

**THE TRANSFORMATION OF ENFORCEMENT OF MINIMUM  
EMPLOYMENT STANDARDS IN AUSTRALIA:  
A Review of the FWO's Activities from 2006-2012**

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## ABBREVIATIONS

ABS	Australian Bureau of Statistics
ACTU	Australian Council of Trade Unions
AIRC	Australian Industrial Relations Commission
ANZSIC	Australian and New Zealand Standard Industry Classification
DEEWR	Department of Education, Employment and Workplace Relations
FCA	Federal Court of Australia
FMCA	Federal Magistrates Court of Australia
FMW	Federal Minimum Wage
FWA	Fair Work Australia
FWO	Fair Work Ombudsman
NES	National Employment Standards
NMW	National Minimum Wage
OWS	Office of Workplace Services
TCU	Targeted Campaigns Unit
WO	Workplace Ombudsman

## EXECUTIVE SUMMARY

### *The Fair Work Ombudsman Research Project*

The *Fair Work Act 2009* (Cth) (FW Act) establishes a number of statutory minimum employment standards for the benefit of Australian employees, as well as making provision for the setting of working conditions through modern awards and enterprise agreements. However, minimum employment entitlements are meaningful only in so far as they are complied with. The effectiveness of the federal agency responsible for enforcement of those entitlements is therefore a crucial issue.

Since 2006, government enforcement of minimum employment standards in Australia has undergone a significant transformation. From that time, the federal enforcement agency (now called the Office of the Fair Work Ombudsman (FWO)) was given substantially increased resources along with new powers for labour inspectors, coupled with an earlier, significant increase in the penalties that courts are able to impose for breach of these standards. In 2009, with the enactment of the FW Act, the agency was provided with a number of additional administrative enforcement tools, such as the power to enter into enforceable undertakings. From 2010 onwards, resourcing of the agency has declined significantly. However, the FWO's response to these funding constraints has been to become more strategic and sophisticated in its enforcement activities, a reflection of the agency's commitment to being a dynamic organisation engaged in continuous improvement.

This report provides an initial account of an extensive empirical evaluation of the federal employment standards enforcement agency in its various guises, focusing on the period between 2006 and 2012. It examines how the FWO has carried out its role of monitoring and enforcing compliance with the FW Act and industrial instruments made under that Act, and also presents evidence of the patterns of federal investigation and enforcement of minimum employment standards between 2006 and 2012.

The methodology upon which this report is based is a combination of quantitative and qualitative assessment of the regulatory practices observed by the FWO, with reference to the study period. The three main sources of data relied upon are:

- (i) FWO data on investigations, detection, education/media and use of sanctions, supplemented by our own data collection from public sources (quantitative);
- (ii) Interviews with over 50 FWO staff and external workplace relations lawyers, as well as participant observation of the FWO staff carrying out their responsibilities (qualitative);
- (iii) Analysis of FWO policy documents, published decisions in FWO cases and FWO enforceable undertakings and compliance deeds.

Although the report largely reports on a six year 'snapshot' of the agency over the period from 27 March 2006 to 30 June 2012, a postscript to the report provides an overview of recent changes at the FWO, many of which address the findings of this report.

The key findings and recommendations presented in this report can be summarised as follows:

## ***Chapter 2 - Theoretical and Comparative Perspectives on Good Practice in Enforcement***

1. Although there is a lack of empirical evidence concerning the extent of non-compliance with minimum employment standards in Australia, on the evidence which is available, including recent data gathered by the FWO and its predecessors, it appears that achieving widespread employer compliance with minimum employment standards is a major and ongoing challenge in Australia.
2. Compliance and enforcement problems in the Australian context are exacerbated by changing patterns of production, increased competition in product markets, increased labour migration and rapid technological advances, as well as the complexity of the legal framework of minimum employment standards, at least during the FW Act transition period.

3. Unravelling the ‘puzzle’ of corporate motivation and regulatory forms is critical to ensuring that the FWO’s resources are targeted effectively, that trust and legitimacy in the regulatory process is strengthened and that strategies for achieving deterrence are refined.
4. The report highlights the particular relevance of two important approaches in the compliance literature: ‘responsive regulation’ and ‘strategic enforcement’. We have used these theories, as well as various other comparative studies, to assess the FWO’s compliance and enforcement strategy in the study period.
5. Ayres and Braithwaite’s influential theory of ‘responsive regulation’<sup>1</sup> suggests, amongst other things, that enforcement agencies should follow an ‘enforcement pyramid’. Under this approach, enforcement activity should commence and occur most frequently at the foundation of the pyramid, which provides for less interventionist techniques, including education, advice and persuasion. If compliance is not achieved, the regulator escalates up the pyramid where more formal enforcement mechanisms are available, such as the issuing of official warnings or infringement notices. At the apex of the pyramid sit the most punitive sanctions.
6. A number of other leading theories concerning effective enforcement are reflected in the theory of ‘strategic enforcement’ devised by David Weil in relation to employment standards regulation in the United States.<sup>2</sup> Strategic enforcement is framed around four central principles which should be used to guide the design and implementation of enforcement policy, namely: prioritization; deterrence; sustainability; and systemic effects. Weil’s conceptualisation of deterrence focuses on the symbolic and expressive value of sanctions (commonly referred to as ‘general

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<sup>1</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

<sup>2</sup> See, eg, David Weil, ‘Improving Workplace Conditions Through Strategic Enforcement, A Report to the Wage and Hour Division’ (Report, US Department of Labour, May 2010).

deterrence’) and encourages regulators to enhance deterrence efforts at the industry and geographic levels when planning and evaluating investigation strategies.

7. These two theoretical approaches inform many of the recommendations in this report, particularly in Chapters 5 and 6.

#### ***Chapter 4 - Objectives and Internal Structure of the FWO***

8. The priorities of the FWO and its predecessors in fulfilling statutory functions shifted over the study period from 2006 to 2012. Initially the agency sought to portray itself as an aggressive enforcer of the law in order to change perceptions of the agency that had endured from a relative lack of activity in previous years. More recently, however, the FWO has cast itself in more of an educative role in relation to the majority of workplaces, emphasising that investigation and prosecution will be strategically focused on more egregious cases of non-compliance.
9. In the study period, the FWO generally adopted an internal structure designed to maximise the impact of its inspectorate through internal specialisation, establishing sections within the agency with responsibility for different types of contraventions. We have found the FWO to be a highly reflective organisation, open to reviewing its approaches to structure and adapting them when deemed appropriate. The FWO’s emphasis on continual change, combined with the resourcing reductions, led to the development of a new organisational structure which appears to place a heavier emphasis on dispute resolution and compliance rather than investigation and enforcement<sup>3</sup> This new structure will be discussed in more detail in the postscript.

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<sup>3</sup> For example, ‘Regional Services and Targeting’ has now been renamed ‘Dispute Resolution and Compliance’, which includes not only the traditional inspectorate, but also Mediation and Dispute Resolution teams.

10. In the study period, there also appears to have been an increasing focus on specialisation by reference to particular types of contraventions (such as sham contracting or general protections) or particular types of workers (such as overseas or young workers). On the one hand, this type of specialisation can lead to the development of expertise and the promotion of efficiency. On the other hand, it may not necessarily reflect the principles of the strategic enforcement model to the extent that this model places a much heavier emphasis on tailoring the compliance and enforcement strategy by way of industry (or sub-industries), rather than by reference to contravention type or worker category. For example, Weil suggests that a ‘vulnerable worker coordinated strike force’ be established in one or two industries employing vulnerable workers.<sup>4</sup> We recommend that the FWO consider whether to train or identify a more senior inspector who has experience or expertise in a particular industry so that more generalist inspectors could seek his or her assistance in complex matters. This same person could also prove an important contact point for managing stakeholder relationships.
  
11. These efforts to develop an optimal structure for the inspectorate have been supplemented by an effort to achieve greater professionalisation of inspectors through increased training opportunities, and the establishment of a ‘Professionalisation Project’. We support this initiative. The Project is important in ensuring that decision-making is not only consistent and accountable, but that innovative solutions to regulatory problems are encouraged and that accurate data about business relationships and industry structures is collected and flagged, as appropriate. As Weil points out, inspectors must be trained to ask different questions about the drivers of non-compliance and the influence of industry structures:

In essence, strategic enforcement requires competencies that go beyond knowledge of the laws, interviewing techniques, ability to analyse payroll records and negotiating skills.<sup>5</sup>

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<sup>4</sup> Weil, ‘Report to the Wage and Hour Division’, above n 2, 79.

<sup>5</sup> Ibid 90.

12. If inspectors are sufficiently trained and authorised to make decisions, the literature suggests that regulatory enforcement is likely to be more tailored and effective. We note below that the highly centralised decision-making structure which has historically been adopted by the inspectorate in relation to most sanctions may have hindered wider use of these new regulatory mechanisms, such as enforceable undertakings and compliance notices.

### *Chapter 5 - Complaints and campaigns*

13. In accordance with its statutory obligations, the FWO devoted considerable resources to responding to complaints. The number of complaints has tended to increase over time and the FWO devised several strategies to address them efficiently. We suggest that, in dealing with complaints, the FWO continues to improve its efforts to focus resources on the most vulnerable categories of workers.
14. There is strong evidence, particularly from the work of David Weil, that complaint rates from particular occupations do not necessarily correlate with non-compliance rates. For example, some occupational categories may experience high rates of non-compliance but low rates of complaints. This means that, in order to promote adherence to minimum work standards across various industries in Australia, the FWO needs to adopt measures other than complaint resolution.
15. The FWO has, particularly in recent years, acted on this insight and has directed considerable resources to activities such as targeted campaigns in certain organisational categories. These activities have both audit and educational aspects. We strongly support this policy direction.
16. We agree with the Targeted Campaigns Unit (TCU) that audit activities should be directed at those occupational groups which are (1) characterised by high rates of non-compliance and (2) have high proportions of vulnerable workers.

17. However, in the Australian context, it is very difficult to determine non-compliance rates at the occupational level. Data based on the Australian and New Zealand Standard Industry Classification (ANZSIC) codes at the division or sub-division (2-digit) level are not sufficiently detailed to enable resources to be targeted. While certain ABS data (especially the Employee Earning and Hours statistics disaggregated to group (3-digit) and class (4-digit) levels) sheds some light on low paid industries, the large number of minimum wage rates in modern awards preclude a relatively straightforward assessment of the level of underpayments (such as can be undertaken in the United States). The TCU has attempted to get around this problem by ingenious use of the complaint data, but this has not entirely obviated the risk of using complaint data to determine non-compliance.
18. The following initiatives may assist with better targeting of occupations with high rates of non-compliance:
- ensuring that the FWO data is categorised using ANZSIC codes at group and class levels (i.e. 3- and 4-digit);
  - collecting and recording more information in complaint investigations and audits about ownership, management and responsibility for activities at particular worksites;
  - building and strengthening relationships with unions, employer associations, community organisations and other government departments and agencies to improve data on compliance behaviour in target industries; and
  - engaging a labour economist or sociologist to complement the existing FWO statistical expertise with a view to developing precise labour market data on compliance rates and the impact of various compliance and enforcement tools.

We note that the FWA research reports on minimum wage reliance that use ANZSIC codes at group level provide useful examples of what the FWO could aim for.

## ***Chapter 6 - Compliance and Enforcement Activities and Outcomes***

19. This chapter presents our findings regarding the FWO's use of the various enforcement tools when it detected non-compliance with minimum employment standards in the relevant study period. We make a number of specific recommendations in relation to each tool.
  
20. By way of a general comment, we note that although the agency's enforcement practice is consistent with some aspects of the enforcement pyramid, in particular the higher and lower ends of the pyramid, the under-utilisation of Compliance Notices and Penalty Infringement Notices suggest that the agency was yet to achieve an approach which was entirely consistent with this aspect of the responsive regulation model.

### **Civil Remedy Litigation**

21. Over the period from 2006 to 2012, there was a substantial increase in federal enforcement of minimum employment standards through civil litigation. The number of matters being litigated by the federal agency increased sharply from a low of 4 matters in 2005-2006, the year prior to the expansion of the OWS under Work Choices, to a high of 58 completed matters brought against employers in 2009-2010. The most common target of this litigation was smaller to medium enterprises in the accommodation and food services, administrative support services, and retail trade industries. We found that:
  - the agency became more strategic in its selection of matters for litigation, consistent with Weil's model of 'strategic enforcement'; and
  - although the agency brought litigation in only a small proportion of matters that came to its attention, it had a very high success rate, achieving a positive outcome in, on average, 95% of cases.

22. Nevertheless, after peaking in 2009-2010, we have observed that the number of litigation matters commenced and completed by the FWO contracted, with 36 matters completed in 2010-2011, and 31 in 2011-2012. This appears to have been in part a necessity brought on by shrinking resources. However, it is also possible that the number of litigation matters pursued overall may have been restricted by a cautious application of the Litigation Policy, and the centralisation of decision-making concerning the selection of matters for litigation.
23. While centralisation of decision-making is important for accountability and consistency, we recommend that the agency review its caution with respect to application of the Litigation Policy. Although we acknowledge that use of enforcement mechanisms without authority or justification may render them invalid, and undermine the credibility of the regulator more generally, too much emphasis on these risks may have a chilling effect on the legitimate use of tools, such as PINs and compliance notices, which can also work to weaken the overall regulatory regime.
24. We also make the following recommendations with a view to addressing concerns about the agency's choice of litigation matters, and maximising the deterrence impact or 'ripple effects' of the litigation:
  - We understand that in deciding whether to pursue litigation in any given matter, there is a strong emphasis placed on the presence or otherwise of documentary evidence, as well as the age of the complaint. While we appreciate the importance of presenting a strong evidentiary case, and the practical difficulties of pursuing older cases, we also emphasise the need to ensure that the employers are not unintentionally privileged by virtue of the fact that they have failed to keep or provide employment records, or actively resisted attempts at achieving voluntary rectification of the matter.

- We support an approach which seeks to more quickly identify the potentially serious cases so that they can be fast-tracked for litigation. We also hope that the FWO's increasing familiarity with the small claims jurisdiction may serve to strengthen its confidence in relying on witness testimony rather than documentary evidence.
- In line with the recommendation made in Chapter Five, the data relating to litigation can be improved. While the FWO website contains summaries of most of the finalised litigation, this is not always the case. Further, relevant information such as the full company name, the trading name and the names of the directors are not always set out in these summaries. In some cases, the names have been included, but have been spelt incorrectly. In order to enhance the deterrence effects of the litigation, as well as the information available to current and prospective employees, consumers and other interested third parties, we recommend that the FWO provide a searchable database which contains all key information relating to the cases which are finalised.
- The FWO may also wish to consider whether to upload any Agreed Statements of Fact given that this document generally sets out key information about the case and is often relied on heavily by the courts in determining the appropriate penalty amount. This information may also enhance the deterrence effects of the litigation.
- We also note that it is not always easy to discern when a matter has been or is subject to an appeal. In the interests of transparency, we recommend that the FWO clearly set out this information on the relevant case summary available on its website.
- Improving the accuracy and scope of the litigation data collected by the FWO is important for ensuring that the litigation strategy is properly aligned with the

broader agency priorities, including the targeting strategy. It is also critical for understanding the potential effects of pursuing and imposing formal sanctions. We recommend that the FWO routinely collects data relating to the size of the business which is the subject of litigation, the industry in which the business operates, the type of contravention, the number of respondents, including any accessories and the discount applied to any penalty.

25. We strongly support the important role played by the regulator in running test cases in order to clarify particular provisions of the FW Act and the boundaries of employment responsibility. While this approach has attracted criticism from some quarters, we believe that running test cases is not only proper, but is necessary in a complex regulatory environment such as that facing the FWO. It is also critical at a time when industry structures have led to the blurring of traditional employment relationships and responsibilities. We have observed that the agency's appetite for test cases appears to have grown and we support this development.
26. We note, nevertheless, that the FWO may be somewhat reluctant to test the limits of the law in some areas. For example, while the remedial provisions under the FW Act are relatively broad, the FWO sought a fairly limited range of remedies – in most cases, compensation for underpayments, interest and penalties. There may be opportunities for the FWO to explore other remedies which may aid in building a culture of compliance, rather than simply strengthening deterrence signals. The FWO may consider whether to pursue remedies such as remedial orders in lieu of civil penalties, publicity orders, corporate rehabilitation orders, probationary orders and community service orders.
27. The use of enforceable undertakings by the FWO has illustrated the power of non-monetary orders, particularly in relation to companies or individuals that are not in a financial position to comply with court-ordered penalties or compensation orders. We further support the proposal put forward by PWC regarding the need for banning orders in order to deter phoenix behaviour. We acknowledge, however, the

opportunities for law reform in this respect may be limited in the foreseeable future. In the meantime, the FWO may consider (if it has not done so already) whether there is potential to pursue garnishment orders or Mareva injunctions in order to gain access to assets or property which can be used to satisfy relevant compensatory orders or penalties.

28. The FWO may wish to consider seeking compensation against accessories given that the relevant legislative provisions appear, on their face, to allow for such an approach. While directing payment of the penalties to workers affected by contraventions may serve as a default remedy, it is clear that there are many cases where there is a shortfall between the underpayment amount and the penalty amount.
29. While the FWO has begun to explore through litigation the extent to which accessorial liability provisions (and indeed other FW Act provisions) can be used to address employer non-compliance in complex company structures or supply chains, we note that there was a dominant tendency to use these provisions against directors of insolvent or deregistered employer companies. In order to better engage key gatekeepers within the firm, to strengthen motivations to comply and to enhance the ripple effects of litigation, the agency may wish to consider using the accessorial liability provisions to bring more cases against company officers and, in particular, human resources managers, in solvent medium to large enterprises where non-compliance with minimum employment standards is detected.
30. We understand that the small claims jurisdiction has been used more readily by the FWO either on an assisted or unassisted basis. In many respects, this development is positive insofar that it allows for relatively speedy resolution of matters where evidence is inconsistent or weak or where the amount is not high enough to justify FWO-initiated litigation. However, in keeping with the points raised below in relation to vulnerable workers and alternative dispute resolution mechanisms, we suggest that the FWO carefully consider how vulnerable workers are being managed

in the small claims process. As noted above, this will necessarily require that more information is obtained about the background of the worker in order to make a proper assessment of whether any vulnerability factors are present. As the FWO's use of mediation increases, it may be that there is less need to refer matters to small claims.

31. This touches on a related point regarding the public interest test under the Litigation Policy. We understand that the dollar threshold under the Litigation Policy (currently set at \$5,000) is an important way in which the FWO manages the complaint and litigation caseload. However, we have concerns that this may serve to disadvantage low-paid or precarious workers who are more likely to fall below this threshold amount. We suggest that this amount be redefined as a proportionate amount of the overall worker's pay in order to account for these concerns.

### **Enforceable Undertakings and Proactive Compliance Deeds**

32. Theories of regulatory good practice, particularly responsive regulation, suggest that in addition to punitive sanctions, regulators should have a number of administrative sanctions at their disposal that are more flexible than litigation, and with a greater capacity for engendering commitment to compliance. In particular, some of these sanctions should have the potential to foster a cooperative enforcement relationship between regulator and regulatee.
33. Two enforcement approaches the FWO used which fit within this category were enforceable undertakings and proactive compliance deeds. We found that the FWO was active in negotiating enforceable undertakings with employers, although we note:
  - the annual number of undertakings was only a small proportion of the number of civil litigation matters brought by the agency; and

- a majority of the undertakings we reviewed appeared to have been made with medium to large businesses. This can be contrasted with civil litigation by the FWO, where the majority of litigation matters were brought against smaller businesses.
34. However, it has been the further commitments made by individuals and firms in undertakings that have attracted most interest. In particular, many enforceable undertakings have included clauses whereby employers have agreed to:
- develop systems and processes to ensure future and ongoing workplace compliance;
  - organise and ensure that firm managers attend training on the rights and responsibilities of employers; and
  - pay sums of money to external organisations, such as not-for-profit community legal centres, as a way of promoting future compliance with workplace laws.
35. The FWO has made less frequent use of proactive compliance deeds. To date, they have only been used in limited circumstances with particular types of companies, namely large, high-profile employers or franchises. Over the study period, the agency entered into four deeds with McDonald's, Domino's Pizza, Red Rooster and Spotless Services.
36. Overall, we found that the FWO had devoted significant resources and energy to exploring the benefits of enforceable undertakings and compliance deeds as alternative approaches to civil litigation in securing compliance. The result was a number of innovative agreements with mostly larger employers which have great potential to engender changes in compliance culture at these firms.
37. Nevertheless, our findings raise a number of issues regarding enforceable undertakings and compliance deeds:

- The relatively low number of undertakings and compliance deeds compared to litigation matters suggests that these tools are not being fully utilised.
- All of the enforceable undertakings in the relevant period have included an admission regarding the relevant contravention(s), and most have included a promise to make good these contraventions. We suggest that the FWO reconsider whether it is necessary in all cases to insist on the alleged wrongdoer making an admission given that, in some cases, this acts as a major block on negotiations regarding undertakings which would otherwise achieve the substantive policy goal.
- It is unclear how many enforceable undertakings were offered by the FWO but rejected by the employer, and vice versa. Although the public availability of the FWO's Enforceable Undertakings Policy and the public nature of the concluded enforceable undertakings are positive for the accountability of this sanction, there could be greater transparency around the process of negotiation of enforceable undertakings.
- The enforceability of some of the more far-reaching commitments in enforceable undertakings may be questionable on the basis that there is not a sufficient nexus between the contraventions which are the subject of the undertaking and the relevant commitments. Cases determined in other jurisdictions, such as competition and consumer regulation, may be instructive in this respect.

### **Compliance Notices and Penalty Infringement Notices**

38. Consistent with the idea of escalating sanctions in the enforcement pyramid, the availability of compliance notices was intended to provide Fair Work (FW) Inspectors with a sanction that is less time consuming and costly than court proceedings, yet more serious than a penalty infringement notice. They may be

issued where an inspector reasonably believes that a person has contravened a minimum employment standard, and may require a person to either take specified action to remedy the direct effects of the contravention, and/or produce reasonable evidence of the person's compliance with the notice within the time specified in the notice.

39. Our research indicates that there was initially only moderate use of compliance notices for much of the study period, suggesting this tool has been relatively under-utilised. As discussed in the postscript, use of this tool appears to have increased in the last financial year.
40. To further increase the use of compliance notices, the agency could consider:
  - focusing the use of compliance notices in specific circumstances where the sanction may be most appropriate, such as smaller underpayments and small to medium businesses;
  - using compliance notices strategically to build pressure on head franchisors to take steps to encourage or require greater workplace relations compliance in the relevant network or industry (e.g. via proactive compliance deeds); and
  - whether to initiate proceedings more readily against the recipient of the compliance notice for any relevant failure to comply with the terms of the notice, without insisting that these proceedings also encompass the substantive contraventions which were the subject of the compliance notice.
41. We found that on the whole, over the period from 2006 to 2012, penalty infringement notices (or PINs) were also used sparingly by the inspectorate. It appears that the agency needs to provide more incentives to FW Inspectors to make more use of PINs. This might be achieved through streamlining the approval process, introducing electronic templates for the issuing of PINs, or by otherwise actively promoting and encouraging the use of PINs by staff. Recent figures provided

to us by the FWO, and outlined in the postscript, suggest that the use of PINs is now increasing.

## **Prevention and Voluntary Rectification**

42. The FWO placed a strong emphasis on prevention and voluntary rectification of non-compliance through the agency's multi-faceted education program, including provision of information via the agency's website and social media tools, and through the agency's telephone advice services.
43. In addition, between 2010 and 2012, the federal agency increased its emphasis on dispute resolution mechanisms as an approach to achieving 'voluntary compliance' in cases of alleged breach of minimum employment standards. The agency used 'assisted voluntary resolution' (AVR) as a way of resolving complaints and reducing the number of complaint investigations, as well as offering mediation in relation to selected complaints. In March 2012, the FWO moved to formalise and extend the use of mediation as one of its enforcement options through the establishment of a one year Mediation Pilot Program.
44. Our interviews suggested that contravention letters were frequently used by FW Inspectors where contraventions had been detected and formal notification of the employer was thought to assist in achieving voluntary rectification of the contravention. Letters of caution were also used strategically in order to ensure that the FWO was in a stronger position to make certain arguments about the employer's knowledge in relation to future contraventions. This proved to be especially helpful in relation to sham contracting contraventions.
45. The achievement of voluntary compliance through education, the provision of information, and 'softer', cooperative and/or persuasive enforcement approaches is an important element of any regulatory regime, given limited resources and the different compliance motivations of employers. In practical terms, they have proved

essential to stemming the flow of complaints and managing the growing complaint caseload. However, we noted the following concerns:

- Caution must be exercised lest too much emphasis be placed on voluntary compliance at the expense of more formal sanctions higher up the enforcement pyramid as this can lead to creative compliance and other behaviours which may weaken the overall regulatory project.
- Voluntary compliance measures such as the use of mediation and AVR tends to obscure from public view the resolution of contraventions, as has been noted in other jurisdictions. This lack of transparency not only weakens the deterrent aspects of this approach, but may put these employers at higher risk of recidivism.
- While both AVR and mediation are important ways in which to manage complaint caseload and resolve matters efficiently, we believe some caution should be exercised in using these mechanisms in relation to ‘vulnerable workers’. As noted in Chapter Five, the working definition of ‘vulnerable worker’ used internally by the FWO appears to be much narrower than that set out in the Litigation Policy. In most cases, it appears that FW Advisors and Inspectors only associated overseas or young workers with being a ‘vulnerable worker’. There was limited consideration given to factors such as whether the worker was low-paid, disabled or working in an area of high unemployment, amongst other things. In practice, it is difficult for FW Advisors and Inspectors to make a full assessment of whether the worker is ‘vulnerable’ and what assistance may be required to adequately assist the person in resolving the complaint given that the current FWO Complaint Form seeks very limited information about the complainant’s background.<sup>6</sup>

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<sup>6</sup> Currently, the Office of the Fair Work Ombudsman (FWO) Complaint Form requires the complainant to provide the following details: name, contact details, date of birth, whether the person needs an interpreter, whether the employment is subject to a working visa and whether someone else has completed the form on behalf of the complainant.

- The assessment of the vulnerability or otherwise of the worker is critical given that the AVR and mediation processes are conducted on the basis of resolving only those issues which are set out in the Complaint Form. In effect, this means that it is the worker, rather than the employer, who is obliged to identify and articulate what entitlements may be owing to them. This is a much more difficult task for someone who may have literacy or numeracy difficulties or who is unfamiliar with the Australian workplace relations system.
- We suggest that the FWO consider revising the Complaint Form in order to capture the necessary information to make a full assessment of whether the complainant is a 'vulnerable worker' as defined in the Litigation Policy. If the complainant is identified as a 'vulnerable worker', the FWO should consider whether a different approach should be adopted in relation to resolving the matter. For example, the FW Advisor, Inspector or Mediator may actively seek to identify what entitlements may be owing to the person outside of those set out in the original Complaint Form.

## **Media and Communication**

46. Although not strictly falling within the concept of the enforcement pyramid, since 2006 the federal agency has been particularly effective and innovative in using public communication as part of its overall strategy in the enforcement of minimum employment standards. It has used the media to disseminate information about its enforcement activities to the public, particularly the use of sanctions, in order to maximise the deterrence impact of its actions. Indeed, the FWO has been so successful at harnessing the media to its advantage that other regulators are seeking to emulate the FWO's approach in this respect. That said, the FWO should carefully consider the content of any media releases which are issued at the commencement of litigation to ensure that they do not go beyond what is appropriate in

circumstances where the allegations set out in the statement of claim may be later amended or withdrawn.

## **Future Research**

47. In light of these preliminary findings, we believe that further research is needed to explore the implications of the FWO's activities and interventions, including: the influence of litigation and targeted campaigns on the compliance behaviour of employers and firms in the relevant industry or region; the potential effects of increasing the use of mediation in the resolution of contraventions and whether, for example, employers who resolve matters via alternative dispute resolution are at greater risk of future contraventions. There is also a need for an assessment of the effectiveness of enforceable undertakings and proactive compliance deeds in delivering deterrence, as well as bringing about sustained compliance with the FW Act.

## 1. INTRODUCTION

Between 2006 and 2012, government enforcement of minimum employment standards in Australia underwent a significant transformation. Historically, minimum employment standards such as minimum wages, maximum working hours and leave entitlements were set through industrial relations processes and industry or sectoral instruments or agreements, and were largely enforced by trade unions. The federal government maintained only a small, under-resourced labour inspectorate.<sup>7</sup> As the coverage of trade unions declined in the 1980s and 1990s, employer non-compliance with many employment standards became a significant problem.

The entry into force, in March 2006, of the Work Choices amendments to the Workplace Relations Act, heralded the ‘most significant changes in Australian labour law for 100 years’.<sup>8</sup> This included a significantly expanded capacity for government enforcement of minimum employment standards. From 2006, the federal agency responsible for enforcement (now called the Office of the Fair Work Ombudsman (FWO))<sup>9</sup> was given substantially increased resources along with new powers for labour inspectors, coupled with an earlier, significant increase in the penalties that courts are able to impose for breach of these standards. By mid-2007, the number of staff involved in employment standards enforcement had grown from 70 to 275, and the number of locations in which staff were based had increased from 4 to 26.<sup>10</sup> As at 30 June 2012, the FWO had a presence in 27 centres across Australia, with a further 26 state partner offices in New South Wales, Queensland, and South Australia delivering Fair Work Ombudsman services.<sup>11</sup>

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<sup>7</sup> The States also maintained their own small labour inspectorates, see Andrew Stewart, *Stewart’s Guide to Employment Law* (Federation Press, 2<sup>nd</sup> ed, 2009) 169.

<sup>8</sup> Ron McCallum in Joellen Riley and Kathryn Peterson, *Work Choices: A Guide to the 2005 Changes* (Thomson, 2006) (i).

<sup>9</sup> The agency was initially known as the Office of Workplace Services, and between 2007-2009, as the Workplace Ombudsman. These developments are discussed below, and in Chapter 3. For ease of reference, notwithstanding these changes in the name and nature of the agency, when discussing developments since 2006 we refer to the agency by its current name, the FWO, or as the FWO and its predecessor agencies.

<sup>10</sup> See Office of Workplace Services, *Annual Report, 2005-2006* (2006); Workplace Ombudsman, *Annual Report, 2006-2007* (2007).

<sup>11</sup> Fair Work Ombudsman, *Annual Report 2011-2012* (2012) 10.

These changes coincided with a significant shift in responsibility for setting and enforcing minimum employment standards such as wages and working hours. This responsibility, previously shared between the Commonwealth Government and multiple State governments in respect of those employed by private sector employers, is now largely the domain of the Commonwealth, with federal law covering as much as 85% of the Australian workforce.<sup>12</sup> Minimum standards are now set through a combination of legislation, industry awards and enterprise level agreements pursuant to the *Fair Work Act 2009* (Cth) (the FW Act).

The federal employment standards enforcement agency therefore has several features which distinguish it fundamentally from its federal (and State) predecessors. The agency has responsibility for a much greater number of workers. Compared to previous labour inspectorates, and in the study period, the federal enforcement agency has been better resourced, with more funding, and more staff and offices in more locations, including rural and regional areas. It has a much firmer statutory basis. It deploys a wider range of compliance strategies, and has been more willing to use litigation; for example, in its first year of operation, it increased the number of prosecutions tenfold.

However, since 2010, the level of resourcing provided to the FWO has significantly declined in real terms. The last three federal budgets have delivered substantial cuts to the agency's annual funding.<sup>13</sup> Although in 2011/2012, the FWO's compliance and education activities

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<sup>12</sup> Under Work Choices, this extension was made by relying on the Corporations Power as the basis for the amendments to the *Workplace Relations Act 1996* (Cth) (*WR Act*), so that the *WR Act* applied to all employees of a constitutional corporation: W J Ford, 'The Corporatisation of Australian Labour Law: Completing Howard's Unfinished Business' (2006) 19 *Australian Journal of Labour Law* 144. A further extension of the federal system under the *Fair Work Act 2009* (Cth) (FW Act) was negotiated with the States, with all States except Western Australia agreeing to refer their powers to regulate industrial relations of private sector employees to the Commonwealth: see A Lynch, 'The Fair Work Act and the Referrals Power – Keeping the States in the Game' (2011) 24 *Australian Journal of Labour Law* 1. The exact proportion of private sector employees covered by the federal system is not known. For discussion, see G Williams, *Working Together: Inquiry into Options for a New National Industrial Relations System* (New South Wales Government, 2007) 18-20. Previously, up to 70% of employees in some States were covered by State industrial relations systems.

<sup>13</sup> Figures extracted from the FWO's Annual Reports show the amounts as set out in the Portfolio Budget Statements for Outcome 1 - 'Compliance with workplace relations legislation by employees and employers through advice, education and where necessary enforcement'. These figures suggest that in the last three financial years the funding has steadily decreased from around \$154 million in 2009/2010, to \$149 million in 2010/2011 to \$143 million in 2011/2012. The Budget delivered in May 2013, however, stated that the federal government will provide \$25.7 million over four years to the FWO to provide compliance, education and advisory services in support of the national workplace relations system. In the same budget, the government committed to provide an additional \$3.4 million over four years to enable the FWO to

were supported by more than 325 Fair Work Inspectors (FW Inspectors), that number has since declined to 250 FW Inspectors.<sup>14</sup> This presents a number of challenges for the agency, and has resulted in some structural changes since the finalisation of our research, which we outline in the postscript to this report.

The aim of this interim report is to provide an account of an extensive empirical evaluation of the federal employment standards employment agency in its various guises over this period of transformation - between 27 March 2006 and 30 June 2012. The report is part of a larger study which is funded by the Australian Research Council, and is being carried out with the support of the FWO.<sup>15</sup> This report examines how the FWO carried out its role of monitoring and enforcing compliance with the FW Act and industrial instruments made under that Act, and also presents evidence of the patterns of federal investigation and enforcement of minimum employment standards over the period from 2006 to 2012. We seek to address two key questions:

1. How did the FWO (and its predecessor agencies since 2006) meet its statutory objectives during the study period, and how does this compare to pre-2006 enforcement of minimum employment standards in Australia? Some of the specific questions we have sought to address include:
  - a. Which regulatory techniques and strategies (eg. education, persuasion, warning, prosecution) were adopted by the FWO/Workplace Ombudsman (WO) in particular contexts (eg. in relation to small business, or in industries where non-compliance is particularly widespread)?
  - b. How did investigation/enforcement techniques differ? Did this depend on the nature of the workplace, the specific workplace entitlement and the nature of the employment?

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monitor and enforce employer compliance with 457 visa conditions. See Commonwealth of Australia, *Budget Paper No. 2 - Part 2: Expense Measures, Education, Employment and Workplace Relations* (May 2013).

<sup>14</sup> In addition to the Fair Work Inspectors (FW Inspectors) directly engaged by the FWO, there were 183 FW Inspectors working in State partner agencies and 92 dual badged Fair Work Building Industry Inspectors in 2011/2012. See Fair Work Ombudsman, *Annual Report 2011-2012* (2012) 33. The most recent Inspector numbers were provided to us by FWO staff and were current as at 29 April 2013.

<sup>15</sup> LP09990298, 'New Initiatives in Enforcing Employment Standards: Assessing the Effectiveness of Federal Government Compliance Strategies'.

2. Whether the FWO's approach to inspection and enforcement over the study period is consistent with what studies suggest is 'good practice' in the monitoring and enforcement of non-compliance. In determining good practice, we consider theories of optimal enforcement strategy drawn from studies of enforcement in other areas of social regulation, including occupational health and safety, as well as employment standards enforcement in other jurisdictions.

This study is important because workers' enjoyment of the protection of minimum employment standards depends upon their adequate enforcement. The role of the FWO in enforcing minimum employment standards has become pivotal as alternative methods of enforcement have become less viable. While trade unions continue to carry out some 'time and wages' enforcement activities, trade union representation of the workforce has been declining, and the legal system is less favourable to the monitoring role of trade unions than it was in the twentieth century.<sup>16</sup> Further, while individual employees retain a legal right to bring proceedings against employers for breach of minimum employment entitlements, they face numerous practical obstacles. In particular, the financial costs of such action act as a significant deterrent.<sup>17</sup>

The scope of our study is limited; as already noted this interim report is primarily an evaluation of the enforcement of minimum wages and working time regulation by the federal agency in the period from 2006 to 2012. Although some of our consideration of enforcement statistics relates to some other areas of the FWO's responsibility, such as sham contracting, anti-discrimination provisions in the FW Act, and enforcement of freedom of association and restrictions on industrial action, the qualitative aspects of our study have for the most part not considered these areas. This is due to the resources available for our study, and also to some extent because the FWO has generally maintained

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<sup>16</sup> Tess Hardy and John Howe, 'Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22 *Australian Journal of Labour Law* 306. The authors are engaged in a complementary research project that is examining the nature and extent of union enforcement of minimum employment standards in Australia.

<sup>17</sup> Christopher Arup and Carolyn Sutherland, 'The Recovery of Wages: Legal Services and Access to Justice' (2009) 35 *Monash University Law Review* 96.

a separate group responsible for wages and hours matters, as distinct from its other areas of responsibility, albeit these traditional divisions are under review and appear to have already shifted in some respects.<sup>18</sup>

This report also does not consider the potential compliance effects of the FWO's activities. The final stage of our broader project consists of a study of the business response to the FWO's activities, which we anticipate will allow us to make some findings concerning the effects of the FWO on compliance activity. That study is underway, and its findings will be delivered in a separate report.

## 1.1 Other Studies and Commentary

Research into the enforcement of employment conditions in Australia has until recently been very limited. This is in contrast to the many sophisticated, empirically based analyses on workplace safety issues,<sup>19</sup> illustrated, for example, by the many Working Papers from the National Centre for Occupational Health and Safety Regulation, based at the Australian National University. Issues of compliance have been largely ignored within mainstream labour relations literature, and indeed broader regulation theory scholarship.<sup>20</sup> The lack of detailed, empirical research relating to enforcement of minimum employment standards means that very little is known about the operation of enforcement agencies or the level of employer non-compliance. While the issue of standard-setting has consumed much public and scholarly debate, compliance with these standards was traditionally viewed as 'unproblematic and the activities of enforcement agencies [as] being of little interest'.<sup>21</sup>

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<sup>18</sup> See, eg, Fair Work Ombudsman, *Organisational Chart*, August 2013.

<sup>19</sup> Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: Systems and Sanctions* (Oxford University Press, 1999); Richard Johnstone *Occupational Health and Safety, Courts and Crime: The Legal Construction of Occupational Health and Safety Offences in Victoria* (Federation Press, 2003); Elizabeth Bluff, Neil Gunningham and Richard Johnstone (eds), *OHS Regulation for a Changing World of Work* (Federation Press, 2004); Neil Gunningham, *Mine Safety: Law Regulation Policy* (Federation Press, 2007).

<sup>20</sup> Margaret Lee, 'Regulating Enforcement of Workers' Entitlements in Australia: the New Dimension of Individualisation in Australia' (2006) 17 *Labour and Industry* 41; Miles Goodwin and Glenda Maconachie, 'Recouping Wage Underpayment: Increasingly Less Likely?' (2006) 41 *Australian Journal of Social Issues* 328; Miles Goodwin, *The Great Wage Robbery: Enforcement of Minimum Labour Standards in Australia* (PhD Thesis, University of New South Wales, 2003); Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (Lawbook, 1994).

<sup>21</sup> Bennett, above n 22.

A small number of studies, however, have challenged this view. Laura Bennett, in her research into the nature of enforcement in the industrial context,<sup>22</sup> was perhaps the first to go beyond a superficial analysis of the mechanics of enforcement. Her analysis showed very serious deficiencies in governmental compliance strategies. Ron McCallum, likewise, was critical of award enforcement in the early 1990s, describing the award system as a ‘safety net full of holes’.<sup>23</sup>

More recently, Miles Goodwin and Glenda Maconachie have undertaken a detailed empirical analysis of federal government enforcement of recovery of underpayment of wages for the period 1952-1995. They argue that employer non-compliance with minimum conditions has been a significant and persistent phenomenon throughout Australia’s history. Margaret Lee, too, has argued that enforcement of legal obligations has been hampered by ‘a range of structural and political obstacles hindering the agencies’ successful operation’.<sup>24</sup>

These studies, though small in number and limited in scope, have provided a foundation for further empirical research. The elevation of the role of the federal enforcement agency since Work Choices and the expansion in its powers and available remedies under the FW Act has triggered increased academic interest in enforcement of workplace relations laws in Australia.<sup>25</sup> In particular, Goodwin and Maconachie have critiqued aspects of the federal agency’s investigation and enforcement strategy in a series of papers. For example, in one paper they examined the extent to which the Workplace Ombudsman (WO) was using the inspection ‘blitz’, or unannounced workplace audit, as a compliance strategy.<sup>26</sup> This

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<sup>22</sup> Ibid.

<sup>23</sup> Ron McCallum, ‘The Imperfect Safety Net: The Enforcement of Federal Awards and Agreements’ in Ron McCallum, Greg McCarry and Paul Ronfeldt (eds), *Employment Security* (Federation Press, 1995).

<sup>24</sup> Lee, above n 22, 41.

<sup>25</sup> See, for example, Hardy and Howe, ‘Partners in Enforcement?’, above n 18; Karen Wheelwright, ‘Enforcement under Work Choices: Recent Developments’ (2007) 13 *Employment Law Bulletin* 58, 64; Lee, above n 22.

<sup>26</sup> On the basis of a review of publicly available data, media reports and industry publications, they argued that the agency did not litigate in relation to contraventions detected as a result of the agency’s targeted campaigns. Glenda Maconachie and Miles Goodwin, ‘Transforming the inspection blitz: Targeted campaigns and the Ombudsman’ (2010) 21(1) *Labour and Industry* 369. Another Goodwin and Maconachie study compared the FWO’s use of enforceable undertakings with other regulators that have had a more longstanding capacity to use this approach to compliance: Miles Goodwin and Glenda Maconachie, ‘Enforceable undertaking: a new mechanism for minimum labour standards’ enforcement’ (Paper presented at 26th AIRAANZ Conference 2012 : Re-organising Work, Surfers Paradise, Australia, 8-10 February 2012).

critique is examined in Chapter 5 of this report. These authors have also explored the extent to which the agency's establishment as an independent statutory agency gives it sufficient freedom from political influence, a concern which plagued the early days of the OWS under Work Choices.<sup>27</sup>

Since the establishment of the WO, public comment by unions and employers concerning the enforcement role of the federal agency has, overall, been positive. A useful source of stakeholder views is the submissions to the recent Fair Work Act Review, conducted by an expert panel appointed by the federal government.<sup>28</sup>

The Review Panel noted in its final report:

'Perhaps not surprisingly for an organisation of 952 employees spread over 26 locations in Australia, we received a wide range of views about the operations of the FWO. Strong support came from Ai Group, who indicated that FWO "carries out its functions in an effective manner and works hard to consult and maintain good working relations with employer groups and unions". They also complimented the activities of Fair Work Inspectors, noting that in nearly all instances in which Ai Group had been involved, the inspectors had used their powers appropriately. In the small number of cases where they took concerns to a more senior level, the matters were resolved satisfactorily.

The SDA was also a clear supporter of the FWO, commenting favourably on its information services including the website and pay calculator. The union noted that the "increased educative role for the FWO, combined with random auditing following training, most certainly helps employers and employees to better understand their rights and obligations under the Act".<sup>29</sup>

There have been two areas where stakeholders have consistently been critical of the FWO. The first is in relation to the FWO's practice of providing advice concerning the interpretation of particular standards or rules under the FW Act. In public comment and in submissions to the Fair Work Act Review, both employers and unions have criticised the

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<sup>27</sup> Glenda Maconachie and Miles Goodwin, 'Does institutional location protect from political influence? The case of a minimum labour standards enforcement agency in Australia' (2011) 46(1) *Australian Journal of Political Science* 105.

<sup>28</sup> John Edwards, Ron McCallum and Michael Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, June 2012 ('FW Act Review Report').

<sup>29</sup> Ibid 253-254, footnotes omitted.

accuracy and consistency of the advice given by the FWO.<sup>30</sup> Some have argued it is a conflict of interest for the agency to perform both advisory and compliance functions, suggesting that the advisory role should be instead given to Department of Education, Employment and Workplace Relations (DEEWR).<sup>31</sup>

Unions have also criticised the FWO for bringing proceedings against unions, union officials and workers in relation to unlawful industrial action. The Australian Council of Trade Unions (ACTU) has argued that this area of the law can be enforced by employers without assistance from the regulator, and that the FWO should focus on assisting non-unionised workers enforce their rights.<sup>32</sup>

The Fair Work Act Review Panel considered these criticisms, but concluded that: 'Our overall impression is that the FWO has been successful in carrying out its education and enforcement activities, and has the right tools at its disposal to further enhance those activities. We are particularly impressed with its informative and functional website, which we consider could serve as an example for other similar institutions.'<sup>33</sup> The Panel did not make any recommendations for reform of the FWO or its powers in relation to its role in promoting and enforcing compliance with minimum employment standards.<sup>34</sup>

Notwithstanding the scholarship and commentary we have outlined above, to date there has not been a comprehensive evaluation of the enforcement of minimum employment standards in Australia in the context of various changes introduced since 2006. Our research seeks to address that gap through an extensive inquiry into enforcement of

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<sup>30</sup> See, for example, Australian Chamber of Commerce and Industry, Submission to Fair Work Act Review Panel, *Fair Work Act Review*, March 2012 and Australian Council of Trade Unions, Submission to Fair Work Act Review Panel, *Fair Work Act Review*, 17 February 2012. Submissions to the Review can be found at: <http://home.deewr.gov.au/submissions/FairWorkActReview/Initial.htm> (last viewed 23 September 2013).

<sup>31</sup> Australian Chamber of Commerce and Industry, Submission to Fair Work Act Review Panel, *Fair Work Act Review*, March 2012, 179-180; and Restaurant and Catering Australia, Submission to Fair Work Act Review Panel, *Fair Work Act Review*, 17 February 2012, 12, 14.

<sup>32</sup> Australian Council of Trade Unions Submission, to Fair Work Act Review Panel, *Fair Work Act Review*, 17 February 2012.

<sup>33</sup> *FW Act Review Report*, above n 30, 255, footnotes omitted.

