an employee, agent, officer, director, auditor, advisor, partner, consultant, contractor, or sub-contractor or that party.'

- being used by people to record names other than their own.

We suggest there's a high risk that Woolworths doesn't know or have an accurate record of who is collecting trolleys on their sites.

The Trolley Collection Service Agreement at clause 5.2 prohibits sub-contracting beyond one level. This appears to be well understood by principal contractors who provided information to the Inquiry. However, at least two principal contractors had 'franchised' trolley collection contracts which, while not labelled subcontracting, introduces additional layers to the supply chain across multiple sites. One informed us that Woolworths 'know about the franchising arrangements'.

We acknowledge Woolworths has introduced a range of systems and processes to improve and monitor compliance with workplace laws across the subsector, as described above. However, the Inquiry found Woolworths governance systems haven't been effective in ensuring compliance with workplace laws throughout its various labour supply chains. This is illustrated by the:

- failure in monitoring and enforcement of identity card and induction requirements
- use of franchise arrangements to circumvent prohibition of multiple levels of subcontracting
- ineffectiveness of Visitors Books as a record of who is on site and when.

Further, on multiple occasions the FWO has been provided with suspected false employee records. They were professional in appearance and would not have raised suspicion if not for corroboration against Fair Work Inspector observations, individual employee hours records and/or Visitors Books. If Woolworths and third party auditors have been provided with these allegedly false or misleading records and not corroborated them, there's an obvious risk the audits will not detect non-compliance.

Several principal contractors told us they had paid for and participated in third party audits but never received a report about the results. One contractor, supplying services at multiple sites, said they rang the auditor asking for the report. They were told the report would only be provided to the client, Woolworths. Good governance should include contractors being provided with feedback on their compliance and direction for improvement.

Prior to commencement of this Inquiry Woolworths informed FWO that since 2011 they require contractors to rectify breaches of workplace laws, before their contracts are terminated.

Notwithstanding this requirement, we remain concerned any retrospective action by Woolworths or principal contractors to rectify breaches will be significantly impaired by deficient, missing or inaccurate employment records.

Case study: governance

Fair Work Inspectors visited a regional supermarket site in September 2014. Trolley collection services were being provided through a principal contracting and subcontracting arrangement. Employees said they were paid \$10 per hour for all hours worked.

When Fair Work Inspectors returned to this site in April 2015 they were informed Woolworths had terminated its Trolley Collection Service Agreement with the principal contractor. A new principal contractor had been awarded the contract. The new principal contractor used the same subcontractor to employ trolley collectors.

During the April 2015 visit, Fair Work Inspectors again spoke with trolley collectors. One identified himself as the supervisor and said employees were paid correct Award entitlements. A second employee separately told Fair Work Inspectors nothing had changed and trolley collectors were still being paid \$10 per hour for all hours worked.

Case study: records governance

An employer (subcontractor) provided the Inquiry with employee records showing three employees collecting trolleys. The records appeared genuine and recorded correct rates of pay. Bank records indicated the employees were paid the amounts recorded on pay slips.

Further investigation revealed that while these three employees did work for the subcontractor, they did not collect trolleys. Trolley collection work was actually subcontracted to another (third-tier) provider.

Features of non-compliance

Cash economy

While many contractors and employers paid employees via EFT, we found a significant number of cash payments made to employees. On examination of subcontractor bank accounts, we could see the majority withdrew 50% of monies received from the principal contractor. For some this figure was as high as 90% in cash withdrawals or cheques made out to cash. For example, one subcontractor withdrew amounts up to, and on one occasion exceeding, \$100 000 cash a week.

It is not unlawful to pay employee wages using cash but cash payments combined with false or inadequate record keeping poses a number of compliance concerns. It makes it difficult to verify records are accurate and makes remedial action very difficult unless the worker has kept their own detailed records.

A cash economy may also indicate tax and superannuation avoidance, visa fraud and facilitate fraudulent receipt of Commonwealth benefits.²⁷

Taking into account other findings, the extent to which the cash economy was utilised by some contractors is considered an indicator of broader non-compliance.

Indeed, when taken together, the FWO is of the view that there is an entrenched culture of non-compliance in the Woolworths trolley collecting supply chain. Such a culture is typically characterised by a network of inter-relationships and systems to avoid or work around workplace laws and other regulations.

Record keeping and vulnerable workers

A culture of non-compliance is entrenched by some employers, and those assisting them, who use their knowledge of the FW Act and its regulatory framework to design and produce records which falsely show full compliance.

Providing inaccurate or false records to the regulator is underpinned by vulnerable workers prepared to support the deception. They do this for a variety of reasons including the need to keep a job or involvement in non-compliance with visa or social security obligations.

Complex and opaque company group structures and the fluidity with which subcontracting employees are substituted compounds difficulties faced in identifying supply chain participants and employing entities.

The Inquiry found many contractors work diligently to comply and promote compliance but are regularly undercut by competitors who allegedly engage in non-compliance.

The Inquiry found the presence of individuals or 'intermediaries' operating outside corporate structures. The services that intermediaries variously provide to subcontractors include:

- recruitment of staff (mostly on temporary visas or of recent migrant origin)
- distribution of cash to employees
- supervising staff
- encouraging or persuading employees not to record their hours worked

²⁷ FWO refers evidence of unlawful activity outside our jurisdiction to relevant statutory agencies

- instructing employees to sign blank time sheet and pay slip templates that are later completed by a third person
- instructing employees how to answer questions when approached by Fair Work Inspectors
- instructing employees not to sign Woolworths Visitors Books or to sign using a false name.