<sup>34</sup> The Fair Work Act Review Panel did, however, make recommendations in relation to: 1) the FWO's role in working with FWA to actively encourage more productive workplaces; and 2) the FWO being the body responsible for lodgement of individual flexibility agreements.

employment conditions in Australia since that time. This report presents our empirical findings, and is intended to be a thorough and critical analysis of the role played by the federal enforcement agency since Work Choices to 2012.

## 1.2 Methodology

The methodology upon which this report is based is a combination of quantitative and qualitative assessment of the regulatory practices observed by the FWO. We relied upon three main sources of data:

- (i) Analysing FWO data on investigations, detection, education/media and use of sanctions, supplemented by our own data collection from public sources (quantitative);
- (ii) Interviews with the FWO staff and participant observation (qualitative);
- (iii) Analysing FWO policy documents, published decisions in FWO cases and FWO enforceable undertakings.

The first two phases of this research have involved documentary analysis, followed by over 50 in-depth, semi-structured, qualitative interviews with FW Inspectors in capital cities and some regional areas, managerial staff at the FWO who are responsible for the operation of the FWO more generally, and lawyers situated in the FWO's legal branch. Most of the interviews were conducted in 2010 and 2011. The inspector interviews were selected on the basis of the individual inspectors' involvement in, or responsibility for, investigation of complaints or targeted campaigns directed at breaches of minimum standards pertaining to wages and working hours. In addition to selecting interviewees from different geographic areas, the authors endeavoured to select a combination of both more experienced and less experienced inspectors. The FWO assisted in the selection of interviewees.

We also interviewed some employees of state partner offices/state inspectorates, as well as a small number of external lawyers with experience acting for the FWO, or on behalf of employers that were being investigated or litigated against by the FWO.

Documentary analysis has included review of both internal and publicly available FWO documentation, including the various FWO Guidance Notes and the FWO Operations Manual, both of which are followed by FW Inspectors and other staff in carrying out inspection and enforcement activities.

In order to examine the patterns of the FWO investigation and enforcement activity discussed in Chapters 5 and 6, this project has drawn upon a number of different sources of data:

- Data drawn from the FWO Annual Reports and public speeches and presentations, supplemented by commissioned research from FWA, analysing data from sources including the Australian Bureau of Statistics and other sources;
- Data drawn from the FWO's own case management system, provided to us by the FWO;
- Our own review of relevant decisions and orders relating to court actions that can be either publicly sourced (via the FWO website or Austlii) or which has been provided to us by the FWO, as well as enforceable undertakings, which are all made available on the FWO's website. In some cases, there is very limited information available on litigation (no orders, transcripts or decisions). In these instances, we have relied on the FWO summaries available on the Legal section of the website, albeit this also appears to be incomplete in relation to some financial years.

Our analysis of this data in the report draws on both comparative study of labour enforcement, and the extensive regulation and compliance literature, which is discussed in detail in Chapter 2.

### **1.3 Structure of the Report**

In the following section of our report, Chapter 2, we discuss the problem of employer non-compliance with legal minimum standards, and present perspectives on the various

approaches by which regulatory enforcement of employment standards may be carried out. We present our findings as to good practice in regulatory enforcement, some of which are drawn from employment standards enforcement in other jurisdictions.

In Chapter 3, we explain the historical background of the enforcement of employment standards in Australia prior to 2006. This background assists us in comparing the Office of Workplace Services (OWS), the WO and the FWO's approach and performance to those of federal inspectorates before 2006.

Chapters 4, 5 and 6 of the report consider the goals and structure of the agency, its approach to investigation, and its enforcement practices for the period from 2006 to 2012.

In Chapter 4, we discuss the statutory functions of the agency, as well as its goals as determined by a review of agency policies and speeches, and our interviews with agency personnel. We then explain the internal structure of the agency, and the investigation and enforcement powers of inspectors and the agency as a whole as it stood at 30 June 2012. As noted above, the internal structure of the FWO has undergone some change since that time.

Chapter 5 presents our findings concerning the pattern of the FWO's education and investigation activities during the study period. In particular, we provide a detailed analysis of the FWO's detection strategies and the balance struck by the agency between responding to complaints and targeted campaigns and compliance audits.

Chapter 6 is a detailed analysis of the enforcement activities of the FWO under the relevant provisions during the first six years of the agency's operation, including the number of litigation matters completed; the nature of contraventions litigated; trends and patterns in the types of employer and the context of litigation, in particular the agency's use of accessorial liability; and the outcomes of the FWO litigation. We also discuss the agency's use of administrative sanctions such as enforceable undertakings, proactive compliance deeds, compliance notices, infringement notices, as well as other enforcement tools. A more

detailed explanation of our methodology in the preparation of civil litigation data is explained in Appendix 1.

A final postscript chapter outlines some developments at the FWO since 30 June 2012 which are relevant to the content and recommendations of our report.

## **2. THEORETICAL AND COMPARATIVE PERSPECTIVES ON GOOD PRACTICE IN ENFORCEMENT**

As we noted in the Introduction to this report, the primary concern of most studies of the operation of Australian labour law has been on the standards set by regulation, and the processes by which these standards are set, with compliance considered unproblematic. However, the extent of non-compliance already detected by the Fair Work Ombudsman (FWO) and its predecessors from 2006 to 2012, in combination with historical studies of enforcement and compliance with minimum employment standards, demonstrate that compliance is a major and ongoing challenge for minimum employment standards enforcement in Australia.

This chapter considers the evidence of employer non-compliance in this context, and discusses some of the theoretical and empirically-based literature on the reasons why businesses often do not comply with social regulation, such as labour laws. The chapter then explores some theories concerning the role of enforcement in regulation, and describes some different systems of employment standards enforcement, drawing on comparative studies. We also consider some optimal or ‘good practice’ enforcement approaches and strategies, and highlight some issues which will inform this study of the FWO’s enforcement practices.

### **2.1 The problem of non-compliance with employment standards**

Legal minimum employment entitlements are useful only in so far as they are observed. As well as providing for a process for the establishment of norms or standards, most regulatory systems will also include a system by which compliance with those norms is monitored, and a mechanism ‘for holding the behaviour of regulated actors within the acceptable limits of the regime (whether by enforcement action or by some other mechanism).’<sup>1</sup>

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<sup>1</sup> Colin Scott, ‘Analysing Regulatory Space: Fragmented Resources and Institutional Design’ (2001) *Public Law* 329, 331.

Why are monitoring and enforcement mechanisms necessary? Unfortunately, as the discussion below reveals, it cannot be assumed that employers will necessarily comply with minimum employment standards in Australia. It is therefore important that there are effective and efficient education, monitoring and enforcement mechanisms in place to maximise compliance with minimum employment standards set under the FW Act. Before we consider some of the factors influencing compliance with employment standards in Australia, and the barriers to achieving effective enforcement of those standards, we first assess the evidence concerning the extent of employer non-compliance in Australia.

As we discuss more fully in Chapter 5, current levels of non-compliance with employment standards are inherently difficult to measure and limited independent information is available. Goodwin and Maconachie sought to quantify the extent of employer evasion of employment standards in Australia between 1952 and 1995 through analysis of the historical complaints data of the federal labour inspectorate on the basis that ‘complaint levels are a reasonable indicator of non-compliance levels’.<sup>2</sup> Contrary to the common conjectures about employer compliance in Australia, their research revealed that employer non-compliance with minimum employment standards through this period was both significant and sustained.<sup>3</sup> That said, research undertaken elsewhere casts some doubt on the reliability of compliance measures based solely on complaints data. In particular, studies undertaken in the United States have shown that the level of complaints under represents the level of employer compliance – a gap which is perhaps most conspicuous in industries characterised by precarious working arrangements.<sup>4</sup> Goodwin and Maconachie also conceded that the complaints data on which they relied was likely to represent ‘a gross underestimate of employer evasion in Australia.’<sup>5</sup>

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<sup>2</sup> Glenda Maconachie and Miles Goodwin, ‘Recouping Wage Underpayment: Increasingly Less Likely?’ (2006) 41(3) *Australian Journal of Social Issues* 327, 339.

<sup>3</sup> Miles Goodwin and Glenda Maconachie, ‘Unpaid entitlement recovery in the federal industrial relations system: Strategy and outcomes 1952–95’ (2007) 49(4) *Journal of Industrial Relations* 523.

<sup>4</sup> David Weil and Amanda Pyles, ‘Why Complain? Complaints, Compliance and the Problem of Enforcement in the US Workplace’ (2005) 27(1) *Comparative Labor Law and Policy Journal* 59.

<sup>5</sup> For example, they noted that the data they reviewed did not necessarily include cases where non-compliance had been effectively addressed by unions through direct negotiations with employers or individually by employees through other means. Maconachie and Goodwin (2006) above n 2, 340. More importantly, their analysis did not capture cases where the employee failed to voice any complaint about his or her working conditions.

Some more recent figures concerning possible non-compliance come from a study of employees earning below the Federal Minimum Wage (FMW) in 2007 by the Minimum Wages Branch of Fair Work Australia (FWA).<sup>6</sup> The study drew on three existing labour market data sources in seeking to establish the number and characteristics of employees earning below or just above the NMW, including the *Survey of Employment Arrangements, Retirement and Superannuation* (SEARS); the *Survey of Income and Housing* (SIH) and the *Household, Income and Labour Dynamics in Australia* (HILDA) Survey. All three collect a wide range of relevant information at an individual and household level. The ABS *Employee Earnings and Hours* (EEH) survey, which includes information on the method by which pay is set, was another relevant data source. According to the FWA Minimum Wage Branch study the SIH data showed that 7.5 per cent of all adult employees earned below the FMW), including 3.6 per cent who earned well below the FMW. In the SEARS data, the corresponding figures were 9.2 and 4.0 per cent, and for the HILDA they were 6.8 per cent and 2.6 per cent.

The study found that compared to all adult employees, employees earning below the FMW and just above the FMW were more likely to be employed in the industry categories of: agriculture, forestry, and fishing; retail trade; accommodation and food services; administrative and support services, and other services. Accommodation and food services and agriculture, forestry and fishing were particularly over-represented for employees earning below the NMW. The study also found that those employees earning below the NMW were more likely to be employed as labourers, sales workers and community and personal service workers. Also over-represented were employees working 60 hours per week or more, and small businesses with between 1-9 employees.

As the study makes clear, non-compliance with the laws concerning minimum wages was only one of a number of possible reasons for employees earning below the FMW. Other

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<sup>6</sup> Lucy Nelms, Peter Nicholson and Troy Wheatley, *Employees Earning below the Federal Minimum Wage: Review of data, characteristics and potential explanatory factors*, (Research Report 3/2011, Fair Work Australia, 2011). For earlier studies, see S McGuinness, J Freebairn and K Mavromaras, *Characteristics of Minimum Wage Employees* (Research Report No 2/07, Australian Fair Pay Commission, 2007); Seamus McGuinness, Elizabeth Webster and Kostas Mavromaras, *What are the characteristics of the employers of the low paid in Australia?*, Report commissioned by the Australian Fair Pay Commission (2006).

reasons could be: the exclusion of certain groups of employees from the FMW, such as trainees or people with a disability; some employees may have been recorded as earning below the FMW on an hourly basis due to working long hours and/or working unpaid overtime; and the data may not take into account non-cash remuneration such as salary sacrifice. Nevertheless, the study concluded 'there is evidence to indicate that non-compliance and cash-in-hand employment provide at least a partial explanation of why employees were observed to have been earning below the FMW' based on the fact that 'the limited evidence on non-compliance is consistent with the patterns we observe for below FMW employment in relation to industry, occupation, and age group, and employees working long hours appeared to account for a notable percentage of employees who were observed to earn below the hourly FMW'.<sup>7</sup>

The FWA study was limited in scope, only reviewing employee pay against one specific employment standard set by federal labour legislation, the NMW. Of more utility, and potentially of more concern, is the FWO's findings concerning compliance with a range of minimum employment standards through audits of employers. We present more detailed analysis of FWO's detection of non-compliance in Chapter 5, however, for current purposes we note that the average rate of non-compliance in national audits finalised by the FWO in the 2010-2011 financial year<sup>8</sup> was around 33 per cent.<sup>9</sup> Approximately, one half to one third of the contraventions identified in these campaigns related to underpayment of wages and/or allowances. In some industries, ranging from hospitality to real estate, and regions from regional Victoria to the Gold Coast, employer non-compliance was found to be

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<sup>7</sup> Ibid.

<sup>8</sup> In 2010/2011, national targeted campaigns were finalised by the Office of the Fair Work Ombudsman ('FWO') in the following industries: contract cleaning; insulation installers; and horticulture. In addition, a national follow-up campaign undertaken across a mix of different industries was also finalised. In this particular campaign, the FWO sought to target employers who it suspected may not be complying with workplace relations laws, despite previous interaction with the FWO. Entities were targeted either because they had a non-compliance history, Fair Work ('FW') Inspectors held concerns regarding their level of engagement during a previous investigation/audit or they had previously received education assistance from the FWO. See Fair Work Ombudsman, *National Follow Up Campaign Final Report* (August 2010) Fair Work Ombudsman <<http://www.fairwork.gov.au/campaignresults/National/National-Follow-Up-Campaign-Final-Report-2010.pdf>>.

<sup>9</sup> This figure is an estimate only and may not accurately represent the true level of non-compliance. On the one hand, it may overestimate employer non-compliance in that the audit sample is not entirely random and may include businesses which have been flagged through various channels as more likely to be in contravention of the relevant standard. On the other hand, the figure may underestimate the overall rate of non-compliance given that a number of investigations were ongoing at the time the relevant reports were published by the FWO.

greater than 50 per cent.<sup>10</sup> These findings are supported by a recent study of low-paid workers in Victoria which similarly found that many were not receiving their statutory entitlements.<sup>11</sup>

It is not only the breadth, but the depth of non-compliance which is of concern, as revealed by successful civil litigation by the FWO in recent years. For example, in 2011, the FWO brought a case on behalf of a number of section 457 workers who had been recruited from China by a Western Australian construction company. The qualified tradesmen were paid as little as \$3 an hour and required to work 10 to 11 hours a day, six to seven days a week with no penalty rates or leave entitlements. In addition, pay of up to four months' wages was withheld by the employer for expenses associated with organising their work visas. The five workers were ultimately found to have been underpaid approximately \$240,000.<sup>12</sup> Unfortunately, this is not an isolated case. Similar instances of extreme and deliberate exploitation have been found in respect of other vulnerable employees working in various industries from call centres<sup>13</sup> to convenience stores<sup>14</sup> to Japanese restaurants,<sup>15</sup> amongst others.

### *Drivers of Non-Compliance in Australia*

Research into why businesses do or do not comply with social regulation such as labour laws has found that firms and the people who manage them respond to a variety of motivational factors.<sup>16</sup> Under the traditional economic conception of compliance, profit-seeking firms are motivated only by economic self-interest, and comply with regulation

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<sup>10</sup> See, eg, Fair Work Ombudsman, *Mornington Peninsula Hotels and Restaurant Campaign Final Report* (June 2011) Fair Work Ombudsman <<http://www.fairwork.gov.au/campaignresults/VIC/VIC-Mornington-Peninsula-Hotels-and-Restaurant-Campaign-Final-Report.pdf>>.

<sup>11</sup> For example, the study found that a significant proportion of low-paid workers did not receive a pay rise during a period in which such a rise in the minimum wage was mandated by the Australian Fair Pay Commission. Further, many employees reported that they worked more hours than for what they were paid. See Sandra Cockfield, Donna Buttigieg, Marjorie Jerrard and Al Rainnie, 'Assessing the Impact of Employment Regulation on the Low-Paid in Victoria' (2012) 22(2) *The Economic and Labour Relations Review* 131.

<sup>12</sup> See *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3)* [2011] FCA 579.

<sup>13</sup> See *Fair Work Ombudsman v Contracting Plus Pty Ltd & Anor* [2011] FMCA 191.

<sup>14</sup> See *Fair Work Ombudsman v Bosen Pty Ltd & Ors* (Unreported, Magistrates' Court of Victoria, 21 April 2011).

<sup>15</sup> See *Workplace Ombudsman v Golden Maple Pty Ltd & Ors* [2009] FMCA 664.

<sup>16</sup> Robert A Kagan, Neil Gunningham, and Dorothy Thornton, 'Fear, Duty and Regulatory Compliance: Lessons from Three Research Projects' in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011), 37.

only when they believe that non-compliance is likely to be detected and penalised. According to this model, many employers will fail to comply with minimum standards regulation if the financial benefit gained by not complying with these standards - for example, paying less than the minimum wage - outweigh the potential costs (risk of detection or complaint and the amount of penalty if prosecuted).<sup>17</sup>

However, studies of business compliance have revealed that in addition to material considerations and the threat of formal legal sanctions, the level of compliance may be influenced by perceptions of the seriousness of a specific crime or regulation, the significance of the 'social licence to operate' of a given firm, and the moral and ethical consciousness of individuals within the firm.<sup>18</sup> Moreover, different motivations may interact - for example, corporate managers with higher levels of moral consciousness are more likely to react to the threat of legal sanctions.<sup>19</sup>

The reasons for employer non-compliance in Australia have not been conclusively or exhaustively identified and depend on a whole range of structural, political, social and economic dynamics. We saw earlier that the shortcomings in government enforcement of minimum employment standards may have been a factor in employer non-compliance before 2006. In this report we will detail the transformation in enforcement that occurred between 2006 and 2012. Notwithstanding the increased enforcement activity and profile that resulted, there are a number of circumstances which appeared to influence and exacerbate compliance and enforcement problems in the Australian context, and which must be confronted by the federal enforcement agency.

These include economic factors such as competition in product markets, changing patterns of production, increased labour migration and rapid technological advances. For example,

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<sup>17</sup> See, for example, A Mitchell Polinsky and Steven Shavell, 'The Economic Theory of Public Enforcement of Law' (2000) 38(1) *Journal of Economic Literature* 45; Steven L Willborn, 'Public vs. Private Enforcement of Labor Statutes: Differences Over the Economic Cycle' (Paper presented at Regulating for Decent Work Conference: Regulating for a Fair Recovery, International Labor Organization, Geneva, Switzerland, July, 2011).

<sup>18</sup> See, generally, Kagan, Gunningham and Thornton, above n 16, and Sally S Simpson and Melissa Rorie, 'Motivating Compliance: Economic and Material Motives for Compliance', in Parker and Nielsen, above n 16.

<sup>19</sup> Simpson and Rorie, above n 18, 65.

it seems that greater exposure to global markets has increased competition at the same time as reducing profit margins. The quest for maximum business flexibility at minimum cost often leads employers, sometimes unwittingly and often recklessly, to exploit labour through various means.<sup>20</sup> This has prompted various changes to work organisation and labour market arrangements. A push for a reduction in operating costs and lean production has led to an intensification of work processes through business process re-engineering. For example, a significant minority of the workforce are now required to work longer hours than in the past. There is also an increasing proportion required to work non-standard working hours, such as weekends and evenings, or in new ways, such as 'remote' work.<sup>21</sup> There has also been a marked swing towards fragmented working arrangements, such as outsourcing and labour hire, and a growth in complex and elaborate supply chains. The use of sham and bogus contracting to avoid employment regulation also appears to be on the rise in industries which were not previously exposed to such practices, such as cleaning.

Some have suggested that this shift is simply a reflection of the growing business desire to focus on 'core competencies'.<sup>22</sup> Others have blamed these trends, particularly in labour-intensive industries, on the vertical disaggregation of firms on the back of the network supply chain model.<sup>23</sup> In comparison, there are others who have pointed out that the challenge of regulating contingent and complicated work arrangements is not a new one, although, the scale of the challenge has increased over time.<sup>24</sup>

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<sup>20</sup> Richard P Chaykowski and Morely Gunderson 'The Implications of Globalization for Labour and Labour Markets' in Richard P Chaykowski (ed) *Globalization and the Canadian Economy: The Implications for Labour Markets, Society and the State* (School of Policy Studies, 2001), 27-60.

<sup>21</sup> Philip Bohle and Michael Quinlan, 'Editorial – Long Working Hours and OHS: What Have We Learned?' (2005) 21 *Journal of Occupational Health and Safety – Australia and New Zealand* 275. See also Australian Council of Trade Unions, *Voices from Working Australia – Findings from the ACTU Working Australia Census 2011* (Working Australia Paper No 6, September 2011).

<sup>22</sup> David Weil, *Improving Workplace Conditions Through Strategic Enforcement, A Report to the Wage and Hour Division* (US Department of Labour), May 2010, 9.

<sup>23</sup> See Peter Buckley and Jonathan Michie (eds), *Firms, Organisations and Contracts: A Reader in Industrial Organisation* (Oxford University Press, 1996).

<sup>24</sup> For instance, Quinlan has pointed out that in order to address sweating, legislation was enacted over a century ago in Australia which contained specific provisions relating to outwork. Michael Quinlan, 'Contextual Factors Shaping the Purpose of Labour Law: A Comparative Historical Perspective', in Christopher Arup et al, *Labour Law and Labour Market Regulation* (Federation Press, 2006), 39.

Another problem which has potentially grown in the past few years, given the pace of regulatory change in Australia, is the nature of the regulatory framework. It has been argued that Australian employers may be contravening the law simply out of confusion or ignorance given the pace of legislative change and the current complexity of the regulatory environment, including the modernisation of awards and various transitional provisions.<sup>25</sup> Indeed, the Australian workplace relations system has long been complicated and the present difficulties are partly due to this historical legacy.<sup>26</sup>

In the absence of any data on the extent of confusion and ignorance concerning employment standards among Australian employers, the following discussion provides an outline of the findings of studies in other areas of social regulation. These studies suggest that although motivations to comply are critical, a willingness to do the right thing may be insufficient if the target of regulation does not have knowledge or awareness of the relevant regulation or the capacity to comply.<sup>27</sup> In relation to the first of these preconditions, it seems that there are several reasons why awareness or knowledge of the rules on the part of regulated firms cannot be assumed. For instance, the regulation may be too new or not adequately publicised. Further, even if the regulated community is generally aware of the existence of the regulation, details of the specific rules may not be readily understood. This is particularly the case where the regulation is broad, ambiguous or complex

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Second, firms must also have the financial and technical capacity to comply, particularly if compliance is complicated or entails extra costs, such as more onerous reporting and

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<sup>25</sup> See Patricia Todd, 'Employer and Employer Association Matters in 2010' (2011) 53(3) *Journal of Industrial Relations* 353, 359.

<sup>26</sup> For example, there is no common minimum wage across industries, but rather several hundred. Other terms and conditions, such as penalty rates and ordinary working hours, may also vary depending on the provisions of the applicable 'modern award' – a statutory instrument setting out minimum terms and conditions of employment for particular sectors and occupations. For scholarly consideration of the complexity of Australian labour law, see Mark Bray and Peter Waring, "'Complexity" and "congruence" in Australian labour regulation' (2005) 47 *Journal of Industrial Relations* 1; and Joel Fetter and Richard Mitchell, 'The Legal Complexity of Workplace Regulation and Its Impact upon Functional Flexibility in Australian Workplaces' (2004) 17 *Australian Journal of Labour Law* 276; Andrew Stewart, 'A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation' (2005) 31 *Australian Bulletin of Labour* 210.

<sup>27</sup> Søren C Winter and Peter J May, 'Motivation for Compliance with Environmental Regulations' (2001) 20 *Journal of Policy Analysis and Management* 675.

<sup>28</sup> *Ibid* 680.

administrative requirements. While this aspect of compliance is relevant to the utility calculus at the heart of economic theories of deterrence, it is also a relevant factor in respect of the normative and social motivations. Although a regulated firm may feel compelled to comply on a normative basis, or be subject to some form of social pressure to comply, compliance will ultimately not occur unless the entity also has sufficient resources to comply. Indeed, Kagan and Scholz suggested that one of the most influential factors affecting the economic rationalities informing business attitudes to compliance was the ability to pass on the costs of compliance to third parties, such as consumers.<sup>29</sup> Where the costs of compliance outweigh the benefits of production, this may not only lead to competitive disadvantages, it can also perpetuate communication and compliance gaps (such as through increased subcontracting):<sup>30</sup> a trend which is well-documented in the OHS sphere.<sup>31</sup>

The size of the firm and the industry structure has also been found to be highly influential in terms of compliance. While some studies have cautioned against making any generalisations based on the attitudes of organisations within any specific sector or according to their size,<sup>32</sup> other research, in a range of different policy contexts,<sup>33</sup> has found a significant compliance gap between larger and smaller firms which is not only linked to

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<sup>29</sup> This finding was supported by findings in later studies, including that undertaken by Loosemore and Adonakis of small subcontractors in the construction industry in Australia. They found that implementation costs were one of the primary inhibitors of compliance with health and safety laws: M Loosemore and N Adonakis, 'Barriers to Implementing OHS Reforms – The Experiences of Small Subcontractors in the Australian Construction Industry' (2007) 25(6) *International Journal of Project Management* 579. Similarly, Genn's cross-sectoral study of forty industrial and agricultural sites in the UK found that a critical variable in compliance was the cost of compliance relative to the benefits likely to accrue to the company. See Hazel Genn, 'Business Responses to the Regulation of Health and Safety in England' (1993) 15(3) *Law and Policy* 219.

<sup>30</sup> Winter and May, above n 27. See also Fiona Haines, 'The Show Must Go On: The Response to Fatalities in Multiple Employer Workplaces' (1993) 40 *Social Problems* 547.

<sup>31</sup> See Richard Johnstone and Michael Quinlan, 'The OHS Regulatory Challenges Posed by Agency Workers: Evidence from Australia' (2006) 28(3) *Employee Relations* 273.

<sup>32</sup> See Michael Wright, Sara Marsden and Ali Antonelli, *Building an Evidence Base for the Health and Safety Commission Strategy to 2010 and Beyond: A Literature Review of Interventions to Improve Health and Safety Compliance* (Research Report 198, Health and Safety Executive, 2004). See also Filippa Corneliussen, 'The Impact of Regulations on Firms: A Case Study of the Biotech Industry' (2005) 27(3) *Law and Policy* 429.

<sup>33</sup> For example, this trend has been observed in occupational health and safety (Genn, above n 29); competition law (Vibeke Lehmann Nielsen and Christine Parker 'The ACCC Enforcement and Compliance Survey: Report of Preliminary Findings', report for the Centre for Competition and Consumer Policy, Australian National University, Canberra (2005); and food safety regulation (Robyn Fairman and Charlotte Yapp, 'Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement' (2005) 27(4) *Law & Policy* 491).

the relative capacities to comply,<sup>34</sup> but the ability to challenge how deviance is defined and determined.<sup>35</sup>

In terms of capacity, smaller firms are more likely to fall into non-compliance given that they have fewer resources available to them and are therefore less responsive to regulatory developments. In particular, the capacity and motivations to comply may be compromised in small businesses by a lack of expertise, competitive pressures and cost concerns.<sup>36</sup> Smaller firms have more condensed management structures and corporate lifespans, which together present fewer opportunities for building regulatory knowledge and compliance expertise.<sup>37</sup> These problems are further exacerbated by the limited accessibility of specialist legal, human resources and accounting expertise.<sup>38</sup>

The problem of organisational ignorance and systemic non-compliance is not, however, confined to small businesses. While large businesses may have more reasons to comply with minimum employment standards,<sup>39</sup> this assumption should not be overstated. Large businesses often struggle to keep on top of their workplace obligations, particularly where the organisation has reduced control through outsourcing its operations or engaging a transient workforce.<sup>40</sup> On the other hand, the fact that larger firms have more resources and power can mean that they have an increased capacity to challenge and subvert the definition and measures of compliance and are more easily able to conceal contraventions and ward off detection by regulatory officials.<sup>41</sup> In particular, the powerful position of large businesses and their dominant relationship with the state means that they can often

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<sup>34</sup> Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford University Press, 1986).

<sup>35</sup> Peter C Yeager, *The Limits of the Law The Public Regulation of Private Pollution* (Cambridge University Press, 1991).

<sup>36</sup> Fiona Haines, *Corporate Regulation: Beyond Punish and Persuade* (Clarendon Press, 1997).

<sup>37</sup> Fairman and Yapp, above n 33; Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford University Press, 1986); Bridget Hutter and Clive Jones, 'Business Risk Management Practices: The Influence of State Regulatory Agencies and Non-State Sources' (Discussion Paper No DP41, CARR, June 2006).

<sup>38</sup> See Fairman and Yapp, above n 33.

<sup>39</sup> Kagan notes that larger firms are more likely to be law-abiding because: 'their prominence and potential for doing harm, [means they] can expect more frequent contact with regulatory officials...Partly because their violations are more visible, partly because they are often more concerned about maintaining a public image as responsible corporate citizens, larger enterprises are more likely to have a staff of regulatory officials.' See Robert Kagan, 'Understanding Regulatory Enforcement' (1989) 11 *Law & Policy* 89.

<sup>40</sup> Gunningham and Johnstone, above n 21, 5.

<sup>41</sup> Kagan, Gunningham and Thornton, above n 16.

initiate or encourage regulatory developments which are geared towards their business objectives, but are not well-suited to small businesses.<sup>42</sup>

It is evident from the preceding discussion that compliance motivations are multi-faceted and relational.<sup>43</sup> Non-compliance can arise in a variety of ways – regulatees may not be aware or appreciate regulatory requirements, may not agree with them, may not be capable of compliance, or simply may not care – and in a variety of business contexts. As will be discussed later in this report, unravelling the ‘puzzle’<sup>44</sup> of corporate motivation and regulatory forms appears to be critical to ensuring that resources are targeted effectively, trust and legitimacy in the regulatory process is strengthened and strategies for achieving deterrence are refined.

## 2.2 Approaches to Regulatory Enforcement and Compliance

Although we have identified a number of reasons why firms may not comply with employment standards regulation, empirical studies of regulation and compliance have shown that the nature and extent of regulatory enforcement activity is a key institutional pressure on firms.<sup>45</sup> In the next two parts of this chapter, we discuss some of the most important factors relevant to the impact of regulatory enforcement on compliance. These factors are relevant to our discussion and analysis of the FWO’s enforcement of minimum employment standards in this report. In this part, we consider the various ways in which regulation and enforcement can be structured, and the importance of the goals, resourcing and internal organisation of the enforcement agency. In the following part, we discuss various theories on how regulatory enforcement strategy is best designed to achieve compliance by regulated firms.

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<sup>42</sup> John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Edward Elgar, 2008).

<sup>43</sup> See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); Valerie Braithwaite, Kristina Murphy and Monika Reinhart, ‘Taxation Threat, Motivational Postures and Responsive Regulation’ (2007) 29(1) *Law & Policy* 137.

<sup>44</sup> Neil Gunningham and Robert Kagan, ‘Regulation and Business Behaviour’ (2005) 27(2) *Law & Policy* 213.

<sup>45</sup> For a summary of this literature, see Christine Parker and Vibeke Lehmann Neilsen, *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011).

## *Nature of Regulatory Framework and Rules*

First, as our discussion of possible reasons for Australian employer non-compliance with employment standards suggested, consideration should be given to the regulatory framework itself. The enforcement of laws may be affected by the substance and form of the rules or laws themselves, as well as the range, strength and legitimacy of the powers of investigation and enforcement provided to the regulator.<sup>46</sup> For example, in relation to the former, the extent to which rules are specific or vague, prohibit certain acts or set broad standards to be achieved, and are accessible and reasonable, may have implications for the effective enforcement of those rules.<sup>47</sup> In relation to the latter, a key issue will be the extent to which the law allows and facilitates public, private and trade union enforcement.

There are three different ways to organise a regulatory system that can provide for detection and enforcement of non-compliance with minimum employment standards: the public enforcement model; the corporatist or industrial relations model; and the private enforcement model.<sup>48</sup> Many systems are characterised by aspects of all three systems, with the main issue being the extent to which each approach is encouraged under the system in question.

Under the public enforcement model, a state agency investigates compliance and is empowered to employ a range of powers, processes and approaches to address non-compliance, ranging from negotiation to prosecution. The public enforcement model is the model assumed to be the central feature of a regulatory system in much of the regulatory literature.

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<sup>46</sup> Bronwen Morgan and Karen Yeung, *An Introduction To Law And Regulation: Text And Materials* (Cambridge University Press, 2007); Helen Bird, Davin Chow, Jarrod Lenne, and Ian Ramsay, 'ASIC Enforcement Patterns' (Legal Studies Research Paper No 71, University of Melbourne Faculty of Law, 1999).

<sup>47</sup> Morgan and Yeung, above n 46; see also Bird, Chow, Lenne and Ramsay, above n 46; Robert Baldwin, 'Why Rules Don't Work' (1990) 53 *Modern Law Review* 321; Robert Baldwin, *Rules and Government* (Clarendon Press, 1995); Julia Black, *Rules and Regulators* (Oxford University Press, 1997).

<sup>48</sup> Our taxonomy draws on the wider literature concerning regulatory enforcement, which is summarised in Morgan and Yeung, above n 46, 176- 220. However, we have also taken into account the taxonomy in Jonas Malmberg, 'Enforcement of Labour Law', in Bob Hepple and Bruno Veneziani (eds.) *The Transformation Of Labour Law In Europe: A Comparative Study Of 15 Countries 1945 To 2004* (Hart Publishing, 2009), Malmberg distinguishes between three different kinds of enforcement process: the administrative process (supervision by labour inspectors or equality bodies), the industrial relations process (similar to what we have characterised as the corporatist or industrial relations model), and the judicial process (enforcement of rules through judicial procedures in courts or tribunals).

The corporatist or industrial relations model exists where there is ‘institutionalized representation’ of organised interests in enforcement, in this context through the industrial relations system established by the state.<sup>49</sup> Thus, in some countries, employment conditions covering the majority of the workforce are largely determined through collective bargaining mechanisms. The parties involved in collective bargaining (eg. unions), are then responsible for detecting non-compliance with the outcomes of bargaining, collective agreements, and taking action to secure compliance.<sup>50</sup>

Finally, the state may facilitate private enforcement by allowing individuals affected by breaches of their employment rights to enforce regulation. Under this model, the state confers rights of action on employees who become aware of a breach of their employment rights, and are unable to remedy that breach by negotiation with their employer. The state often provides incentives for private enforcement, either by allowing for recovery of legal costs or through tax incentives.<sup>51</sup>

As we will discuss in Chapter 3 of this report, over time the Australian labour relations system has maintained elements of each of these models. In particular, for much of the last century, trade unions were a significant agent in the enforcement of minimum employment standards. However, the role of trade unions in enforcement appears to be of less influence than it was. Moreover, while individual workers in Australia do have the right to bring proceedings against employers for non-compliance with employment standards, it is not sufficient to rely on individual workers to enforce their own rights and entitlements in the absence of active enforcement by the state and trade unions or other representative

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<sup>49</sup> The description of corporatist models is taken from Peter N Grabosky, *Using Non-Governmental Resources to Foster Regulatory Compliance* (1995) 8 *Governance* 527, 532. Malmberg uses the term ‘industrial relations processes’ to classify this type of enforcement model: Malmberg, above n 48.

<sup>50</sup> This model has been most frequently attributed to the Scandinavian nations, where in many countries minimum standards are set not by legislation but by collective agreements which are then enforced by the unions and employers that are party to those agreements. For an historical overview of the ‘Nordic model’, see Malmberg, above n 48, 270-2. Malmberg notes a drift toward individual judicial processes in some Nordic countries since the 1970s (276-277).

<sup>51</sup> Barton H Thompson, ‘The Continuing Innovation of Citizen Enforcement’ [2000] *University of Illinois Law Review* 185, 193-4; Willborn, above n 17.

bodies.<sup>52</sup> Firstly, many workers will not have knowledge of their entitlements. Secondly, even where workers have such knowledge and are aware of their employer's lack of compliance, they will fail to bring this to the attention of relevant agencies for fear of employer retribution and victimisation.<sup>53</sup>

These challenges serve to emphasise the importance of monitoring, inspection and enforcement rights and practices by state agencies. Where a public enforcement agency is part of regulatory system, it will be important to consider whether the agency has an appropriate range of administrative and court-based sanctions at its disposal. The most traditional assumption about the relationship between regulation and corporate compliance motivations is that firms can be motivated to comply through the deterrent effect of penal sanctions. A number of studies have questioned this assumption. For example, in the employment standards context, the limited funding of regulators means that they will 'rarely have the resources to detect, prove, and punish cheating with sufficient consistency for it to be economically rational not to cheat.'<sup>54</sup>

Even where regulators achieve success in penalising corporations, this may not have the desired impact on future corporate compliance. For example, in the employment standards context, which in Australia is a civil liability regime, the chief punishments are monetary – payment of fines and compensation, and reputational damage. Some studies have found that fines, 'no matter how large, do not guarantee that corporate offenders will respond by revising their internal operating procedures or physical protection devices in such a way as adequately to guard against repetition of the offence. The response may be simply to write a cheque in payment of the fine.'<sup>55</sup> 'Phoenixing' - where company owners allow their companies to become insolvent, owing creditors large amounts of money, then set up a new company under a new name, and free of debt - is another way in which incorporated

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<sup>52</sup> Christopher Arup and Carolyn Sutherland, 'The Recovery of Wages: Legal Services and Access to Justice' (2009) 35 *Monash University Law Review* 96 .

<sup>53</sup> Miles Goodwin and Glenda Maconachie, 'Victimisation, Inspection and Workers' Entitlements: Lessons Not Learnt?' (Paper presented at the Asia-Pacific Economic and Business History Conference, Melbourne, 13-15 February 2008).

<sup>54</sup> Ayres and Braithwaite, above n 43, 96.

<sup>55</sup> Brent Fisse, 'Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1992) 13 *University of New South Wales Law Journal* 1.

firms may avoid the consequences of their actions and undermine the deterrence effects of prosecution.

As we will see when we discuss enforcement strategies later in this section, it is generally accepted that regulators should employ a mix of compliance and enforcement measures and tools. These should range from education and informational strategies along with financial incentives, through to warnings and administrative sanctions such as improvement and penalty notices, with prosecution and penalties reserved for more egregious cases of non-compliance or strategic purposes.

Two enforcement approaches used by the FWO that we examine in Chapter 6 of this report are examples of alternative approaches to the motivation of corporate compliance that seek to address some of the shortcomings identified above: personal liability regimes, which rely largely on the strength of deterrence in motivating individuals to improve firm compliance; and enforceable undertakings, an approach which seeks to secure management commitment to future compliance in a manner influenced by theories of responsive regulation and restorative justice.

### *Goals, Resources and Internal Organisation of Enforcement Agency*

Studies have also shown that the extent and nature of enforcement of minimum employment standards is likely to be a factor in compliance. For example, regulators determine the goals of their agency, and may be sensitive to the political, social and economic context of the legal standards they are enforcing in determining the approach taken to compliance. The level of resourcing of the agency will be another consideration, as well as the how the organisation deploys those (usually limited) resources in the achievement of its goals.

For example, the scope of the labour inspectorate's jurisdiction, and whether it is constituted as an organisation with general authority over that mandate, or is structured by specialisation in relation to specific areas of authority, are important issues for

employment standards enforcement. Another is the extent to which the agency directs its resources toward responding to complaints, or is engaged in more targeted investigation of non-compliance. In general terms, labour inspectorate staff can be deployed to determine non-compliance in either a reactive manner – in response to complaints received from workers or others – or proactively through planned inspection activities designed to detect any non-compliance that has otherwise not come to the attention of the inspectorate.<sup>56</sup> These proactive education and inspection activities can also serve a preventative function, in that education activities or detection of minor breaches of minimum standards may ensure that larger breaches do not occur.

The balance between inspection activities in response to complaints, and proactive inspection designed to find or prevent non-compliance, is an important issue raised in studies of labour enforcement.<sup>57</sup> This is because a low level of complaint activity in a particular industry, sector or region is not necessarily indicative of widespread employer compliance.<sup>58</sup> The probability of detection is an important source of general deterrence recognised in the regulation and compliance literature. It is therefore important that any areas featuring high levels of non-compliance, particularly where this is accompanied by low levels of complaints, are found and addressed by the labour inspectorate.

### *Discretion and Professionalisation of Enforcement Officers*

The nature of interactions between inspectors and those they regulate, and the degree of discretion afforded to inspectors in carrying out their role, have also been identified as important variables in enforcement. Further, the background and level of professionalisation of inspectors is a related consideration.<sup>59</sup>

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<sup>56</sup> Bridget Hutter, 'An Inspector Calls: The Importance of Proactive Enforcement in a Regulatory Context' (1986) 26(2) *British Journal of Criminology* 114.

<sup>57</sup> Studies have shown that many workers do not complain about non-compliance, either because they are unaware of their legal entitlements, or because of fear of retribution by their employer. See, eg, David Weil and Amanda Pyles, 'Why Complain? Complaints, Compliance and the Problem of Enforcement in the US Workplace' (2005) 27(1) *Comparative Labor Law and Policy Journal* 59; Hutter, above n 56, 118.

<sup>58</sup> Weil and Pyles, above n 57.

<sup>59</sup> See, eg, Keith Hawkins and John Thomas (eds) *Enforcing Regulation* (Kluwer-Nijhoff, 1984); Malcolm Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brookings Institution Press, 2000); Piore and Schrank, above n 16.

A central theme of empirical and theoretical analyses of regulatory bureaucracies has been the extent to which field-level officers are 'rule-bound' by legislation and internal regulation designed to achieve consistency and accountability in decision-making, or alternatively are free to exercise discretion – to make choices concerning the enforcement tools and approaches that are employed in performance of their functions. The former approach is often associated with Anglo-American regulatory systems that are characterised as having 'centralised' systems of enforcement, where field-level officers must consult with central or regional officials before making decisions about enforcement actions.<sup>60</sup> The latter approach is associated with decentralised or localised systems commonly referred to as the 'Franco-Iberian' model,<sup>61</sup> although in France, there has been a recent move towards more centralised authority.<sup>62</sup>

The ability of regulators to exercise discretion is particularly important in the case of field-level inspectors, given the desire of regulatory bureaucracies to control discretion as a means of ensuring that policy 'is transmitted down through the organisation and implemented at street level.'<sup>63</sup> Sparrow argues that discretion for field agents is more than 'choosing whether to initiate enforcement action or not,' noting that inspectors 'now have a broader range of alternatives from which to choose.'<sup>64</sup> Studies have suggested that inspectors should be cognisant of the motivations of regulated actors in making these choices, a theme which is discussed further in section 2.3 when we consider responsive regulation.

Some recent studies of labour inspectorates, in particular the work of Piore and Schrank,<sup>65</sup> have suggested that the 'Franco-Iberian' model of labour inspection with its high levels of

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<sup>60</sup> See Hawkins and Thomas, above n 59, 12.

<sup>61</sup> See Robert Kagan and John Scholz, 'The "Criminology of the Corporation" and Regulatory Enforcement Strategies' in Keith Hawkins and John Thomas (eds), *Enforcing Regulation* (Kluwer-Nijhoff Publishing, 1984) 67. In relation to the 'problem-solving' approach, see Malcolm Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brookings Institution Press, 2000).

<sup>62</sup> Kapp, Thomas, Paul Ramackers, and Jean-Pierre Terrier, 'Le Système d'Inspection du Travail en France: Missions, Status, Moyens et Fonctionnement' (Rueil-Malmaison: Liaisons, 2009).

<sup>63</sup> Hawkins and Thomas, above n 59, 19.

<sup>64</sup> Sparrow, above n 61, 247.

<sup>65</sup> Michael Piore and Andrew Schrank, 'Toward Managed Flexibility: The Revival of Labour Inspection in the Latin World' (2008) 147 *International Labour Review* 1, 10.

inspector discretion is superior to more bureaucratic inspection systems in several respects. They note that the discretion granted to inspectors is primarily derived from the nature of the extensive mandate. This means that it is impossible for inspectors to monitor compliance with every provision of the relevant labour code and that they must therefore make decisions about what to enforce and when to do so. They argue that this discretion means the system is far more flexible and able to accommodate economic and technical variables. For example, the labour code can be enforced strictly in large enterprises and less so in smaller firms or adapted to the exigencies of individual employers or industries. Moreover, ‘the inspector is in a position to weigh the total regulatory burden and to make tradeoffs among different aspects of the labour code in a way which is not possible in the US system; that is, to balance the benefits of enforcement in terms of social protection against the cost of enforcement in terms of employment and output’.<sup>66</sup>

However, other scholars of labour inspection do not favour a system characterised by high levels of inspector discretion. Von Richthofen<sup>67</sup> points out that while ‘employers value the use of a certain amount of discretion in the inspector’s role, as distinct from simple mechanical enforcement, they are ... greatly perturbed if it appears that their competitors are being treated more leniently.’ Piore and Schrank have also conceded that securing consistent and equitable outcomes is difficult when the system is inherently defined and shaped by qualitative judgements made by individual inspectors. Similar observations have been made in relation to enforcement of health and safety regulation,<sup>68</sup> and also plea bargaining by legal representatives in relation to breaches of competition regulation.<sup>69</sup>

### 2.3 Optimal Enforcement Approaches and Strategies

We have explained that the agency’s goals and internal organisation of its resources are important considerations in examining the operation of employment standards enforcement. In this section we consider how various experts have suggested that the

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<sup>66</sup> Ibid 10–11

<sup>67</sup> Wolfgang von Richthofen, *Labour Inspection: A Guide to the Profession*, (Geneva: International Labour Organization, 2002), 118.

<sup>68</sup> Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford University Press, 2002).

<sup>69</sup> Karen Yeung, *Securing Compliance: A Principled Approach* (Hart Publishing, 2004).

overall enforcement strategy of the enforcement agency is best constructed ‘to achieve policy outcomes that are effective (in terms of reducing the incidence of social harm) and efficient (cost the least to both duty holders and the regulator)’.<sup>70</sup> Although much of this literature is derived from studies of regulatory enforcement in contexts different to minimum employment standards, the conclusions and recommendations made by these studies may still be relevant to analysis of the FWO. We also consider some approaches that are derived from employment standards enforcement in other jurisdictions.

In reviewing these strategies, we note that we do not intend this report to provide a comprehensive evaluation of whether the FWO follows any particular strategy. Instead, we will draw on the discussion in this chapter to offer an assessment of whether the FWO’s approach broadly accords with ‘good practice’ approaches described in this chapter.

There are a number of approaches and strategies that have been identified as providing optimal enforcement. While the process of detection of non-compliance through monitoring and inspection is a key element of any enforcement system, much of the literature focuses on the approach taken by regulators once non-compliance is detected and the effectiveness of these approaches in bringing about greater levels of compliance. It is important to emphasise that there is no single approach which can unequivocally be identified as internationally accepted best practice. We discuss a number of key approaches below, and select some key issues and concerns which we will use to evaluate the FWO and its predecessors from 2006 to 2012 in this report.

### *Deterrence or Compliance*

Traditionally, approaches to regulatory enforcement have been divided between the deterrence or punishment model on the one hand and the compliance or accommodative model on the other. A deterrence strategy is adversarial in nature and based on the detection of violations and punishment of wrongdoers, while a compliance approach

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<sup>70</sup> Neil Gunningham, ‘Strategizing Compliance and Enforcement: Responsive Regulation and Beyond’, in Christine Parker and Vibeke Lehmann Neilsen, *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011). May and Winter suggest a distinction can be drawn between the overall enforcement strategy preferred by an agency, and inspectors’ day to day dealings with regulated entities (their enforcement ‘style’): Peter J May and Søren C Winter, ‘Regulatory Enforcement Styles and Compliance’, in Christine Parker and Vibeke Lehmann Neilsen, *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011).

'emphasizes co-operation rather than confrontation, conciliation rather than coercion'.<sup>71</sup> The compliance approach is, however, comprised of two additional sub-branches: persuasive compliance and insistent compliance. While both these sub-strategies have the same objective of securing compliance without resorting to retribution, they work in different ways towards this goal. The persuasive compliance model is premised on the assumption that compliance is an 'open-ended and long-term venture'<sup>72</sup> and therefore emphasises the use of education and persuasion. In comparison, those who adopt the insistent strategy are 'less benevolent and less flexible'<sup>73</sup> in their approach. Rather than using patient persuasion, there are clearly defined limits to their tolerance: if the offender does not play ball, increased pressure will be applied by way of more formal legal sanctions.<sup>74</sup>

### *Responsive Regulation and Smart Regulation*

More recent studies have suggested, however, that, consistent with the concept of 'responsive regulation' developed by Ayres and Braithwaite, 'the most credible and optimal enforcement strategy is achieved by a judicious mix of deterrence and persuasive approaches being applied in a regulatory enforcement pyramid.'<sup>75</sup> The enforcement pyramid works on the basis that '[t]he more the regulated firm refuses to comply, the greater the sanction that should be adopted.'<sup>76</sup> Enforcement activity should commence and occur most frequently at the foundation of the pyramid, which provides for less interventionist techniques, including education, advice and persuasion. If compliance is not achieved, the regulator escalates up the pyramid where more formal enforcement mechanisms are available, such as the issuing of official warnings or infringement notices. At the apex of the pyramid sits the most punitive sanctions, such as penalties and prosecution.

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<sup>71</sup> Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: Systems and Sanctions* (Oxford University Press, 1999) 111.

<sup>72</sup> Bridget Hutter, 'Variations in Regulatory Enforcement Styles' (1989) 11(2) *Law & Policy* 153, 155-6.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> Elizabeth Bluff and Richard Johnstone, 'Infringement Notices: Stimulus for Prevention or Trivialising Offences?' (2003) 19(4) *Journal of Occupational Health and Safety* 337, 338. See also Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

<sup>76</sup> Julia Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001).

Notwithstanding its popularity, a number of limitations to responsive regulation have been identified. Among other things, the theory does not really deal with the detection of non-compliance, and in so far as the 'tit for tat' nature of the pyramid is concerned, assumes a level of resources and interaction between inspector and regulated which rarely occurs in practice.<sup>77</sup>

One of the first attempts to refine and build on the key principles of responsive regulation was the theory of 'smart regulation'.<sup>78</sup> While responsive regulation contemplates the involvement of third parties, the focus of tripartism – as initially formulated by Ayres and Braithwaite – was to guard against regulatory capture and increase participatory governance. A secondary, and seemingly lesser, concern was how the involvement of third parties could improve compliance outcomes. Smart regulation brings this latter aspect to the fore. First, the 'simple model of tripartism'<sup>79</sup> is extended by smart regulation which contemplates many actors acting simultaneously. In particular, a central tenet of smart regulation is to consider and focus on how broader regulatory influences and institutions, such as international standards organisations, trade partners and competitors, commercial institutions, financial markets and supply chains, industry associations, trade unions, consumers and employees, could all be harnessed for the purposes of achieving public policy goals. At the same time, by sharing responsibilities for enforcement with the industry and the wider community, smart regulation envisages that the state could minimise the pull on its own limited regulatory resources and provide greater ownership of regulatory issues by non-state actors.

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<sup>77</sup> See, for example, Black, above n 76; Richard Johnstone, 'From Fiction to Fact – Rethinking OHS Enforcement' (Working Paper No 11, National Centre for Occupational Health and Safety Regulation, 2003).

<sup>78</sup> See Neil Gunningham, and Peter Grabosky, *Smart Regulation: designing environmental policy*, (Clarendon Press, 1<sup>st</sup> ed, 1998).

<sup>79</sup> In explaining the concept of tripartism, Ayres and Braithwaite devised a 'simple model of tripartism' where 'a single PIG is selected by the state (or by a peak council of PIGs) as the most appropriate PIG to counterbalance the regulated actors. That PIG then elects its representative to participate in that regulatory negotiation. Contestability in this simple model is, therefore, accomplished by (1) different PIGs competing for the privilege of acting as the third player in the regulatory negotiation; and (2) different PIG politicians within each PIG competing for election to the negotiating role.' See Ayres and Braithwaite, above n 43, 58.

## *Risk-Based Regulation*

An increasingly influential alternative or complement to responsive regulation, which has been particularly popular in the UK and Europe, is known as risk-based regulation.<sup>80</sup> This regulatory model advocates that regulators should target their inspection and enforcement resources based on an assessment of risk posed by the regulated entity or person.<sup>81</sup> Risk-based regulation 'differs from "pyramidal" approaches by emphasising analysis and targeting rather than a process of responsive regulation.'<sup>82</sup> Risk-based regulation advocates for a detection strategy which relies on and combines proactive and reactive methods depending on the risk profile of the firm and generally eschews routine, random or regional inspection approaches.<sup>83</sup>

One of the key problems with risk-based regulation, however, is its tendency to focus on a limited number of large, known risks and overlook or ignore new or lower level risks, which may harbour a cumulative danger and potentially create a set of 'forgotten offenders'.<sup>84</sup> A further obstacle is the potential political fallout from developing a systematic framework which effectively establishes particular levels of risk tolerance.<sup>85</sup> Another challenge is to obtain sufficiently reliable and accurate data on which to properly undertake a risk analysis in the first place.<sup>86</sup> Indeed, it is arguable that risk-based regulation does not necessarily lead to an efficient use of resources given that it directs resources towards the highest risks, but does not necessarily take into account the costs of

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<sup>80</sup> See Julia Black, 'The Emergence of Risk-Based Regulation and the New Public Risk Management in the UK' (2005) *Public Law* 512.

<sup>81</sup> See Fiona Haines, 'Facing the Compliance Challenge: Hercules, Houdini or the Charge of the Light Brigade?' in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011); Bridget Hutter, 'Negotiating social, economic and political environments: compliance with regulation within and beyond the state' in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011).

<sup>82</sup> Robert Baldwin and Julia Black 'Really Responsive Regulation' (2008) 72 *Modern Law Review* 59, 66. Gunningham points out, however, that 'risk-based regulation' is not necessarily opposed or antithetical to responsive regulation given that the enforcement pyramid approach can be applied to those enterprises which have been identified as posing the greatest risk according to the prior assessment of the regulator. See Gunningham, above n 70, 205.

<sup>83</sup> Baldwin and Black, 'Really Responsive Regulation', above n 82, 66.

<sup>84</sup> Record-keeping contraventions could be an example of such a risk. While they are considered to present a fairly low risk when considered in isolation, if they are consistently overlooked, record-keeping breaches has the effect of undermining more substantive rights, such as minimum wage and maximum hours regulation.

<sup>85</sup> Baldwin and Black observe that the process of selecting one firm over another 'clashes with the political, and civil, expectation of universal protection and the transparency of the selection process can render the regulator politically vulnerable.' Julia Black and Robert Baldwin, 'Really Responsive Risk-Based Regulation' (2010) 32(2) *Law & Policy* 181, 97.

<sup>86</sup> See Baldwin and Black, 'Really Responsive Regulation', above n 82.

compliance and enforcement. This is linked to the fact that risk-based regulation often focuses on the individual firm, rather than the more pressing problem of how to improve compliance throughout the relevant industry. Even at the level of the firm, risk-based regulation is potentially limited by the fact that sanctions are selected based on the perceived risk presented by the firm, and does not probe further to understand what led to the risk in the first place.<sup>87</sup>

### *Really Responsive Regulation*

More recently, Baldwin and Black have developed the theory known as ‘really responsive regulation’ in response to what they saw as the weaknesses of previous approaches.<sup>88</sup> In developing this theory, Baldwin and Black evaluate all of the theories discussed above, but also consider the ‘target-analytic’ approach developed by Kagan and Scholz of responding to the organisations reasons for non-compliance, as well as the ‘problem-solving’ or ‘regulatory craft’ approach devised by Malcolm Sparrow which promotes comprehensive performance assessment systems within regulatory processes.<sup>89</sup> In their view, neither responsive regulation, smart regulation or risk-based regulation adequately deals with the day-to-day dilemmas faced by regulators, such as: how to overcome resource constraints and reconcile conflicting institutional demands; how to deal with changes in the social, economic or political environment; or how to ensure that the deployment of one regulatory strategy does not adversely affect other aspects of regulatory activity.<sup>90</sup>

Really responsive regulation is explicitly designed to address these perceived gaps and promote a more holistic approach. In particular, really responsive regulation requires regulators to be responsive to a set of five different principles. The first principle is that the regulator must be responsive to the ‘attitudinal settings’, that is, the compliance performance, motivational posture and organisational capacity of the regulatee.

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<sup>87</sup> Baldwin and Black, ‘Really Responsive Regulation’, above n 82, 67.

<sup>88</sup> Ibid 61.

<sup>89</sup> In relation to the ‘target-analytic’ approach, see Kagan and Scholz, above n 61. In relation to the ‘problem-solving’ approach, see Sparrow, above n 61.

<sup>90</sup> Baldwin and Black, ‘Really Responsive Regulation’, above n 82, 61.

The second element of really responsive regulation is that regulators are sensitive to obstacles and opportunities for compliance presented by the broader institutional environment.<sup>91</sup> In other words, the position and power of state regulators can be influenced by the institutional context, such as cultural or organisational norms, resource distribution, political forces or legal infrastructure.

The third characteristic of really responsive regulation is that the regulator must be responsive to the 'logics' of different strategies and tools. In some ways, this refines the key proposition put forward by responsive regulation, that is, the regulator must first understand the compliance motivations of the firm in order to determine how to most effectively respond – either with a punitive or a restorative approach.<sup>92</sup>

The fourth element of really responsive regulation is that the regulator has to be responsive to the performance of the relevant regulatory regime by critically assessing the success of particular enforcement tools and strategies and adjusting its approach accordingly. The final characteristic of really responsive regulation is for the regulator to be responsive to both internal and external change, such as policy shifts, swings in attitude, technological advances and the rise or demise of different regulatory actors, amongst other things.

While really responsive regulation represents what regulators should strive towards in seeking to effectively implement policy objectives, Baldwin and Black acknowledge the difficulties of adhering to these principles in polycentric regimes where regulatory functions are performed by a wide range of institutional types and instruments.<sup>93</sup> Taking into account these complexities, they suggest that regulators should consider not only the ways in which regulatory problems vary across different industries and tasks, but also recognise '[t]he importance of divergent interests (be these public, private/economic, or

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<sup>91</sup> Baldwin and Black, 'Really Responsive Regulation', above n 82, 70.

<sup>92</sup> Ibid 71.

<sup>93</sup> Ibid 93.

group); the significance of variations in cultures, values, ideas, communications regimes, and control systems; and the impact of intra- and inter-institutional forces.’<sup>94</sup>

### *Strategic Enforcement*

While the theories of smart regulation, risk-based regulation and really responsive regulation could possibly be applied to a variety of policy contexts, many fundamental features are echoed in the theory of strategic enforcement devised by David Weil in relation to employment standards regulation in the US. Strategic enforcement is framed around four central principles which should be used to guide the design and implementation of enforcement policy, namely: prioritisation; deterrence; sustainability; and systemic effects.

The first principle is that of prioritisation. While inspectors are directly or indirectly prioritising all the time in terms of deciding how to conduct an investigation or which complaint to escalate, in order to engage in strategic enforcement, prioritisation needs to become more embedded in the policy development stage.<sup>95</sup> The principle of prioritisation, as conceptualised by Weil, is arguably a more sophisticated version of risk-based regulation given that it takes into account not only the risk posed by individual firms, but also considers as part of the risk analysis, the likely outcome of any intervention. In applying this principle, regulators should:

pursue strategies that focus at the top of industry structures, on the companies that affect how markets operate and many of the incentives that ultimately affect compliance. This starts with having a clear “map” of how priority industries operate and how that results in employer behaviour.<sup>96</sup>

On a more practical level, Weil identifies a number of key factors to guide the setting of industry priorities. First, he argues that labour inspectorates should target those sectors with a significant proportion of vulnerable workers and where such workers are unlikely

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<sup>94</sup> Black and Baldwin, ‘Really Responsive Risk-Based Regulation’, above n 85, 187 [citations omitted].

<sup>95</sup> David Weil, ‘Enforcing Labour Standards in Fissured Workplaces – The US Experience’ (2011) 22(2) *Economic and Labour Relations Review* 33.

<sup>96</sup> Weil, *Improving Workplace Conditions*, above n 22, 3.

to complain about workplace contraventions. Second, in relation to these industries, labour inspectorates should then consider whether regulatory intervention is likely to be successful in changing compliance behaviour in a way that is both sustainable (limited recidivism) and systemic (has effects beyond the individual firm).<sup>97</sup> Industries which display ‘fissured’ employment characteristics make them problematic from a regulatory perspective. Somewhat ironically, it is these same characteristics which can be exploited by innovative enforcement strategies by leveraging ‘lead firms’ at the top of industry structures to take an interest in the compliance practices of employers at ‘lower levels’.<sup>98</sup> This notion partly echoes the idea of ‘social motivations’ toward compliance discussed earlier in this chapter, that significant ‘others’ can have powerful effects in relation to compliance behaviour.<sup>99</sup>

Second, strategic enforcement requires that deterrence effects are factored into all regulatory activities. Although Weil acknowledges that there is a range of compliance motivations, he argues that the deterrent impact of regulatory interventions is critical to achieving compliance. Further, as industries ‘fissure’ and businesses become smaller and more numerous, the deterrent element grows in importance. While deterrence is traditionally directed at economic motivations and associated with the frequency of inspections and the imposition of punitive sanctions, the concept of deterrence can be considered more broadly as how to influence employer perceptions, particularly those who have avoided the attention of the labour inspectorate. In many respects, Weil’s conceptualisation of deterrence differs from that envisaged by responsive regulation, which is largely focused on specific deterrence of the firm with whom the regulator is interacting. In contrast, Weil appears to focus on the symbolic and expressive value of

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<sup>97</sup> Ibid 75.

<sup>98</sup> Ibid 77. In many respects, this strategy mimics that proposed by Braithwaite who has subsequently refined the original formulation of responsive regulation. In particular, he recognised that where firms lack the capacity to comply with regulations, which is often the case in small and micro businesses, it is far more difficult to implement a ‘tit-for-tat’ regulatory strategy. Rather, he suggests that ‘that the answer lies in the links between those small, marginal firms and the leading firms on which they are often economically dependent.’ See Cynthia Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (Yale University Press, 2010) 141.

<sup>99</sup> For instance, for large or ‘lead’ firms, informal sanctions deployed by civil society groups and consumers, such as adverse publicity, can be particularly formidable motivators. For small and medium sized firms, research suggests that the attitude of superior contractors or purchasers is a key regulatory influence.

sanctions (commonly referred to as ‘general deterrence’)<sup>100</sup> and encourages regulators to enhance deterrence efforts at the industry and geographic levels.<sup>101</sup> More specifically, Weil notes:

[t]hat all investigations are not created equal. Some investigations have very local effects, essentially limited to the worksite being investigated. But other investigations seem to have much stronger ripple effects that go on to affect the behaviour of other establishments controlled by the firm, or, more interestingly, the behaviour of other companies in the same industry or geographic area.<sup>102</sup>

On the basis of this finding, Weil contends that in planning and evaluating investigation strategies, the labour inspectorate should directly consider the likely deterrence effects. To undertake this assessment, it is necessary to have a map of business relationships in each priority industry or region. Strategic enforcement then requires that in respect of each targeted campaign or complaint investigation, the labour inspectorate takes into account the likely ripple effects of that investigation. These ripple effects will not only depend on the characteristics of the particular industry or geographical area, but will also be conditional on the relationship between the state inspectorate and key non-state actors. Lead firms, unions, employer associations and other influential community groups can all be critical for magnifying the necessary ‘ripple effects’ of investigations and prosecutions.<sup>103</sup>

Sustainable and ongoing compliance is the third principle of strategic enforcement. This potentially reflects the fact that employer recidivism is the bane of many inspectors. Rather than focusing on the compliance status of the individual employer at the time the inspection takes place, Weil contends that enforcement effects should be measured and judged more broadly so that they take account of interventions which lead to the institutionalisation of positive compliance behaviours and approaches. Sustainable

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<sup>100</sup> As Pires found in his research on the Brazilian labour inspectorate, sanctions are critical to sustainable compliance. He observes: beyond their strict cost-impinging character, sanctions work as a moral statement on an undesirable and offensive practice, thereby also constituting an organisational strategy for focusing public attention and shame on a specific situation. See Roberto Pires, ‘Promoting Sustainable Compliance: Styles of Labour Inspection and Compliance Outcomes in Brazil’ (2008) 147(2) *International Labour Review* 199, 223.

<sup>101</sup> Weil, *Improving Workplace Conditions*, above n 22, 3.

<sup>102</sup> *Ibid* 81.

<sup>103</sup> *Ibid*. By way of example, the Asian American Hotel Operators Association (AAHOA) was engaged in a number of hotel/motel initiatives undertaken by the WHD in the US. This Association was identified as having a strong regulatory capacity given that it represents more than 50 per cent of all independent hotels.

initiatives could include compliance agreements which include commitment for ongoing monitoring or settlement agreements which contain stronger accountability requirements in relation to future compliance behaviour. Such agreements are aligned with one of the core tenets of responsive regulation.<sup>104</sup>

The final principle of strategic enforcement is that of 'systemic effects'. This principle overlaps, in part, with the prioritisation and deterrence principles insofar that all these notions are premised on building a 'map' of the relevant regulatory space and then acting accordingly. The systemic effects principle is more focused, however, on addressing the underlying drivers of compliance. Weil explains that:

Increasingly complex workplace settings require inspectorates to consider how to achieve geographic, industrial and/or product-market effects. Employer practices in the workplace are an outgrowth of broader organisational policies and practices, often driven (implicitly or explicitly) by competitive strategies or forces. Bringing an understanding of the impact of these larger factors into the regulatory scheme potentially allows enforcement to have systemic rather than local effects.<sup>105</sup>

In some respects, this echoes Sparrow's argument for what he terms 'problem-solving regulation',<sup>106</sup> namely that effective enforcement requires regulators to not only identify the most important problems, but to isolate and eliminate the root causes 'that hide at the end of meandering and idiosyncratic causal chains.'<sup>107</sup> This requires that inspectorate activities move beyond focusing on changing compliance motivations at the workplace level, to altering system-wide incentives for compliance.

In summary, to achieve strategic enforcement, there is a critical need to build and act on 'a deep understanding of how industries and sectors operate and how those dynamics affect

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<sup>104</sup> In this respect, Kingsford-Smith observes: 'Responsive regulation champions internalisation because long-term internalisation is the more important matter in almost any domain of social control because it is usually impossible for society to organise its resources so that rewards and punishments await every act of compliance or non-compliance': Dimity Kingsford-Smith, 'A Harder Nut to Crack? Responsive Regulation in the Financial Services Sector' (2011) 44(3) *UBC Law Review* 695, 702.

<sup>105</sup> Weil, *Improving Workplace Conditions*, above n 22, 356.

<sup>106</sup> Sparrow, above n 61.

<sup>107</sup> See Salo Coslovsky, 'Relational regulation in the Brazilian Ministério Público: The organizational basis of regulatory responsiveness' (2011) 5 *Regulation and Governance* 70, 71, citing John Paul MacDuffie, 'The Road to Root Cause: Problem-Solving at Three Auto-Assembly Plants' (1997) 43 *Management Science* 479.

workplace outcomes generally and employment vulnerability in particular.’<sup>108</sup> This requires the regulator to carefully ‘map’ the regulatory terrain in order to pinpoint what and who is driving the most significant compliance problems. Relying on the labour inspectorate alone will not be enough to combat the macro-level factors which underlie the rise in workplace vulnerability. In addition to a boost in inspectorate resources and a change in strategy, there is a need for the labour inspectorate to have much more direct engagement with lead firms, as well as labour market intermediaries ‘whose activities at the workplace- and industry-level are natural complements to government efforts’.<sup>109</sup>

We have found Weil’s work particularly important in the course of our study. We return to it in Chapter 5.

## 2.4 Conclusion

The discussion in this chapter outlines a number of concepts, questions and issues that are relevant to the analysis presented in this report. There are a number of challenges confronting enforcement agencies seeking to motivate employers to comply with regulation, such as minimum employment standards. In turn, enforcement agencies face a number of choices in how they respond to those challenges. In the remainder of this report, we will discuss and evaluate the choices made by the federal employment standards enforcement agency between 2006 and 2012. In particular, in Chapter 5 we will set out our findings concerning the nature and pattern of education and investigation activities of the FWO, and the outcomes of those activities. In Chapter 6 we will describe patterns in the FWO’s use of the various enforcement approaches and tools at its disposal.

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<sup>108</sup> David Weil, ‘Rethinking the Regulation of Vulnerable Work in the USA: A Sector-Based Approach’ (2009) 51(3) *Journal of Industrial Relations* 411, 426.

<sup>109</sup> David Weil, ‘A Strategic Approach to Labour Inspection’ (2008) 147 *International Labour Review* 349, 372. Weil separately explains that: ‘A strategic complaint-based policy requires creatively drawing on the strengths and abilities of different institutions to respond to workplace problems: that is, relying on collective bargaining arrangements (where present) to help assure compliance; working with worker centres, community organisations, and similar organisations to establish effective floors where such institutions are present; and relying on government enforcement where no other institutions can perform this function.’ Weil, *Improving Workplace Conditions*, above n 22, 86.

In evaluating the FWO's approach to both investigation and enforcement, we will discuss the extent to which the agency has followed any of the examples of good practice in enforcement strategy discussed in the previous section. It is difficult to identify a single example of good practice that should be applied in all circumstances of minimum employment standards enforcement. For example, studies have shown that neither pure 'deterrence' nor persuasive compliance based on advice and education is likely to be an effective and efficient enforcement strategy. Therefore, good practice in enforcement is likely to involve an approach which takes into account a number of issues which have arisen in empirical studies of regulation, including:

- Whether the regulator is responsive to the motivations of employers in dealing with non-compliance;
- Whether the regulator is proactive and strategic in the way in which it deploys its education, detection and investigation functions, and allows inspectors discretion in carrying out their responsibilities;
- Whether the regulator's enforcement approach involves a mixture of enforcement approaches and tools, deployed in an appropriate sanctioning regime – whether responsive or strategic – remembering that formal enforcement processes remain important to the effectiveness of regulatory compliance strategies;
- Whether the regulator critically assesses the success of particular enforcement tools and strategies and adjusts its approach accordingly;
- Whether the regulator harnesses the expertise and industry knowledge of third parties like trade unions and employer groups; and
- Whether the regulator identifies and prosecute individuals, such as directors or managers of corporate employers, when it is appropriate to do so.

Some of the more specific questions we will address in Chapters 4-6 in order to facilitate this evaluation are drawn from the literature discussed in this chapter, and include:

- What are the objective characteristics of the regulated actors against which the FWO and predecessors have taken action, categorised by type of action?
- What is the relationship between the FWO enforcement activities and its regulatory objectives?
- What are the standards most commonly enforced? Have particular standards been targeted by the FWO?
- Has a specific regulatory purpose or effect been sought by the FWO in enforcing particular standards?
- What sanctions are available for non-compliance with these standards, and what sanctions were most commonly sought/imposed?

We do not in this report engage in an assessment of the employer response to the FWO's enforcement, or in any particular enforcement strategy. This is a particularly challenging task in any regulatory context, and is difficult without a comprehensive and rigorous survey of employer compliance. The final stage of our research project will be a study of employer responses to federal enforcement of minimum employment standards since 2006. The findings of this report focus on how the FWO has responded to its regulatory environment through its deployment of education, investigation and enforcement activities. These findings will then inform the design of our study of the agency's effects on compliance.

### **3. FEDERAL ENFORCEMENT OF MINIMUM EMPLOYMENT STANDARDS IN AUSTRALIA: HISTORY AND CURRENT STATUTORY FRAMEWORK**

As we observed in the introduction to this report, between 2006 and 2012 there was a transformation in the federal labour relations jurisdiction's approach to compliance. In this chapter, we provide some historical background to the research project by considering past approaches to the enforcement of minimum employment standards in the Australian system. We also describe the important changes to federal enforcement of minimum employment standards over the study period, and provide an overview of the current mandate of the Fair Work Ombudsman (FWO), and the statutory framework governing the agency's investigation and enforcement powers.

#### **3.1 Regulation and Enforcement of Employment Standards in the Federal System 1904-1995**

Although regulation of workplace relations in Australia has virtually always provided for some form of remedial action for failure to comply with minimum labour standards, for the first three decades of the conciliation and arbitration system, trade unions provided the only body capable of enforcement.<sup>1</sup> The expansive role played by unions in this earlier period was strongly connected with their right to institutionally establish wages and conditions of employment through awards. The nature of conciliation and arbitration meant unions had an inherent and legitimate interest in ensuring awards were enforced, at least in respect of union members.<sup>2</sup>

In the late 1920s, under pressure from both unions and employer groups, the federal government decided to establish a government labour inspectorate, while maintaining union enforcement powers.<sup>3</sup> The federal legislation was amended in 1928 to allow for the

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<sup>1</sup> Miles Goodwin, *The Great Wage Robbery: Enforcement of Minimum Labour Standards in Australia* (PhD Thesis, University of New South Wales, March 2003) 66.

<sup>2</sup> *Ibid* 164.

<sup>3</sup> For discussion of the reasons why both unions and employers wanted a government inspectorate, see Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (Law Book Company, 1994) 146, citing Arbitration Inspectorate, *Annual Report 1972* (Department of Labour and Immigration, 1972) 9, and Goodwin, above n 1, 171-2.

appointment of government inspectors, although the first inspector was not appointed until 1934.

In the decades to follow, the fortunes of the federal inspectorate waxed and waned.<sup>4</sup> In 1952, the Menzies Government transferred what was by then a loose group of appointed inspectors into a dedicated Arbitration Inspectorate. However, this did not result in any significant change in the weak, persuasive compliance approach that had been preferred in previous years. In the first 34 years following the appointment of the first inspector in 1934, only 67 employers were prosecuted for 258 award breaches.<sup>5</sup>

In the early 1970s, attempts by the Whitlam Labor Government to increase the effectiveness of the Inspectorate were successful insofar that they decentralised decision-making procedures and increased prosecution activity.<sup>6</sup> The inspectorate was incorporated into the Industrial Relations Bureau (IRB) established by the Fraser government. Under the Hawke and Keating Labor Governments, the Arbitration Inspectorate was initially restored but in 1991, the Inspectorate was brought within the Awards Management Branch of the Department of Industrial Relations and routine inspections were replaced by a more complaints-based strategy.<sup>7</sup>

What was consistent over this period was that, despite several changes in government and some political fine-tuning, both conservative and labor governments tended to see award enforcement as relatively straightforward and of limited interest. This, combined with various legal impediments, scarce resources and a general lack of independence from government, left the federal enforcement agency generally neglected and largely ineffectual.

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<sup>4</sup> A more detailed discussion of the historical evolution of the federal inspectorate can be found in Goodwin, above n 1. See also Bennett, above n 3.

<sup>5</sup> Miles Goodwin and Glenda Maconachie, 'Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategy and Outcomes 1952-1997' (2007) 49 *Journal of Industrial Relations* 523, 535.

<sup>6</sup> In the period from 1973/1974 to 1975/1976, enforcement proceedings were instituted against 239 employers, which represented an average of almost 80 per year. See Glenda Maconachie and Miles Goodwin, 'Does institutional location protect from political influence? The case of a minimum labour standards enforcement agency in Australia (2011) 46(1) *Australian Journal of Political Science* 105-19.

<sup>7</sup> Goodwin, above n 1, 214.

Although there is limited empirical research concerning the extent of trade union enforcement activity and strategy in the twentieth century, it is generally assumed that unions filled the void left by the inadequacy of federal government enforcement.<sup>8</sup> As noted earlier, over time the extent of union enforcement activity was itself a factor in the resourcing of the federal agency, as well as shaping the inspection practices of the federal agency.<sup>9</sup>

It therefore appears that after the 1930s, the federal system was characterised by a dual system of award enforcement. Unions and the inspectorate largely operated on parallel tracks, as the agency tended to confine its activities to non-unionised industries, leaving unions to fund enforcement in other sectors.<sup>10</sup>

Since the early 1990s, unions' capacity to carry out monitoring and enforcement of labour standards has declined. Goodwin and Maconachie argue that three key factors have combined to cause this change: the shift in the Australian labour relations system from conciliation and arbitration and award making to enterprise bargaining; a continuing decline in union membership; and restrictions on union right of entry.<sup>11</sup> A number of other challenges to enforcement by both unions and federal government emerged during this period, including a growth in non-standard employment, and shifts in business size and structure such as a growth in outsourcing arrangements and an increase in smaller

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<sup>8</sup> See, for example, Tess Hardy, and John Howe, 'Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22 *Australian Journal of Labour Law*, 306–36; Margaret Lee, 'Regulating Enforcement of Workers' Entitlements in Australia: the New Dimension of Individualisation in Australia' (2006) 17 *Labour and Industry* 41; Goodwin, above n 1, 163-4; Bennett, above n 3, 136. Goodwin and Maconachie note that the inspection powers and activity of unions became more important after the federal inspectorate abandoned routine inspections in 1991: Miles Goodwin and Glenda Maconachie, 'Victimisation, Inspection and Workers' Entitlements: Lessons Not Learnt?' (Paper presented at the Asia-Pacific Economic and Business History Conference, Melbourne, 13-15 February 2008).

<sup>9</sup> For example, the Hawke Government relied upon the capacity of unions to monitor and enforce labour standards to justify its failure to increase the resources of the federal agency: Goodwin, above n 1, 234. In relation to the influence of trade union enforcement on federal agency inspection practices, see Glenda Maconachie and Miles Goodwin, 'Recouping Wage Underpayment: Increasingly Less Likely?' (2006) 41(3) *Australian Journal of Social Issues* 327, 339.

<sup>10</sup> Christopher Arup and Carolyn Sutherland, 'The Recovery of Wages: Legal Services and Access to Justice' (2009) 35 *Monash University Law Review* 96..

<sup>11</sup> Goodwin and Maconachie, 'Recouping Wage Underpayment', above n 9, 339.

business units.<sup>12</sup> The discussion below reveals that at least initially, these challenges did not result in any significant expansion in public enforcement capacity.

### 3.2 Federal Enforcement under the Workplace Relations Act 1996-2005

The decline in union enforcement capacity in the 1990s was in part the result of changes in the legal framework of labour relations introduced by the Howard Coalition Government elected in 1996. During its first decade in power, the Howard Government introduced the *Workplace Relations Act 1996* (Cth) (WR Act), which encouraged individualisation strategies, restricted union rights and curtailed the powers of the federal tribunal, the AIRC.<sup>13</sup>

Under the WR Act, the traditional enforcement model was gradually reconstructed, with the Arbitration Inspectorate being replaced by three separate but related agencies. Firstly, the Office of the Employment Advocate (OEA) was established as a statutory agency in 1996. Secondly, and at the same time, the Awards Management Branch was rebadged as the Office of Workplace Services (OWS). Thirdly, the Building Industry Interim Taskforce was set up in October 2002 in the course of the Cole Royal Commission. It was subsequently replaced by the Australian Building and Construction Commission (ABCC) in 2005.<sup>14</sup>

During this period, it seems that the resources directed towards the federal inspectorate continued to lag behind the funding received by other federal and state-based regulatory agencies. For example, in the original budget for the 2005/2006 financial year, only \$21 million was allocated to the OWS. In the same period, the ABCC received \$22 million in

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<sup>12</sup> See, eg, Bennett, above n 3, ch 5-6; Iain Campbell, 'Casual Employment, Labour Regulation, and Australian Unions' (1996) 38 *Journal of Industrial Relations* 571.

<sup>13</sup> See generally Lee, above n 8, and Stephen Deery and Richard Mitchell (eds) *Employment Relations: Individualisation and Union Exclusion* (Federation Press, 1999).

<sup>14</sup> See Lee, above n 8, 344. See also George Williams and Nicola McGarrity, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *Australian Journal of Labour Law* 244.

federal funding for enforcement in an industry comprising a small portion of the overall workforce.<sup>15</sup>

As part of the revised structure, enforcement of federal labour laws in Queensland, Tasmania, South Australia and Western Australia was outsourced to state governments under contracted arrangements and most state inspectors in those states were also cross-appointed as federal inspectors.<sup>16</sup> However, the federal government maintained control over the delivery of services by ensuring that the relevant contracts required the state governments to comply with the OWS Policy Guide. A key part of the OWS Policy Guide was the elevation of education and persuasion functions over prosecutions.<sup>17</sup> In the period from 1996/1997 to 2005/2006 only 35 enforcement proceedings were recommended against employers.<sup>18</sup>

Combined, these factors meant that, in the early years of the Howard Government, the burden of enforcing employer compliance by way of legal action was effectively shifted to individual employees and unions.<sup>19</sup> While the federal enforcement agency still facilitated the recovery of underpayments on behalf of employees – on the basis of a complaints-based inspection strategy - in the years immediately preceding Work Choices, it appears to have virtually stopped prosecuting employers for breaches of the Act, and almost never unless the amount was more than \$10,000.<sup>20</sup> Further, claims were frequently settled by agreement, presumably for a lesser amount than that due to the aggrieved employee.<sup>21</sup>

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<sup>15</sup> See, eg, Queensland Department of Industrial Relations, *Industrial Relations Perspectives* (2005) and Office of Industrial Relations, *The Year in Review* (2005) NSW Department of Commerce.

<sup>16</sup> Department of Employment and Workplace Relations, *Annual Report 2004/2005* (2005) 145.

<sup>17</sup> See Lee, above n 8, 53. Compare the OWS Policy Guide with the enforcement techniques which held favour after Work Choices, as set out in the Workplace Ombudsman's Litigation Policy.

<sup>18</sup> See Goodwin and Maconachie, 'Does institutional location protect from political influence?', above n 6, 7. However, Goodwin and Maconachie acknowledge that poor reporting standards during 1999/00 and 2001/02 may have led to a few prosecutions going unreported.

<sup>19</sup> See Lee, above n 41, 345.

<sup>20</sup> See Group of 150 Australian Academics, Submission to the Senate Committee on Employment, Workplace Relations and Education, *Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005 (Cth)* (2005) and Office of Workplace Services, *OWS Policy Guide* (2004).

<sup>21</sup> See Lee, above n 8, 53. Lee notes that details regarding the settlement amounts were not available, so it is difficult to know whether settlement amounts reflect the actual amounts owed.

On the basis of the research undertaken by Goodwin and Maconachie, it appears that the enforcement strategies adopted by the federal inspectorate prior to and during this period, particularly the use of prosecution as a last resort, reduced the probability of detection, provided little deterrence and implicitly allowed employer evasion.<sup>22</sup> They argue that while discarding prosecution as a primary enforcement tool could be justified on a cost-benefit analysis given the time and expense of undertaking a prosecution, this position was deficient in several respects.

First, the amounts recovered via prosecution may have been modest, but were not insignificant for low-paid workers who were affected by the contravention. Second, the small claims approach was not realistic for vulnerable workers, such as those with low job security or for those workers who lacked education or spoke English as a second language. Third and foremost, a failure to prosecute meant that employers in highly competitive industries or who had a flagrant disregard for law may have become confident that the only risk they faced in underpaying employees was an order for rectification of the underpayment. Further, they may have taken comfort from the fact that such an order was unlikely given that it required an employee to commence a small claims action.<sup>23</sup> These findings are important in the sense that they suggest that the enforcement strategy favoured by the 'traditional time and wages inspectorate' that was the federal enforcement body prior to 2006 – namely a weak persuasive compliance model – was failing in several respects.

In addition to a lack of political support for more aggressive enforcement strategies, governments, regardless of their ideological bent, have also tolerated deficiencies in the statutory scheme. These legal and practical 'stumbling blocks'<sup>24</sup> have had significant implications for investigation, enforcement and remedial practices. For instance, it seems that the more ambiguous the legislative framework, the more inclined inspectors are to

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<sup>22</sup> Goodwin and Maconachie, 'Unpaid Entitlement Recovery', above n 5, 542.

<sup>23</sup> Ibid 540.

<sup>24</sup> Ron McCallum, 'The Imperfect Safety-Net: The Enforcement of Federal Awards and Agreements' in Ron McCallum, Greg J McCarry and Paul Ronfeldt (eds), *Employment Security* (1994), 210. See also Bennett, above n 3, 159, commenting that while political factors have 'significant implications for the operations of enforcement agencies, they can be overstated'.

adopt a persuasive compliance approach which emphasises voluntary compliance and avoids the unnecessary legal glare of prosecutions. Further, the lack of coercive remedies, such as injunctions, under the legislation meant there was little recourse for employees who were detrimentally affected by an employer's breach of a non-monetary term and limited opportunity for an inspector to engage in responsive regulation.<sup>25</sup>

Another key deficiency, which was not rectified until 2004, was the relatively low maximum penalties which were available under the WR Act and the long-standing reluctance of courts to impose significant penalties against non-complying employers.<sup>26</sup> According to Goodwin and Maconachie, in the pre-Work Choices period, the penalties were so small and prosecution so rare that it 'reversed any deterrent effect of the legislation on employers as the potential savings from non-compliance outweighed the costs of being prosecuted.'<sup>27</sup> Or, in line with responsive regulation and the enforcement pyramid, it seems that the sanction at the apex of the pyramid was not sufficiently strong enough to support the foundation: that is, the effective use of less intrusive mechanisms.

Further, prior to the 1990s, there was no federal legislative requirement to keep time and wage records, although some such obligations were imposed under awards and to a lesser extent, state legislation. This was a critical omission. Without time and wage records, it was virtually impossible to gather sufficient evidence to support a prosecution for recovery of underpayments.

An additional issue with the statutory regime until it was partially rectified by Work Choices, was the inability to pursue directors, or other persons, who had been involved in contraventions by a corporate employer.<sup>28</sup> With no way of imposing personal

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<sup>25</sup> See Lee, above n 8, 46.

<sup>26</sup> It is worth noting that the maximum penalty that could be imposed against a body corporate under the *Conciliation and Arbitration Act 1904* (Cth) and subsequently the *Industrial Relations Act 1988* (Cth) was \$1000. From 1 March 1994, the maximum penalty was increased to \$5,000. Upon commencement of the *Workplace Relations Act 1996* (Cth) ('WR Act'), the penalty was increased to \$10,000 and, from 10 August 2004, the penalty was fixed with reference to penalty units. More importantly, at this time, pecuniary penalties were increased for most contraventions of the WR Act from a maximum of \$10,000 to a maximum of 300 penalty units or \$33,000 for a body corporate.

<sup>27</sup> Goodwin and Maconachie, 'Unpaid Entitlement Recovery', above n 5, 535.

<sup>28</sup> See, eg, *Tucker v Noutzo* (1984) 2 VIR 167.

accountability, the effectiveness of enforcement regime was seriously weakened. Monetary penalties against corporations can be of limited utility as sanctions given that they do not lead to internal disciplinary action, may exceed the ability of the corporation to pay or may result in asset-stripping.<sup>29</sup> As such, there was no direct consequence and little incentive for senior management to ensure the firm complied with its legal obligations.

### **3.3 Work Choices and the Reinvigoration of Employment Standards Enforcement**

From the early twentieth century, most minimum employment standards in Australia were set by industry or sectoral level instruments - awards - which normally included a wide range of employment conditions, rights and entitlements. Awards were the product of negotiation between unions, employers and employer associations. Where agreement over the content of awards could not be reached, a tribunal was empowered to arbitrate over the specific terms and conditions to be included in the award. From the 1980s, this system was supplemented by enterprise level collective bargaining, with collective bargaining agreements normally setting terms and conditions above a 'safety net' of conditions in awards. Most states maintained similar systems of standard setting.

Work Choices introduced a number of major alterations to the federal system of labour regulation of relevance to this report. In particular, the Work Choices legislation severely curtailed the role of awards in favour of enterprise bargaining underpinned by a legislated safety net of five minimum conditions, including a minimum wage, known collectively as the Australian Fair Pay and Conditions Standard (AFPCS).<sup>30</sup> This was the first time that key working conditions such as wages and working hours regulation had been regulated directly by legislation.

Work Choices also extended federal jurisdiction to regulate the employment conditions of many workers previously covered by state systems of standard setting and enforcement. Through reliance on the corporations power in the Constitution, Work Choices extended

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<sup>29</sup> Brent Fisse, 'Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13(1) *University of New South Wales Law Journal* 1, 7-9.

<sup>30</sup> For consideration of a number of different aspects of the Work Choices changes, see Anthony Forsyth and Andrew Stewart (eds) *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009).

the federal government's jurisdiction over employment standards to all employees of constitutional corporations.<sup>31</sup> This was estimated to give the federal government jurisdiction over 75-85% of Australian employees.

One of the features of the Work Choices legislation was the move to enhance the resources and power of the federal labour inspectorate. The first federal government initiative was to increase the status and resources of the existing inspectorate, the OWS. The OWS was established as an executive agency in the Employment and Workplace Relations portfolio, reporting directly to the Minister for Workplace Relations.<sup>32</sup> While the Minister referred to the OWS as an 'independent agency',<sup>33</sup> it was only independent from the Department of Employment and Workplace Relations (DEWR). The OWS was not only subordinate to the Minister during this period, but as a separate agency whose head was appointed by the Minister, its functions were potentially 'more susceptible to ministerial direction, and so less independent, than when it was within DEWR.'<sup>34</sup> At the time, this arrangement was in contrast to the OEA, which continued to operate as a separate statutory agency.

Just over a year later, in May 2007, the federal government announced, along with other reforms under the *Workplace Relations Amendment (Stronger Safety Net) Act 2007* (Cth) that the OWS would be transformed into a statutory agency known as the Office of the Workplace Ombudsman (WO), which would be headed by a statutory appointee. As part of this change, from 1 July 2007, the WO became independent of the management of DEWR.<sup>35</sup> The WO was given responsibility for appointing workplace inspectors, a function previously undertaken by the Minister.<sup>36</sup> At the time the legislation was read for a second time, the then Minister for Workplace Relations commented that '[t]he Workplace

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<sup>31</sup> The High Court upheld the constitutional validity of the Work Choices legislation in *New South Wales v Commonwealth of Australia* (2007) 229 CLR 1 (the 'Work Choices Challenge'). For a summary of the case, see Simon Evans, Cheryl Saunders and Megan Donaldson, *Work Choices: The High Court Challenge* (Thomson, 2007) 1-6, 55-9.

<sup>32</sup> See Order 542, *Commonwealth of Australia Gazette*, 17 March 2006.

<sup>33</sup> Kevin Andrews, Doorstop Interview, Treasury Place, Melbourne, 4 April 2006.

<sup>34</sup> Paddy Gourley, *The Public Sector Informant*, 5 September 2006, 6.

<sup>35</sup> Department of Employment and Workplace Relations, *Annual Report 2006/2007* (2007) 79.

<sup>36</sup> *WR Act* ss 166B(h), (i),

Ombudsman will strengthen the policing role which has been undertaken by the Office of Workplace Services.’<sup>37</sup>

After Work Choices, for virtually the first time in Australian industrial relations history, funding of the federal enforcement agency appears to have been a government priority. Under Work Choices, compliance was originally allocated a budget of \$141.5 million over four years.<sup>38</sup> This meant that annual funding for labour inspection more than doubled between 2005 and 2007, from \$21 million to around \$50 million. The Stronger Safety Net Act resulted in a further increase of \$60 million over four years to account for the increased responsibilities of the enforcement agency.<sup>39</sup> As at 30 June 2007, there were 292 employees (including 220 workplace inspectors) based in 27 offices, which represented a staffing increase of 64 per cent during 2006/2007.<sup>40</sup> At the time, then Prime Minister Howard stated that the additional resourcing was ‘an indication of the Government’s determination to ensure that the standard under the new legislation is fully met and that the rights and interests of employees under that legislation are fully observed.’<sup>41</sup> These changes, when combined with significant increases in the penalties applicable to breaches of federal labour legislation in 2004, meant that for the first time in the history of Australian labour regulation there was a well-resourced labour inspectorate at federal level backed by serious penalties for non-compliance.<sup>42</sup>

### 3.4 Enforcement and compliance under the Fair Work Act 2009

When the Howard Government subsequently lost power to the Rudd Labor Government at the 2007 federal election, the Labor Government moved quickly to draft new legislation, the FW Act, part of which came into force in July 2009 and the remainder on 1 January 2010. The FW Act retained many aspects of the previous system, including the Howard Government’s commitment to an improved labour inspectorate. However, the legislation

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<sup>37</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 28 May 2007, 87. See generally Tess Hardy, ‘A Changing of the Guard: Enforcement of Workplace Relations since Work Choices and Beyond’, in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 85.

<sup>38</sup> See Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth), 3.

<sup>39</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 28 May 2007, 87.

<sup>40</sup> Workplace Ombudsman, *Annual Report 2006/2007* (2007) 34.