Some intermediaries identified by Fair Work Inspectors were associated with contracting entities which had previously had contracts terminated by Woolworths or the principal contractor. Some are recorded in documents provided by Woolworths as the contact person for various subcontractors.

It was also noted that a number of contractors used the same professional service provider to produce their employment records. These records were provided in exactly the same form, showed correct minimum rates of pay, but in most instances could not be verified as correct through observations, comparison with Visitors Books or cooperative employees.

Records produced by some subcontractors or their accountants create the appearance of compliance with workplace laws. However, as described throughout this report, the veneer of compliance was broken through Inquiry methods including:

- site visits
- employee interviews
- comparisons of records provided by Woolworths, principal contractors and subcontractors (including bank accounts)
- interviews with store management
- cross-checking against Woolworths Visitor Books.

Such methods assisted the Inquiry form a more realistic assessment of the sector.

Summary of findings

A sample of 130 Woolworths supermarket sites across Australia, representing 13.5% of all Woolworths supermarkets, found:

- more than 3 in every 4 (79%) of sites visited had indications of some form of non-compliance with workplace laws
- almost 1 in every 2 (49%) of sites visited presented serious issues, that is multiple indicators of non-compliance
- deficient governance contributing to errors caused by lack of Award knowledge and substandard record keeping
- employment records that were inconsistent with evidence obtained about hours worked and rates paid to employees
- evidence of cash payments used to conceal worker identities and the actual amounts paid to workers
- manipulation of the Woolworths identity card system
- employees vulnerable to exploitation and often complicit in acts of non-compliance
- networks of corporate structures and intermediaries used by contractors to facilitate organisation of cash payments, recruitment of vulnerable workers and production of inaccurate or false records.

In addition, the Inquiry found Woolworths' approach to procurement and oversight of its contracts has contributed to a culture of non-compliance through:

- inadequate monitoring of who is performing work at which site and when, and that each worker is appropriately identified and inducted
- failure to implement adequate systems to ensure that the use of multiple entities within a supply chain does not occur
- failure to adequately address record keeping deficiencies identified in its own audit
- a reliance upon suboptimum governance systems which allow poor or false record keeping to flourish and result in underpayment of workers.

Recommendations

The FWO recommends Woolworths:

- Enters into a compliance partnership with us wherein Woolworths publicly accepts responsibility for monitoring and ensuring compliance with Australian workplace laws within trolley collection services at all business sites via a formal, transparent and binding arrangement with the FWO.
- The terms of the compliance partnership would be contained in the form of a Proactive Compliance Deed designed to facilitate sustainable self-monitoring arrangements. Some of these terms would include Woolworths:
 - acknowledging legal responsibility for compliance with all aspects of the law across its business operations
 - acknowledging its ethical and moral responsibility to require standards of conduct from entities directly involved in the conduct of its enterprise which comply with the law and meet Australian community and social expectations
 - committing to permanent and sustainable change to its trolley collection service model in order to assure the Australian community the exploitation of trolley collectors engaged to work at Woolworths sites never occurs
 - reviewing its current contracting arrangement to ensure:
 - the contracting arrangements and the contract price permits employee entitlements to be met throughout the life of a contract
 - tender processes give preference to contractors who demonstrate employees are paid via EFT or personal cheque and that PAYG is remitted on behalf of employees to the Australian Tax Office and superannuation payments are made.
- Implements systems and processes to ensure local Woolworths management:
 - know and record the entities and individuals responsible for trolley collection on a daily basis
 - have access to records that accurately record times worked and payments owed.
- Ensure its *Speak Up* helpline is reasonably accessible to people whose first language is not English.
- Publicly advertise its *Speak Up* helpline and its purpose.

- Investigate and resolve all grievances relating to the employment of trolley collectors within 30 days of receipt, and report to the FWO quarterly the actions taken to resolve such complaints.
- Establish a 'guarantee' reserve fund to cover payments to trolley collectors in the event those trolley collectors are found to be underpaid wages for trolley collection services carried out for Woolworths, and where the relevant subcontractor employing entity fails to rectify the underpayment.
- Conduct regular and frequent audits of its contractors and subcontractors (verified by third party accounting, legal or workplace relations professionals) to ensure compliance by employers with Australian workplace laws.

Michael Campbell

Deputy Fair Work Ombudsman – Operations

Fair Work Ombudsman

About the Fair Work Ombudsman

The Fair Work Ombudsman is an independent statutory agency, created by the FW Act on 1 July 2009.

The FWO supports compliant, productive and inclusive Australian workplaces.

We ensure compliance with Australia's workplace laws by:

- offering people a single point of contact to receive accurate and timely advice and information about Australia's workplace relations system
- educating people working in Australia about their workplace rights and obligations
- monitoring compliance with, inquiring into and, investigating any act or practice that may be contrary to workplace laws, awards and agreements
- enforcing workplace laws and to deter people from not complying with their workplace responsibilities.

For further information and media enquiries please contact FWO media (media@fwo.gov.au).

FWO's strategic intent as well as its Compliance and enforcement policy can be located on our website www.fairwork.gov.au.

If you would like further information about our Compliance and enforcement policy please contact Steve Ronson, Executive Director – Dispute Resolution and Compliance (steven.ronson@fwo.gov.au).