<sup>41</sup> Hon. John Howard MP, Prime Minister of Australia, Press Conference, Parliament House, Canberra, 30 March 2006.

<sup>42</sup> Hardy and Howe, ‘Partners in Enforcement?’, above n 8; Hardy, above n 37.

established a new statutory agency, the Office of the Fair Work Ombudsman, replacing the previous agency, the Workplace Ombudsman. As well as having responsibility for labour inspection and enforcement under the FW Act, the FWO assumed the general advisory function of the former Workplace Authority, which was abolished. The agency therefore has both an education and technical assistance function as well as a responsibility to monitor and enforce compliance with the Act.<sup>43</sup>

The Office of the Fair Work Ombudsman (FWO) was established as an independent statutory agency under Part 5-2 of the FW Act. The statutory functions of the FWO are set out in s 682(1) of the FW Act:

- (a) to promote:
  - (i) harmonious, productive and cooperative workplace relations; and
  - (ii) compliance with this Act and fair work instruments;including by providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices;
- (b) to monitor compliance with this Act and fair work instruments;
- (c) to inquire into, and investigate, any act or practice that may be contrary to this Act, a fair work instrument or a safety net contractual entitlement;
- (d) to commence proceedings in a court, or to make applications to FWC to enforce this Act, fair work instruments and safety net contractual entitlements;
- (e) to refer matters to relevant authorities;
- (f) to represent employees or outworkers who are, or may become, a party to proceedings in a court, or a party to a matter before FWA, under this Act or a fair work instrument, if the Fair Work Ombudsman considers that representing the employees or outworkers will promote compliance with this Act or the fair work instrument;
- (g) any other functions conferred on the Fair Work Ombudsman by any Act.

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<sup>43</sup> FWO is established by the *Fair Work Act 2009* (Cth) Part 5-2; s 682 lists the functions of FWO.

As noted, the FWO has a number of roles including educating employers and employees about workplace rights and obligations to ensure compliance with workplace laws; the use of proactive methods to carry out its statutory objective of promoting 'harmonious, productive and cooperative workplace relations'; taking action to determine compliance with minimum employment standards, rights and obligations under the Act; and imposing sanctions and commencing proceedings against employers, employees or unions who breach the FW Act or instruments such as awards or enterprise agreements made under the Act.

In this report, we are primarily concerned with the FWO's carrying out of its compliance and enforcement functions, although in some cases its performance of advisory functions will also be relevant.

The FW Act further expanded the federal agency's mandate over employment standards and regulation of industrial behaviour, a process begun with the consolidation of agencies undertaken by Work Choices. As noted above, prior to Work Choices, labour inspectorates in Australia largely followed the approach of having separate specialised agencies with a division of power between "time and wages," OHS and, from the 1970s, anti-discrimination regulation. The differentiation between responsibility for time and wages, OHS and discrimination was maintained to some degree with the creation of the Office of Workplace Services, and later the Office of the Workplace Ombudsman.

However, under the FW Act, the FWO has been given significantly expanded powers over a range of labour matters. Although wages and conditions investigations are the major activity undertaken by the FWO, the remit of the agency is fairly broad in the sense that it is responsible for enforcing all relevant provisions of the FW Act and the FW Regulations. This includes matters such as anti-discrimination (a jurisdiction it shares with other state and federal bodies), sham contracting, unlawful industrial action and freedom of association.

The FWO's responsibilities include 10 minimum statutory 'National Employment Standards' (NES) (replacing the AFPCS), modern awards set by the FWC directly (rather than through arbitration) that apply nationally for specific industries and occupations, and a national minimum wage order (where it applies). Enterprise bargaining continues to operate as a mechanism by which, for the most part, unions and employers can negotiate enterprise level agreements which supplement or are better than the terms and conditions in the NES and modern awards.<sup>44</sup>

There are 10 minimum workplace entitlements in the NES:

1. A maximum standard working week of 38 hours for full-time employees, plus 'reasonable' additional hours.
2. A right to request flexible working arrangements to care for a child under school age, or a child (under 18) with a disability.
3. Parental and adoption leave of 12 months (unpaid), with a right to request an additional 12 months.
4. Four weeks paid annual leave each year (pro rata).
5. Ten days paid personal leave each year (pro rata), two days paid compassionate leave for each permissible occasion, and two days unpaid carer's leave for each permissible occasion.
6. Community service leave for jury service or activities dealing with certain emergencies or natural disasters. This leave is unpaid except for jury service.
7. Long service leave.
8. Public holidays and the entitlement to be paid for ordinary hours on those days.
9. Notice of termination and redundancy pay.
10. The right for new employees to receive the Fair Work Information Statement.<sup>45</sup>

Modern awards are permitted to regulate an additional 10 employment matters. Wages

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<sup>44</sup> See *Fair Work Act 2009* (Cth) ss 55-57.

<sup>45</sup> The National Employment Standards are set out in the *Fair Work Act 2009* (Cth) Part 2-2.

and classifications are set by modern awards,<sup>46</sup> and are reviewed annually by a Minimum Wage Panel of FWA.<sup>47</sup> Modern awards also include terms regulating types of employment arrangements; hours of work; overtime and penalty rates; annualised wage or salary arrangements; allowances; leave loadings; superannuation; and dispute settlement procedures.

In addition, employees' terms and conditions may set by enterprise agreements approved by FWA. Modern awards do not apply to an employer and employee while they have an agreement in place. However the base rate of pay under an agreement must not be less than the base rate of pay under the relevant modern award. If there is no modern award that covers the employees the agreement rate must be at least equal to the national minimum wage.<sup>48</sup>

The national system also protects employers, employees and unions from discrimination and victimisation (including denial of freedom of association rights).<sup>49</sup> It is unlawful for an employer to take adverse action against an employee (including dismissal, discrimination<sup>50</sup> and undue influence and pressure) for asserting a workplace right. Enforcement of these rights is through either the FWO, or the tribunal, FWA.<sup>51</sup>

In summary, under the FW Act, the FWO has been given significantly expanded powers over a range of labour matters. While the FWO's mandate has expanded, leading to the claims by the agency that it had become a "full service regulator",<sup>52</sup> there are still some

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<sup>46</sup> Employees are classified into types for the purposes of pay and other entitlements under an industrial instrument. A classification outlines the type of work an employee does and sometimes their expected skill level or required qualifications. Different classifications apply to employees doing different work.

<sup>47</sup> For discussion of the different standards, see Jill Murray and Rosemary Owens, 'The Safety Net: Labour Standards in the New Era', in Anthony Forsyth and Andrew Stewart (eds) *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009).

<sup>48</sup> *Fair Work Act 2009* (Cth) s 293.

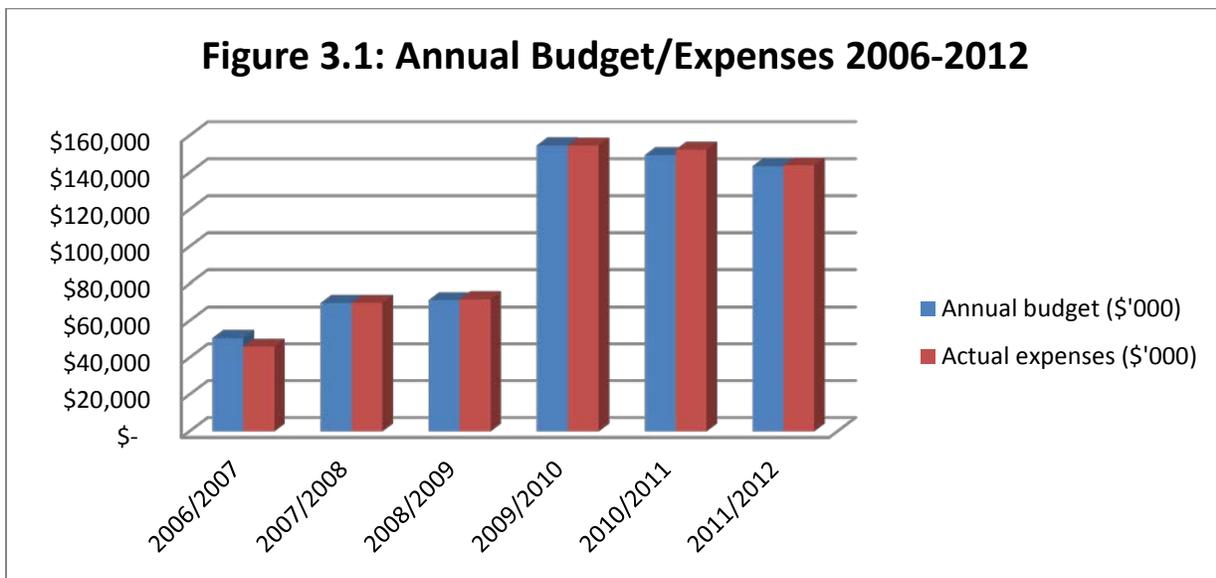
<sup>49</sup> Protection against discrimination and victimisation has formed part of the industrial relations system since the early twentieth century. See Colin Fenwick and John Howe, 'Union Security After Work Choices', in Anthony Forsyth and Andrew Stewart (eds) *Fair Work: the New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 175.

<sup>50</sup> Prohibited forms of discrimination include discrimination based on race, sex, sexual preference, age, physical or mental disability, marital status, union activity, filing a complaint, or participating in proceedings against an employer.

<sup>51</sup> The system also provides for protection against unfair dismissal, although these provisions do not form part of the FWO's jurisdiction. Instead, employees who allege that they have been dismissed from their employment in a manner that is 'harsh, unjust or unreasonable' may make an application to FWA for assistance: see *Fair Work Act 2009* (Cth) s 387.

<sup>52</sup> *FWO Annual Report 2009-2010*, 12.

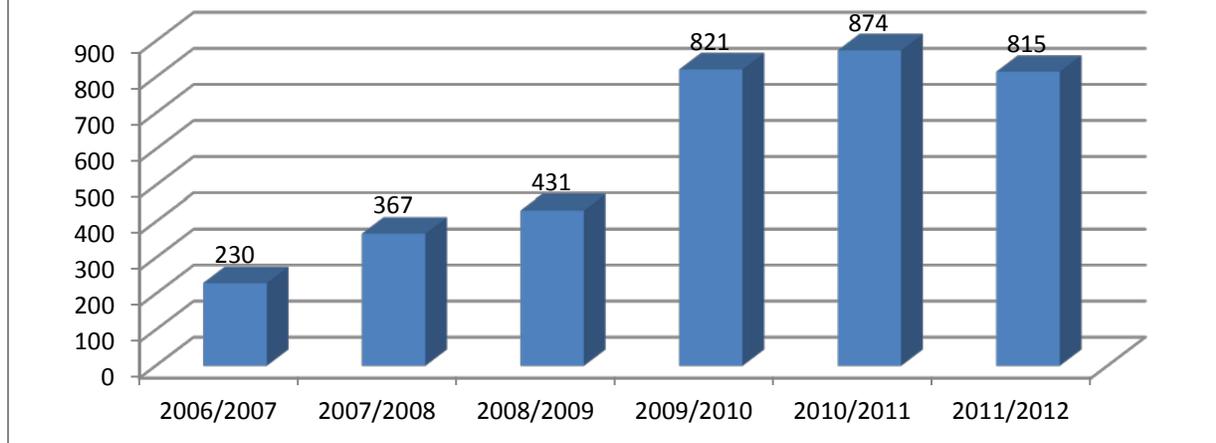
areas that fall outside its jurisdiction, in particular OHS regulation. Nevertheless, the broadening mandate of the FWO is substantial enough to create new tensions for the regulator. In taking on these additional responsibilities, the FWO faces a resourcing challenge. It must try to maintain its activity levels in relation to its original mandate, while becoming active in relation to its new areas of responsibility. Inevitably, there are concerns within the agency that activity in new areas is at the expense of what some at the FWO consider to be its “core” or “bread and butter” areas of responsibility.<sup>53</sup> Figures 3.1 and 3.2 below indicate the way in which the resourcing of the inspectorate has fluctuated over the study period. The decline in funding and staffing levels at the FWO since 2009-10 underlines one of the fundamental challenges facing the agency – how to do more with less.<sup>54</sup>



<sup>53</sup> For example, Interview with FWIL.

<sup>54</sup> This data has been extracted from the Annual Reports of the OWS, WO and the FWO in the period from 2006/2007 to 2011/2012. In particular, it should be noted that the figures for 2006-07 and 2007-08 budget are stated to reflect the Portfolio Additional Estimates Statements and do not include 'additional funding approved as part of the organisation's expanded role beyond 1 July 2007, as well as adjustments to 2006-07 budgets that were approved during the 2006-07 financial year'. All other financial years simply state that the budget information reflects budgets as set out in the Portfolio Budget Statements. These are for Outcome 1 - 'Compliance with workplace relations legislation by employees and employers through advice, education and where necessary enforcement'.

**Figure 3.2: Average Staffing Level 2006-2012**



Moreover, the FWO must also decide whether to allow FW Inspectors a broad discretion over all of these areas, or to have divisions within the agency which allow for specialisation in relation to particular standards. We consider the pros and cons of broad mandates as against internal specialisation in Chapter 4 (when we discuss the internal structure of the agency).

### 3.5 Investigative Powers of Fair Work Inspectors

The Office of the Fair Work Ombudsman consists of the Fair Work Ombudsman, Fair Work Inspectors (FW Inspectors) appointed in accordance with the terms of the FW Act, and other staff assisting with the performance of workplace compliance and advisory functions set out in the FW Act.<sup>55</sup>

FW Inspectors are appointed by the FWO and are empowered to investigate and enforce compliance with Commonwealth workplace laws and industrial instruments within the statutory mandate of the agency, such as the NES, modern awards and enterprise agreements. Complainants have standing to lodge a complaint with the FWO if they are subject to relevant Commonwealth workplace laws (eg. the FW Act) or industrial instruments and the complaint relates to incorrect pay, unfair discrimination or

<sup>55</sup> *Fair Work Act 2009* (Cth) s 696; see also Hardy, above n 37.

contravention of workplace rights. An inspector will then be appointed to investigate the complaint.<sup>56</sup>

Before we outline the various enforcement approaches and sanctions available to the FWO, we first discuss the specific powers of investigation that the FW Act provides to FW Inspectors.

FW Inspectors are authorised to inspect a range of matters including underpayments of wages and entitlements, time and wages record-keeping obligations, freedom of association, right of entry by trade unions, undue influence or pressure in relation to individual flexibility arrangements, guarantees of annual earnings, transfer of business arrangements, sham contracting arrangements, unprotected industrial action and unlawful discrimination. The FWO is not empowered to investigate unfair dismissal complaints. If a person seeks to hinder or obstruct a FW Inspector in the course of their duties, they may face criminal charges.<sup>57</sup>

Subdivision D of Division 3 of Part 5-2 of the FW Act sets out the functions and powers of FW Inspectors in carrying out their responsibilities, including their rights of entry and inspection (ss 708 and 709, FW Act). Under s 706 of the FW Act, an Inspector may exercise compliance powers (other than a power under ss 715 or 716) for one or more of a number of 'compliance purposes' listed in the FW Act:

- (a) determining whether this Act or a fair work instrument is being, or has been, complied with;
- (b) subject to subsection (2), determining whether a safety net contractual entitlement is being, or has been, contravened by a person;
- (c) the purposes of a provision of the regulations that confers functions or powers on inspectors;

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<sup>56</sup> Australian Government, *Factsheet: About the Fair Work Ombudsman* (17 July 2013) Fair Work Ombudsman <<http://www.fairwork.gov.au/resources/fact-sheets/about-us/pages/about-the-fair-work-ombudsman-fact-sheet.aspx>>.

<sup>57</sup> See Fair Work Ombudsman (31 May 2010) *Guidance Note 8: Investigative Process of the Fair Work Ombudsman*.

- (d) the purposes of a provision of another Act that confers functions or powers on inspectors.

### *Power of Inspectors to Enter Premises*

Under s 708 of the FW Act, FW Inspectors are empowered to enter premises without force 'if the inspector reasonably believes that this Act or a fair work instrument applies to work that is being, or applied to work that has been, performed on the premises'; or, in relation to business premises, 'if the inspector reasonably believes that there are records or documents relevant to compliance purposes on the premises, or accessible from a computer on the premises'. An inspector may exercise compliance powers at any time during working hours, or at any other time 'if the inspector reasonably believes that it is necessary to do so for compliance purposes'.<sup>58</sup>

Before entering a premises, a FW Inspector must show their identity card to the occupier of the premises or their representative but does not need permission to enter the premises. An Inspector must not enter a part of a premise that is used for residential purposes unless they reasonably believe that work is being performed on that part of the premise.

A FW Inspector may exercise a number of powers whilst on the premise including inspecting any work, process or object; interviewing anyone (with their consent); requiring a person to tell them who has, or who can access, a record or document; requiring the person with access to a record or document to hand it over while the inspector is on the premises or within a specific timeframe; inspecting and making copies of any record or document kept on the premises (hardcopy or electronic); and taking samples of any goods or substances after informing the owner or other relevant person in charge of the goods or substances.<sup>59</sup> To assist an investigation, a suitably qualified and experienced person may accompany a FW Inspector onto the premises if the Inspector deems it necessary and reasonable. Assistants could include information technology specialists, forensic

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<sup>58</sup> *Fair Work Act 2009* (Cth) s 707.

<sup>59</sup> *Ibid* s 709.

accountants or interpreters.<sup>60</sup>

### ***Power to Require Name and Address***

If a FW Inspector reasonably believes that a person has contravened a relevant Commonwealth Act, and the contravention may attract a monetary penalty, the FW Inspector can require that person to tell them their name and address and provide proof of such.<sup>61</sup> Refusal to comply with this request could attract a penalty of up to \$3,300 if prosecuted.

### ***Power to Require Production of Records or Documents***

Furthermore, in the course of an investigation, a FW Inspector can issue a written Notice to Produce Records or Documents, requiring a person to provide records or documents at a particular location, within a specified time period (at least fourteen days).<sup>62</sup> A person cannot refuse to comply with this on the grounds that providing the documents may incriminate them. Failure to comply with a Notice to Produce Records or Documents could attract a penalty of up to \$6,600 (for an individual) or \$33,000 (for a corporation) if prosecuted.

## **3.6 Overview of the FWO's Enforcement Mechanisms and Procedures**

Given that a major object of the FW Act is to ensure 'a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions', enforcement is an essential component of the FW Act. The mechanisms available in the FW Act include provisions empowering the FWO to determine compliance with minimum standards, as well as various administrative sanctions and penalty provisions for failure to observe the NES and other terms of the FW Act, modern awards, and other instruments, as well as mechanisms by which the FWO, unions or employees can recover entitlements when awards and the NES are breached.

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<sup>60</sup> Fair Work Ombudsman, *Fair Work Inspector's Assistants* (17 September 2010) Fair Work Ombudsman <<http://www.fairwork.gov.au/about-us/fair-work-inspectors/Pages/fair-work-inspectors-assistants.aspx>>.

<sup>61</sup> *Fair Work Act 2009* (Cth) s 711.

<sup>62</sup> *Ibid* s 712.

The FW Act has increased the variety of enforcement approaches available to the FWO when compared to its predecessor, the WO. In particular, the FWO now has a number of administrative sanctions at its disposal, a reflection of the FW Act's emphasis on 'preventative compliance (eg. through education and advice) and cooperative and voluntary compliance (eg. through enforceable undertakings)'.<sup>63</sup> However, the FWO is also able to bring court proceedings seeking penalties for breach of terms and conditions of employment under the FW Act.

### *AVR and Mediation*

Two approaches used by the FWO in the resolution of complaints are Assisted Voluntary Resolution (AVR) and mediation. The use of these approaches falls within the discretion of the FWO and FW Inspectors. They are not specifically conferred by the FW Act.

### *Full Investigation*

The FWO may decide that AVR is neither possible nor appropriate in some circumstances in which case the complaint will proceed directly to full investigation. A full investigation generally involves a FW Inspector obtaining evidence by a variety of methods and making a final determination so far as possible.

### *Administrative sanctions*

If a FW Inspector identifies a contravention of a civil remedy provision under the FW Act, there are a range of compliance tools available. In particular, the following can be considered:

- a letter of caution;
- a contravention letter;
- an infringement notice;
- referral to mediation or small claims;
- a compliance notice;

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<sup>63</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth), 386. See also Hardy and Howe, above n 8, 328.

- an enforceable undertaking; or
- litigation to seek various remedies, such as an injunction, penalties and/or compensation.

As noted earlier, the FW Act has enhanced the mix of enforcement approaches available to the FWO, especially the administrative sanctions available to FW Inspectors. These provisions are intended to provide 'the FWO with another option to deal with non-compliance (by encouraging co-operative compliance) instead of pursuing court proceedings.'<sup>64</sup> The FWO's use of these sanctions will be discussed in more detail in Chapter 6, but the more notable of these include: **infringement notices**, similar to an on-the-spot fine, which FW Inspectors may issue where they reasonably believe an employer has contravened the record-keeping and pay slip obligations contained in the FW Act and FW Regulations; **compliance notices**, which FW Inspectors may issue in circumstances where the FW Inspector reasonably believes that there has been a breach of a minimum employment standard, and which will normally provide that a person must take specified action to remedy the contravention, and require the person to produce reasonable evidence of the carrying out of that action; and **enforceable undertakings**, an agreement enforceable in court made between the FWO and an individual or firm who the FWO reasonably believes has contravened (or been involved in contravening) the FW Act. These agreements generally specify actions that the person or business will take - such as the adoption of new compliance processes - or refrain from taking. It is an alternative to more formal and punitive administrative, civil or criminal sanctions.

### *Court Based Enforcement Actions*

In addition to the administrative sanctions and the small claims jurisdiction available under the FW Act, the legislation provides that the FWO (along with employees and unions) may bring court proceedings in relation to a breach of provisions in the NES, the minimum wage and modern awards (employers and their associations may also sue for breach of modern awards).

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<sup>64</sup> Explanatory Memorandum, FW Act 2008 (Cth), 400.

The FW Act achieved substantial reform of the availability and organisation of remedies under federal labour regulation, in contrast to previous statutes.<sup>65</sup> With the principal exception of unfair dismissal claims,<sup>66</sup> the remedy provisions were rationalised and consolidated. Most forms of wrongdoing were made a breach of a civil remedy provision, including breaches of modern awards<sup>67</sup> and enterprise agreements.<sup>68</sup> The FW Act also retains prohibitions against unlawful termination and breach of freedom of association. However, under the FW Act these provisions are now grouped together now within Part 3-1 of the Act, the ‘General Protections’, and the Act makes it clear they are also civil remedy provisions.

Chapter 4 is almost a complete code for the enforcement of the FW Act.<sup>69</sup> In particular, Part 4.1 provides that a number of civil remedies may be sought in relation to contraventions of civil remedy provisions.<sup>70</sup> Within Part 4.1, s 546 allows for the making of pecuniary penalty orders against employers, and like previous legislation, gives the court discretion to order payment to the Commonwealth, a particular organisation or a particular person.<sup>71</sup> However, the FW Act also provides the court with a general discretion to ‘make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision’, including granting an injunction, awarding compensation, or reinstatement of a person to their employment.

The effect of these provisions is that a wide range of remedies has become available under

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<sup>65</sup> See further Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010) 503-518.

<sup>66</sup> In contrast to unlawful termination under the *WR Act*, there is no scope for an order for compensation in relation to unfair dismissal against an employer company’s director under the *Fair Work Act 2009* (Cth). Section 392(1) of the *Fair Work Act 2009* (Cth) provides that ‘[a]n order for the payment of compensation to a person *must* be an order that the person’s *employer* at the time of the dismissal pay compensation to the person in lieu of reinstatement’ (emphasis added).

<sup>67</sup> *Fair Work Act 2009* (Cth) s 45.

<sup>68</sup> *Fair Work Act 2009* (Cth) s 50.

<sup>69</sup> There are some exceptions, such as the unfair dismissal provisions, which are in Part 3-2, and provision for a reverse burden of proof in applications relating to contraventions of the ‘general protections’ claims: *Fair Work Act 2009* (Cth) s 361.

<sup>70</sup> Some breaches of the *Fair Work Act 2009* (Cth) are designated as a criminal offence, such as where a person breaches an order of FWA, in which case criminal proceedings may be brought against those alleged to have breached the legislation. However, the legislation excludes FWA orders concerning minimum employment standards such as minimum wages or equal remuneration. In the event that an FWA order concerning a non-excluded employment standard was breached, such matters must be referred to the Commonwealth Office of Public Prosecutions.

<sup>71</sup> *Fair Work Act 2009* (Cth) s 546(3).

the FW Act which were not available under previous legislation, thus constituting a significant expansion of the remedies available under federal labour legislation. For example, the FW Act extends the remedies for breaches of awards and agreements beyond wage recovery and penalties to include compensation and injunctions, neither of which were available for such breaches under previous legislative regimes.<sup>72</sup>

The FW Act imposes a maximum penalty of either \$3,300 or \$6,600 for individuals (depending on the nature of the breach), or \$16,500 or \$33,000 in the case of a corporation. These penalties are significantly greater than the penalties imposed for breaching minimum employment standards prior to 2004, which were \$2,000 and \$10,000 respectively. However, these penalties are not as significant as penalties in commercial regulatory regimes, such as under the *Corporations Act 2001* (Cth), the statute which regulates corporate governance in Australia. Under that legislation, penalties for breaching civil penalty provisions range between a maximum of \$200,000 for an individual or \$1 million for a corporation.<sup>73</sup>

In cases where a firm is alleged to have committed a breach of the FW Act, the legislation also provides for 'accessorial liability'. Under s 550(1), proceedings may be brought against individuals 'involved in a contravention' with the firm, such as company directors by providing that '[a] person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.'<sup>74</sup> The FW Act provisions appear to be broader than under Work Choices, as it appears that any of the remedies available in cases of primary liability, such as compensation, are also available when accessorial liability is proven. Under the Work Choices legislation, there was only limited capacity for the courts to award compensation against accessories.<sup>75</sup>

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<sup>72</sup> *Fair Work Act 2009* (Cth) s 545.

<sup>73</sup> *Corporations Act 2001* (Cth) s 1317G.

<sup>74</sup> Under *Fair Work Act 2009* (Cth) s 550(2), 'A person is involved in a contravention of a civil remedy provision if, and only if, the person: (a) has aided, abetted, counselled or procured the contravention; or (b) has induced the contravention, whether by threats or promises or otherwise; or (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or (d) has conspired with others to effect the contravention'. Involvement, therefore, requires much more than merely being a director or officer of the company at the time of the company's breach.

<sup>75</sup> Helen Anderson and John Howe, 'Making Sense of the Compensation Remedy under the Fair Work Act' (2012) *Melbourne University Law Review* 335.

We will consider the FWO's use of court proceedings (and its referral of some matters to the small claims jurisdiction) and administrative sanctions in more detail in Chapter 6 of the report.

### **3.7 Conclusion**

Since the 1930s, the Australian government has maintained a labour inspectorate with responsibility for monitoring compliance with federal employment standards, and where necessary, enforcing those standards. However, the reinvigoration of the OWS under Work Choices, and the subsequent establishment of the WO and then the FWO and the enhancement of the investigation and enforcement framework under federal legislation, represents a significant transformation in public enforcement of minimum employment standards in Australia. In the following chapter, we set out the agency's objectives and priorities between 2006 and 2012, and the internal structure it adopted to further its regulatory goal.



## **4 THE OBJECTIVES AND INTERNAL STRUCTURE OF THE FAIR WORK OMBUDSMAN**

### **4.1 Introduction**

In Chapter 2 of the report, we observed that the nature and extent of enforcement of minimum employment standards is likely to be a factor in the compliance effects of the agency, and that the goals and internal configuration of a regulatory agency are key elements of its approach to enforcement. This chapter discusses the goals and priorities of the federal employment standards enforcement agency between 2006 and 2012, and examines the organisational structure which the agency established in order to carry out its statutory functions as described in the previous chapter. As noted in the postscript to this report, this internal structure has been the subject of recent review. This chapter will comment on the structure as it stood at 30 June 2012. The final section discusses the recruitment and training of Fair Work Inspectors.

### **4.2 The FWO's Enforcement Objectives and Priorities**

As noted above, the FW Act provides that the Office of the Fair Work Ombudsman (FWO) must serve a number of objectives and functions concerning the promotion of compliance, monitoring of compliance, and enforcement of the FW Act in cases of non-compliance. In this section, we consider the more specific enforcement priorities and strategies that have been followed by the agency in carrying out these broad statutory responsibilities during the study period. In discussing the objectives of the FWO, we include consideration of the goals of the agency's predecessors over the period from 2006 to 2009; the post-Work Choices OWS and the Workplace Ombudsman.

As discussed in Chapter 3, the federal agency has significantly expanded, and the FWO sought to establish a significant regional presence through a network of offices throughout Australia. A key goal of the FWO and its predecessor agencies has therefore been to achieve consistency across these different regional branches and state-based inspectorates which are subject to partnership agreements with the FWO.

Accountability was also an important value of the FWO, and reflects the political pressures faced by the agency. The agency also emphasised its independence:

The wider purpose of the Fair Work Ombudsman is to assist employers and employees alike to understand their respective workplace rights and obligations. Our role in all cases is independent and neutral. We are independent of Government and we generally do not act for either employers or employees. We're not advocates and we're not representatives.<sup>1</sup>

It is not surprising that the FWO placed a heavy emphasis on the importance of independence, transparency and accountability. More recently, a review by the Commonwealth Ombudsman (which reviews the functioning of federal agencies such as the FWO) has had the effect of testing various accountability measures the FWO has since put in place.<sup>2</sup>

In part, the FWO sought to achieve consistency and accountability across the agency through a rule-based approach to the carrying out of its functions, particularly management of investigations and the use of various compliance tools, with the development of an internal Operations Manual and the issuing of various Guidance Notes which were publicly available on the FWO's website. Some of these Guidance Notes were directly concerned with how the function and powers of FW Inspectors were to be exercised, such as *Guidance Note 8: Investigative Process of the Fair Work Ombudsman*, while others addressed specific compliance tools. There were separate Guidance Notes concerning the use of compliance notices, enforceable undertakings, and the commencement of litigation, amongst others. The Guidance Notes will be discussed in greater detail in chapters 5 and 6 of this report.

However, by way of example, *Guidance Note 1: FWO Litigation Policy*, stated that the agency's litigation activities were only one element in a broader set of compliance tools

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<sup>1</sup> Fair Work Ombudsman, *Annual Report 2010-2011* (2011).

<sup>2</sup> Commonwealth Ombudsman, *Fair Work Ombudsman: Exercise of Coercive Information-Gathering Powers*, Report No. 9, (Commonwealth Government, 2010). The effectiveness of the FWO's education and compliance activities is also being assessed by the Australian National Audit Office, which is due to report by the end of 2012.

consisting of both ‘positive motivators and deterrents aimed at bringing about compliance with Commonwealth workplace laws’. However, under the policy, proceedings could be commenced ‘if the FWO considers such proceedings to be the most appropriate means of dealing with the contravention or deterring others from contravening Commonwealth workplace laws (for example, where there are significant amounts underpaid, a number of employees or vulnerable employees involved)’, notwithstanding that there may have been voluntary compliance.<sup>3</sup>

The Guidance Note specified that before the FWO would commence proceedings, a two-stage test had to be satisfied: ‘First, there must be sufficient evidence to prosecute the case’, and second, ‘it must be evident from the facts of the case, and all the surrounding circumstances, that commencing proceedings is in the public interest’.<sup>4</sup> In determining the public interest, the Guidance Note provided that a number of factors could have been considered, including the nature and circumstances of the alleged contravention, the characteristics of the alleged wrongdoer, characteristics of the alleged aggrieved party, the level of public concern, the impact of the contravention, the likely effects of the proceedings on general and specific deterrence, and so on.<sup>5</sup>

It is apparent from the range of factors that may be considered under the Litigation Policy that these Guidance Notes set very broad parameters concerning the FWO’s priorities in carrying out its various responsibilities. It is therefore necessary to look to other sources concerning the agency’s key objectives and priorities between 2006 and 2012. For example, between 2006 and 2009, the federal agency emphasised that it was taking an ‘insistence compliance’ approach to its role, to draw a contrast with the persuasive compliance approach which had prevailed in the pre-Work Choices period. In 2008, the Chief Counsel of the Workplace Ombudsman stated that ‘the increased use of litigation as a form of insistence compliance and the significant penalties that have been awarded by the courts send a warning signal to workplace participants that the “light handed” approach to

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<sup>3</sup> Fair Work Ombudsman, *Guidance Note 1: FWO Litigation Policy*, cl 4.4. We discuss the Litigation Policy in further detail in Chapter 6.

<sup>4</sup> Fair Work Ombudsman, *Guidance Note 1: FWO Litigation Policy*, cl X.

<sup>5</sup> Fair Work Ombudsman, *Guidance Note 1: FWO Litigation Policy*, cl 12.

industrial regulation is a thing of the past.’<sup>6</sup> It must be remembered that at this time the agency’s responsibilities were largely confined to compliance and enforcement. A different agency (the Workplace Authority) was responsible for providing information and education concerning the workplace relations system.<sup>7</sup>

The WO’s 2007-2008 Annual Report stated that:

‘The Workplace Ombudsman acts independently and impartially when complaints are made about workplace relations breaches. As far as possible, we seek voluntary compliance. Litigation is considered only in circumstances where a breach is significant, relates to a vulnerable worker or group, or where one party is unwilling to recognise and fix the problem.

Our operations during the reporting period have demonstrated that the Workplace Ombudsman is much more than a time and wages regulator. We are a genuine workplace “watchdog” prepared to push the boundaries in the interests of all workers; whether they be newly arrived 457 visa holders recruited from overseas, long-serving factory workers, or casual student employees.’<sup>8</sup>

After the establishment of the FWO, the agency revised and expanded upon its objectives in its 2009-2010 Annual Report:

‘The agency’s **vision** is fair Australian workplaces, and its **mission** is to work with Australians to educate, promote fairness and ensure justice in the workplace.

The Fair Work Ombudsman promotes harmonious, productive and cooperative workplace relations and ensures compliance with Australia’s workplace laws, and does this by:

- offering people a single point of contact for them 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
- investigating complaints or suspected contraventions of workplace laws, awards and agreements
- litigating to enforce workplace laws and to deter people from not complying

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<sup>6</sup> Leigh Johns, ‘Wielding a Bigger Stick in Workplace Relations Compliance’ (2008) 82(11) *Law Institute Journal* 42, 42.

<sup>7</sup> Although it should be noted that it is arguable the inspectorate has always had an education function, as demonstrated by its longstanding provision of information services such as ‘Wageline’.

<sup>8</sup> Workplace Ombudsman, *Annual Report 2007-2008* (2008) 2.

with their workplace responsibilities.’<sup>9</sup>

In relation to the agency’s ‘new vision’, the then Fair Work Ombudsman, Nicholas Wilson, later observed:

‘One of the things we have done is to define “fairness” for our own use, and for the development of our products.

Since a fairness definition is not included in the Fair Work Act, we developed our own, so we would know it when we saw it, or perhaps more importantly, so we would know it when we didn’t see it. The definition we came up with is this;

*A fair workplace ...*

- *builds a balance between the working and home lives of employees;*
- *is just, and ensures an even playing field;*
- *has all parties engaged in matters affecting their workplace;*
- *is fully compliant with the law.’<sup>10</sup>*

After the FW Act came into effect, the agency acknowledged a need to go ‘softly-softly’ on some employers in light of some of the complexities inherent in the transition to a new system. In particular, the transitional arrangements for modern awards proved difficult to navigate, especially for small businesses without the assistance of human resources departments. The possibility that failure to pay the correct wage was based on genuine error rather than disregard for the mandatory standards was relatively high. Partly in response to this situation, Nicholas Wilson stated that the regulator ‘would take a flexible compliance approach in relation to modern awards’ given that the content is not fixed or still contested, such as annual leave loading.<sup>11</sup>

Our interviews with present and former FWO managers, and perusal of the transcripts of Senate Estimates Committee Hearings since the establishment of the FWO on 1 July 2009,

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<sup>9</sup> Fair Work Ombudsman, *Annual Report, 2009-2010* (2010) 6.

<sup>10</sup> Nick Wilson, ‘Fairness over the First Year’, (Speech delivered at the Industrial Relations Society of Victoria National Convention, 8 October 2010.)

<sup>11</sup> See ‘FWO welcomes union/employer variation bids’, *Workplace Express*, 2 June 2010.

confirmed that in the aftermath of the Fair Work system coming into full effect on 1 January 2010, a major focus of the agency was assisting employers and employees with the transition to the new system. This included interpretation of modern awards and the transition of many non-incorporated employers to the federal system under the state system referrals.<sup>12</sup>

More recently, the FWO has suggested that its goals are to perform an educative role for the majority of workplaces, and that it will focus its enforcement activities on more egregious contraventions:

Our work promotes harmonious, productive and cooperative workplace relations. The overwhelming majority of us who work, go to work each day pleased that we can contribute; satisfied that we engage socially with our workmates; and that we are paid fairly for our labour. On the one hand, my Office works daily with Australian employers to ensure this equation is a balanced one by providing them with the information they need to ensure fair payment.

On the other hand, we hear a lot about the exploitation of a relative few. When we hear these things, [our] staff work assiduously to get to the bottom of the matter and, as best we can, ensure the exploitation is removed including, where necessary, by using formal investigation or litigation. ...

A very small proportion of businesses have got to where they are because they resist the laws applying to them, and an even smaller proportion deliberately and systematically set out to exploit their workforce. But it is this segment of the community that logically deserves most attention from the Fair Work Ombudsman.

The advisory, auditing and compliance services offered to the community by the Fair Work Ombudsman are pitched to ensure that as much as possible Australians have the information they need to pay, or be paid, properly. My objective is to progressively reorient the services in order to expend the greatest effort on the areas of greatest need, which is especially the employment of young, migrant and other vulnerable workers in workplaces which are not members of industry or employer organisation and the workforce is not unionised.<sup>13</sup>

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<sup>12</sup> See, for example, statement by Nick Wilson to Senate Estimates Hearing, 1 June 2010.

<sup>13</sup> Fair Work Ombudsman, *Annual Report 2010-2011* (2011) 2-3.

Some of our interviewees noted the contrast between the agency's priorities in the period between 2006 and 2009, and after becoming the FWO:

In the early days of the agency it became very apparent to us that there was a base level of compliance that we needed to achieve. Before we got too caught up in concepts of best practice, and really evolving Australia's workplace relations system, it was critical for us to deliver on a base level of compliance, and from that we can then build. And that was an evolution from the WO to the FWO, and the FWO is very clearly building on that again.

... perhaps [the agency's focus] has changed. I mean the focus of the Workplace Ombudsman was very much around compliance outcomes – you know, the cost of non-compliance; do the right thing or else – and that was an important time, I think, in compliance history in this country, that there was suddenly a cost for non-compliance, and the cost could be quite significant. ...The OWS obviously started it, but WO really, I think, took the ball and hammered it home. I think the notoriety, if you like, or the community awareness or the broader awareness of the Agency assisted the Fair Work Ombudsman as far as establishing its legitimacy and reputation when it tried to move into a different space which was trying to assist employers comply with workplace law before they contravened them.

So we certainly leveraged off the hard work of the Workplace Ombudsman to move quickly into the Fair Work Ombudsman and its broader mandate. So I think it was really important, but I guess there's been a shift, if you look at the educational messaging coming out of the Fair Work Ombudsman now, it's far more about accidents happen, and we're here to help, as a last resort we'll prosecute.<sup>14</sup>

To summarise, between 2006 and 2012 the federal enforcement agency identified a number of priorities in carrying out its statutory compliance functions. Early on, the agency sought to portray itself as an aggressive enforcer of the law in order to change perceptions of the agency that had endured from a relative lack of activity in previous years. More recently, however, as the last quote indicates, the agency cast itself in more of an educative role in relation to the majority of workplaces, emphasising that investigation and prosecution would be strategically focused on more egregious cases of non-compliance.

### **4.3 Internal Structure of the FWO and Professionalisation of FW Inspectors**

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<sup>14</sup> Interview with FWMF .

The formal, statutory functions of the FWO described in this chapter, and its responsibility for a range of employment standards under the Act, leave the agency with a broad discretion concerning how it is to deploy its resources and powers. Moreover, the Act says little about how the agency should conduct the recruitment and training of the FW Inspectors who are so integral to the statutory regime.

This section therefore discusses the FWO's internal structure as at 30 June 2012, as well as the selection and training of FW Inspectors, in order to explain how the agency implements its formal responsibilities. We consider this in light of comparative studies of the ideal structure of labour inspectorates, and present our findings concerning the FWO staff's own views regarding the effectiveness of the structure it has adopted.<sup>15</sup>

### *Internal Structure of the FWO*

The question of how a labour inspectorate should be structured in order to be both efficient and effective in the carrying out of its responsibilities has been the subject of much debate internationally, among both academic commentators and administrators. In the previous chapter, we observed that the scope of the FWO's jurisdiction – its mandate – was expanded by the FW Act.

Labour legislation may be consolidated into one statute or divided into discrete categories (separate laws may deal with wages and hours, occupational health and safety, child labour and so on). However, administration of the standards need not follow legislative structure; regardless of whether labour law is consolidated, it may be administered on a generalist or specialised basis.<sup>16</sup> In more generalist inspection systems such as France and several other European and Latin American countries, inspectors are broadly responsible for all areas

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<sup>15</sup> A more detailed analysis of these questions can be found in John Howe, Tess Hardy and Sean Cooney, 'Mandate, Discretion and Professionalisation at an Employment Standards Enforcement Agency: An Antipodean Experience (2012) 35 *Law & Policy* 1.

<sup>16</sup> See Michael Piore and Andrew Schrank, 'Toward Managed Flexibility: The Revival of Labour Inspection in the Latin World' (2008) 147 *International Labour Review* 1; Wolfgang von Richthofen, *Labour Inspection: A Guide to the Profession*, (Geneva: International Labour Organization, 2002); and Roberto Pires, *Labour Inspection and Development: Some Reflections*, (Working Document No. 9, Labour Inspection and Administration Programme LAB/ADMIN, International Labour Organization, Geneva, 2011).

covered by labour legislation, monitoring occupational health and safety, conditions of work, and also individual or collective labour relations.<sup>17</sup>

As noted in Chapter 2, a number of scholars engaged in international comparison of labour inspection systems are attracted to this broad jurisdiction. Two of the most prominent, Piore and Schrank, argue that the wide latitude given to inspectors in such systems “allows them to weigh the various regulations against each other, as well as the total cost of the regulatory burden (goods, services and employment the enterprise provides) against the benefits of various enforcement strategies”.<sup>18</sup> This broad mandate is therefore combined with a wide discretion with regard to what action should be taken.

The specialised inspection system is characterised by a number of departments which are each responsible for different types of labour protection. For example, it is common in many of these jurisdictions for the enforcement of ‘time and wages’ to be separated from occupational health and safety regulation, as in Australia.<sup>19</sup> In many jurisdictions, these specialist agencies are under the overall control of separate authorities or a single authority, as is the case in the United States and Germany.<sup>20</sup>

There is also scholarly support for this specialisation approach. For example, Malcolm Sparrow suggests that dedicated units offer the advantage of providing ‘an incubator for fledgling problem-solving skills and a protective shield from competing demands.’<sup>21</sup> He makes the point that while an agency must be versatile in its response to complex problems, this does not necessarily mean that individual agents must be equally versatile. Provided that the resources and activities of individual inspectors or multiple units can be

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<sup>17</sup> International Labour Organization (ILO) Committee of Experts on the Application of Conventions and Recommendations, *Report V: Labour Administration and Labour Inspection*. International Labour Conference, 100<sup>th</sup> session, Agenda Item 5, ILC.100/V,(2011) 62.

<sup>18</sup> Piore and Schrank, above n 17, 6; see also Michael Piore, ‘Beyond Markets: Sociology, Street-Level Bureaucracy, and the Management of the Public Sector’ (2011) 5 *Regulation & Governance* 145.

<sup>19</sup> See von Richthofen, above n 17, 146.

<sup>20</sup> Although Piore classifies these jurisdictions into a third category of labour inspection system, the integrated system, we have chosen to include these jurisdictions as a sub-set of the “specialised” category: Piore. Above n 17, 5

<sup>21</sup> Malcolm Sparrow, *The Regulatory Craft* (Brookings Institution Press, 2000).

adequately coordinated and utilised by the central risk control operation, specialisation of this nature can enhance rather than damage an overall regulatory strategy.<sup>22</sup>

Traditionally, the Australian employment standards inspectorate could be characterised as falling within a ‘specialist’ jurisdiction. The old Arbitration Inspectorate was responsible for time and wages matters, while occupational health and safety was the responsibility of dedicated State inspectorates, and anti-discrimination laws also had their own regulatory structure. However, we have already noted the expansion of the FWO’s mandate under the FW Act, giving it a much wider jurisdiction with similarity to some generalist jurisdictions.

The conferral of additional jurisdiction by the FW Act prompted new internal configurations of resources at the agency, together with attempts by the organisation to allocate its resources in the manner that will most efficiently address its priorities. Some of these divisions accord with the agency’s different functions. Thus, the agency maintains an extensive advisory service provided by telephone and web-based services.

Our concern in this report is with the compliance functions of the agency. In this regard, the FWO followed the practice of internal specialisation, establishing sections within the agency with responsibility for different types of contraventions. For example, while wages, hours and leave matters were handled by the Regional Services and Targeting Branch (RST), cases which involved some of the FWO’s newer areas of responsibility – such as sham contracting, discrimination, contravention of collective bargaining orders, industrial action and union right of entry – were generally deemed to be ‘complex cases’ and handled by the Complex Investigations and Innovation Branch (CII). CII was staffed by more senior inspectors who were trained in taking witness statements, interviewing techniques and investigation methodology.

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<sup>22</sup> Ibid 234; see also International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations, *Report V: Labour Administration and Labour Inspection*, International Labour Conference, 100<sup>th</sup> Session, Agenda Item 5, ILC.100/V (2011), 62.

Where a complex case also involved wages and conditions allegations, the matter has in the past often been split between RST and CII. In practice, this meant that two different inspectors could be charged with inspecting the same workplace. This potentially recreated the problems of narrow jurisdiction in a way that would not have occurred if the basis of specialisation was, for example, firm size. As one senior manager explained:

[I]f we get a complaint that comes through that has a wages issue and it has a general protections [i.e. discrimination] issue we're splitting that and having an Inspector from both sides working on it. And arguably that's not giving us a great outcome.<sup>23</sup>

Moreover, internal specialisation based around the nature of the matter investigated risks creating expertise gaps in relation to cases falling between or outside functional boundaries. It is perhaps for these reasons, in part, that the FWO's policy concerning these matters changed in the 2011-2012 financial year. Where a matter involved both 'complex' issues and potential contraventions of minimum employment standards, CII assumed sole responsibility for this matter.

The FWO also had specialised units based on the size of the regulated business. In 2009–2010, a Small Business Education Unit was established within the FWO, which was dedicated to developing education tools specifically tailored for small business, including template letters and record-keeping documents and best practice guides. The Small Business Education Unit was not staffed by persons with inspection powers but general staff who were focused on tailoring education tools for SMEs.

In the same period, the FWO set up a specialist team known as the National Employer Branch, later called the Major Employers Branch, that was dedicated to providing education and assistance to large national enterprises and franchise operations. The aim of this initiative was twofold: first, to identify compliance issues facing large employers; and second, to proactively work with these companies to voluntarily implement compliant

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<sup>23</sup> Interview with FWM O.

processes and systems.<sup>24</sup> In the future, the FWO has indicated that this program will be expanded to strategically focus on procurement decisions by large firms and government agencies so as to consider compliance amongst the contractor workforce of these firms and agencies.

Unlike France, where industry specialisation is necessary because of the health and safety functions of the inspectorate, the FWO resisted further specialisation by industry or sector, except to the extent that the agency's targeted detection and education campaigns tended to have an industry focus. By way of explanation, the work of the inspectors who focused on the enforcement of minimum employment conditions was generally divided between two teams. The first and largest was the team which responded to individual employee complaints. The second and more strategic team included those inspectors who devised and implemented 'targeted campaigns' – education and compliance audits which focused on a specific industry, region or issue which had been flagged as a concern. We discuss the operation of these teams in further detail in Chapter 5.

Senior staff at the FWO recognised that there are advantages and disadvantages to specialisation along industry lines. The FW Inspectors we interviewed who worked in teams responding to complaints generally expressed satisfaction with the fact that this led them to work in a range of different industries, depending on the origin of the complaint. However, some were attracted to specialisation:

I think actually there could be some value in having specialised industries, because they'd get to know the instruments specific to that industry, and you would have some experts. It's not to say that they wouldn't be capable of going outside of that industry, it would just give people an expert to go to if they needed questions in those instruments. Given that we work with so many, you can never be across all of them. So I think to specialise, there probably would be some value in that for a select group of people.<sup>25</sup>

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<sup>24</sup> See further discussion of the Major Employers Branch in Chapter 5.

<sup>25</sup> Interview with FWI J.

The above quote makes reference to the fact that, as noted in our earlier discussion, a number of minimum terms and conditions of employment are established through the modern award system. This means that there are separate and specific minimum employment standards set for each industry. This stands in contrast to many other regulatory systems that are based on the enforcement of standards which are universal to the workforce, and is relevant in weighing up the advantages and disadvantages of specialisation.

However, one Fair Work Manager we interviewed was concerned that while specialisation by industry might have its advantages in terms of developing expertise in industry-specific standards and familiarity with stakeholders ('you can really get your head around a particular legislation. You can actually build up the relationships with the key people in the industry'), it required resourcing levels that were not feasible for the FWO.<sup>26</sup> Another manager felt that the FWO was:

on a trajectory where we're creating more specialist and siloed structures. That's not going to make us a more efficient or effective organisation in that the more specialist areas you have the less flexibility you've got in dealing with changes in workload and changes in what's coming through. So I think we need to make sure that we're getting a good balance between the more generalist roles and specialists. I'm not necessarily convinced that specialist industry teams are the way to go.<sup>27</sup>

The internal organisation of responsibilities within the FWO was still a work in progress, but at 30 June 2012, activities were generally structured around function or the type of contravention rather than the nature of industry or the size of enterprise. Again, this arrangement has its advantages and disadvantages; the effectiveness of this configuration can usefully be considered by reference to alternative ways of imagining how a labour inspectorate might divide its tasks. In particular, it seems that the two diverging views of inspectors on this point could be reconciled to the extent that there is a level of coordinated specialisation. For example, it may be useful to train or identify a more senior inspector who has experience or expertise in a particular industry so that more generalist inspectors

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<sup>26</sup> Interview with FWM K.

<sup>27</sup> Interview with FWM O.

could seek his or her assistance in complex matters. This same person could also prove an important contact point for managing stakeholder relationships.

In any event, the responses of our interviewees suggest that the internal organisation of the FWO was a manner of ongoing debate and review. The FWO was not, at least by the end of the study period, locked into a particular model, and there remained significant scope for experimentation and restructuring.

### *Recruitment and Training of Fair Work Inspectors*

The FW Act says little about the qualifications required of FW Inspectors, requiring only that the FWO 'is satisfied that the person is of good character.'<sup>28</sup> The competency, skills and professionalisation of labour inspectors has been identified as '[o]ne of the essential elements of an adequate system of labour inspection'.<sup>29</sup> The recruitment of Inspectors, and the level of training and professionalisation offered by the FWO, is therefore of interest in examining the nature and functions of the inspectorate.

In practice, the FWO did not appear to recruit FW Inspectors on the basis of any formal qualifications they may have had. While some Inspectors we interviewed had a relevant tertiary degree, such as an industrial relations qualification, many did not. Many FW Inspectors we interviewed were appointed from within the organisation, largely from the telephone advisory service, or were hired on the basis of previous investigative experience, such as with the Australian Taxation Office or the police force.

One manager told us that in his view, there was no particular background that led to better Inspectors, and that it 'was good to have a mix because of that spread of experiences.'<sup>30</sup> Other managers and inspectors reported that there had been a conscious effort to improve recruitment and to move away from the 'ex-police skill set'. This shift became more

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<sup>28</sup> *Fair Work Act 2009* (Cth) s 700(2).

<sup>29</sup> Vera Jatoba, 'Labour Inspection Within a Modernized Labour Administration' (Working Paper No 148, Series of the Inter-American Conference of Labour Ministers, ILO, 2002) 19.

<sup>30</sup> Interview with FWM O.

pressing after the FWO took over the broader educative functions that were previously carried out by the Workplace Authority.<sup>31</sup>

The FWO was making concerted efforts to build the skills, knowledge and competency of the Inspectors it recruited. This appeared to be partly driven by a desire to ensure that inspectors were displaying the 'key behaviours' required in their position, which included being 'courageous, impartial, proactive and professional'.<sup>32</sup> It also seemed to be part of a broader strategy to establish a career development framework, but it had, at least until very recently, tended to be directed at a building a range of operational competencies and familiarity with legislation, not at broad analytical skills characteristic of higher education degree courses.

When the OWS was first expanded and then re-badged as the Workplace Ombudsman (WO), training was largely undertaken via an induction process and a 'buddy' system, whereby new Inspectors were assigned to work with a more experienced Inspector who acted as a supervisor and mentor. Since then, the FWO and its predecessor agencies have taken steps to develop more sophisticated induction and training programs, while maintaining on-the-job training opportunities, including the buddy system.

Throughout the course of their employment at the FWO, there were various internal training opportunities made available to Inspectors, including short technical briefings and more comprehensive skills training, such as in negotiation or dispute management. Technical training was particularly important from July 2009, given the implementation of the new Fair Work system.<sup>33</sup> In addition to providing training regarding state referral systems and modern awards, FW Inspectors and Advisers were also trained to specifically handle enquiries relating to workplace discrimination. As noted earlier, a new process was also put in place which allowed difficult or complex matters to be escalated to specialist

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<sup>31</sup> Interview with FWM R; see also Interview with FWI I.

<sup>32</sup> FWO *Annual Report 2009-2010* (2010) 50.

<sup>33</sup> *Ibid* 51-2.

areas and the resolution shared with staff via regular information bulletins and updated training.<sup>34</sup>

More recently, the FWO took steps to develop and seek accreditation for more formal training opportunities, in particular the Certificate IV and Diploma in Government (Workplace Relations) which it developed in partnership with Government Skills Australia. This was a qualification which was focused on the regulatory system to be enforced by the Inspectors and had been developed specifically for the FWO staff. It was in addition to the more longstanding Certificate IV in Government Inspections which provided training in investigatory techniques and processes, but which in the past had not been specific to the FWO.

In a review of the exercise of coercive information-gathering powers by the FWO, the Commonwealth Ombudsman found that the initial training, combined with the refresher training offered periodically to staff, was 'sound' and noted the new qualifications with encouragement.<sup>35</sup> Most Inspectors we interviewed were satisfied with the increased training opportunities and the level of professionalisation of their roles, although many expressed the view that it was on-the-job training and the opportunity to gain investigation experience which was the most valuable to their professional development.

Some managers and Inspectors felt that there was still progress to be made in the development of greater degrees of competency testing at entry level, and in the development of a more structured training program leading to an officer being appointed as a FW Inspector.<sup>36</sup> This appeared to lead to the establishment and development of a 'Professionalisation Project' which commenced in 2011. The primary purpose of this project was to implement 'a broader FWO strategy to ensure we are building capability in

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<sup>34</sup> Ibid 59.

<sup>35</sup> *Evidence to Senate Standing Committee on Education, Employment and Workplace Relations (Fair Work Ombudsman)* (1 June 2010, Questions on Notice: DEEWR Question No EW0273\_11) 13.

<sup>36</sup> For example, Interview with FWM Q.

people and culture through developing technical and professional skills and thus ensuring the FWO is able to deliver effective compliance activities.’<sup>37</sup>

In summary, although not requiring the same level of professionalisation as inspectorates in France and some other jurisdictions, the FWO has recognised the importance of developing the skills and expertise of its frontline staff. While this training may eventually enhance the capacity of FW Inspectors to operate with greater discretion and autonomy, the FWO’s immediate motivation was to improve the competency and effectiveness of its Inspectors.

#### 4.4 Conclusion

Within the statutory parameters set by federal labour legislation, the FWO and its predecessors have enjoyed a significant discretion as to what compliance goals to prioritise, and how best to structure the agency to further those goals. We observed that the FWO’s goals shifted over time, with an initial promotion of insistence compliance during the WO era replaced by a focus on the agency’s educative function, with an emphasis on strategic enforcement.

Unlike some of the Franco-Iberian systems, the FWO has historically chosen to structure its investigation functions according to type of breach rather than allowing Inspectors to address compliance with multiple regulations by firm or industry. This is not to suggest that the FWO has failed to consider, for example, industry specialisation. Time and wages matters are more in the nature of bright-line standards in relation to which it is possible to determine compliance or contravention than, for example, some OHS duties. This specialisation was supplemented by an effort to achieve greater professionalisation of the inspectorate.

In the following Chapter, we move on to examine how those divisions of the inspectorate

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<sup>37</sup> Communication from FWM S to authors.

responsible for educating employers (and the workforce more generally) and detecting non-compliance carried out these functions.



## 5. COMPLAINTS, CAMPAIGNS AND COMPLIANCE

As with other labour inspectorates, the task of the Fair Work Ombudsman (FWO) is to ensure that employers are complying with minimum employment standards under the FW Act, and to take action to change their behaviour when they are not in compliance.<sup>1</sup> The FWO sought to fulfil its statutory mandate in a variety of ways. First, the FWO undertook various education initiatives ranging from the provision of information via a telephone information line, known as the Fair Work Infoline, the agency website and (to a lesser degree) through the holding of educational seminars. Second, to enable the FWO to carry out its compliance and enforcement functions, as we observed in Chapter 3, the FW Act provides FW Inspectors with broad investigatory and enforcement powers. Within these wide parameters, the FWO was largely free to determine which firms and workers are most in need of assistance and/or deterrence.<sup>2</sup>

This chapter of the report focuses on one aspect of the second of these tasks, that is, how the FWO detected non-compliance with federal fair work law. Chapter 6 deals with another aspect, the enforcement of the law in cases of non-compliance. The issue of detection is closely linked to how the FWO allocated its enforcement and education resources. We then discuss the FWO's approach to detection, which became increasingly sophisticated as the organisation developed. We consider this approach in light of the literature discussed earlier in this report, and by reference to practices overseas.<sup>3</sup>

The chapter focuses on the two central methods the FWO used to detect non-compliance over the study period: *complaints* (generally from employees) and *campaigns* (initiated by

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<sup>1</sup> See, for example, David Weil and Amanda Pyles, 'Why Complain? Complaints, Compliance and the Problem of Enforcement in the US Workplace' (2005) 27 *Comparative Labor Law and Policy Journal* 59, 61.

<sup>2</sup> The Minister may give written directions to the FWO about performance of his or her functions, however, such directions must be 'of a general nature only': *Fair Work Act 2009* (Cth) s 684.

<sup>3</sup> See, David Weil, *Improving Workplace Conditions Through Strategic Enforcement, A Report to the Wage and Hour Division* (US Department of Labour), May 2010; David Weil, 'A Strategic Approach to Labour Inspection (2008) 147(4) *International Labour Review* 351, 349-375; David Weil, 'Enforcing Labour Standards in Fissured Workplaces: The US Experience' (2011) 22 *Economic and Labour Relations Review*, 33; David Weil and Amanda Pyles, above n 1; Mary Gellatly, John Grundy, Kiran Mirchandani, Adam Perry, Mark Thomas, and Leah Vosko, 'Modernising' Employment Standards?: Administrative Efficiency and the Production of the Illegitimate Claimant in Ontario, Canada' (2011) 22 *Economic and Labour Relations Review* 81.

the FWO, usually in specific industry sectors). These are described in the first half of the chapter. The second half develops two main themes. The first is that, while the FWO must certainly respond to complaints, it would be prudent not to rely too heavily on dealing with complaints as a means of securing observance of the law because there is not necessarily a close relationship between the number of complaints in an industry, and the level of (non-) compliance with the law. There is therefore a continuing need for complementing strategies such as audits. The FWO has come to recognise and act upon this observation. The second theme is that it is very difficult to determine how best to design audits so that they will have the greatest impact on compliance. The FWO made considerable advances in addressing these difficulties, but we suggest some further possibilities. In particular, we emphasise the need to refine analyses identifying target industries and vulnerable workers. Additional organisational skills will be required to do this, in the form of a labour market economist or sociologist with high level skills in quantitative research methods.

## 5.1 The FWO's Detection Strategies

In general terms, the staff of a labour inspectorate can be deployed to determine non-compliance in response to complaints received from workers or others, or through planned inspection activities designed to detect any non-compliance that has otherwise not come to the attention of the inspectorate. The balance between inspection activities in response to complaints, and proactive inspection designed to find non-compliance, is a key issue raised in studies of labour enforcement. This is because a low level of complaint activity in a particular industry, sector or region is not necessarily indicative of widespread employer compliance.<sup>4</sup> Moreover, the probability of detection is an important source of general deterrence recognised in the regulation and compliance literature. It is therefore important that any areas featuring low levels of complaints and high levels of non-compliance are found and addressed by the labour inspectorate.

In the case of the FWO, contraventions were generally brought to the attention of the agency by requests for information or complaints made through the phone contact number

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<sup>4</sup> This issue is explored at length in the second half of this chapter.

(13 13 94) or the website. Those providing information included employees and people acting on their behalf, other government agencies, and employer associations or unions. The FWO could also become aware of contraventions through issues exposed in the media, matters raised by members of federal, state or territory parliaments, and otherwise by compliance audits and/or targeted campaigns.<sup>5</sup> In addition, potential contraventions could be identified through other novel initiatives, such as the national employer program, later known as 'Major Employers'. There were also detection methods linked to enforcement mechanisms, such as proactive compliance deeds and enforceable undertakings (these are explored in a separate paper).

### *Complaints*

The dominant detection strategy adopted by the federal labour inspectorate agency for at least the past two decades was complaint-orientated.<sup>6</sup> This is consistent with the practice in many overseas jurisdictions, although it has been increasingly questioned.<sup>7</sup> While the agency transformed between 2006 and 2012 with a significant boost in funding and powers, and a changed political environment,<sup>8</sup> it remained committed to the idea that one of its key functions was to deal with workplace grievances.<sup>9</sup> Indeed, while it was true that the 'FWO may exercise discretion regarding the matters it chooses to investigate or not investigate',<sup>10</sup> there was a strong tendency to attempt to deal in some way with all the complaints that came before it. Furthermore, speedy complaint resolution was central to the FWO's Key Performance Indicators, such as the indicator concerning the number of complaints resolved within 90 days.<sup>11</sup>

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<sup>5</sup> See Fair Work Ombudsman, *Guidance Note 8 - FWO Investigative Process*.

<sup>6</sup> See Glenda Maconachie and Miles Goodwin, 'Recouping Wage Underpayment: Increasingly Less Likely?' (2006) 41(3) *Australian Journal of Social Issues* 327, 339; Miles Goodwin and Glenda Maconachie, 'Unpaid entitlement recovery in the federal industrial relations system: Strategy and outcomes 1952-95' (2007) 49(4) *Journal of Industrial Relations* 523.

<sup>7</sup> See the references by Weil, above n 3 (on the United States), Gellatly et al, above n 3 (on Canada). See also, Sean Cooney, Sarah Biddulph and Ying Zhu, *Law and Fair Work in China* (Routledge, 2013) 120-131;

<sup>8</sup> Tess Hardy, 'A Changing of the Guard: Enforcement of Workplace Relations Laws Since Work Choices and Beyond' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, (Federation Press, 2009).

<sup>9</sup> Indeed, some interviewees were of the view that responding to complaints was the agency's primary purpose, based on extracts from , Interview with FWMJ and Interview with FWMN.

<sup>10</sup> See *Guidance Note 8 - Investigative Process*, above n 5, 7.

<sup>11</sup> Fair Work Ombudsman, *Annual Report 2011-2012* (2012) 42.

**Figure 5.1: Complaints Finalised (FWO and WO)**

	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12
Complaints finalised	11 977	24 207	23 338	21 070	22 523	28 412
Total recovered (complaints and audits) (millions) <sup>12</sup>	\$13.5	\$36.6	\$32.5	\$26.2	\$26.8	\$39.8

Many FWO staff we interviewed supported this direction of considerable FWO resources towards dealing with complaints on several grounds. Firstly, there was a widespread view that all members of the public who approached the organisation were entitled to have their grievances dealt with by the agency in some form or another. The FWO's Customer Service Charter stated that one of the five key principles underpinning the FWO's service commitment was 'customer focus'.

A second argument in favour of this approach is that it apparently lead to a high level of wage recovery. For example, in the 2011/2012 financial year, FW Inspectors recovered \$33.6 million in lost wages and entitlements for 11 923 employees.<sup>13</sup> A further \$6.2 million was recovered on behalf of 6574 employees as a result of audit and targeted investigation activities. This pattern, which was been consistent from the establishment of the FWO to 2012, seems to suggest that recoveries from audits may be more modest (i.e. \$943 per employee) than that for complaints (i.e. \$2818 per employee). However, this may simply indicate that workers with large amounts owing to them were more likely to complain, and possibly that many such workers were more highly paid than those whose underpayments were detected by audit. Again, persons who complained tended to at the end of an employment relationship and were therefore entitled not only to wages but to accrued

<sup>12</sup> The data here are from the annual reports of FWO and the Workplace Ombudsman. The annual reports do not disaggregate recovered payments according to whether they relate to complaints or other mechanisms (such as audits), but see Figure 5.2 in relation to amounts specifically recovered through campaigns.

<sup>13</sup> This and the following data are from Fair Work Ombudsman, *Annual Report 2011-2012* (2012) 32.

entitlements. In any event, it does not of course follow that the failure to pay workers who do not lodge complaints should be disregarded.

In the early days after the establishment of the FWO in 2009, the emphasis on complaints caused some concern among staff members. One issue was the work generated as a result of the high case load.<sup>14</sup> In the view of some, managing the sheer volume of complaints was exacerbated by the fact that the agency attempted to provide a high quality of service for every complainant.<sup>15</sup> Some questioned whether this was appropriate in the case of complainants who could effectively help themselves.<sup>16</sup> For example, one inspector reported that on average up to 60-70% of the complaints she was handling did not necessarily involve vulnerable workers.<sup>17</sup>

An important response to this was various forms of triaging. One example was the Assisted Voluntary Resolution (AVR) process, which channeled initial complaints through an informal process overseen by an Inspector. A second strategy was the ‘complaint treatment model’. This model was a ‘risk management tool’<sup>18</sup> designed to address problems of lower productivity and to ensure that inspectorate resources were being allocated efficiently according to public policy factors. The model involved senior FW Inspectors reviewing key elements of each matter which was received from the AVR team in order to determine the most appropriate treatment. For example, if a matter involved a highly educated, well-resourced employee or the evidence was conflicting or weak, the complainant may have been directed to file a small claims proceeding or referred to mediation. On the other hand, if the complaint was brought by a ‘vulnerable worker’,<sup>19</sup> a full investigation or audit may have ensued.

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<sup>14</sup> Extract from Interview with FWML.

<sup>15</sup> Extract from Interview with FWMP.

<sup>16</sup> Based on comments made in Interview with FWMP and Interview with FWIM.

<sup>17</sup> Based on comments made in Interview with FWMP.

<sup>18</sup> Extract from Interview with FWMP.

<sup>19</sup> ‘Vulnerable worker’ is defined by the Office of the Fair Work Ombudsman (FWO) to include: young people, trainees, apprentices, people with a physical or mental disability or literacy difficulties, recent immigrants and people from non-English speaking backgrounds, the long-term unemployed and those re-entering the workforce, outworkers, people with carer responsibilities, indigenous Australians, employees in precarious employment (e.g. casual employees) and people residing in regions with limited employment opportunities and/or with financial and social restraints on their ability to relocate to places where there might be greater job opportunities. See Fair Work Ombudsman, *Guidance Note 8 – Investigative Process*, 11.

### *Audits: targeted campaigns and compliance audits*

As an alternative to responding to complaints, the agency sought to strengthen its powers of detection through proactive interventions. The most prominent of these were ‘targeted campaigns’ which were designed ‘to help employers understand and comply with Commonwealth workplace laws’.<sup>20</sup> The FWO had a Key Performance Indicator that it would conduct at least four national campaigns and two in each state, an indicator that it largely met.<sup>21</sup>

### *A focus on education?*

We understand from our interviews and from the reports into campaigns that audits had a strong orientation towards education. This focus, and the ‘flexible compliance’ approach adopted more generally by the FWO, was at least in part a response to the regulatory complexity of the environment at the time, especially the transitional provisions. Nicholas Wilson has stated that the regulator ‘would take a flexible compliance approach in relation to modern awards’ given that the content was not fixed.<sup>22</sup> The assumptions underlying this approach influenced the methodology and outcomes of the audits undertaken by the FWO: most targeted campaigns had strong aspects of information transfer and cooperation. This was in accordance with one of the FWO’s statutory functions, which was to educate workplace participants. As the 2011-2012 Annual Report states:

In 2011-2012, rather than a single focus on ‘catching’ employers not complying with workplace laws, the Fair Work Ombudsman’s campaigns began with an ‘information and awareness’ phase with targeted industries receiving information on their workplace rights and obligations.<sup>23</sup>

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<sup>20</sup> Fair Work Ombudsman, *Audits and Campaigns – Employers: What to Expect* (10 April 2012) Fair Work Ombudsman <<http://www.fairwork.gov.au/about-us/audits-and-campaigns/pages/employers-what-to-expect.aspx>>. For a critical analysis, see Glenda Maconachie and Miles Goodwin references, above n 6

<sup>21</sup> Fair Work Ombudsman, *Annual Report 2011-2012* (2012) 15; see also Table 5.3.

<sup>22</sup> See ‘FWO welcomes union/employer variation bids’, *Workplace Express*, 2 June 2010.

<sup>23</sup> Fair Work Ombudsman, *Annual Report 2011-2012* (2012) 37.

The FWO viewed education as an important tool in achieving employer compliance, so it is likely that the education focus of targeted campaigns will continue beyond the transitional period.

One problem with this approach is that it may fail to deal appropriately with recalcitrant employers. For example, Miles Goodwin and Glenda Maconachie, in an analysis of the early targeted campaigns, observe that while the FWO had increased its litigation activity in relation to complaints, they failed to do so in the context of audits.<sup>24</sup> They argue that '[a]s it becomes clear that voluntary rectification is the worst outcome of being caught through a targeted campaign, compliance in the longer term will be compromised'.<sup>25</sup> We agree that if this were the case, it would be a matter of serious concern since it would suggest a reluctance by the FWO to 'escalate up the enforcement pyramid' in relation to employers who are not amenable to voluntary methods.

Our analysis of the FWO data stored in their 'Nexus system' database, covering campaigns up to 2012, suggests that where violations are detected during campaigns, they are in most cases pursued with the employer until compliance is achieved; in 90% of cases this occurred as a result of voluntary compliance by the employer. When combined with the emphasis on education and cooperation in the FWO audits, these factors may mean that employers were less adversarial and defensive in their interactions with the FWO. Indeed, a consistent message across our interviews (one borne out in the data about voluntary resolution) was that it was much easier to achieve voluntary compliance in the context of an audit rather than a complaint investigation.<sup>26</sup> The fact that employers were more cooperative during audits also meant that inspectors could more easily access records which of itself may have aided greater detection.

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<sup>24</sup> Miles Goodwin and Glenda Maconachie, 'Transforming the inspection blitz: targeted campaigns, enforcement and the Ombudsman' (2010) 21 *Labour & Industry* 369, 382-3; see also Miles Goodwin and Glenda Maconachie, 'Minimum Labour Standards Enforcement in Australia: Caught in the Crossfire?' (2011) 22 *Economic and Labour Relations Review* 55.

<sup>25</sup> *Ibid* 386.

<sup>26</sup> See, e.g., Interview with FWIP, Interview with FWMQ and Interview with FWIG.

Nonetheless, there remained cases where voluntary compliance was not forthcoming following an audit. How were such cases dealt with? We understand from our discussions with the FWO that just under 10% of all litigation between 2009 and 2012 was derived from audits (this is further discussed in Chapter 6). However, this figure does not simply correspond to the 10% of audit cases where compliance was not voluntary (since it refers to 10% of the FWO litigation, not the 10% of audit cases). In any event, the data does not enable us to determine conclusively the relationship between audits and litigation. The FWO Nexus data aggregated litigation arising from both complaints and audits, so that is not possible to identify (other than anecdotally) how many instances of litigation originated in audits. It would be helpful to clarify the data on litigation along these lines.

### *The structure of targeted campaigns*

There were two main forms of targeted campaigns: national and state/regional. Since 1 July 2012, there has been a national team dedicated exclusively to conducting audits as part of the various campaigns. Previously, there was a small dedicated targeting team at the national level and separate targeting teams at each state level. Inspectors from outside the targeted teams were drawn into campaigns on an ad hoc basis, with the division of resources within the inspectorate being weighted in favour of the resolution of complaints. At the end of the study period there was a national team of 28 people dedicated only to conducting audits.

We were informed that the assessment in relation to which occupations to target was, at least until the more recent approach discussed later in this paper, based on the number of vulnerable workers employed in the relevant sector, as well as general ‘intelligence’, such as data collected from the Fair Work Infoline and website<sup>27</sup> and the rate of complaints in any given industry or region. The FWO also employed other methods to capture ‘the complaints that we don’t see’.<sup>28</sup> Decisions about who, what and where to target were supplemented by information sourced from Inspectors on the ground to advisors from the

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<sup>27</sup> Based on comments made in Interview with FWMQ .

<sup>28</sup> Extract from Interview with FWMH .

Major Employers Branch. Information shared by other government agencies and, on occasion, the police was also taken into account,<sup>29</sup> as were those industries which were likely to have low profit margins<sup>30</sup> or may have been the subject of new regulation. Interviewees said that such decisions could be based on issues such as ‘what industries have we not touched upon in the last four years, what are the growth industries, what are the recalcitrant industries’.<sup>31</sup>

The important role played by employer associations, unions, community groups and other government agencies in the detection game became increasingly prominent.<sup>32</sup> For example, the National Cleaning Services Campaign was initiated not just because of the number of vulnerable workers in the sector, but because of concerted and persistent pressure from employer associations and unions.<sup>33</sup> Similarly, information provided by a community centre in South Australia weighed in on a decision to undertake a state-based audit of the aged care industry.<sup>34</sup> These groups could also be an important source of more specific information about employers of concern.<sup>35</sup>

Recently, the TCU tried to develop a more systematic methodological framework in relation to identifying which occupations to target. This framework, which drew on the work of David Weil, is discussed at length in the second half of this Chapter.

According to our interviews and various FWO campaign reports, national targeted campaigns unfolded in a regular pattern. First, the FWO consulted external stakeholders about the forthcoming campaign to seek their views and garner their support. Second, media releases were published about the campaign, which were generally picked up by the local media or specialist industry publications. These media releases typically highlighted

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<sup>29</sup> Based on comments made in Interview with FWIG and Interview with FWMQ .

<sup>30</sup> Extract from Interview with FWIG .

<sup>31</sup> Extract from Interview with FWMN and Interview with FWIS .

<sup>32</sup> For general discussion of the evolving relationship between the FWO and unions, see Tess Hardy and John Howe (2009) ‘Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia’ 22 *Australian Journal of Labour Law* 306.

<sup>33</sup> Extract from Interview with FWMR .

<sup>34</sup> Extract from Interview with FWM .

<sup>35</sup> Based on comments made in Interview with FWIS .

the information available from the FWO website. This could often prompt members of the public to provide additional information or even encourage employers to proactively ask for the FWO's assistance.<sup>36</sup> Third, letters or emails were sent to all employers in the relevant industry or region informing them about the scope of the campaign and providing general information about the applicable workplace obligations. Finally, a representative sample of employers was selected to undergo a compliance audit.<sup>37</sup>

If clear monetary breaches were detected, the employers were contacted by the FWO and asked to rectify the specific contraventions identified, as well as undertake a self-audit for the rest of the employees and report the results back to the FWO. For the most part, FW Inspectors generally used an office-based audit methodology. Field visits were conducted as necessary, for instance, where records were not returned or further evidence was required to make an assessment.<sup>38</sup>

Our discussion so far has concentrated on national campaigns. State and regional campaigns were conducted on similar principles, albeit on a more condensed basis. One distinction was that while state and regional campaigns were usually preceded by local media coverage or letters to the affected employers, a few were conducted on an unannounced basis.

In the financial year 2011-2012, the FWO carried out a total of 3,329 finalised targeted audits as part of national campaigns, a 63% decrease over national audits conducted in the previous year.<sup>39</sup> However, this was offset by an increase in state and territory campaigns, which took the total number of audits to 6,547 (compared to 6,779 in 2010-2011 and 3,678 in 2009-2010). There were four national campaigns in 2011-2012<sup>40</sup> and twenty-two state and territory campaigns. The campaigns conducted over 2011-2012 also resulted in a major increase in monies recovered (\$6.2 million compared to \$4.7 million and \$4.3 million

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<sup>36</sup> Based on comments made in Interview with FWIS .

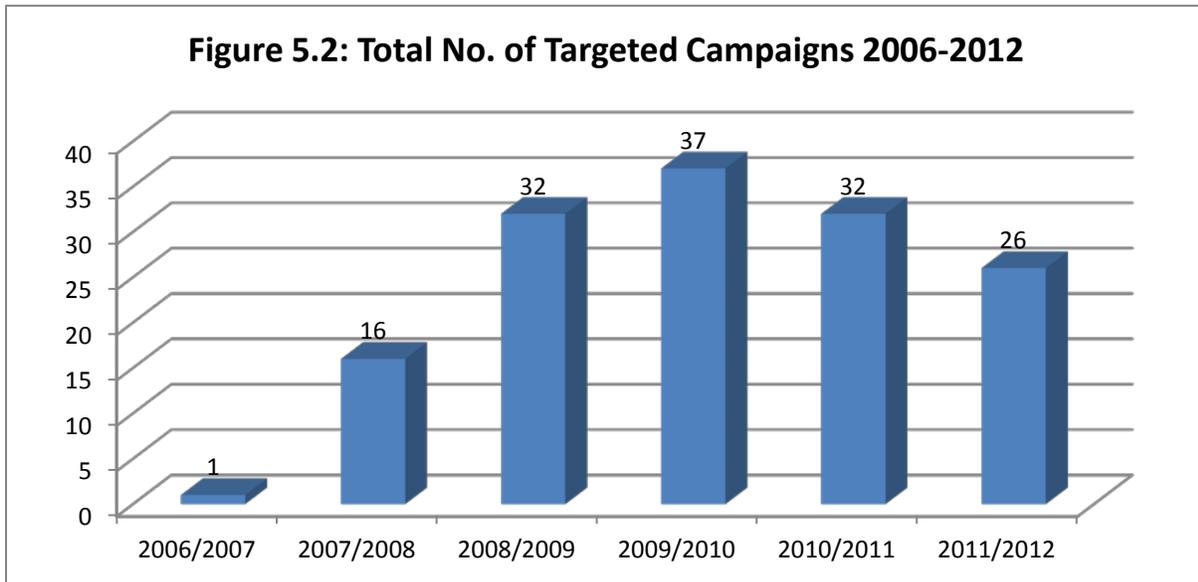
<sup>37</sup> Based on comments made in Interview with FWMK and Interview with FWIQ .

<sup>38</sup> Based on comments made in Interview with FWIS .

<sup>39</sup> Fair Work Ombudsman, *Annual Report 2011-2012* (2012) 38.

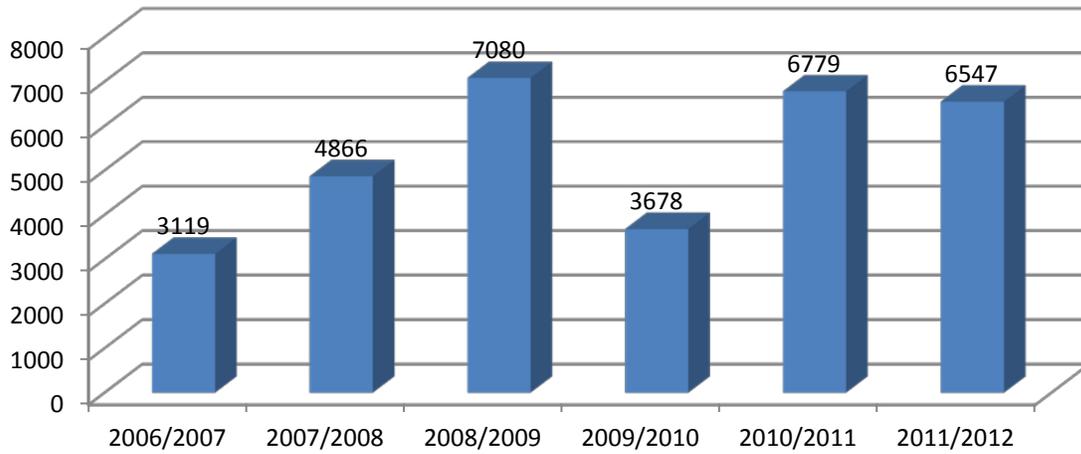
<sup>40</sup> The retail industry campaign, the security industry follow-up campaign, the clerical workers campaign and the vehicle repair and maintenance campaign: *ibid*, 38, 41.

in the two previous financial years). The pattern of campaigns, audits and recoveries over the period from 2006/2007 to 2011/2012 is set out in Figures 5.2, 5.3, 5.4 and 5.5 respectively.<sup>41</sup>

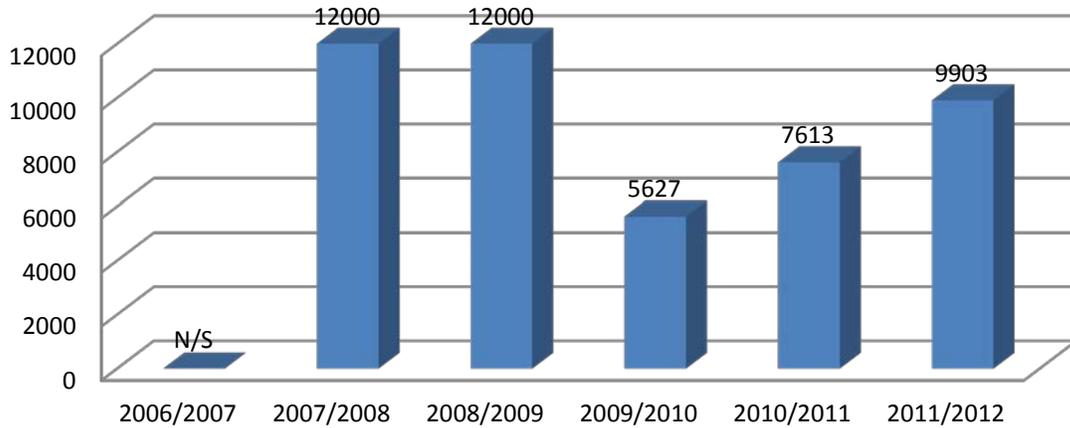


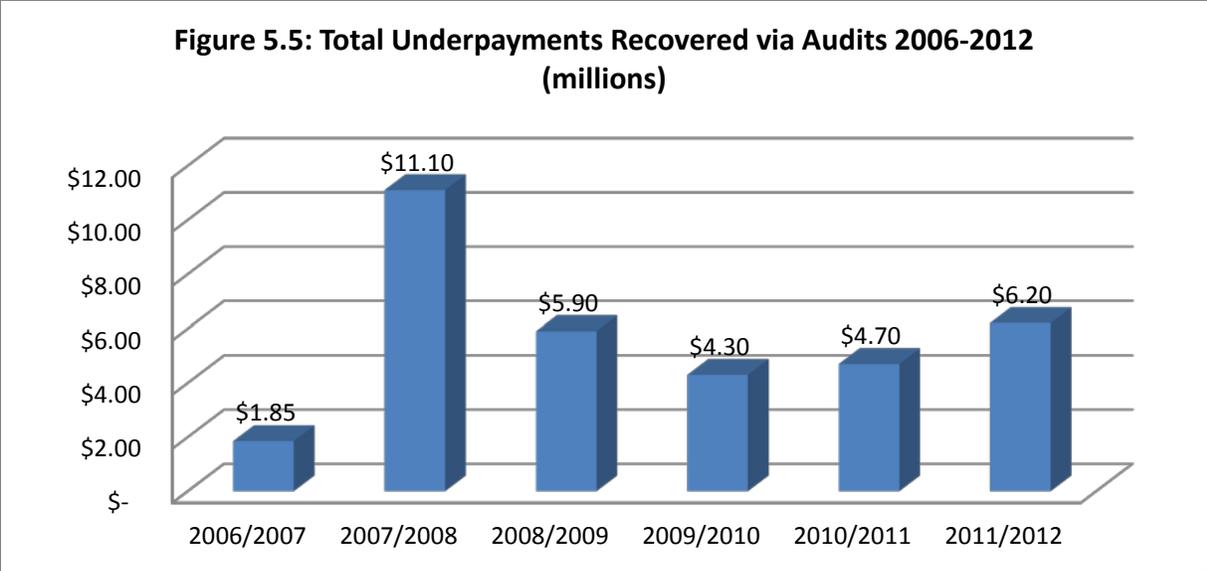
<sup>41</sup> These figures are based on data extracted from all Annual Reports issued by Office of Workplace Services (OWS), Workplace Ombudsman (WO) or the FWO in the period from 2006/2007 to 2011/2012. There is limited data available in the 2006/2007 Annual Reports and on the FWO website. Technically speaking, there were no targeted campaigns *finalised* in this financial year, although it appears that for the purposes of statistics, the national targeted campaign that was commenced in this financial year was counted even though it was not finalised until 2007/2008. Further, in the 2007/2008 and 2008/2009 Annual Reports, the data is broken down into 'Local Initiatives' and 'National and State Campaigns' which is different from the categories used in the later Annual Reports i.e. 'State and Territory Campaigns' and 'National Campaigns'. In addition, the number of workers who recovered payments in 2006/2007 is not available in the relevant Annual Report and in respect of 2007/2008 and 2008/2009, the number is approximate and includes both compliance audits and targeted investigations. Note that scope of an audit can vary widely – for example, in some campaigns, the audit may focus on a single type of contravention (e.g. record-keeping) or a particular type of employee (e.g. apprentices) whereas other campaigns may be more general in scope (i.e. a sample of all employees in respect of key wages and conditions).

**Figure 5.3: Total No. of Businesses Audited 2006-2012**



**Figure 5.4: Total No. of Workers Recovering Payment via Audits 2006-2012**





*Site visits and unannounced inspections*

Most audits, particularly those carried out as part of targeted campaigns, were office-based. The most obvious driver for this approach was resource concerns. Undertaking a physical inspection of records in the workplace was not only time-consuming, but in some cases, Inspectors had to make multiple visits.<sup>42</sup> Depending on the attitude of the employer, the environment might also have been hostile.<sup>43</sup> Further, the complexity of the current legislative and modern award system meant that the Inspector might not have been able to ascertain the correct pay rates ‘on the spot’.<sup>44</sup>

On the other hand, there was a strong consensus amongst the Inspectors we interviewed that site visits were invaluable. First, they provided Inspectors with an opportunity to better understand the substance of the complaint, including whether the correct award classifications had been applied by the employer.<sup>45</sup> Second, Inspectors were often able to garner relevant intelligence about the broader compliance issues.<sup>46</sup> Third, it often lead to a quicker resolution because it provided an opportunity for better employer engagement and

<sup>42</sup> Based on comments made in Interview with FWIG .  
<sup>43</sup> Based on comments made in Interview with FWMI .  
<sup>44</sup> Extract from Interview with FWMI .  
<sup>45</sup> See, e.g., Interview with FWIK .  
<sup>46</sup> Based on comments made in Interview with FWIN .

allowed an Inspector to ‘eyeball’ the alleged wrongdoer, which could sometimes achieve ‘instantaneous compliance’.<sup>47</sup> Or as one Inspector observed: ‘it’s easy to ignore a piece of paper, it’s not as easy to ignore someone who keeps turning up on your doorstep.’<sup>48</sup>

Finally, Goodwin and Maconachie express concern that targeted campaigns do not necessarily entail physical visits of firms when a paper audit reveals serious breaches; they point to the FWO statements to the effect that physical audits need not occur in such cases provided the employer voluntarily remedies the breach.<sup>49</sup> While acknowledging that paper audits can be efficient and avoid possibly hostile confrontations, they suggest that physical visits may be appropriate where serious breaches are uncovered, even if an employer indicates that the firm will voluntarily comply. One response to this critique would be to include a number of physical inspections of voluntary complying firms as part of several campaigns, and then to examine the findings of those visits.

Unannounced inspections were the exception rather than the rule given that they were perceived as limiting the opportunities for education and threatening future employer cooperation.<sup>50</sup> On a practical level, they can be inefficient because employers may not have the employment records readily available for review. It was recognised, however, that each method had its merits and the audit methodology should ultimately be the one that ‘meets what you’re trying to achieve’.<sup>51</sup> For instance, unannounced inspections have shown to be particularly useful in uncovering fraudulent employee records<sup>52</sup> and “cash in hand” payments at rates well below the legal minimum.

For example, significant underpayments and other unlawful practices were revealed through a series of surprise night-time visits by the FWO to Melbourne and Sydney convenience stores in 2009, Sydney bars and hotels in 2008, and fast food stores and restaurants in a regional centre in Victoria in the same year. In respect of this last

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<sup>47</sup> Extract from Interview with FWIL.

<sup>48</sup> Extract from Interview with FWIJ.

<sup>49</sup> Goodwin and Maconachie, ‘Transforming the inspection blitz’. above at 24, 383-384.

<sup>50</sup> Extract from Interview with FWMQ and Interview with FWML.

<sup>51</sup> Extract from Interview with FWMK.

<sup>52</sup> Extract from Interview with FWMQ.

campaign, one Inspector noted that because of the sensitive nature of the allegations and the vulnerability of the workers involved:

we had to hit them at the time when there would be the most staff on deck, most of their staff on deck... to stop them tipping each other off it had to be all at the same time. So we got Inspectors from all the offices in Victoria plus a couple from South Australia and we hit all the restaurants in Warrnambool at 5.30 one evening.<sup>53</sup>

Given that some industries had been the subject of at least one targeted campaign and yet continued to attract high numbers of complaints, the FWO turned its attention to follow-up campaigns. For example, in 2011-2012 there was a national follow up campaign in the security industry, where there had been a previous campaign in 2009. As is illustrated in Figure 5.7 below, the incidence of non-compliance among audited firms in 2011-2012 (a sub-set of which included firms previously found to be non-compliant) almost halved. As we discuss further below in the context of designing campaigns, it is very difficult to determine levels of non-compliance. It is therefore not self-evident that the 2009 campaign has led to improved observance of the law in the security industry. Nonetheless, the findings of the follow-up campaign certainly raise this as a possibility that merits further careful investigation. Follow up audits at a regional, local or firm level were also undertaken on an occasional basis; those that have been completed appear to have had positive outcomes.<sup>54</sup>

It should be noted that there is some recent evidence from the United States (in the context of research into occupational health and safety) suggesting that the efficacy of follow-up visits diminishes over time.<sup>55</sup> According to this study, the first audit is the most effective and the authors suggest, with some qualifications, that it is preferable for an agency to prioritise first visits to establishments (or first visits after a long period) rather than

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<sup>53</sup> Extract from Interview with FWIS .

<sup>54</sup> During the 2008, 2009 and 2010 'Taste of Tasmania' food and wine festivals, Fair Work (FW) Inspectors conducted an education and audit campaign. The initial audit revealed a 67% non compliance rate among festival employers. By 2010, however, eight employers who had been found to contravene in the initial audit were re-audited. Of these, there was only one found to have underpaid their employee.

<sup>55</sup> Ko Kilkon, John Mendeloff and Wayne Gray, 'The Role of Inspection Sequence in Compliance with OSHA Standards - Interpretation and Implications' (2010) 4 *Regulation and Governance* 48.

repeatedly return. However, we would maintain that in some instances a second visit, at least, may be important for the purposes of evaluating the impact of the first audit.

### *Other forms of audits*

Another method of audit apart from targeted campaigns is the undertaking of ‘*compliance audits*’, that is, an audit of a firm in response to an individual complaint in order to protect the confidentiality of the complainant or where the Inspector is willing to expand the scope of the investigation because similar issues appear to affect all other employees.

Some, but not all, Inspectors were reluctant to escalate a complaint to a compliance audit for purely practical reasons.<sup>56</sup> Often, with an already full workload, commencing an audit in the wake of a complaint could make it more challenging for Inspectors to meet relevant performance targets.<sup>57</sup> This meant that there was ‘a tendency to try to resolve it for that one complainant’.<sup>58</sup> In addition, in some settings, such as regional workplaces or small businesses, maintaining confidentiality was practically impossible given the limited pool of employees.<sup>59</sup>

Yet another innovative way that the FWO has sought to enhance its detection functions is by enrolling powerful corporates in *systematic pay packet audits*.<sup>60</sup> Similarly, enforceable undertakings<sup>61</sup> that have been agreed between the FWO and alleged wrongdoers as an alternative to litigation can also act as a detection tool. For example, past enforceable undertakings have included commitments by the relevant firm to: audit past practices,<sup>62</sup> engage an independent monitor and self-report to the FWO in respect of future

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<sup>56</sup> Based on contrasting Interview with FWIJ and Interview with FWII.

<sup>57</sup> A key performance measure for FW Inspectors is whether they have successfully finalised 80% of all investigations within 90 days. See Fair Work Ombudsman, *Guidance Note 8 – Investigative Process*, 9.

<sup>58</sup> Extract from Interview with FWIP.

<sup>59</sup> Based on Interview with FWIH.

<sup>60</sup> This approach has so far involved three high profile franchises and one major group employer in Australia: McDonald’s Australia, Domino’s, Red Rooster and Spotless. McDonald’s and the FWO have worked together to establish a self-audit process set out in a compliance deed between the FWO and McDonald’s. This requires the company to engage a certified accountant to confirm that all employee payments are in order, amongst other things. See Fair Work Ombudsman, *Proactive Compliance Deed between McDonald’s Australia Ltd and the Commonwealth of Australia* (8 April 2011) Fair Work Ombudsman <<http://www.fairwork.gov.au/Documents/Proactive-Compliance-Deed-McDonalds-Aust-and-FWO.PDF>>. Compliance deeds are discussed further in Chapter 6 of the report.

<sup>61</sup> These are discussed further in Chapter 6 of the report.

<sup>62</sup> Enforceable Undertaking between the FWO and Coles Supermarkets Australia Pty Ltd dated 3 March 2011.

compliance;<sup>63</sup> fund the production of information packs about employee rights and distribute them to vulnerable workers;<sup>64</sup> and maintain a whistleblower hotline for employees to raise concerns about potential underpayments.<sup>65</sup>

### *The Major Employers Branch*

There is one further way in which the FWO performed its educative, and arguably detection, functions. This was via the Major Employers Branch, formerly the National Employers Branch, which was established in 2010. The Major Employers Branch was designed to provide guidance and assistance to large national enterprises and franchises<sup>66</sup> with the aim of achieving the FWO's vision of 'fair Australian workplaces'<sup>67</sup> using fewer resources.<sup>68</sup> The Major Employers Program was run on a voluntary basis and normally involved a 'Major Employer Advisor' undertaking a review of the relevant policies and practices and working directly with a central contact within the business to ensure compliance. In a sense, this program allowed for the greater detection of contraventions with the critical distinction that the task was not performed by FW Inspectors and sanctions were unlikely to be levelled against the firm for non-compliance as part of this program.

## **5.1 Balancing complaints and auditing campaigns**

The importance of identifying those businesses and workers most in need of compliance and/or enforcement activities is magnified by the fact that most complaints are finalised without legal action. In short, although the use of court proceedings by the inspectorate against employers between 2006 and 2012 increased significantly from previous years, sanctions were nevertheless imposed in a relatively small number of matters. In order to maximise general deterrence, effective detection of contraventions is critical. The efficient

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<sup>63</sup> Enforceable Undertaking between the FWO and Cotton On Group Services Pty Ltd dated 3 June 2010.

<sup>64</sup> Enforceable Undertaking between the FWO and Michael David Hibberd and Gregory Laurence Prescott dated 12 May 2011.

<sup>65</sup> Enforceable Undertaking between the FWO and Toys R Us Pty Ltd dated 21 January 2011.

<sup>66</sup> As at May 2011, the National Employers Branch had worked with 28 national employers who cumulatively employ a total of more than 201,000 employees.

<sup>67</sup> Fair Work Ombudsman, *Customer Service Charter* (23 April 2013) Fair Work Ombudsman <<http://www.fairwork.gov.au/about-us/publications/customer-service-charter/pages/default.aspx>>.

<sup>68</sup> Fair Work Ombudsman, 'National Employer Branch Information Session' (Internal Presentation, May 2011).

use of resources for educational activities is also very much dependent on being able to effectively identify those ‘people [who] don’t know what they don’t know’.<sup>69</sup>

Recent international scholarship on enforcing labour standards strongly suggests that responding to complaints alone is unlikely to be an effective way of securing overall compliance. The FWO was aware of this and, as we discuss further below, has acted on it. However, while the agency has consistently aimed to ensure that for every five complaints, there was at least one audit, it has sometimes struggled to reach this target.<sup>70</sup> This is likely to be due, at least in part, to the overwhelming complaint caseload, the organisational metrics compelling swift resolution, and the perception that audits divert resources away from dealing with that load.<sup>71</sup> Yet, while it is true that it would be ‘simply impossible to audit every workplace, once, before we die’,<sup>72</sup> it is clear that relying on the resolution of individual complaints alone is not the best solution to systemic non-compliance.

The introduction of AVR and the complaint treatment model were partly designed to address this challenge by dealing more efficiently with the flow of complaints. Together with mediation and the new focus on small claim referrals, these initiatives were also designed to reduce the time and expense spent on full investigations. Screening or managing complaints in this way, however, carries some risk. For example, a study of a similar process in the US found that complaints resolved by conciliation were associated with an increased probability of contraventions of the same employer in subsequent investigations.<sup>73</sup>

More generally, it is not clear if prioritising complaint resolution best assists those vulnerable workers who do not or cannot speak up. These workers may be better aided by alternative strategies, such as targeted campaigns or unannounced inspections. There is clear evidence to suggest that the fear of retribution on the part of potential complainants

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<sup>69</sup> Extract from Interview with FWMF.

<sup>70</sup> Based on comments made in Interview with FWMH.

<sup>71</sup> Extract from Interview with FWMK.

<sup>72</sup> Extract from Interview with FWMH.

<sup>73</sup> United States Government Accountability Office, ‘Fair Labour Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance’ (Report GAO-08-962T, 15 July 2008).

is real.<sup>74</sup> For example, following a series of night-time inspections in fast food stores in a regional town in Victoria, it was discovered that some employees who were owed back pay were bullied by their employers not to cash their cheques.<sup>75</sup> Similarly, a contract cleaner and recent migrant who was receiving \$5 an hour was scared that if she complained and her identity was revealed, she would lose her job and ‘they might send me back home’.<sup>76</sup> Another migrant worker was too scared to speak out about poor working conditions because he feared his employer, who shared the same ethnic background, would threaten his family who remained in their country of origin.<sup>77</sup> Although threatened retribution such as this is unlawful – the FWO has taken such threats seriously and has prosecuted a number of employers where this has occurred<sup>78</sup> – it remains likely that there are many instances where threats of retribution stifle potential complaints, leaving both threats and non-compliance undetected.

Other Inspectors noted sometimes that there were workers who did not necessarily meet the description of a ‘vulnerable worker’, but were reluctant to complain for other reasons. For example, some believed older workers often ‘suffer in silence’.<sup>79</sup> Similarly, workers in small communities with strong familial connections were also afraid to openly complain because they ‘don’t want to jeopardise their relationships’.<sup>80</sup> Alternatively, others may stay quiet out of concern for their employer or fellow employees.<sup>81</sup> For cultural reasons, some may simply be reticent to approach a government agency for assistance.<sup>82</sup>

Again, in a study of changing labour inspection policies in Ontario, Gellatly et al point out that the increasing prevalence of precarious work through short-term and casual

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<sup>74</sup> Gellatly et al, above n 3; Miles Goodwin and Glenda Maconachie, ‘Victimisation, Inspection and Workers’ Entitlements: Lessons Not Learnt?’ (Paper presented at the Asia-Pacific Economic and Business History Conference, Melbourne, 13-15 February 2008); for consideration in the context of the US, see Weil and Pyles, above n 1.

<sup>75</sup> See Fair Work Ombudsman, ‘Warrnambool workers short-changed \$84,000’ (Media Release, 10 June 2008). Similarly, there have been instances where employers who, after having rectified relevant underpayments and provided evidence to this effect, demand the money ‘back off the employee’: extract from , Interview with FWIT .

<sup>76</sup> Extract from Interview with FWIQ.

<sup>77</sup> Ibid.

<sup>78</sup> See, eg, *Fair Work Ombudsman v Maleha Newaz Pty Ltd & Anor* [2010] FMCA 422; *Fair Work Ombudsman v Bottcher & Anor* [2010] FMCA 956.

<sup>79</sup> Extract from Interview with FWIN.

<sup>80</sup> Ibid.

<sup>81</sup> Based on comments made in Interview with FWIG.

<sup>82</sup> Based on comments made in Interview with FWIQ.

contracting means that employees who complain risk their security of employment. While Australia has stronger unfair dismissal and anti-retaliatory legislation than Ontario, it remains the case that it is more difficult for precarious workers to meet the jurisdictional requirements of that legislation than it is for workers on continuing or long-term contracts.

The question of whether the complaint will be kept confidential is another significant factor weighing on workers and is particularly critical to those who are vulnerable. The FWO directives required that investigations be conducted on a transparent and open basis and that the identities of the parties and the materials obtained in the course of the investigation be disclosed to all other relevant parties.<sup>83</sup> The presumption could be displaced, however, for example, where the complainant was still employed by the employer or their safety had been threatened. In practice, Inspectors reported it was difficult to conceal the identity of the complainant without escalating the investigation into a full-scale audit of all the company's employees. One way Inspectors sought to navigate this issue was by confirming to the employer that they were being audited because of information the office had received, but to not disclose the source of that information.<sup>84</sup> Alternatively, in the course of undertaking the investigation, inspectors would stress to the employer that they must not take any adverse action against their employees for making a complaint.<sup>85</sup>

Issues of retribution and confidentiality only arise, however, once complainants are aware of their workplace entitlements under Australian law. In this respect, there may need to be even greater emphasis on *employee*, as well as employer, education. We note that an increasingly significant proportion of the FWO's activities were devoted to educating employees including numerous communication campaigns, traditional and social media work, and website resources.<sup>86</sup> As one Inspector noted, foreign students were particularly

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<sup>83</sup> See Fair Work Ombudsman, *Guidance Note 8 – Investigative Process*, 8. For example, as a general rule, the FWO will refuse to keep confidential the name of an employee who makes a complaint in respect of their former employment.

<sup>84</sup> Based on comments made in Interview with FWIH.

<sup>85</sup> Based on comments made in Interview with FWIN.

<sup>86</sup> See, eg, Fair Work Ombudsman, 'Sham contracting education campaign begins' (Media Release, 13 April 2011); and Fair Work Ombudsman, 'Fair Work inspectors join O-Week to help university students understand workplace rights' (Media Release, 14 February 2011). See also Fair Work Ombudsman, *Annual Report 2011-2012* (2012) 18-26.

vulnerable to exploitation given that ‘they had no idea of what the situation was here and what their entitlements might be’.<sup>87</sup> Labour market intermediaries, such as unions and community organisations, have a critical role to play in this respect.<sup>88</sup> While the FWO has started to actively engage with these stakeholders, it would be beneficial to secure and expand these relationships. Similarly, steps have been taken to share information and resources with other government agencies, in particular the Department of Immigration and Citizenship, which may also assist in better addressing these problems.

One objection to a focus on audits is that inevitably resources will be spent on those people who are already complying (although the same could be said of many of those complaints which, upon investigation, are found to be either misplaced or unsubstantiated).<sup>89</sup> To address this problem, research and analysis of industry structures and employer behaviour is crucial.

### *Strategic Enforcement*

In his ground-breaking 2010 report on strategic enforcement for the Wage and Hour Division (WHD) of the US Department of Labor, David Weil and his team of investigators argue that there is no necessary correlation between the level of complaints and the level of compliance with workplace standards.<sup>90</sup> This means that campaigns and audits are essential to increasing overall observance of statutory standards. Weil draws on data on non-compliance from the WHD and other sources to show that there are some industries with high levels of non-compliance but low levels of complaints. Industry structure is an important reason for this. Weil and his collaborators point to the phenomenon of ‘fissuring’ whereby a direct employer and employee relationships (one readily amenable to traditional forms of wage and hours regulation) is broken down in certain industries by complex contractual and managerial practices. This shifts many vulnerable workers into

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<sup>87</sup> Extract from Interview with FWIS .

<sup>88</sup> See, eg, David Weil, ‘Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets’, in Richard B Freeman, Joni Hirsch and Lawrence Mishel (eds), *Emerging Labor Market Institutions for the 21<sup>st</sup> Century* (National Bureau of Economic Research, 2004); Janice Fine and Jennifer Gordon, ‘Strengthening Labor Standards Enforcement through Partnerships with Workers’ Organizations’ (2010) 38 *Politics & Society* 552.

<sup>89</sup> Extract from Interview with FWMQ .

<sup>90</sup> Weil, ‘Improving Workplace Conditions’, above n 3.

small firms located in a highly competitive markets, creating downward pressure on work standards. Two examples familiar to people from many jurisdictions are the garments industry with its supply chains and fast food with its franchising practices.<sup>91</sup> As we have suggested above, vulnerable workers in such industries may refrain from complaining about non-compliance with the law for reasons including fear of employer retaliation.

Weil argues that a labour standards regulator (such as the FWO or the US WHD) should attempt to direct resources to those areas where there are the best prospects of increasing the *overall compliance level* in an industry. That is a fundamental aim of wage and hour legislation, but it can be obscured as regulators meet multiple objectives, including dealing with cases immediately before them. In the Australian case, the FWO is under statutory obligations to promote and monitor general compliance, but this is comingled with the obligations to respond to individual complaints and to engage in educational and advisory activities. The challenge for the FWO is to integrate these aspects of its operations with strategies such as targeted campaigns so as to maximise its effectiveness.

By setting metrics for targeted campaigns at both national and standard levels as part of its KPIs, the FWO has clearly taken on board the need for alternative approaches to complaints. As we have described above, campaigns and audits, in their various forms, have grown in sophistication as the FWO gained regulatory experience. We consider that these initiatives should be continued and enhanced.

### *How can the FWO best target campaigns?*

Accepting that securing compliance requires more than simply responding to complaints, but includes campaigns and audits, the question arises of how to identify the areas which are most suitable for intervention. Weil has devised the matrix in Figure 5.6 to analyse, and more importantly, prioritise industries. Industries located in Quadrant 2 are clearly the ones that require attention by methods other than responding to complaints. There are two

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<sup>91</sup> A third, less familiar but very interesting, example concerns branding and outsourcing practices in the hotel industry.

issues here. The first is to identify the Quadrant 2 industries. The second is to work out what forms of intervention are most likely to be effective for particular industries.

**Figure 5.6: The Weil Strategic Enforcement Matrix**

	High non-compliance	Low non-compliance
High complaint rates	<b>Quadrant 1</b> High complaints High violations	<b>Quadrant 3</b> High complaints Low violations
Low complaint rates	<b>Quadrant 2</b> Low complaints High violations	<b>Quadrant 4</b> Low complaints Low violations

*Identifying industries in ‘Quadrant 2’*

Unfortunately, it seems to be much more difficult to track non-compliance in Australia than it was for Weil and his collaborators in the United States. We have attempted to determine rates of non-compliance according to industry but have encountered several difficulties. One is that much of the national data on wages and hours that might enable a calculation to be conducted to determine compliance rates is not sufficiently disaggregated. Australian Bureau of Statistics data (and much other social science research in Australia) refers to ANZSIC codes (Australian and New Zealand Standard Industrial Classifications). These codes are organised into various tiers – commencing with ‘divisions’ such as ‘accommodation and food services’ and ‘construction’. Divisions are not very useful in identifying problems in particular kinds of workplaces, because they tend to aggregate very disparate industries. For example, the division ‘administrative and support services’ covers both travels agents and cleaners.

The ABS divides these broad categories into two digit ‘sub-divisions’, three digit ‘groups’ and four digit ‘classes’. This allows for much more finely grained analyses, although even at the group level, some substantively dissimilar forms of employment are brought together (such as the classes of police and security guards; or cleaning, pest control and gardening).

It is really only at the level of 'class' - the four digit level – that a clear picture of relative levels of non-compliance across all discrete occupational types would emerge. However, potentially many useful public data collections, including those by the FWO, use the broad categories (see Appendix 1).

A second problem is that non-compliance is more complicated to determine than is the case in the United States. Generally speaking, federal US wage law specifies one minimum wage level (although other levels of government can also stipulate minimum wages for firms within their jurisdiction). It also establishes a fairly simple system of overtime. Thus, data on remuneration and times disaggregated according to occupation can be used to work out areas where underpayments appear to be common. By contrast, Australia has multiple levels of wages set out in the modern awards, so that workers who appear to be paid at the level of the federal minimum wage could still be underpaid depending on their award classification.

One useful source of information is the ABS data on Employee Earnings and Hours, Australia (EEH) (see ABS 6306.0, May 2010) which uses categories at the four digit level. The EEH data enables researchers to identify occupations with low rates of pay, but not rates of compliance. FWA has commissioned a series of reports that draw on EEH data, as well as other material such as the HILDA survey to determine who is likely to be affected by adjustments in the minimum wage.

Particularly insightful reports include those on award-reliant small businesses,<sup>92</sup> employees earning below the minimum wage,<sup>93</sup> and on earnings of employees who are on

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<sup>92</sup> Samantha Farmakis-Gamboni, David Rozenbes and Kelvin Yuen, 'Award-reliant Small Businesses' (Research Report No 1/2012, Fair Work Australia, 2012). This report contains a very helpful analysis of the strengths and shortcomings of various data sources (19-26). The report shows that accommodation services and retail trade have particularly high levels of award reliance, which suggests low pay levels relative to other industry sectors (see 70-6)

<sup>93</sup> Lucy Nelms, Peter Nicholson and Troy Wheatley, 'Employees earning below the Federal Minimum Wage: Review of data, characteristics and potential explanatory factors' (Research Report No 3/2011, Fair Work Australia, 2011). The report contains a section examining non-compliance: 36-41. In addition to discussing reasons for non-compliance, the report surveys data from the UK and Australia on prevalence of non-compliance, including FWO data. It notes the apparent high levels of contraventions in accommodation and food services and retail trade and using FWO data identifies a number of sub-industries with high contravention levels (the two highest being food and beverage services and other store-based retailing).

minimum rates of pay.<sup>94</sup> However, it is only the last report which makes systematic use of the EEH data to 'drill down' below the industry level and identify specific occupations where employees are likely to be reliant on minimum pay. The report identified the following occupations as those where such reliance is particularly prevalent:

Child carers; hospitality workers; prison and security officers; and personal carers and assistants; sales support workers; and sales assistants and salespersons; cleaners and laundry workers and food preparation assistants; and hairdressers, skilled animal and horticultural workers, food trades workers, construction trades workers, wood trades workers, panel beaters, and vehicle body builders, trimmers and painters, receptionists and delivery drivers.<sup>95</sup>

Several of these categories have been the subject of the FWO campaigns, suggesting that the organisation is using the fragmentary data which currently exists to target categories of workers which probably need intervention. Nonetheless, better information is clearly needed.

Owing to the importance of obtaining accurate non-compliance data, we would strongly suggest that the FWO consider engaging a labour economist with high level statistical skills to determine whether existing Australian quantitative labour data (such as that produced by the ABS or HILDA) could be used to form a reasonably accurate picture of non-compliance according to industry sub-groups. This person could also ensure that the FWO's own data systems consistently use ANZSIC categories at the appropriate level (ideally, class).

As we have just seen, FWA has made use of its research capacity to produce excellent reports on low-paid workers. The FWO should also have this capacity. It is incongruous to produce detailed research into the formulation of work standards, but not into their enforcement. We note that the FWA reports, being concerned largely with the impact of the minimum wage, do not directly address questions of compliance. This gap in the research should be remedied as soon as possible.

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<sup>94</sup> Tom Bolton and Troy Wheatley, 'Earnings of employees who are reliant on minimum rates of pay' (Research Report No 4/2010, Fair Work Australia, 2010).

<sup>95</sup> Ibid.

### *Using FWO data to target industries*

Having observed the shortcomings in the data currently available in Australia, in this section we consider the extent to which the FWO's internal records assisted in determining compliance rates. We consider two approaches. The first is one taken by the TCU. In February 2012, the TCU produced an analysis of FWO complaint data ('the 2012 complaint analysis') over the 2010-2011 calendar years.<sup>96</sup> This sophisticated document draws on available data from the FWO and the ABS in an attempt to apply David Weil's strategic enforcement matrix (which we outlined earlier in Figure 5.6). The TCU has used this approach to identify areas they seek to target, in a more systematic way than previously.<sup>97</sup> We strongly agree with the TCU's observation that:

...there were 820,822 employing businesses operating across all industry categories at the end of 2009. In 2008-09, the FWO finalised 7080 audits (representing 0.9% of employing entities). These figures highlight the importance of basing targeted activities on strategic evidence based research and analysis and ensuring we utilise our finite resources to maximum effect.<sup>98</sup>

The 2012 complaint analysis disaggregated complaints according to ANZSIC codes,<sup>99</sup> down to the group level (which they described as the second tier). The TCU then examined these categories using two important concepts: 'monetary contravention' and 'vulnerable workers'. 'Monetary contraventions', as we understand it, refer to 'serious' complaints that relate to matters such as underpayments of wages or under entitlements. These are also termed 'violations' in the analysis. The TCU examined the ratio between the number of complaints and the number of violations according to occupational group. This ratio was used to produce a table ranked according to whether the proportion of monetary violations was higher than average.<sup>100</sup>

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<sup>96</sup> Targeted Campaigns Unit, *Complaint Analysis; Analyses of FWO Complaint Data – 2010/11 Calendar Years* (Fair Work Ombudsman, 2012).

<sup>97</sup> See Targeted Campaigns Unit, *FWO's Targeted Strategy 2011-2012 Complaint Analysis* (Fair Work Ombudsman, 2013).

<sup>98</sup> *Ibid* 6.

<sup>99</sup> 70% of data in NEXUS is categorised on the basis of ANZSIC codes: Targeted Campaigns Unit, above n 97, 4.

<sup>100</sup> *Ibid* 14

The TCU then related this data to the Weil matrix. Quadrant 1 was considered to refer to occupations with high complaints and high violations. Quadrant 2 was taken to refer to occupations with low complaints and high violations. Figure 5.7 illustrates this approach with some examples drawn from the complaint analysis:

**Figure 5.7: The Weil Strategic Enforcement Matrix as Applied by the TCU: Examples<sup>101</sup>**

	<b>High non-compliance</b>
High complaint rates	<p><b>Quadrant 1</b></p> <p>High complaints, High violations</p> <ul style="list-style-type: none"> <li>• Cafes, restaurants and takeaway food services</li> <li>• Bakery product manufacturing</li> <li>• Child care services</li> </ul>
Low complaint rates	<p><b>Quadrant 2</b></p> <p>Low complaints, High violations</p> <ul style="list-style-type: none"> <li>• Motor vehicle parts retailing</li> <li>• Travel agency services</li> <li>• Veterinary services</li> </ul>

The second concept employed in the analysis is ‘vulnerable worker’. This refers to workers who are young (under 21), old (over 60), in casual or part-time work, from a non-English speaking background or requiring an interpreter, or on a non-resident visa.<sup>102</sup> Twenty-eight per cent of the total number of complaints categorised by ANZSIC code concerned vulnerable workers so defined. However, in some occupations the proportion of vulnerable workers was very much higher (e.g. 43% in cafés, restaurants and takeaway

<sup>101</sup> Based on Targeted Campaigns Unit, above n 97, 14-20.

<sup>102</sup> Ibid 9.

food services and personal care services and 49% in agriculture and fishing support services).<sup>103</sup>

It is important to note that alongside these national figures, there was considerable regional variation – although more in the ‘quadrant two’ occupations than ‘quadrant one’.<sup>104</sup> Indeed, the complaints analysis attempted to allocate regions themselves (not just occupations) into the quadrants of the Weil matrix.

### *Comments on the use of this data*

The TCU complaints analysis is an ingenious attempt to use the available data to develop a coherent framework in order to identify which occupations to target in campaigns and audits. In the absence of alternative sources of information about contravention rates, it represents a defensible method of allocating resources.

However, we should point out that, while clearly being influenced by the Weil matrix, the complaints analysis does not in fact apply Weil’s methodology quite as he and his collaborators intended. The complaints analysis, by definition, rests on data about complaints. Weil’s approach contrasts complaints data *with data about contraventions that is not based on complaint rates*. The TCU analysis substituted the ‘violation’ or ‘monetary contravention rate’ *in relation to complaints* for Weil’s non-complaint based data, but they are clearly not measuring the same matters. Thus, it is possible that actual non-compliance is higher in occupations with low complaints and/or low ‘violations’ than appears to be the case from the TCU analysis, for instance, the clothing outworker sector. The upshot of this is that there is still the need for independent sources of information about compliance that are not dependent on complaints.

The FWO did have a small set of data about compliance rates that are not complaint-dependent. That data came from non-compliance rates detected in national and state

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<sup>103</sup> Ibid 21-2.

<sup>104</sup> See Targeted Campaign Unit, above n 97, summary 31.

targeted campaign audits. The non-compliance rates from recent national audits are set out below in Figure 5.8.

There is very wide variance in compliance rates between campaigns, even within the one occupation group. This suggests that the data should be treated with some caution, with data from national surveys with larger samples perhaps being more indicative of the population (but depending on the degree to which they are randomised – see the comment below). This is a further reason for engaging a person with expertise in quantitative research to provide advice on constructing samples.

The non-compliance rates in the cleaning industry are particularly prominent but they do not figure in the TCU analysis as being a priority occupation in either quadrants one or two. This suggests that the TCU should reconsider the complaints analysis in light of the contravention data deriving from their campaigns. It should be noted, though, that the sample of employers in the campaigns data is not random (rather it is based on a combination of referrals and random selection), therefore it is not necessarily an accurate reflection of non-compliance in the relevant industries. Depending on the structure of the sample, it may show higher rates of non-compliance than might otherwise be evident in a completely random sample.

**Figure 5.8: Non-Compliance Rates Detected In National Targeted Campaigns<sup>105</sup>**

Campaign	Year campaign completed	Audits finalised	Non-compliant in total	Non-compliant underpayments
Retail <sup>106</sup>	2011	1866	>492 (26%)	>312 (17%) <sup>107</sup>
Security industry follow-up <sup>108</sup>	2011-12	392	>97 (25%)	>68 (17%) <sup>109</sup>
Clerical workers <sup>110</sup>	2011-12	1621	>389 (24%)	>135 (8%) <sup>111</sup>
Cleaning services <sup>112</sup>	2010-2011	366	>117 (37%)	>75 (23%) <sup>113</sup>
Horticulture <sup>114</sup>	2010	277	101 (36%)	'approx 33% of 101' <sup>115</sup>
Insulation installers <sup>116</sup>	2010	211	>58 (27%)	>30 (14%) <sup>117</sup>
Security industry <sup>118</sup>	2009-2010	302	>159 (53%)	> 87 (29%) <sup>119</sup>
Hair and beauty	2009	362	> 130 (39%)	>78 (22%) <sup>120</sup>

<sup>105</sup> This data is taken from the FWO Annual Reports and from the campaign reports completed with respect to the National Clerical Worker, Cleaning Services, Retail Industry and Security Industry Follow-up Campaigns. This does not include ongoing campaigns, or the Sham contracting campaign into cleaning, contact centre, hair and beauty), for which there does not appear to be readily comparably data.

<sup>106</sup> Fair Work Ombudsman, *National Retail Industry Campaign 2010-11, Final Report* (November 2011) 11-12.

<sup>107</sup> Does not include 224 ongoing investigations.

<sup>108</sup> Fair Work Ombudsman, *National Security Industry Campaign 2011, Final Report* (April 2012) 6.

<sup>109</sup> Does not include 42 ongoing investigations.

<sup>110</sup> Fair Work Ombudsman, *National Clerical Worker Campaign 2011, Final Report* (June 2012) 9.

<sup>111</sup> Does not include 49 ongoing investigations

<sup>112</sup> See also Fair Work Ombudsman, *National Cleaning Services Campaign 2010-2011, Report* (June 2011).

<sup>113</sup> No raw number given. Does not include 51 ongoing investigations or 63 entities subject to sham contracting analysis.

<sup>114</sup> Fair Work Ombudsman, *Horticulture Industry Shared Compliance Program 2010, Final Report* (November 2010,) 6.

<sup>115</sup> Does not include 8 ongoing investigations.

<sup>116</sup> Fair Work Ombudsman, *National Insulation Installers Audit Program 2010, Final Report* (November 2010) 5.

<sup>117</sup> Does not include 19 ongoing investigations.

<sup>118</sup> Fair Work Ombudsman, *National Security Industry Campaign 2011, Final Report* (April 2012) 2 and Fair Work Ombudsman, *National Security Industry Campaign 2009, Report and Recommendations* (March 2010) 7-98.

<sup>119</sup> Does not include 42 ongoing investigations at the time of the 2009 report.

<sup>120</sup> Does not include 32 ongoing investigations.

Hospitality	2008-2009	571	>33% <sup>121</sup>	(not disaggregated with same methodology) <sup>122</sup>
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We would raise four more issues. First, we suggest that it would be useful to determine complaint rates, not just by raw numbers of complaints, but by dividing the number of complaints from a given occupation by the number of workers in that occupation (by reference to ABS or other appropriate data sources). This would yield information about whether the occupations are ‘high complaint’ in the sense that *a greater proportion of workers in that occupation are likely to complain about non-compliance than in other occupations*. There has been some attempt to do this at the FWO, but only at the division level of the ANZSIC codes. The calculation needs to be made at the group or class level.

Second, we would suggest reconsidering the ‘vulnerable’ category as applied by the TCU in order to align with the broader concept of ‘vulnerable’ as used in the FWO Guidance Notes.<sup>123</sup> That would assist in capturing data about workers who are vulnerable owing to important factors such as difficulties with literacy or low incomes (who may be English speaking middle-aged working class non-union members, for example)

Third, it would be helpful to consult with relevant unions, community organisations and other amenable government departments to determine whether they have systematic data, or at least impressions drawn from extensive experience, about levels of non-compliance in the occupations they cover (we understand that the Textile Clothing & Footwear Union of Australia, for example, has extensive relevant data). This is already beginning to occur and we would further encourage it.

Finally, it is useful to recall that Weil’s strategic enforcement approach is concerned not just with non-compliance rates but with the *relative capacity of an inspectorate to influence*

<sup>121</sup> In the accommodation sector, 70% of firms were found to be non-compliant, but this was out of a small sample of ten, exclusively in the Northern Territory and Tasmania. Further investigation is required to determine whether this is part of a wider phenomenon.

<sup>122</sup> Fair Work Ombudsman, *National Hospitality Campaign 2009, Final Report* (March 2009).

<sup>123</sup> See above n 19.

*behaviour within an occupation.* This is closely connected to industry structure. Thus, there may be two ‘quadrant two’ occupations with roughly equal levels of non-compliance. However, one of those occupations may be more responsive to FWO intervention, and it may therefore be a better use of FWO resources to prioritise that occupation. This may be the case where there is a relatively small number of firms (so they are easier to audit). However, it may also be the case where there are a large number of firms, but they are organised into hierarchical supply chains where pressure on the few firms at the ‘top’ may flow down the chain to firms at the base. This approach was reflected in the FWO’s Major Employers initiative. It may be able to be further integrated into the TCU’s strategic thinking.

## 5.2 Conclusion

As a result of internal reviews, as well as the work of scholars such as Professor Weil, there was a growing awareness within the FWO that contraventions affecting certain vulnerable groups are particularly difficult to detect<sup>124</sup> and new strategies are needed.<sup>125</sup> The FWO, and the TCU in particular, have responded by acting on recommendations to create a team dedicated to targeting initiatives; increase evaluations of the impact of proactive initiatives;<sup>126</sup> better prioritise work so as to target those industries with high levels of non-compliance;<sup>127</sup> and engage in more methodical follow-up audits.

More research and evaluation of targeted campaigns which have been carried out will be helpful in refining the most appropriate methodology and approach at an occupational level, easing the tension between complaint and audit activities and ensuring that proactive measures ‘truly are targeted’.<sup>128</sup> In particular, given the unsatisfactory state of the Australian data on compliance with labour standards, we urge the FWO to consider appointing one or more labour market economists, and/or sociologists well versed in statistical research methods. The work conducted by FWA’s research arm provides a useful

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<sup>124</sup> Extract from Interview with FWMK.

<sup>125</sup> Extract from Interview with FWIL.

<sup>126</sup> Extract from Interview with FWMP.

<sup>127</sup> Ibid.

<sup>128</sup> Extract from Interview with FWMK.

model for what could be achieved. This would enable the FWO's resources to be used to their best effect.

Having considered the preventative measures taken by the FWO, as well as the processes by which compliance with the Act was monitored and investigated, in the following chapter we now turn to consider what enforcement activity was taken by the agency in cases of non-compliance during the study period.

## **6. COMPLIANCE AND ENFORCEMENT ACTIVITIES AND OUTCOMES**

### **6.1 Introduction**

In Chapter 4 of this report, we observed that the federal employment standards enforcement agency has a range of enforcement approaches and tools that it may deploy when it detects non-compliance with minimum employment standards. This chapter of the report will discuss the extent of the agency's use of the various enforcement approaches at its disposal, and the way in which it chose to deploy these tools in the period from 2006 to 2012. Studies of regulation and compliance discussed in Chapter 2 suggest that the manner in which a regulatory agency carries out enforcement is very important to the effectiveness of the regulation it oversees. However, there is less consensus as to how best to measure enforcement success.

In this chapter, we discuss the agency's effectiveness by reference to a number of conventional measures of enforcement, such as the number of court actions and their outcomes, as well as the agency's use of some of the alternative compliance tools at its disposal. However, our assessment of the agency will necessarily be a preliminary one. The final stage of our research, to be completed in 2013/2014, will be an empirical study of the agency's effects on the regulated community, and we hope this will provide some robust data on whether the regulation is achieving its objectives. The findings presented in both Chapter 5 and this chapter, by outlining the patterns of enforcement activity between 2006 and 2012, is a necessary first step in the evaluation of the compliance effects of the Office of the Fair Work Ombudsman (FWO) and its predecessors.

Between 2006 and 2012, the federal enforcement agency was vastly more active and innovative in performing its function of promoting and enforcing compliance with federal labour legislation than its predecessors. In part, this is due to the increased resources provided for federal enforcement over that period compared to the latter part of the twentieth century, and also the greater variety of enforcement approaches available to the FWO under FW Act as compared to its predecessors. These compliance tools, either by themselves, or in conjunction with other remedies, are valuable strategies in that they can

‘deliver superior remedies than courts to compensate victims, prevent future misconduct and fix systemic problems that led to misconduct.’<sup>1</sup> However, in addition to the specific sanctions and tools available to it under the FW Act, the FWO introduced a number of novel tools and programs, such as proactive compliance deeds and the National Franchise Program, to further its responsibility for providing education, advice and assistance to employees, employers and others.

The discussion of the various tools used by the FWO in this chapter will be loosely ordered on the basis of the hierarchy of sanctions most frequently represented by the enforcement pyramid devised by Ayres and Braithwaite.<sup>2</sup> As noted in earlier chapters, the pyramidal enforcement model is designed to address the pluralistic compliance motivations of individuals and corporate actors. For example, the base of the pyramid is represented by ‘softer’ enforcement approaches, such as the use of preventative education and persuasion, which are intended to appeal to those who may act in a socially responsible way. Moving up the pyramid, there are increasingly deterrent strategies focused on triggering economic motivations of apparent rational maximisers. The model is designed to be dynamic with the regulator escalating up and down the pyramid as each case requires. Accordingly, the pyramid theory of responsive regulation is founded on the idea that cooperative compliance, sometimes referred to as restorative justice, should be the dominant strategy adopted by the regulator. More deterrent measures, such as administrative notices, should be used when education and persuasion fails. At the top of the FWO’s pyramid sits civil remedy litigation – a strategy which should only be utilised in rare circumstances when compliance cannot otherwise be achieved.<sup>3</sup>

The chapter begins with the peak of the pyramid, a discussion of civil remedy litigation. Next, our focus turns to the administrative sanctions which sit in the middle levels of the

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<sup>1</sup> Christine Parker, ‘Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission’s Use of Enforceable Undertakings’ (2004) 67 *Modern Law Review* 209, 212.

<sup>2</sup> Responsive regulation was discussed in Chapter 2.

<sup>3</sup> In other spheres of corporate regulation, incapacitation sits at the peak of the pyramid – a sanction which can be achieved by way of an injunction, suspension or withdrawal of an operating license, suspension of trading, asset seizure or imposing a state-authorised management team. Incapacitation rarely means imprisonment in these contexts. Imprisonment is more readily contemplated in occupational health and safety and environmental regulation, albeit imposition of such a sanction is still relatively uncommon. Incapacitation is not one of the sanctions available to the FWO.

enforcement pyramid, such as enforceable undertakings, proactive compliance deeds, compliance notices, penalty infringement notices and contravention letters. These sanctions are often seen as more flexible, less punitive and have a greater capacity for engendering compliance commitment. The chapter later considers the approaches that make up the foundation of the enforcement pyramid, namely: mediation, assisted voluntary resolution and education (based on the discussion in Chapter 5). Finally, there is an exploration of the way in which the FWO has utilised media and publicity in order to enhance the regulatory reach of the compliance mechanisms noted above.

Although we recognise that the agency seeks to deploy an appropriate mix of these diverse tools as part of its overall enforcement strategy, we first evaluate each of these approaches individually on the basis of available data on the extent and nature of the agency's use of the strategy during the study period, as well as our interviews with FWO staff. At the conclusion of the chapter we provide an evaluation of the agency's overall deployment of the various strategies. In doing so, we offer a modest assessment of whether the FWO's approach accords with the good practice approaches to enforcement we discussed in Chapter 2. For example, we discuss the mix of regulatory approaches deployed by the FWO, and conclude that they are broadly used in the proportions suggested by the extremes of the enforcement pyramid; that is, the majority of activity happens at the base, and civil remedy litigation only happens rarely. However, the evidence available to us suggests administrative sanctions are not used to the extent suggested by the pyramid model. We also argue that the agency was increasingly engaging in some aspects of Weil's strategic enforcement model in the manner in which it deploys the various sanctions.

## 6.2 Civil Remedy Litigation<sup>4</sup>

As noted in Chapter 4, the FWO has standing to seek civil remedies in relation to contraventions of civil remedy provisions under Part 4.1 of the FW Act, including pecuniary

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<sup>4</sup> Some breaches of the *Fair Work Act 2009* (Cth) (*FW Act*) are designated as a criminal offence, such as contravening certain orders of the federal tribunal, Fair Work Australia (FWA). Such matters are not administered by the Office of the Fair Work Ombudsman (FWO), and must be referred to the Commonwealth Office of Public Prosecutions. A more detailed discussion of the data presented in this section can be found in Tess Hardy, John Howe and Sean Cooney, 'Less Energetic but More Enlightened? Exploring the Fair Work Ombudsman's Use of Litigation in Regulatory Enforcement' (2013) 35 *Sydney Law Review* 565.

penalty orders (of up to \$6,600 for individuals, or \$33,000 in the case of a corporation), injunctions, compensation and reinstatement of employees. It appears that the FW Act allows for the award of compensation in relation to any contravention of a civil remedy provision, and may extend beyond monies owing in the form of underpaid wages, such as, for example, damages for breach of a disciplinary procedure in a modern award or enterprise agreement.<sup>5</sup> Such orders can be made on application of the parties or at the court's own initiative. Where there are two or more breaches that arise out of the same 'course of conduct', the court may treat these as a single offence. We also observed that the legislation provides for 'accessorial liability', whereby proceedings may be brought against individuals or entities other than a direct employer who are 'involved in a contravention'.<sup>6</sup> Criminal and civil remedies, including the modern hybrid, the civil penalty, have traditionally formed the chief enforcement mechanism for State-based regulatory systems.

Litigation resulting in court-ordered penalties (in the case of criminal offences, prosecution) generally serves the objectives of punishment, deterrence and compensation. From a regulatory perspective, the most important of these objectives is deterrence. It is the threat of sanction which motivates those being regulated to comply with the objectives of the regulation. However, in practice the broader set of remedy objectives are not mutually exclusive. Penalties imposed by courts to deter criminal or civil penalty breaches of the law may in some circumstances be payable to the victim of the breach. More commonly, the award of restitution, damages or compensation acts both as a remedy for the loss caused by the particular behaviour, as well as specific and general deterrence of that kind of behaviour in the future. In the labour law context, there is a tendency to separate the functions of deterrence and compensation. The court may impose on the employer a fine payable to the Commonwealth to achieve the former,<sup>7</sup> and make an award, for example, of unpaid wages, payable to the employee to achieve the latter.

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<sup>5</sup> For comment, see Carolyn Sappideen, Paul O'Grady, Joellen Riley and Geoff Warburton, *Macken's Law of Employment* (Thomson Reuters, 7<sup>th</sup> ed, 2011) 404. See, for example, *Van Efferen v CMA Corporation Ltd* (2009) 183 IR 319.

<sup>6</sup> See discussion below.

<sup>7</sup> See *CSPU v Telstra Corporation Ltd* (2001) 108 IR 228, 231 regarding the importance of general deterrence; see also *Cotis v Pow Juice* [2007] FMCA 140, [51] and *Flattery v The Italian Eatery* [2007] FMCA 9, [63].

We have also observed that in performing a deterrence function, civil litigation is an important aspect of the enforcement pyramid. Responsive regulation can only be effective where the less formal interventions can draw power from the threat of credible, more formal sanctions at the peak of the pyramid – a fact recognised by then Fair Work Ombudsman Nicholas Wilson who commented that: ‘prosecution and the EUs are the lever by which you get voluntary compliance for most matters. The only way you can do that is because there is an explicit threat as to what will occur if you don’t comply.’<sup>8</sup>

In this section we examine the pattern of civil litigation by the federal enforcement agency between 2006 and 2012 according to the following categories: number of matters commenced and completed; the type of matter litigated (ie. wages and hours contraventions, sham contracting etc.); the characteristics of respondents and context of litigation (ie. size of business, industry etc); and the outcomes of litigation (successful/unsuccessful, quantum of penalties etc). In analysing this data, we draw on our interviews with FWO staff and external workplace relations lawyers.

Further to the explanation of our methodology in Chapter 1, we note that the data analysis set out below has been prepared in relation to all ‘completed’ matters of the FWO and its predecessors in the period from 1 July 2006 to 30 June 2012. This data has been prepared on the basis of all information that can be either publicly sourced (via the FWO website or Austlii) or which has been provided to us by the FWO. That said, in some cases, there is very limited information available (no orders, transcripts or decisions). In these instances, we have relied on the FWO summaries available on the ‘Legal’ section of the agency’s website,<sup>9</sup> albeit this data also appears to be incomplete in relation to some financial years. A more detailed explanation of this data, and the assumptions we have made in collating it, is set out in Appendix 1.

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<sup>8</sup> Quoted in Richard Johnstone and Christine Parker, *Enforceable Undertakings In Action – Report of a Roundtable Discussion with Australian Regulators* (Working Paper No 71, National Research Centre for Occupational Health and Safety, February 2010), p 66.

<sup>9</sup> Fair Work Ombudsman, *Legal* (4 August 2011) Fair Work Ombudsman <<http://www.fairwork.gov.au/about-us/legal/pages/default.aspx>>.

## *An Overview of the FWO's Litigation Activity*

Among the various enforcement tools available to the FWO, it is litigation which has arguably been the most visible aspect of the agency's compliance activities during the study period. As we observed in Chapter 3 of this report, civil remedy litigation has been a critical component of the overall compliance and enforcement strategy of the FWO and its predecessors, and reflects a number of the agency's key statutory functions.<sup>10</sup>

However, as noted in the previous chapter, the agency received in excess of 20,000 complaints each year, and conducted audits of over 6,000 businesses. As a result of the agency's detection activities, in 2011-2012 over 18,000 employees received payments. The agency did not have the resources to litigate in all of these cases, nor was litigation necessarily appropriate in every contravention. It therefore had to choose a proportion of matters to litigate according to the agency's priorities. The key policy document governing these decisions is the agency's Litigation Policy<sup>11</sup> – a document which has been largely modelled on the Commonwealth DPP Prosecution Policy.<sup>12</sup> In many respects, the Litigation Policy is one of the touchstones of the FWO when it comes to its overarching compliance and enforcement strategy. It not only refers to litigation, but also deals with the full range of sanctions at the FWO's disposal: 'The FWO's litigation activities are part of a broader compliance system which comprises a combination of positive motivators and deterrents

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<sup>10</sup> For example, s 682 of the *FW Act* provides that the functions of the FWO include: to commence proceedings to enforce provisions of the Act, fair work instruments and safety net contractual entitlements; and to represent employees who are, or might become, a party to proceedings in a court or before FWA if the FWO considers that this will promote compliance with the *FW Act* or fair work instrument.

<sup>11</sup> See discussion in Chapter 4. The Litigation Policy was first adopted on 19 October 2007, when the agency was the Workplace Ombudsman (WO), and commenced operation shortly afterward. While the policy has been through a number of incarnations since that time, much of the central content remains unchanged.

<sup>12</sup> In its submission to the Australian Law Reform Commission enquiry on federal sanctions, the Australian Securities and Investments Commission (ASIC) expressed some concern about using the Commonwealth Director of Public Prosecutions Prosecution Policy as a standard or model for the compliance and enforcement policies of other regulators. ASIC submitted that if guidelines were standardised and based on the Prosecution Policy of the Commonwealth 'they may concentrate too heavily on a perceived need for consistency and not sufficiently recognise the various factors which ASIC must consider when developing an enforcement response to suspected wrongdoing... it is appropriate that different factors be taken into account when considering civil rather than criminal enforcement and accordingly it is not appropriate that any guidelines on the use of civil and administrative penalties should be too closely based on the considerations set out in the Prosecution Policy.' ASIC, Submission CAP 15, 10 September 2002, as cited in Australian Law Reform Commission, 'Principled Regulation: Federal Civil and Administrative Penalties' (Report No 95, Australian Law Reform Commission, March 2003), 384.

aimed at bringing about compliance with Commonwealth workplace laws.’<sup>13</sup> The Policy also notes that in addition to its role in motivating compliance, ‘[l]itigation may also be appropriate when there is a need for judicial clarification of Commonwealth laws’.<sup>14</sup>

The Litigation Policy sets out a two-stage test that must be satisfied before litigation can be commenced. First, there must be sufficient evidence to commence civil proceedings. Second, the facts in the matter and all the surrounding circumstances must demonstrate that civil penalty proceedings are in the public interest.

The Litigation Policy sets out a whole host of factors that must be considered in determining whether civil remedy litigation can be said to be in the public interest. As a general principle, the more serious the contravention the more likely proceedings will be viewed as being in the public interest. The Litigation Policy expressly states that the following contraventions would not be regarded as ‘trivial’: (i) contraventions relating to agreement making, bargaining orders, industrial action or right of entry; contraventions of the general protections provisions; contraventions giving rise to significant underpayments (defined as being more than \$5000 per employer); contraventions giving rise to lesser underpayments, where special circumstances exist, such as the presence of vulnerable workers, a repeat wrongdoer, evidence of employer knowledge or wilfulness or a lack of cooperation with the FWO; and a failure to comply with a compliance notice issued by a FW Inspector.<sup>15</sup>

As noted above, a key element of the FWO’s Litigation Policy is that where the matter is less than \$5,000, and there is some vulnerability on the part of the worker, then it will be considered for litigation. If, however, the relevant underpayment amount is less than \$5000 and there is no such vulnerability present, FWO-sponsored litigation is fairly unlikely. Rather, the matter is more likely to be referred for mediation or to small claims.

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<sup>13</sup> Fair Work Ombudsman, *Guidance Note 1: Litigation Policy of the Office of the Fair Work Ombudsman*, Second Edition, 20 July 2011, 5 (FWO Litigation Policy).

<sup>14</sup> *Ibid.*

<sup>15</sup> Interestingly, a number of factors which were previously relevant under the Office of Workplace Services (OWS) Policy Guide in determining whether to commence litigation are not specifically mentioned in the current Litigation Policy, such as whether there were any award off-setting arrangements in place or the likelihood of recovery.

In relation to the nature of the contravention and its relationship with the public interest test, it is worth noting that a failure to comply with the terms of an enforceable undertaking, a failure to comply with a Penalty Infringement Notice and a failure to comply with a notice to produce are not expressly stated to be non-trivial contraventions and therefore in the public interest. Evidence from our interviews suggests, however, that contraventions of this type would be treated as a matter of high priority by the FWO given that these types of failures have the capacity to weaken the credibility of the regulator and the strength of these tools.

The other public interest factors considered relevant by the FWO include:

- the characteristics of the alleged wrongdoer, such as the degree of culpability,<sup>16</sup> the history and characteristics of the alleged wrongdoer,<sup>17</sup> the level of contrition and the involvement of senior management;
  - the characteristics of the aggrieved party, that is, the degree to which the aggrieved party has the available resourcing to commence proceedings on their own behalf;
  - the level of public concern;
  - the impact of the contravention, including the attitude of the aggrieved party regarding the commencement of proceedings and the impact of the alleged contravention on the aggrieved party and any other relevant persons, such as family members;
  - deterrence, including both general and specific deterrence;
  - the effect of litigation, including the likely outcome in the event that a contravention is established, the availability and efficiency of any alternatives to litigation, and whether the consequences of any finding would be unduly harsh and oppressive;
- and

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<sup>16</sup> The degree of culpability is further stated to include, for example: (i) the degree or extent to which the alleged wrongdoer acted in accordance with any advice given by the FWO or other statutory authority in relation to compliance; (ii) the relevant compliance history of the alleged wrongdoer; and (iii) the attitude of the alleged wrongdoer (including any relevant proactive measures taken to comply with workplace relations laws).

<sup>17</sup> The relevant 'characteristics' of the alleged wrongdoer are said to include: age, intelligence, physical health, mental health, special infirmity etc. While these characteristics may be relevant to natural persons, a notable omission is the size of the business – a key characteristic which is likely to be taken into account in determining whether litigation is appropriate.

- administrative considerations, namely the necessity to maintain public confidence in the administration of workplace laws, the likely expense of litigation, whether the commencement of proceedings would be perceived as counterproductive, and the staleness of the alleged contravention.<sup>18</sup>

We note that the likelihood of being able to recover the penalty/compensation is not necessarily accounted for in these factors, but arguably encompassed by assessing the effect of litigation. That said, it was not clear that prior to commencing litigation, the FWO made an assessment of the assets available to meet court orders or the likelihood the company would engage in some form of phoenix activity in order to avoid or minimise the effect of any orders made against the employer company.

A number of other public interest factors not explicitly dealt with in the Litigation Policy, but obviously of influence internally, included the following: whether there were vulnerable employees involved and whether the contraventions arose in an industry which was renowned for non-compliance, such as the retail industry; and more recently, whether and to what extent the litigation was likely to change the behaviour of the specific firm, as well as the broader supply chain.<sup>19</sup>

In the following discussion, we present data concerning patterns in the use of civil litigation by the federal enforcement agency from 2006 to 2012.

### *Number of Cases Commenced and Completed by the FWO*

Figure 6.1A shows the total number of litigation matters initiated by the federal enforcement agency each financial year from 2005/2006, the year in which the Work Choices changes commenced, until 2011/2012. Since 2008/2009, these numbers also include enforceable undertakings approved for negotiation.<sup>20</sup> This first graph illustrates that in the first three years of the study period, the number of litigation matters initiated

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<sup>18</sup> FWO Litigation Policy, above n 13, 14-6.

<sup>19</sup> Based on comments in Interview with FWLD .

<sup>20</sup> The raw data has been extracted from the Annual Reports over the relevant period.

increased sharply from a low of six matters in 2005/2006, to a high of 77 matters in 2008/2009. However, from then to 2012, the annual number of litigation matters initiated by the agency fell, with an average of 53 matters commenced in the last three financial years of the study period. This drop in litigation is actually likely to be more significant given that the data for these last three years also include a number of ‘enforceable undertakings approved for negotiation’. Overall, however, this data confirms that between 2005/2006 and 2011/2012, there was been a substantial shift in the profile of the federal agency, from an agency that was heavily reliant on persuasive compliance, to one where the threat of litigation was an important element of the agency’s enforcement profile.



Figure 6.1B shows the total number of litigation matters that were completed over the same period.<sup>21</sup> In comparison, Figure 6.1C sets out the number of completed litigation matters against employers and individuals associated with the employer (eg. directors, officeholders, senior managers etc). Figures 6.2A and 6.2B break this down by the state in which the litigation was administered.

<sup>21</sup> For the purposes of determining whether a matter is ‘completed’ for the purposes of preparing the data analysis, we used a set of criteria which does not necessarily reflect internal FWO practice. For example, a matter has been counted as ‘completed’ only where the final penalty decision has been delivered.

The subsequent analysis undertaken in this report (i.e. characteristics of respondents etc) generally uses the dataset in Figure 6.1C given that the focus of our research is on the way in which the FWO used litigation to support compliance with, and enforcement of, minimum employment standards, rather than the way the FWO used litigation against trade unions.

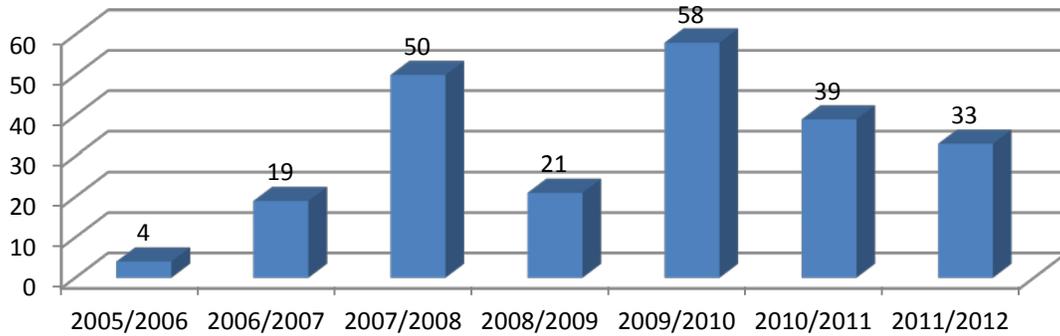
When one compares the number of litigation matters commenced with those completed, the data suggests that the time between initiating and finalising a claim is highly variable. There is no clear correlation between the numbers commenced in one year and the numbers completed in the next. For example, in 2007/2008, 67 matters were commenced, and yet in the following financial year, the number of completed litigation matters showed a significant drop to 21 matters.

It is also clear from this comparative analysis that not all litigation matters which are commenced are finally determined by the court. We do not have access to settlement rates for all the financial years, but evidence in relation to the 2011/2012 financial year gives us some insight into reasons for this gap. In particular, in 2011/2012, the FWO filed 51 proceedings. Less than three months later, no matters had been dismissed, four matters had been discontinued, 11 matters had been completed and 36 matters were ongoing. In relation to the discontinued matters, respondents in two of the matters subsequently entered into enforceable undertakings, one matter was discontinued by consent and the remaining matter was discontinued as a result of the company going into liquidation.<sup>22</sup>

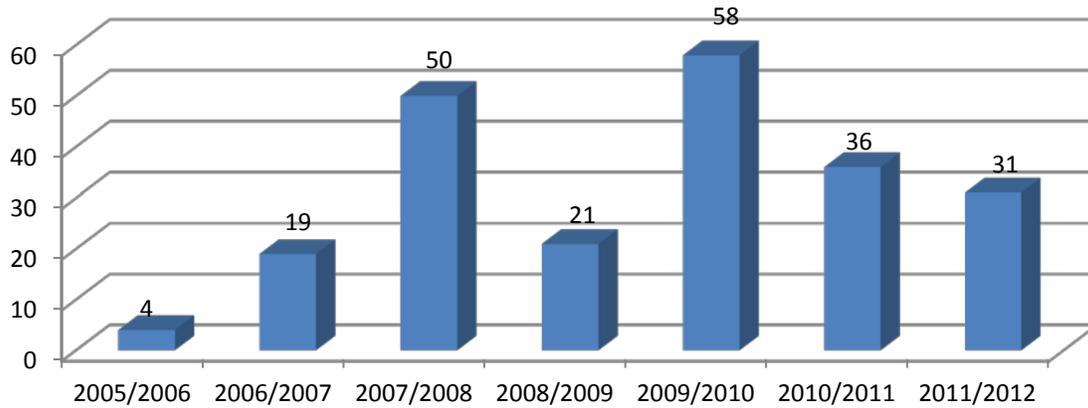
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<sup>22</sup> Evidence to Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 17 October 2012 (Response to question on notice: ew0614\_13).

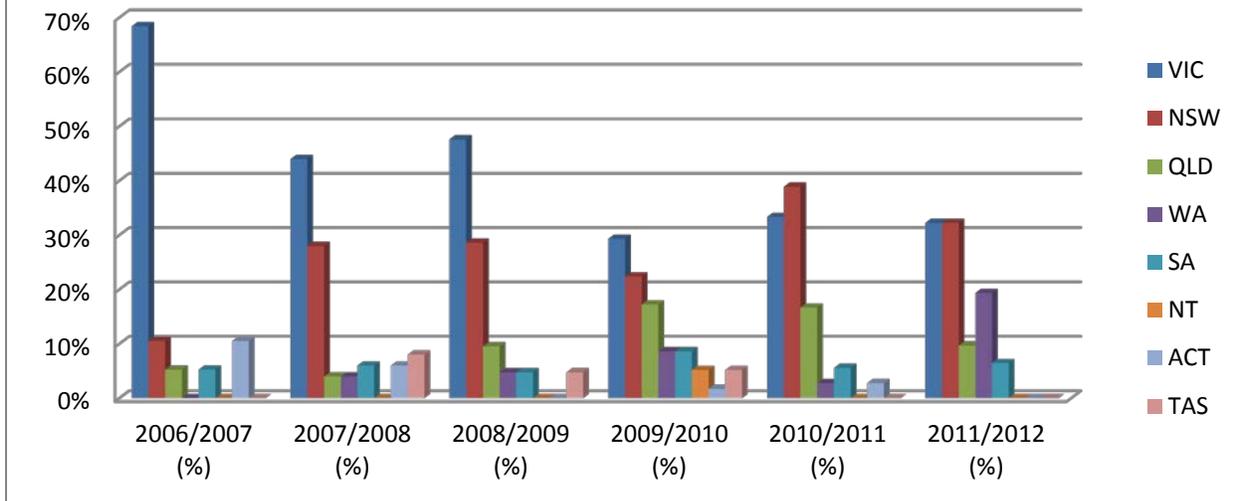
**Figure 6.1B: Total Number of Completed Litigation Matters 2005-2012**



**Figure 6.1C: Total Number of Completed Matters Against Employers 2005-2012**



**Figure 6.2A: Litigation by State (%)**



**Figure 6.2B: Litigation by State (No)**

State	2006/2007	2007/2008	2008/2009	2009/2010	2010/2011	2011/2012	TOTAL
VIC	13	22	10	17	12	10	84
NSW	2	14	6	13	14	10	60
QLD	1	2	2	10	6	3	24
WA	0	2	1	5	1	6	15
SA	1	3	1	5	2	2	14
NT	0	0	0	3	0	0	3
ACT	2	3	0	1	1	0	7
TAS	0	4	1	3	0	0	8
<b>TOTAL</b>	<b>19</b>	<b>50</b>	<b>21</b>	<b>58</b>	<b>36</b>	<b>31</b>	<b>215</b>

Figure 6.2A and Figure 6.2B indicate that until 2010, the majority of litigation took place in Victoria, notwithstanding that there are a higher number of workplaces and workers in NSW. With some exceptions, the number of litigation matters brought in other states seems broadly consistent with the proportion of the workforce located in those jurisdictions.

We also note that the FWO sought to facilitate access to justice for employees whose legal entitlements had been breached while saving its own resources for more strategic litigation by encouraging claimants to commence a **small claims** action – either with the direct or indirect assistance of the FWO. In particular, in 2010-2011, the FWO began a small claims procedure pilot in Melbourne and Coffs Harbour following dialogue with the then Federal Magistrates Court (FMCA), now the Federal Circuit Court.<sup>23</sup> As one FWO lawyer explained, the pilot assisted the agency in:

moving a lot of matters through, where there might not be a public interest in us taking a matter to court, whether it's because the amounts involved are quite slight, or there's no particular vulnerability involved, or aggravating circumstances, or where there's inconsistencies in evidence, but where we see those matters still need help.<sup>24</sup>

As part of the pilot, a FW Inspector or lawyer from the FWO could seek leave to appear in the capacity of *amicus curiae* or 'friend of the court'. In this role, the FWO representative did not act for either party, but rather worked to assist the court to better understand points of law or the relevant facts in dispute. In practical terms, the FWO representative did not make submissions or cross-examine witnesses, but rather responded to specific questions from the magistrate.<sup>25</sup> The pilot has been viewed as so successful that it was expanded in scope and application.<sup>26</sup> In the latest Annual Report, the FWO confirmed that, during the 2011-2012 financial year, 92 small claims applications were heard before the FMCA which resulted in \$266,946 being ordered in favour of applicants during that period.<sup>27</sup>

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<sup>23</sup> This pilot built on previous positive experience in New South Wales. Based on comments in Interview with EXA. Small claims proceedings were seen as so efficient that this was the preferred forum for the majority of enforcement proceedings during this time, at least in NSW. Indeed, it is possible that this may be one reason for the seemingly low levels of enforcement proceedings brought by state labour inspectorates prior to Work Choices.

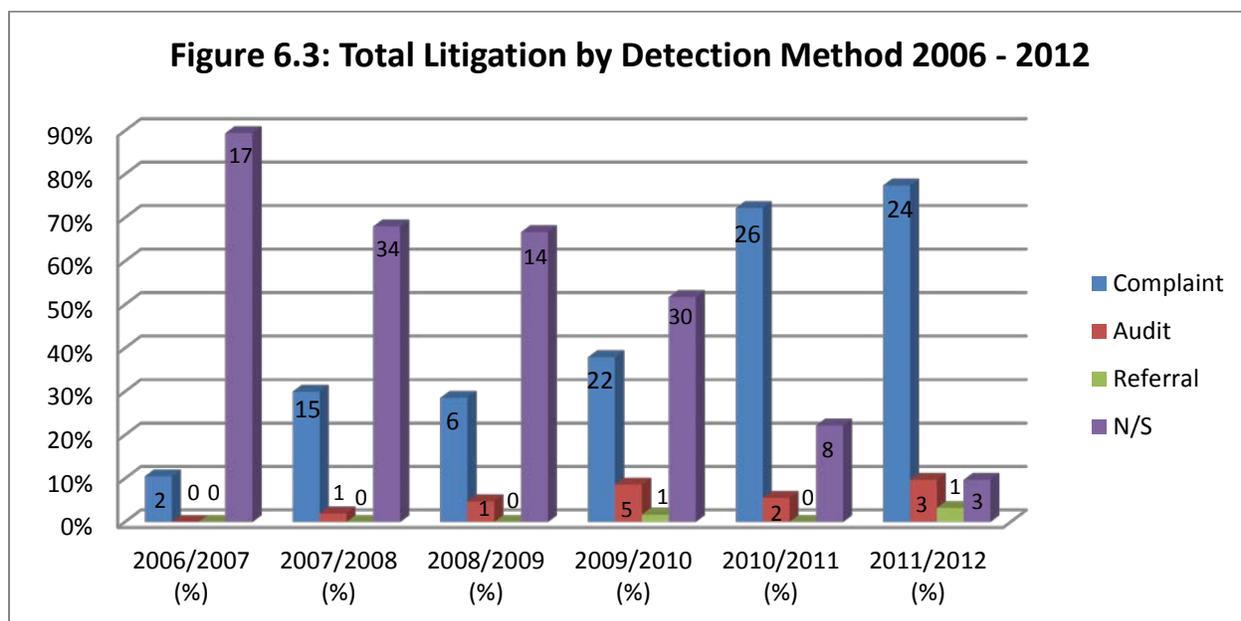
<sup>24</sup> Interview with FWLB.

<sup>25</sup> Based on comments in Interview with FWLC.

<sup>26</sup> Nicholas Wilson and Lynda McAlary-Smith, 'The Fair Work Ombudsman: Litigation Policy in Practice' (Speech delivered at Industrial Relations Commission NSW Annual Members Conference, NSW, 18 October 2012).

<sup>27</sup> Fair Work Ombudsman, *Annual Report 2011-2012* (2012) 59. Presumably, the amounts ordered in favour of applicants do not account for amounts that may have been agreed as part of settlement discussions between the parties – a common process adopted in the small claims proceedings. The latest figures also show that the majority of small claims proceedings are in Victoria, although there are also significant numbers now being filed in NSW and Queensland. As at 30 June 2012, no small claims proceedings had been commenced in South Australia, Tasmania or the Northern Territory. The Annual Report further confirmed that the number of applications filed in 2011-2012 represented an increase of more

We noted in the previous chapter that deterrence can be achieved through the likelihood of detection of non-compliance as a result of FWO investigation. It is important that there is a chance that detection through both complaint investigation and targeted audits will lead to enforcement action. Our review of court decisions did not always disclose whether these matters originated in complaints, or were detected through targeted campaigns and audits. However, combining our review of decisions between 2006 and 2012, along with data provided to us by the FWO for the financial years 2009-2010 and 2010-2011, indicates the following:



This data rebuts earlier claims that the federal agency does not take enforcement action in relation to breaches detected through targeted campaigns and audits.<sup>28</sup> Nevertheless, the number of litigation matters where litigation has arisen from targeted campaigns is small. As noted in Chapter Five, there may be a number of reasons for this trend, such as higher levels of employer cooperation in campaigns as compared to complaints.

than 140% when compared to the previous financial year and orders made in favour of the applicant increased by more than 150%. Presumably, this suggests that there are less settlements being achieved prior to the matter being heard.

<sup>28</sup> See Glenda Maconachie and Miles Goodwin, 'Transforming the Inspection Blitz: Targeted Campaigns, Enforcement and the Ombudsman' (2010) 21 *Labour & Industry* 369.

Notwithstanding the significant increase in the use of litigation from 2006 to 2012, and the fact that litigation was seen as a critical component of the overall enforcement regime (sometimes described as ‘the jewel in the crown’)<sup>29</sup> it represented a tiny proportion of all matters that the federal labour inspectorate received and resolved. Indeed, even during 2008-2009, when the agency claimed to have commenced over 70 cases,<sup>30</sup> litigation was initiated in less than one per cent of all complaints received by the inspectorate.

Nevertheless, even at these levels, litigation was viewed as important by FWO staff for a variety of reasons. Some pointed to the deterrence effects of formal sanctions.<sup>31</sup> Others noted that litigation was often significant in terms of education, particularly when it was combined with media attention.<sup>32</sup> The educational value of litigation is not readily recognised either by the responsive regulation model or the strategic enforcement principles, but is a feature which is particularly important given the current complexity of the Australian workplace relations system.<sup>33</sup> Others pointed to the rewarding effect of achieving positive outcomes for vulnerable workers who had been underpaid.<sup>34</sup> Finally, there were some who pointed to the way in which ‘the regulator can use litigation to help clarify areas of the law that have been uncertain.’<sup>35</sup>

To some degree, the extent of litigation is a function of the resources available to the inspectorate. As has been pointed out by former Fair Work Ombudsman Nicholas Wilson, litigation is very costly and time-consuming.<sup>36</sup> Partly as a result of these resourcing pressures, the FWO has made clear that the maximum litigation capacity is around 50 to 60

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<sup>29</sup> Interview with FWLI.

<sup>30</sup> The Workplace Ombudsman’s Annual Report for 2008-2009 provides that 77 litigation matters were commenced during this financial year: Workplace Ombudsman, *Annual Report 2008-2009* (2009) 28. However, later Annual Reports show that 78 litigation matters were initiated in this financial year. See, eg, Fair Work Ombudsman, *Annual Report 2011-2012* (2012) 57, table 15.

<sup>31</sup> See, eg, Interview with FWLB; Interview with FWLA; Interview with FWLG ; and Interview with FWLF.

<sup>32</sup> Based on comments in Interview with FWLD and Interview with FWLE.

<sup>33</sup> For example, one FWO lawyer commented that what he has always found quite satisfying ‘is the role that the litigation function plays in the agency in both obtaining compliance, but also educating the Australian public about what is acceptable and non-acceptable behaviour.’ See Interview with FWLC.

<sup>34</sup> Interview with FWLH.

<sup>35</sup> Interview with FWLH.

<sup>36</sup> That said, a FWO manager pointed out that regardless of which jurisdiction the matter was filed in, resolution through litigation would generally take a lengthy time. In a best case scenario, where there were no contested facts, judgments could take six to nine months. Where, however, the matter was contested, it could take up to two years from the date of filing to the date on which a decision was handed down. Based on comments in Interview with FWMH.

matters per year.<sup>37</sup> Further, as one manager put it, a judgement was made internally ‘that running a hundred litigations wouldn’t necessarily get you twice the deterrence that running 50 would.’<sup>38</sup> The agency must also ensure that it addresses its priorities in the litigation it chooses, including the need to conduct activity across the various aspects of its mandate.

Nevertheless, the results of our interviews suggest that the overall number of cases brought by the FWO was affected by the caution exercised by the agency in choosing matters for litigation, and uncertainty surrounding the application of the public interest test. Some of the reasons for this caution are set out in the Litigation Policy, which states:

In every case, great care must be taken so that the right decision is made. A wrong decision about whether or not to commence proceedings might tend to undermine the confidence of the community in the Australian Government’s workplace relations system and in the FWO as the national regulator of Commonwealth workplace laws.<sup>39</sup>

A number of Inspectors expressed frustration at the process by which decisions to commence litigation are made. While FW Inspectors are entitled to recommend litigation (or any other enforcement activity),<sup>40</sup> the discretion to commence litigation is constrained by both the Litigation Policy and the Directions to FW Inspectors.<sup>41</sup> In short, this Direction provides that, before commencing civil remedy litigation, the FW Inspector must obtain the consent of the FWO or the consent of authorised staff, as well as comply with the terms of the Litigation Policy, amongst other things.<sup>42</sup> In practice, it seems that in order for a matter to be considered for litigation, the FW Inspector must prepare a litigation brief in consultation with their team leader and executive manager. This brief will ordinarily

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<sup>37</sup> Nicholas Wilson and Lynda McAlary-Smith, ‘The Fair Work Ombudsman Litigation Policy in Practice’ (Paper presented at the Industrial Relations Commission NSW Annual Members Conference, 18 October 2012) 6.

<sup>38</sup> Interview with FWMH .

<sup>39</sup> FWO Litigation Policy, above n 13, 9.

<sup>40</sup> In particular, the FWO Litigation Policy states that: ‘the decision whether to recommend that proceedings be commenced (or some other enforcement activity) rests with the Fair Work Inspector and their Executive Level 2 Manager in consultation with relevant Field Operations Executive Directors and the Group Manager of Field Operations’: FWO Litigation Policy, above n 13, 8.

<sup>41</sup> See *Direction to Inspectors*, Legislative Instrument F2011L00683 (at 24 March 2011) and *FW Act* s 704.

<sup>42</sup> On 18 May 2011, the FWO issued a ‘General Authorisation to Consent to Litigation’ under the Direction to Inspectors which authorised the following senior officers of the FWO to consent to the commencement of litigation: Chief Counsel; Director – Legal Practice; and Group Manager of Field Operations Group.

include a summary of the relevant contraventions and a preliminary assessment of the evidence in support of each contravention. This brief will then be provided to an internal committee known as the 'Strategic Litigation Committee' which is comprised of senior managers from both the inspectorate and the legal group.

Thus, while some of the external lawyers we interviewed were of the opinion that in bringing litigation, 'there's a little bit of a shoot first, ask questions later attitude',<sup>43</sup> this did not seem to reflect the actual practice. Indeed, before even beginning to prepare a litigation brief, it is often the case that the FW Inspector will have discussed the matter at several case conferences and other informal forums to assess its suitability for formal sanctioning.

As noted above, the first step in the two-limb test under the FWO's Litigation Policy is establishing whether there is sufficient evidence to prosecute the case.<sup>44</sup> To determine this matter, the FWO will consider a series of factors, including: if there is admissible, substantial and reliable evidence; the availability, competency and credibility of any relevant witnesses; whether the alleged wrongdoer has made or is likely to make any admissions; and whether there are any lines of defence which are open to the alleged wrongdoer.<sup>45</sup> As part of this evidentiary assessment, the FWO will send a brief to an external law firm for assessment as to whether there are reasonable prospects of success.<sup>46</sup>

Internally, the level of evidence seen as necessary to satisfy this test seemed to vary somewhat between officers. The general perception amongst the inspectorate was that the evidentiary bar for bringing litigations was fairly high. It was not uncommon for a matter to be referred by the inspectorate to the Strategic Litigation Committee for consideration, only to be returned back to the inspectorate for further investigation. This was a common source of frustration for Inspectors. In this respect, one Inspector commented:

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<sup>43</sup> Interview with EXLE.

<sup>44</sup> The reference to 'prosecution' is somewhat misleading in this context given that civil penalty litigation does not involve prosecution of any criminal offence and accordingly, the civil standard of proof applies.

<sup>45</sup> FWO Litigation Policy, above n 13, 9-10.

<sup>46</sup> The FWO Litigation Policy notes that this requirement is actually set down in Legal Service Directions. Under these Directions, 'the FWO must not (except in urgent circumstances) commence proceedings unless it has received written legal advice from lawyers whom the agency is allowed to use in the proceeding indicating that there are reasonable grounds for starting the proceedings': FWO Litigation Policy, above n 13, 10.

We've haven't traditionally been very good at litigation stuff. We've been a bit reluctant, and it seems to me we're still a bit that way, even though we pretend we're not. There's lot of hurdles. If you put something up for litigation, invariably they pull it apart and tell you oh, you've got to redo your whole investigation almost again, to get there. And you wonder, hang on, what are we doing, if you're not going to help us do it? And so people are reluctant to push it up.<sup>47</sup>

This impression amongst Inspectors, together with the pressure to meet time-centric KPIs and a burgeoning caseload, meant that some Inspectors were reluctant to refer a matter to litigation given the extra work involved in preparing the brief and the case more generally for court.<sup>48</sup>

In comparison to the views of the inspectorate set out above, one FWO lawyer confirmed that it was the civil rather than the criminal test which was relevant: '[w]e don't look for beyond reasonable doubt in any of our matters; that's not the test that we apply when determining if there's reasonable prospects of success.'<sup>49</sup>

In general, there appeared to be a tendency to place great weight on the need for documentary evidence. If records were missing or incomplete, particular contraventions would not be pursued. Often Inspectors would hesitate to consider litigation in the instances where records were absent and would instead try to resolve the matter voluntarily to the extent possible. By way of illustration, one Inspector commented:

There's a degree to which, whether rightly or wrongly, we have the impression that – our legal branch and Executive Director's feel this way – it feels we only litigate matters that have excellent prospects. We're not often going to run a case for the principle and the greater good unless we really think we can win it.<sup>50</sup>

This impression was confirmed by the comments of a FWO lawyer who noted that as lawyers:

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<sup>47</sup> Interview with FWIK.

<sup>48</sup> Based on comments in Interview with FWIM.

<sup>49</sup> Interview with FWLF.

<sup>50</sup> Interview with FWIT.

we're always evidence based, that's how we make our decisions, and without evidence, we don't want to be laughed out of court, we don't want to bring a matter and a magistrate or a judge to say, "Well these proceedings are unreasonable, or lack merit, or whatever, and I'm going to award costs against you." I mean that would just be an embarrassing exercise that would do us no service, and our inspectors no service.<sup>51</sup>

Notwithstanding these challenges, it seems that if the contraventions were particularly flagrant or the employees were especially vulnerable, Inspectors would go to great lengths to fill the evidentiary gaps and the lawyers would be willing to consider alternative sources of evidence. In this respect, a FWO lawyer commented:

in a lot of these cases the evidence just isn't there because the employer either hasn't done it, or a flood, or a fire – you'd be surprised by the excuses that we get – and in that case we might have to think outside the square and say well how else can we lead evidence? Is the witness evidence sufficient of the employees concerned? You know, are they going be credible? Is a judge going to believe them?<sup>52</sup>

Other examples of 'thinking outside the square' included where Inspectors sought evidence, such as: security footage or security records to see the times of the days that workers were commencing and finishing work; diaries; signed invoices; bank statements; and statements from other employees who may have witnessed the complainant working.<sup>53</sup> Although, as one Inspector put it: 'at the end of the day it's not very often we can say that we've got sufficient evidence to make a determination in the absence of employment records.'<sup>54</sup>

Applying the public interest test was probably the most common source of confusion or contention internally. There was a noticeable difference between the views of the inspectorate and the views of the FWO lawyers in respect of this issue. For example, one Inspector observed that he was preparing a number of cases for litigation, but they were

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<sup>51</sup> Interview with FWLC.

<sup>52</sup> Ibid.

<sup>53</sup> Based on comments in Interview with FWIE and Interview with FWIJ.

<sup>54</sup> Interview with FWIJ.

not being approved by the Strategic Litigation Committee, because ‘they’re not flavour of the month anymore.’<sup>55</sup> He further explained:

there’s certain hot things at periods of time that they really want to put some litigations forward on, but given the sort of amount of internal checks that go on before a matter that was initially put up for litigation actually gets to that litigation phase, a lot of time has passed and it may not be flavour of the month anymore. It’s like well just tell me upfront and I won’t go to all the trouble of what is effectively wasted work in the end. So there’s a fair amount of that. Then there’s a bit of oh, it’s not the perfect case, so we don’t want to take it.<sup>56</sup>

A FWO lawyer similarly observed that, from time to time, there were ‘trend matters’ – for example, the agency may be keen to file a certain number of sham matters within a short period in order to attract some media attention. However, this same lawyer conceded that:

I don’t think we’ve actually done that to date, and the reason for that I would imagine would be because we have to rely on what investigations are coming through to us, and it’s not always appropriate to sit on a matter to file it with other matters if you’ve got a matter ready to go, it should just be filed unless you know there’s another one pending quite soon.<sup>57</sup>

Another FWO lawyer opined that one of the reasons for these differences in opinion may be the distinct perspectives of the inspectorate and the legal branch:

Inspectors deal with these matters day in/day out, they feel the angst because they’re the ones the dealing with the persons concerned, the wrongdoers, and all that kind of stuff. So we see the matter from our own officers not having dealt with it, and I’m sure they get absolutely frustrated with what happens sometimes, and will be thinking, “Look, we’ve got to get this person because they’re doing the wrong thing,” etcetera, etcetera. And we’re a bit more measured, and a bit sort of removed from it.<sup>58</sup>

An additional reason for the different views of the inspectorate and the senior management staff may be the length of time between when the contraventions took place and the

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<sup>55</sup> Interview with FWIE.

<sup>56</sup> Ibid.

<sup>57</sup> Interview with FWLB.

<sup>58</sup> Interview with FWLE. See also comments in Interview with FWLF .

commencement of litigation. There is a growing reluctance to initiate litigation where the contraventions are perceived to be 'stale'. If a matter was over a year old, litigation is rarely seen as an option.<sup>59</sup> This is despite the statute of limitations being six years in this context.<sup>60</sup> Indeed, a common theme that appears to drive many of the compliance decisions is the phrase: 'justice delayed is justice denied'. It is arguably this principle, along with time-sensitive KPIs, which has led to older matters being directed towards mediation, small claims and enforceable undertakings and away from civil remedy litigation.

A key question, however, is whether 'justice' is really being achieved through these other mechanisms. The substance of the outcomes of mediation and small claims, for example, are not reported in detail, in contrast with litigation and enforceable undertakings. Further, not litigating stale matters may have the unintended consequence of privileging employers who resist compliance. For example, if employers do not cooperate with FW Inspectors, fail to keep records or deny access to key information, the investigation may take much longer than would otherwise be the case. As a result, while the culpability of the wrongdoer may be relatively high, the case may not be seen to meet the public interest test because it has simply taken too long to reach the final decision-making stage. One way in which the FWO sought to address this issue was by 'more quickly identifying those more serious cases so they don't get to that stage of age before we actually start having the serious discussion of should it be litigated or not.'<sup>61</sup>

That said, it appeared that, in deciding whether to commence civil remedy litigation, those we interviewed indicated that the FWO rarely, if ever, took into account: the policy environment, the political sensitivity of a particular matter, or the general economic environment, such as whether a particular industry or sector was struggling. However, at least one Inspector acknowledged that how a matter could be perceived in the media, or by various interests, such as business groups, could be relevant to determining whether a

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<sup>59</sup> For example, we were informed that, in early 2012, the Legal Group had made it clear to the inspectorate that they were reluctant to accept litigation matters which were more than 180 days old and preferred matters that were less than 90 days old. Based on comments in participant observation.

<sup>60</sup> *FW Act* s 544.

<sup>61</sup> Interview with FWIU.

matter was in the public interest.<sup>62</sup> Overall, though, the general views of the FWO staff were quite different to the impressions of the external workplace relations lawyers we interviewed. A number of these external lawyers suggested that litigation matters were often elevated in importance by the FWO if ‘the issue gets some publicity and heat’.<sup>63</sup>

We also note that the FWO appeared to be placing a higher priority on test cases in recent years. As noted earlier, the second, important function of litigation is to seek judicial clarification of fair work laws. The FWO and its predecessors appear to have been relatively conservative in the past in terms of running cases without a fairly high probability of success. It is arguable that the current decision-making framework, and particularly the need for external legal advice, may have had the effect of stifling more novel matters. However, it appears that in light of the complexity of the current system and the fairly recent changes which have taken place, the agency’s appetite for a measured level of risk appeared to be growing over the study period. In 2011-2012, the FWO initiated test cases in relation to a variety of different issues ranging from the jurisdictional reach of the FW Act,<sup>64</sup> to the use of accessory liability provisions to address fissured employment relationships<sup>65</sup> and complex supply chains,<sup>66</sup> sham contracting<sup>67</sup> and the difficult problem of phoenixing.<sup>68</sup> In initiating this litigation, and highlighting them in a recent speech,

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<sup>62</sup> Based on comments in Interview with FWLI.

<sup>63</sup> Interview with EXLD. Similar comments were made in Interview with EXLE.

<sup>64</sup> See, eg, *Fair Work Ombudsman v Jetstar Airways Limited & Ors*, Federal Magistrates Court of Australia, Sydney, 2 April 2012 and *Fair Work Ombudsman v Valair Limited, Tour East (TET) Ltd and Jetstar Airways Pty Ltd*, Federal Court of Australia, Sydney, 25 May 2012. In the first Jetstar case, it was alleged that trainee pilots were engaged under New Zealand individual contracts when it was foreseeable that they would be predominantly working within Australia. See Fair Work Ombudsman, ‘Airline companies to face court over alleged breaches of workplace laws’ (Media Release, 2 April 2012) In addition, in the second Jetstar case, it was alleged that Thai cabin crew used by the airline should have certain portions of their flying time paid in accordance with Australian law. See Fair Work Ombudsman, ‘Thai cabin crew allegedly underpaid on Jetstar domestic routes’ (Media Release, 28 May 2012).

<sup>65</sup> See, eg, *Fair Work Ombudsman v Pocomwell Ltd, Supply Oilfield & Marine Personnel Services Inc, SurveySpec Pty Ltd and Thomas Civiello*: Fair Work Ombudsman, ‘Fair Work Ombudsman alleges four oil rig workers underpaid more than \$120,000’ (Media Release, 27 June 2011).

<sup>66</sup> See, eg, *Fair Work Ombudsman v Ahmad Hamid Mohammed Al Hilfi, Nidal Albarouki, Clency Ferriere and Coles Supermarkets Australia Pty Ltd*, Federal Magistrates Court of Australia, Adelaide, 2 February 2012 and *Fair Work Ombudsman v Al Basry, Albarouki, Ferriere and Coles Supermarkets Australia Pty Ltd*, Federal Magistrates Court of Australia, Adelaide, 24 May 2012: Fair Work Ombudsman, ‘Court action over alleged \$149,000 underpayment of SA trolley collectors’ (Media Release, 3 June 2012).

<sup>67</sup> See, eg, *Fair Work Ombudsman v Telco Services Australia Pty Ltd and Trimatic Contract Services Pty Ltd*, Federal Court of Australia, Melbourne, 24 June 2011. In this case, the FWO alleged that the respondents engaged in sham contracting activity in relation to thousands of call centre workers and door-to-door salespeople.

<sup>68</sup> See, eg, *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (No 2) [2012] FCA 408 and *FWO v Ramsey* [2011] FCA 1176.

Nicholas Wilson expressly acknowledged that ‘consideration of these type of subjects presents significant risk for the Agency, as the bounds of the *Fair Work Act* are explored.’<sup>69</sup> He rightly pointed out, however, that ‘there is on the other hand, an obligation to endeavour to prove these points.’<sup>70</sup> We will return to some of these cases in the following two sections, as we discuss the pattern of FWO enforcement by type of matter and the characteristics of respondents.

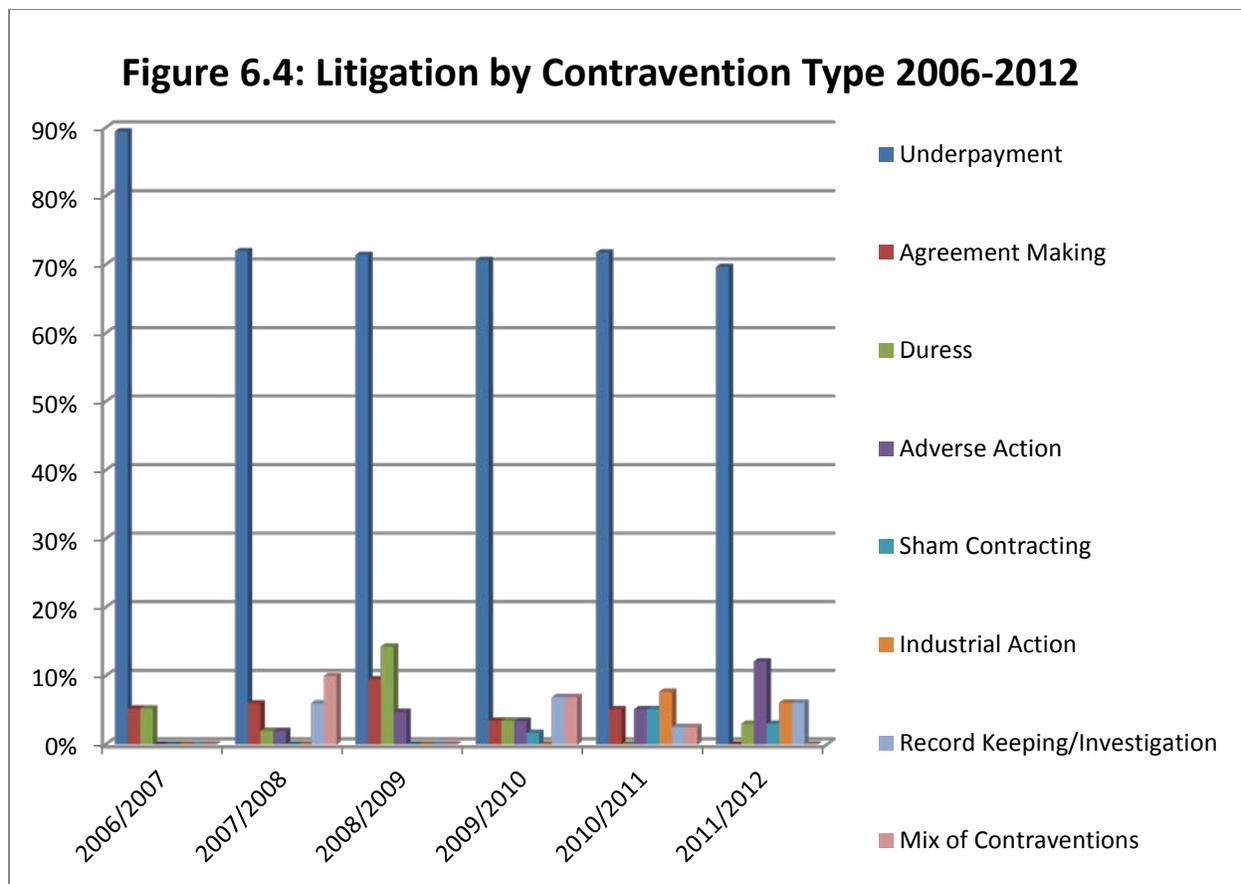
### *Types of Matter Litigated*

In Chapters 3 and 4, and in our discussion of test cases above, we observed that the FWO now enjoys an expanded mandate compared to the OWS and the WO. We have also noted some changes in the goals of the agency between 2006 and 2012. The way in which litigation was used and portrayed by the federal labour inspectorate changed quite significantly over the study period. In particular, this was reflected in the types of contravention that the agency litigated over that period.

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<sup>69</sup> As noted in Nicholas Wilson and Lynda McAlary-Smith, ‘The Fair Work Ombudsman: Litigation Policy in Practice’ (Speech delivered at Industrial Relations Commission NSW Annual Members Conference, NSW, 18 October 2012).

<sup>70</sup> Ibid.



The data presented in Figure 6.4 shows that the vast majority of litigation matters brought by the FWO concerned underpayments. Indeed, in the early years following Work Choices, nearly all litigation matters were related to underpayments. The focus of the agency’s litigation strategy appeared to be about increasing the numbers of underpayment matters that were being litigated, rather than choosing litigation based on whether the particular matter would have a strategic impact, such as maximising general deterrence in a problematic industry. In the words of one Inspector, so long as the matter fell outside the trivial category, ‘pretty much anything ran’.<sup>71</sup> Further, the focus on underpayment matters was largely determined by the narrower mandate of the agency in this earlier period. This approach was also seen as appropriate to the extent that the litigation being run essentially reflected ‘the nature of the majority of matters investigated by the agency’.<sup>72</sup> Further, the

<sup>71</sup> Interview with FWLI .

<sup>72</sup> Workplace Ombudsman, *Annual Report 2007-2008* (2008). Similar statements have been made in later Annual Reports, see: Workplace Ombudsman, *Annual Report 2008-2009* (2009).

Workplace Ombudsman considered ‘the enforcement of minimum standards, including wages, as a priority and consistent with the objects of the *Workplace Relations Act 1996*’.<sup>73</sup>

However, as Figure 6.4 shows, the changing functions, the broadening mandate and the increasing sophistication of the agency meant that there was a deliberate and noticeable shift in the types of contraventions that were the focus of litigation. One Inspector commented that there had actually been a clear direction from senior management to boost the numbers of litigation matters in the more ‘complex’ areas.<sup>74</sup> One FWO manager observed that the reasons for this shift came about:

from debates we’ve had about the integrity of the regulator, that the intention is that we work across the Act, and the intention is that we influence large as well small. Now on that kind of basis I don’t think it’s especially profitable to just keep taking the next underpaying cleaner you can find to court, and then not necessarily getting the money out of them when they go into liquidation. And so it’s that sort of issue – what are the levers?<sup>75</sup>

While it may be desirable from the perspective of the FWO to litigate across the full range of civil remedy provisions in order to establish its presence in these lesser known, and more novel areas, it presents some challenges in practice. For a start, complaints about contraventions under the general protection provisions or sham contracting provisions may be more difficult to detect. They cannot necessarily be identified by a quick check of employment records.<sup>76</sup> A related issue is the fact that there is often less documentary evidence and therefore more need to rely on witness testimony. This means that preparing for litigation is often more resource-intensive and the outcomes are less predictable. Another lawyer, however, acknowledged that while the ‘sexier matters’ involving discrimination and sham contracting may attract more media interest, the cases that were

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<sup>73</sup> Workplace Ombudsman, *Annual Report 2007-2008* (2008). Similar statements have been made in later Annual Reports, see: Workplace Ombudsman, *Annual Report 2008-2009* (2009).

<sup>74</sup> Interview with FWIE .

<sup>75</sup> Interview with FWMH .

<sup>76</sup> In a bid to remedy this issue, one manager commented that he sought to encourage claims in these other areas in the following way: ‘what I would say to the lawyers, and what I would say to the inspectorate was, well that they’ll be there, the breaches will be there, you’ve just got to go and find them. And it’s not sufficient to sit there and wait for them to come in the door, and wait for a complainant, you’ve got to go and find a complainant often, you know because sometimes they won’t know that we’re actually doing this work.’ Interview with EXE.

pursued often depended on the contraventions that were being found by the inspectorate.<sup>77</sup> Indeed, while management may have been keen to vary the types of matters that were the subject of FWO-initiated litigation, this has not necessarily flowed through in practice. In the 2011-2012 financial year, 78% of all proceedings commenced were still related to the underpayment of wages and entitlements.<sup>78</sup>

### *Characteristics of Respondents and Context of Litigation*

It is not only the type of breach that was the subject of the agency's litigation that evolved. In this section, we present data concerning the nature of the respondents to litigation by the federal labour inspectorate from 2006 to 2012, including their industry context. In Chapter 2 of this report, we observed that the characteristics of employing businesses were important to effective enforcement of minimum employment standards in a number of respects. For example, we identified a number of reasons why businesses might not comply with regulation. In some cases, this might be due to their size and capacity to comply with complex regulation, and in others it might be as a result of their industry structure, and economic pressures specific to that industry. We noted that regulators such as the FWO needed to be mindful of these plural motivations when designing their overall enforcement strategy. For example, regulators need to be conscious of the fact that penalising a corporate entity is not always effective in changing corporate compliance behaviour, and that alternative approaches – such as bringing litigation against company officers – may be needed, depending on the context. Moreover, we also observed that it is important for regulators to, where possible, target external pressures on employer firms which may affect compliance behaviour, such as where the firm is part of a larger corporate network or supply chain.

In order to track trends in the FWO's and its predecessors' litigation from 2006 to 2012, we have prepared a number of tables showing different aspects of the litigation strategy, such as the number of litigation matters determined in key industries, the proportion of matters

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<sup>77</sup> Interview with FWLC.

<sup>78</sup> Fair Work Ombudsman, *Annual Report 2011-2012* (2012) 57. We note that there appear to be differences in the way underpayment matters have been counted in our data review as compared to the FWO's analysis. See Appendix 1 for further explanation of the methodology adopted in our review.

decided against small, medium and large businesses, and in the next section, the proportion of cases where accessorial liability provisions were relied on to target individual company directors and officers on the one hand, and associated corporate entities on the other.<sup>79</sup>

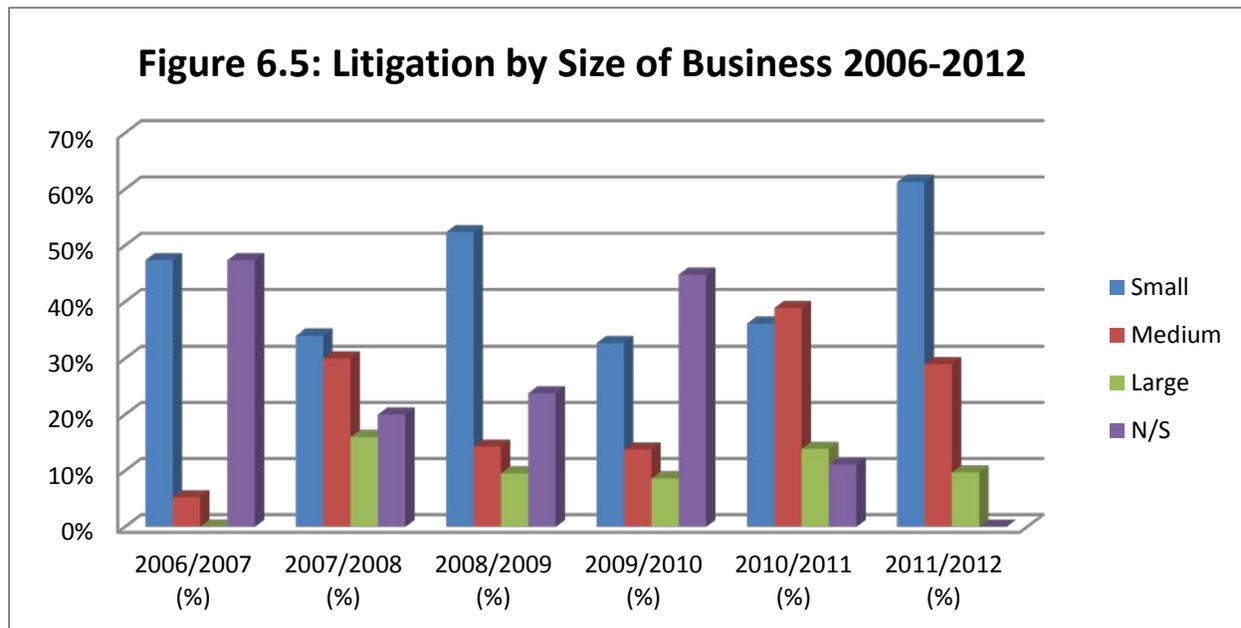
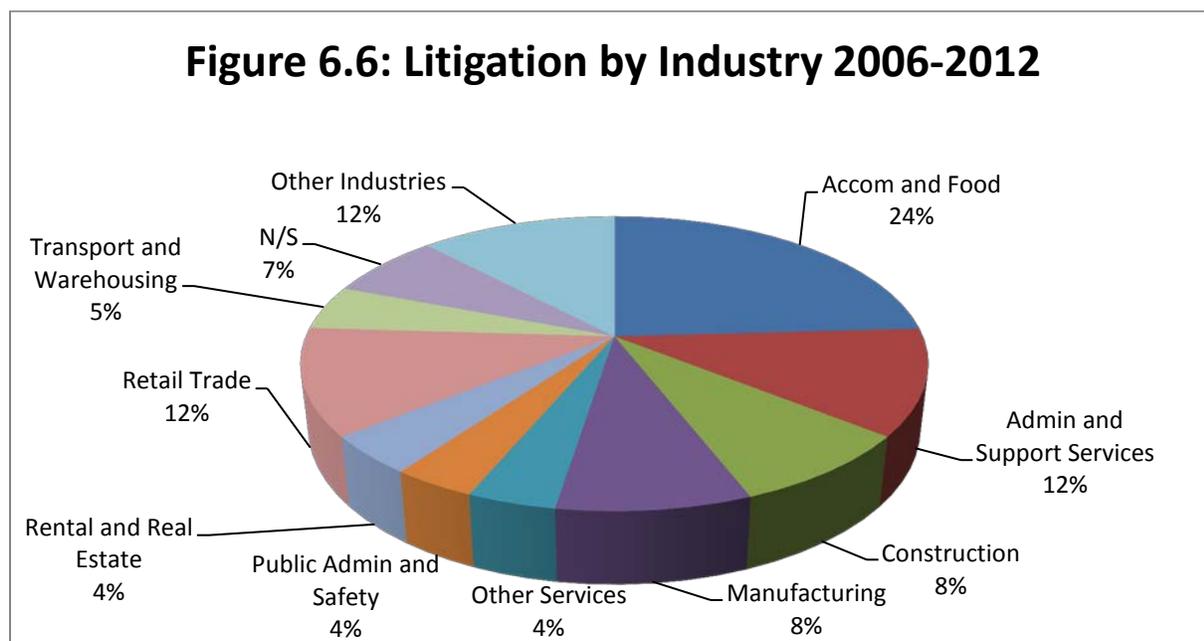


Figure 6.5 shows the size of the business against which the FWO and its predecessors brought litigation between 2006 and 2012. Unfortunately, it has not been possible to determine the size of the employer respondent in all of the cases brought by the federal enforcement agency, even after a review of each court decision. However, of the cases where it has been possible to determine size, we found that the majority of cases brought by the FWO in relation to breaches of minimum employment standards were against small to medium sized businesses. In 2011-2012, over 60% of litigation matters involved small business employers. While, on its face, this suggests that the number of matters brought against small businesses increased significantly in the previous year, it is difficult to make a conclusive assessment in this respect. For example, in 2009-2010, there was a substantial proportion of matters where the size of business could not be determined.

<sup>79</sup> See Appendix 2.

This data may indicate that non-compliance was more extensive in small to medium sized enterprises. On the other hand, it may indicate that the FWO had a preference for targeting smaller enterprises, at least historically. Some studies have suggested that small and medium businesses are more susceptible to deterrence than larger enterprises.<sup>80</sup> The sharp increase in the number of matters against smaller businesses in 2011-2012 may reflect the agency's recent prioritisation of vulnerable workers and more egregious cases of non-compliance. However, it is also the case that small to medium business are easier to bring litigation against, as they are unlikely to be as well-resourced in defending litigation as larger enterprises and have less power to challenge constructions of compliance. They may also have less access to legal or human resources advice during the investigation process and may therefore fail to fully appreciate the consequences of resisting the FWO's attempts at reaching a voluntary resolution of the matter. Further, Weil's research suggests that unless there is some link which binds small businesses together, such as an active employer association, bringing enforcement actions against small businesses may successfully recover lost wages and achieve specific deterrence, but may do little to change behaviour more broadly in the industry.



<sup>80</sup> Neil Gunningham, 'Prosecution of OHS Offences: Deterrent or Disincentive' (2007) 29 *Sydney Law Review* 359, 369.

Figure 6.6 reports the distribution of litigation matters by industry. This piechart shows that since 2006, litigation matters have consistently been concentrated in the following industries:

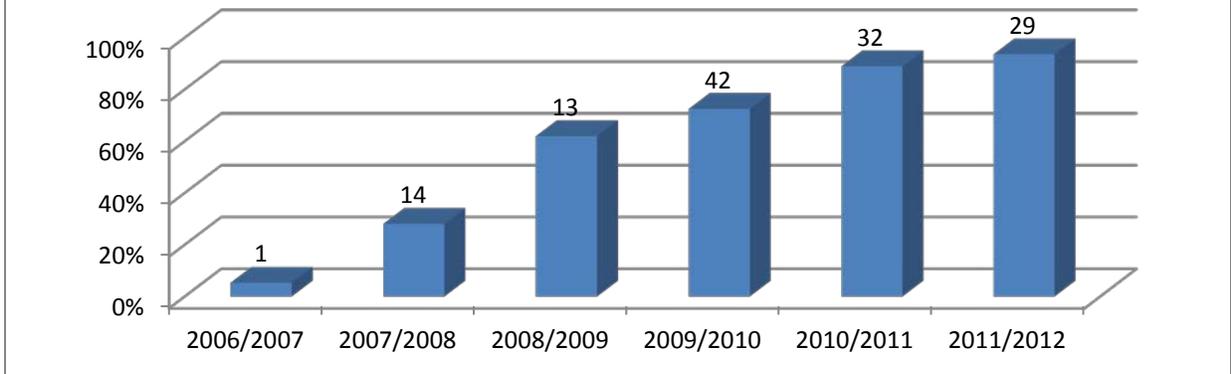
- Accommodation and food services
- Administrative and support services
- Retail trade
- Manufacturing
- Construction

It is difficult to draw concrete conclusions from this data without further research. It may be that the data suggests that it is these industries where non-compliance tends to be higher. On the other hand, it may be that the data is an indication of the FWO's priorities in terms of its detection activities, or the source of a majority of complaints. However, as we noted in Chapter 5, high complaints will not necessarily be an accurate indicator of high non-compliance.

### *Accessorial Liability*

Related to the data on the type of respondent is the number of cases where in addition to proceedings against an employer, the FWO joined individuals or corporate entities other than the employer. A particularly striking trend revealed by the data was an increase in the number of matters where proceedings were brought against a person or persons involved in a contravention of a civil remedy provision in reliance on the accessorial liability provisions in the FW Act.

**Figure 6.7: Proceedings involving one or more Accessory (%)**



The FWO Litigation Policy states that the agency ‘considers that holding individuals accountable for contraventions in which they are involved in is an appropriate compliance tool... Accordingly, in each and every matter considered for litigation action the FWO will look to determine if s 550 proceedings can also be commenced’.<sup>81</sup> The data presented in Figure 6.7 indicates that the FWO increasingly made use of the accessorial liability provisions. Of the 34 litigation matters commenced by the FWO in the financial year 2011-2012 accessories were named in all but 2 of these matters.<sup>82</sup> This was confirmed by a senior FWO lawyer we interviewed, who also emphasised the agency’s goal of achieving general deterrence through this avenue:

most of the matters that we run do [name an accessory pursuant to s 550] and I think that [these actions] do have an impact upon individuals’ behaviours, and at the end of the day individuals are the ones who are in the driving seat.<sup>83</sup>

By way of comparison, in 2007-2008, the WO joined accessories in only 17 of the 54 litigation matters it commenced that year.<sup>84</sup>

<sup>81</sup> FWO Litigation Policy, above n 13, cl 6 (footnotes omitted).

<sup>82</sup> We note that in some of these matters, the accessories named may have been corporate entities rather than individual directors or managers of a corporate employer.

<sup>83</sup> Interview with FWO Lawyer.

<sup>84</sup> Helen Anderson and John Howe, ‘Making Sense of the Compensation Remedy under the Fair Work Act’ (2012) 36 *Melbourne University Law Review* 335.

In the vast majority of these cases, the FWO brought proceedings against both a corporate employer and at least one of the individual company directors or officers of that employer. A key criticism of enforcement regimes which focus on punishment of the firm through penalties is that this strategy does not have proper regard for the shareholders' limited liability, and the fact that firms are actually made up of key individuals with their own set of beliefs, worldviews, and motivations. In punishing the corporation for breaches of social regulation, individual company officers and managers (who may be driven by profit maximisation and the delivery of shareholder value at the expense of other values) are not held to account, and accordingly, there is no incentive for them to improve their employer's compliance profile in the future. One approach to motivating corporate compliance that takes into account the individuals within the firm is to hold officers and managers of corporations personally liable when the company breaches the law, usually in addition to prosecution of the corporate offender itself.<sup>85</sup> There are a number of legal mechanisms by which individuals may be held liable for corporate breaches of criminal and civil laws. One of these is accessory liability, whereby the law holds a third party responsible for a breach of the law caused by the principal's wrong, such that the accessory is liable to the same or a similar degree as the principal wrongdoer.<sup>86</sup>

Studies have shown that if officers and managers are threatened with personal liability for harms done by the business, they are more likely to cause the corporation to comply with the law in order to avoid being held to account. In other words, the threat of personal liability is a deterrent against endorsement of non-compliance, and therefore a useful mechanism in influencing corporate compliance.<sup>87</sup>

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<sup>85</sup> It should be noted that the optimal approach is for regulators to pursue both corporate and individual liability. For a strong exploration of the reasons why pursuing individual liability as the sole punishment for corporate wrongs is flawed, see Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism, and Accountability' (1988) 11(3) *Sydney Law Review* 468. Kraakman refers to this as 'dual liability', and says that 'together, [absolute personal liability with enterprise liability] may provide more effective deterrence than comparable levels of either could alone': Reinier H Kraakman, 'Corporate Liability Strategies and the Costs of Legal Controls' (1984) 93 *Yale Law Review* 857.

<sup>86</sup> Joachim Dietrich, 'The Liability of Accessories under Statute, in Equity, and in Criminal Law: Some Common Problems and (Perhaps) Common Solutions' (2010) 34 *Melbourne University Law Review* 106, 109.

<sup>87</sup> Reinier H Kraakman, 'Corporate Liability Strategies and the Costs of Legal Controls' (1984) 93 *Yale Law Review* 857. For consideration of imposing individual criminal and civil liability of corporate officers and managers as a mechanism for motivating compliance in the context of occupational health and safety regulation, see, for example, Neil Foster, 'Personal Civil Liability of Company Officers for Company Workplace Torts' (2008) 16 *Torts Law Review* 20; Neil Gunningham and

The most common targets for the FWO in relying on these provisions were the directors of corporate employers in cases where there had been a history of misuse of the corporate form to avoid payment of employment entitlements, and/or where the corporate employer was or was likely to become insolvent and be unable to meet its obligations to employees.

The cases of *Fair Work Ombudsman v Shrek Pty Ltd and Anor*<sup>88</sup> and *Fair Work Ombudsman v Ramsey*<sup>89</sup> are examples of matters involving the above scenario.<sup>90</sup> In *Ramsey*, it was alleged an employer of workers in an abattoir had attempted to avoid the employing company's liability for the entitlements of its employees on termination through a corporate restructure. A new entity had been created, and the seven employees of the abattoir transferred to that entity. The company and its owner and director (Mr Ramsey) had claimed that the business' employees were employed by the separate company under a labour-hire arrangement. After the employment of eleven abattoir workers was terminated, the new employer was placed into liquidation in an effort to prevent the workers from recovering their termination entitlements. In deciding the case, Justice Buchanan held that "the breaches in this case [were] very serious. They appear to me to have involved a deliberate, calculated and systematic refusal to comply with the requirements of the WR Act and to take advantage of the vulnerability of the complainant employees".<sup>91</sup> The Federal Court of Australia imposed penalties of \$19,200 on Mr Ramsey and \$96,000 on Ramsey Food Processing Pty Ltd, the company operating the abattoir, representing 97% of the maximum penalties available.

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Richard Johnstone, *Regulating Workplace Safety: System and Sanctions* (Oxford University Press, 1999), 217-8.; Andrew Hopkins, *Making Safety Work: Getting Management Commitment to Occupational Health and Safety* (Allen & Unwin, 1995).

<sup>88</sup> *Fair Work Ombudsman v Shrek Pty Ltd & Anor* [2010] FMCA 907. This decision has been cited by the FWO as an example of the appropriate use of the accessorial liability provisions: Nick Wilson, Address by Fair Work Ombudsman Nick Wilson (Speech delivered at the Australian Labour and Employment Relations Association National Conference, 8 October 2011).

<sup>89</sup> *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408. See also the earlier decision of *Fair Work Ombudsman v Ramsey* [2011] FCA 1176.

<sup>90</sup> Indeed, both these cases (*Shrek* and *Ramsey*) involve a director who has previously been prosecuted for breaches of workplace relations laws. This alone may suggest that prosecution of the company alone did not act as a sufficient deterrent against future contraventions.

<sup>91</sup> *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408, [6].

The *Ramsey* case is also important because it was the first case where the FWO successfully sought an injunction, one of the orders which the court may make under the FW Act.<sup>92</sup> In this matter, the agency successfully applied to have \$1.5 million in funds belonging to the abattoir business paid into a trust account, pending determination of the FWO's claim that this money should be paid to employees in relation to the termination of their employment.

The FWO was particularly active in seeking penalties against directors and managers of corporate employers in cases where these companies were insolvent or likely to become insolvent. For example, our review of the 31 minimum employment standards cases commenced in 2011-2012, most of which involved accessories, indicates that 11 of these matters were proceedings against insolvent or deregistered companies.<sup>93</sup> The right to pursue a party other than the employer company is particularly important in the insolvency context because of the doctrine of limited liability. If a company has insufficient funds to meet unpaid wages and other entitlements, the shareholders of a company are legally protected from being personally liable for such debts.<sup>94</sup> At a more practical level, proceedings against a company in liquidation are stayed,<sup>95</sup> and in the absence of another party to sue, no penalty or remedy will be forthcoming.

Aside from directors and managers, regulatory regimes may also attribute liability to other individuals within the firm who may be conceived of as 'gatekeepers' because they are in a position to monitor and control corporate conduct, such as compliance officers, in-house counsel, and human resources managers.<sup>96</sup> As with directors and managers, the threat of

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<sup>92</sup> *Fair Work Ombudsman v Ramsey* [2011] FCA 1176.

<sup>93</sup> In other cases, the corporate employer became insolvent after the litigation commenced, or may have involved companies which the FWO feared would become insolvent after litigation was commenced. See generally Helen Anderson and John Howe, above n 85.

<sup>94</sup> See generally, Eric Tucker, 'The History of Shareholder and Director Liability for Workers Wages in Canada: From Condition of Granting Liability to Exceptional Remedy' (2008) 26 *Law and History Review* 57; Ronald B Davis, 'The Bonding Effects of Directors' Statutory Wage Liability: An Interactive Corporate Governance Explanation' (2002) 24 *Law and Policy* 403; Kevin Davis and Geoff Burrows, 'Protecting Employee Entitlements' (2003) 36 *Australian Economic Review* 173; David Noakes, 'The Recovery of Employee Entitlements in Insolvency' in Ian Ramsay (ed), *Company Directors' Liability for Insolvent Trading* (2000); Paul Halpern, Michael Trebilcock and Stuart Turnbull, 'An Economic Analysis of Limited Liability in Corporation Law' (1980) 30 *University of Toronto Law Journal* 117.

<sup>95</sup> This is as a result of s 471B of the *Corporations Act 2001* (Cth) which imposes a stay on existing proceedings, and prevents new proceedings being issued, except with leave of the court.

<sup>96</sup> Gatekeepers are generally described as those individuals who hold a key position or possess critical resources that a regulated firm requires. Auditors, legal counsel and human resources professionals are examples of possible gatekeepers in this context. We recognise that gatekeepers are often external to the firm, however the theory can also be applied to

personal liability is an incentive for these gatekeepers to perform their responsibilities effectively and to deter corporate wrongs. There may also be gatekeepers who are external to the firm, such as accountants, auditors, or legal advisors.<sup>97</sup>

In addition to the proceedings it has brought against company directors, the FWO has – less frequently – also been willing to pursue internal ‘gatekeepers’ in order to promote compliance. For example, in *Fair Work Ombudsman v Centennial Financial Services & Ors*<sup>98</sup> the agency successfully brought proceedings against a financial services firm, its director and its human resources manager in relation to the unlawful classification of employees as ‘independent contractors’, known as ‘sham contracting’, resulting in wage underpayments. The court held that the firm had required its staff to sign agreements which purported to make them independent contractors and not employees of the firm in breach of the WR Act, resulting in underpayments of more than \$30,000. The employees had also been threatened with dismissal if they refused to become contractors. Although the court held that the human resources manager ‘was little more than [the company director’s] typist’ – he had ‘just copied what he was told and had no reason to question anything’, he was found to be liable as an accessory.<sup>99</sup>

The former Fair Work Ombudsman Nicholas Wilson emphasised that the use of the accessorial liability provisions is intended to provide general deterrence to people such as human resources and industrial relations practitioners advising companies on employee relations. He urged such practitioners to ‘assure yourselves that the arrangements in your company are not about to leave you with a large and ultimately costly problem ... .You should also be alert that you may have some personal responsibility for what goes on with

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internal officers: Sung Hui Kim, ‘Gatekeepers Inside Out’ (2008) 21 *Georgetown Journal of Legal Ethics* 411; Sung Hui Kim, ‘The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper’ (2005) 74 *Fordham Law Review* 983. A gatekeeper strategy is based on the idea that the motivations of these powerful individuals to comply may differ from that of the firm. If the interests of gatekeepers and the state converge, these individuals can be effectively harnessed by the state to positively influence the behaviour of the firm. See Reinier H Kraakman, ‘Gatekeepers: The Anatomy of a Third Party Enforcement Strategy’ (1986) *Journal of Law, Economics and Organisation* 53.

<sup>97</sup> There is an extensive literature on the engagement of third party gatekeepers in enforcement of corporate regulation. See, for example, Kraakman, above n 97.

<sup>98</sup> [2011] FMCA 459.

<sup>99</sup> *Ibid.*

your organisation's employee relations'.<sup>100</sup> It is therefore apparent that the FWO was aware of the specific and general deterrence that may be achieved by pursuing personal liability against company employees who are key gatekeepers in relation to employment standards.

Notwithstanding these comments, *Centennial Services* is the only matter that we are aware of where the FWO joined a human resources manager to enforcement proceedings.

Overall, of the cases we reviewed it was most common for the FWO to rely on these provisions in bringing proceedings against the directors of insolvent companies, where specific deterrence was unlikely to be achieved.<sup>101</sup> Moreover, in cases where accessorial liability was imposed in the context of solvent businesses, it is unclear as to whether the FWO was conscious of some of the flaws in this approach, such as the possibility that directors and company managers may have been indemnified by the company for personal liability in relation to breaches of employment regulation.<sup>102</sup>

In addition to actions against individual company directors and officers, toward the end of the study period the FWO commenced a number of matters against corporations other than the direct employer of employees under the accessorial liability provisions.

For example, in *Fair Work Ombudsman v Pocomwell Ltd and Others*,<sup>103</sup> the FWO alleged that three companies and one company director breached the FW Act because four Filipino nationals were underpaid while working on oil rigs off Western Australia. The FWO brought proceedings against the company it alleged was the employer of the workers,

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<sup>100</sup> Nick Wilson, 'Address by Fair Work Ombudsman Nick Wilson' (Speech delivered at the Australian Industry Group's National PIR Group Conference, Canberra, 3 May 2011).

<sup>101</sup> For example, in 2011-2012, of the 31 matters where accessories were named in relation to breaches of minimum of employment standards, 10 were cases where the respondent company was insolvent. This does not include cases where the company became insolvent after the commencement of proceedings.

<sup>102</sup> This is a common occurrence in the US: Timothy Glynn, 'Taking Self-Regulation Seriously: High-Ranking Officer Sanctions for Work-Law Violations' (2011) 32 *Berkeley Journal of Employment and Labor Law* 279.

<sup>103</sup> *Fair Work Ombudsman v Pocomwell Ltd, Supply Oilfield & Marine Personnel Services Inc, SurveySpec Pty Ltd and Thomas Civiello* [2011] Federal Court of Australia. For further details, see Fair Work Ombudsman, 'Fair Work Ombudsman alleges four oil rig workers underpaid more than \$120,000' (Media Release, 27 June 2011).

however it also joined the company which was the employer's agent, and the labour hire firm engaged by the owner of the oil rig, as persons 'involved in' the contraventions.<sup>104</sup>

Further, in two related cases, the FWO brought proceedings against Coles Supermarkets as the head contractor of a supply chain that included the direct employer of workers who collect supermarket trolleys in Coles' car parks.<sup>105</sup> The FWO alleged that the trolley collectors were underpaid and that Coles was 'involved in' the contravention to the extent that it was wilfully blind to the underpayments and did not take action to prevent them. Coles' application to dismiss the FWO's action was rejected by the Federal Court of Australia.<sup>106</sup>

As these cases were not yet finalised at the time of writing, they do not show up in our data. However, the fact that these cases have been commenced does indicate that the FWO was willing to consider the root causes of non-compliance, and where appropriate, to consider litigation against entities other than the direct employer of workers in order to maximise the deterrence impact of its litigation. If successful, it seems likely that the FWO will be pursuing similar respondents more frequently in future years.

### *Enforcement Outcomes*

In this section, we present our findings on the outcomes of civil litigation brought by the agency between 2006 and 2012. As noted earlier, the agency is able to seek a range of remedies from the court in relation to breaches of the FW Act or instruments made under the FW Act. The key remedies sought by the FWO and its predecessors were compensation for underpayment of wages and other entitlements, and penalties. As we have noted, although litigation should be deployed with a mix of other sanctions and enforcement

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<sup>104</sup> See ABC, 'Prosecutions Begin over Alleged Labour Exploitation', *Lateline*, 27 June 2011; Nicholas Wilson and Lynda McAlary-Smith, 'The Fair Work Ombudsman: Litigation Policy in Practice' (Speech delivered to the Industrial Relations Commission NSW Annual Members Conference, [Location](#), 18 October 2012).

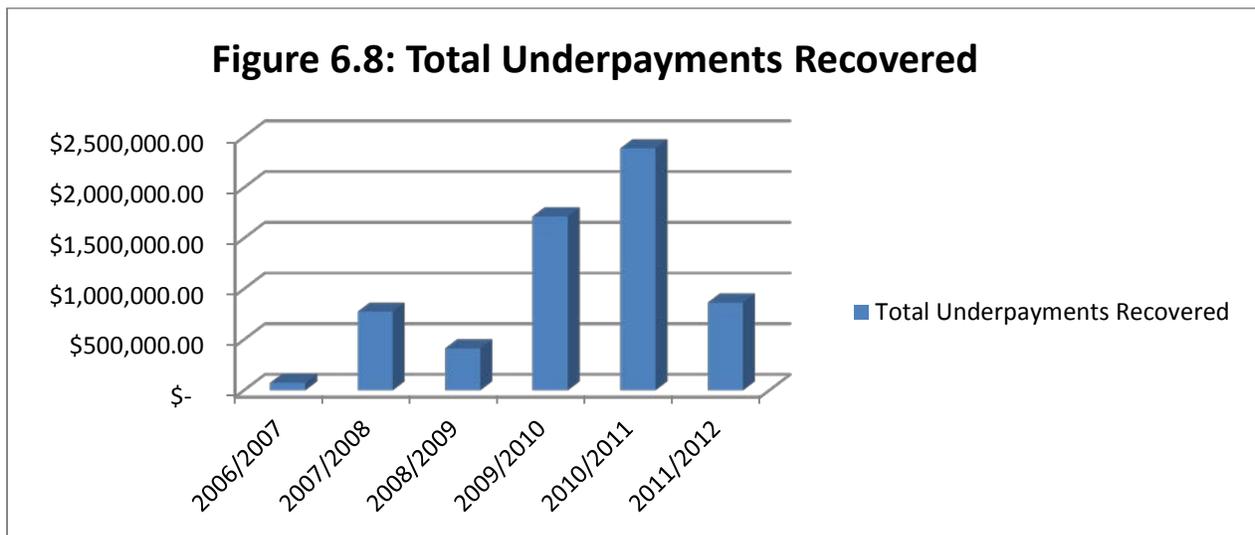
<sup>105</sup> See, eg, *Fair Work Ombudsman v Ahmad Hamid Mohammed Al Hilfi, Nidal Albarouki, Clency Ferriere and Coles Supermarkets Australia Pty Ltd* [2012] Federal Magistrates Court of Australia and *Fair Work Ombudsman v Al Basry, Albarouki, Ferriere and Coles Supermarkets Australia Pty Ltd* [2012] Federal Magistrates Court of Australia; Fair Work Ombudsman, 'Court action over alleged \$149,000 underpayment of SA trolley collectors' (Media Release, 3 June 2012).

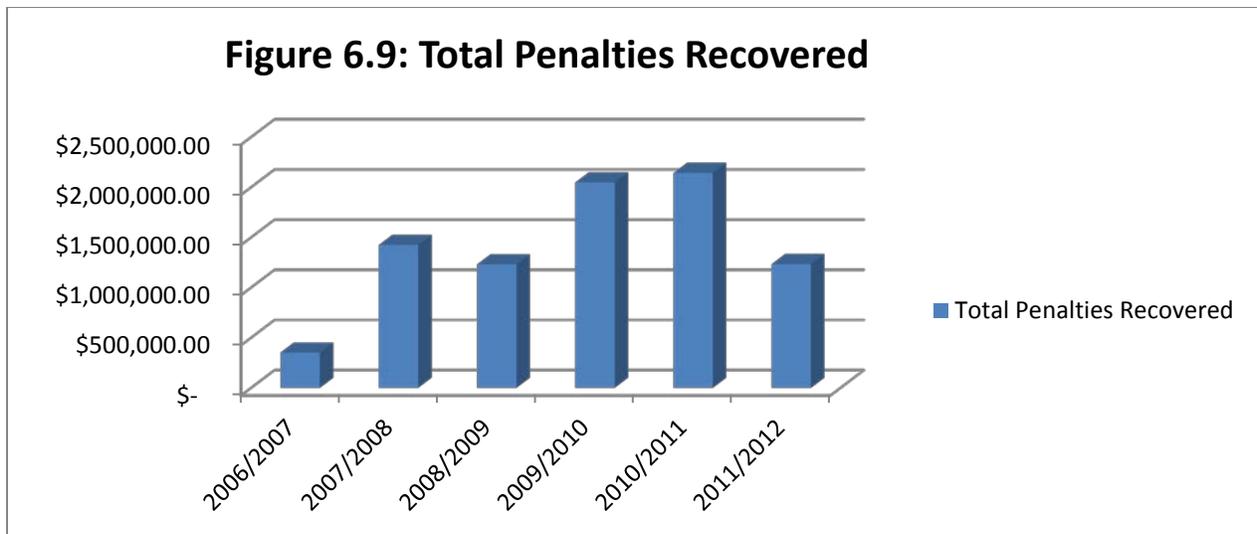
<sup>106</sup> *Fair Work Ombudsman v Al Hilfi* [2012] FCA 1166.

approaches, the success of the regulator in seeking compensation and penalties is important in achieving deterrence of non-compliance throughout the regulated community. The data we present here provides a measure of both the agency's success in redressing breaches of federal labour legislation, as well as an indicator of the willingness of the courts to make use of the various orders available under the FW Act, including the higher maximum penalties applicable since 2004. In combination with the findings about patterns of enforcement above, the findings will also assist us in determining where to test for evidence of the FWO's compliance effects, by identifying those sectors where the FWO has been successful in achieving litigation outcomes.

The data discloses that although the FWO used litigation in only a small proportion of matters that came to its attention, it had a very high success rate. Our review of all litigation outcomes between July 2006 and June 2012 found that the FWO was successful in over 90% of the litigation matters completed in each financial year, for an average success rate over that period of 95%. It appears that the agency's caution in choosing matters for litigation, discussed above, contributed to this high success rate.

The following graphs present our findings concerning the total underpayments recovered by the FWO and its predecessors in each financial year, and the total penalties assessed by the courts in successful FWO litigation by financial year.





Figures 6.8 and 6.9 also show a steady increase in the amount of underpayments recovered and penalties imposed by the courts by financial year between 2006-2007 and 2011-2012.

The average recovery of underpayments increased from \$4,369.08 in 2006-2007 to a high of over \$72,000 in 2010-2011. In each financial year since 2008-2009, the average recovery was in excess of \$25,000. This suggests that from 2006 to 2012, the recovery of underpayments and other pecuniary employee entitlements on behalf of workers significantly increased.

The data also discloses that between 2006-2007 and 2011-2012 the agency achieved strong results in terms of the penalties imposed by the courts. In particular, in each of 2009-2010 and 2010-2011, approximately \$2 million in penalties was imposed for breach of the FW Act. The 2010-2011 result is particularly strong given that the number of litigation matters completed was significantly lower compared to the previous year. Moreover, the average penalty imposed on corporate employers from 2007-2008 to 2011-2012 was in excess of \$30,000 in each financial year.

When compared to the situation prior to 2006, the FWO's success rate, and the amount of penalties and monetary compensation awarded, are likely to have broader compliance impacts through deterrence. The litigation is also likely to have assisted in relation to the

success of any enforcement pyramid followed by the regulator, in that successful litigation is likely to increase the bargaining power of the FWO in relation to more cooperative approaches further down the pyramid, because there is a credible threat of the FWO succeeding if court proceedings are initiated.<sup>107</sup>

In 2011-2012 there was a significant decline in both underpayments recovered and penalties imposed. This decline is disproportionate to the relatively small fall in the number of minimum employment standard matters completed in 2011-2012 compared to the previous financial year. However, trends in the wages recovered could result from any number of factors, including the number of contraventions in any given case, the extent of underpayments proven, and the prioritisation of litigation by the agency (eg. pursuing fewer underpayment cases to make room for sham contracting and discrimination cases under the broader mandate of the agency post-2009). These factors could also be relevant to shifts in the amount of penalties obtained through court action.

While the outcome of most litigation matters involving minimum employment standards resulted in an order of compensation as well as the imposition of penalties, this was not the case in relation to all respondents. A separate study of FWO litigation matters conducted by Anderson and Howe<sup>108</sup> concluded that notwithstanding that the FW Act allows the courts to make compensation orders against accessories, the FWO has not sought compensation orders against accessories found to have been involved in breaches of the Act. This is the case even in circumstances where the corporate employer was insolvent and there were insufficient funds to meet underpayments. The FWO has only asked for penalties to be imposed against accessories in these cases.

Finally, we have been unable to obtain data on whether the FWO was able to enforce the judgments it was successful in obtaining. In some of our interviews, we were told of cases where businesses and individuals subject to compensation orders and/or penalties did not

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<sup>107</sup> A similar finding has been made in relation to the ACCC: Christine Parker and Natalie Stepanenko, 'Compliance and Enforcement Project: Preliminary Research Report' (Preliminary Research Report, Centre for Competition and Consumer Policy, ANU, 2003) 24.

<sup>108</sup> Helen Anderson and John Howe, above n 85.

comply with the order of the court. In the agency's most recent Annual Report, the FWO noted that:

In the course of the year we have strengthened the processes used by us to enforce the Orders made by Courts. This has been done in the belief it is not in the interests of the administration of justice, or for the Australian community generally, for the Orders of Courts to go unenforced. The Fair Work Ombudsman now routinely takes debt recovery actions on behalf of the Commonwealth against persons and entities who have not complied with orders made against them in proceedings originally taken by the Office (and where there is some evidence the person or entity has assets that can be recovered on behalf of the Commonwealth).<sup>109</sup>

It would be useful to know how frequently the FWO returns to court to seek court enforcement of judgments it has obtained.

### *Preliminary Observations Regarding Civil Remedy Litigation*

The above data confirms that between 2006 and 2012, there was a significant increase in the number of litigation matters brought by the federal agency, the range of contraventions litigated, and the level of sophistication of those matters. The FWO and its predecessors from 2006 to 2012 were highly successful in securing penalties and compensation from employers found to be in breach of the FW Act. This litigation activity and success is in contrast to the relative antipathy toward litigation demonstrated by the federal enforcement agency in the decade prior to 2006. It has contributed to the high profile now enjoyed by the FWO, and is broadly consistent with the enforcement pyramid model in that there needs to be activity at the peak of the pyramid for the softer approaches to work. Moreover, the FWO staff were able to identify a number of cases that in their view had achieved a strong compliance impact, in terms of both specific and general deterrence, as well as education.

The data revealed a widening in the types of matters that the agency was willing to litigate, consistent with its broader mandate. However, we noted that this caused challenges for the agency in terms of how many resources it devoted to increasing its profile in new areas of

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<sup>109</sup> Fair Work Ombudsman, *Annual Report 2011-2012* (2012) 4.

its jurisdiction, and whether this reduced the number of matters litigated in its more established areas of responsibility. Having said this, the majority of litigation matters continued to relate to the federal inspectorate's traditional 'time and wages' jurisdiction.

It also appears that the agency became more strategic in its use of litigation. For example, the influence of strategic enforcement and problem-solving regulation as devised by Malcolm Sparrow was also reflected in the types of litigation matters that were being run by the FWO in 2010 to 2012. The FWO appeared to be closely considering where it could direct its litigation resources for maximum effect – or in the words of Weil – how the agency could best enhance the 'ripple effects' of its intervention and activities. For example, we revealed that the FWO increasingly made use of personal liability as a way of improving both the specific and general deterrence impact of litigation. In particular, the FWO made extensive use of 'dual liability' litigation – that is, proceedings against both corporate employers and the individual directors and/or managers who were responsible for ensuring compliance within the firm. Further, litigation matters increasingly appeared to be directed at firms who were in a position to change not only their own compliance behaviour, but the behaviour of other firms throughout the supply chain or the industry sector more broadly.

Another key reason for the changes in litigation strategy was less aspirational and more practical, that is, how to manage the challenge of shrinking resources. Indeed, Nicholas Wilson recently referred to a set of litigation statistics to show that: '[o]verall, our litigation posture is strategic and used sparingly.'<sup>110</sup> That said, the raw numbers discussed above do not necessarily give an accurate picture of the impact of the enforcement activities of the FWO. For a start, as noted in Chapter Five, there is no currently no reliable data about pre-existing compliance levels. Further, while the numbers of litigation matters decreased towards the end of the study period, the matters chosen for litigation were arguably more strategic with greater potential for deterrence.

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<sup>110</sup> Nicholas Wilson and Lynda McAlary-Smith, 'The Fair Work Ombudsman: Litigation Policy in Practice' (Speech delivered to the Industrial Relations Commission NSW Annual Members Conference, 18 October 2012).

Nevertheless, after peaking in 2009-2010, it appears that the number of litigation matters commenced and completed by the FWO contracted. This appears to be in part a necessity brought on by shrinking resources. However, we also observed that the cautious application of the Litigation Policy, and the centralisation of decision-making concerning the selection of matters for litigation, while ensuring a high rate of success for the agency, may have restricted the number of litigation matters pursued overall.

Moreover, it appears that further research is also needed on whether the referral of some matters to the small claims jurisdiction is appropriate. One key benefit of small claims proceedings, at least from the perspective of the FWO, is that proceedings can be initiated prior to the conclusion of an investigation, which makes it far less resource-intensive. It also appears that because the proceedings are less formal and generally carry a lower profile, the two-stage test set out in the FWO Litigation Policy does not apply. Therefore, while there were some FWO resources dedicated to assisting complainants file small claims proceedings and appear at the hearing, it was much less than what was required for ordinary civil remedy proceedings. The lower evidentiary thresholds together with the decentralisation of decision-making made it far more likely that complaints would be referred to small claims, that the referral would happen earlier in an investigation, that they would be heard before a court more quickly and a final determination would be reached more rapidly. Nevertheless, some of our interviewees raised concerns about whether referring matters to small claims was always appropriate, with some concerned that the small claims process was being used too readily by the inspectorate, particularly when matters became difficult to investigate.<sup>111</sup> We were told that hearings were often more formal than they needed to be, not all claimants were equipped to cope with the nature of the proceedings, even with FWO assistance, and in some instances, successful judgments were difficult to enforce due to insolvency and employer avoidance.

Also, while the \$5000 threshold imposed by the Litigation Policy was not strictly applied without regard for other relevant circumstances, it was problematic to the extent that it

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<sup>111</sup> Based on comments in Interview with FWMS.

potentially privileged workers who were paid more rather than less. It also potentially placed employees who were employed in a secure job on a full-time basis ahead of employees who were engaged in precarious work. An alternative way to account for these issues and still manage the complaint and litigation caseload is to apply the relevant threshold as a proportionate amount of the worker's overall pay. For example, if the underpayment amount represents more than ten per cent of the employee's annual income then it should be flagged as a matter that may be considered for litigation regardless of whether it is above or below a set amount.

We also believe there is room for improvement in the FWO's use of accessorial liability to litigate against individual directors and managers of companies. The benefits and limitations of personal liability as presented in academic literature were not completely borne out by the reality of the FWO's practice. It appears that accessorial liability was more likely to be pursued in cases of corporate insolvency, or where there was particularly egregious behaviour by company officers in smaller enterprises, rather than as a way of motivating gatekeepers in larger enterprises through deterrence (although it still potentially played a role in curbing 'phoenixing'). Our findings suggest that for the most part, the FWO pursued managerial liability as a form of ancillary liability, a 'backstop' for when corporate liability was unlikely to have an impact, such as in the case of corporate insolvency.<sup>112</sup>

This does not fully realise the value of accessorial liability as a form of general deterrence for corporate non-compliance. We suggest that the agency should consider bringing more cases against officers in solvent medium to large enterprises. A very good example of this is provided by the successful FWO litigation against the fast food chain Hungry Jack's in relation to breaches of minimum wage and record-keeping requirements in relation to its employees in Tasmania.<sup>113</sup> This was a case where there were good strategic, rather than practical, reasons to bring proceedings against senior managers of the firm.

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<sup>112</sup> Reinier H Kraakman, 'Corporate Liability Strategies and the Costs of Legal Controls' (1984) 93 *Yale Law Review* 857, 867.

<sup>113</sup> *Fair Work Ombudsman v Hungry Jack's Pty Ltd* [2011] FMCA 233.

In that case, one of two matters that were brought by the FWO against the company, the court found that there had been a clear lack of appreciation on the part of management to the importance of human resources management.<sup>114</sup> In fact, the firm did not have any central HR function prior to this litigation. While there was no need for the FWO to bring action against the managers in order to ensure that penalties would be paid, it may have been a very effective way to bolster corporate commitment to the ideal of effective human resources management and compliance.

Nevertheless, we acknowledge that while civil remedy litigation has played an integral role in improving compliance, it is clear that the costs of maintaining previous levels of litigation are not sustainable, particularly in the prospective resourcing environment. Further, it is also evident that litigation does not always achieve the goal of increased compliance as effectively as other approaches. In light of both these elements, it seems that other sanctions were increasingly being considered by the FWO. As Nicholas Wilson noted: '[i]t is also important we explore meaningful alternatives to litigation, which ultimately is a very blunt and costly tool.'<sup>115</sup> Indeed, the threat of litigation has been used quite successfully to encourage parties to enter into enforceable undertakings and proactive compliance deeds: two tools which we now consider.

### **6.3 Enforceable Undertakings and Proactive Compliance Deeds**

As we observed in the introduction to this chapter, theories of regulatory good practice suggest that in addition to punitive sanctions, regulators should have a number of administrative sanctions at their disposal that are more flexible than litigation, and with a greater capacity for engendering commitment to compliance. In particular, some of these sanctions should have the potential to foster a cooperative enforcement relationship between regulator and regulatee.

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<sup>114</sup> Ibid [49].

<sup>115</sup> Nicholas Wilson, 'Fairness over the First Year' (Speech delivered to the Industrial Relations Society of Victoria, 8 October 2010).

Two enforcement approaches used by the FWO which fit within this category are enforceable undertakings and proactive compliance deeds. The enforceable undertaking is essentially an agreement enforceable in court between the FWO and an individual or firm that is alleged to have contravened the FW Act. The agreement specifies actions that the person or business will take – such as the adoption of new compliance processes – or refrain from taking, and if contravened, is enforceable in court. It is an alternative to more formal and punitive administrative, civil or criminal sanctions and is ‘designed to secure quick and effective remedies for contravention of regulatory provisions ... and have enormous potential to provide non-adversarial and constructive solutions to regulatory compliance issues’.<sup>116</sup>

At the same time, enforceable undertakings also have the potential to secure employer commitment to, and capacity for, ongoing and sustained compliance. The literature concerning the use of enforceable undertakings emphasises that both the process of negotiation and the content of enforceable undertakings should help to institutionalise positive compliance behaviour. The process of discussing and then giving an enforceable undertaking allows a business to ‘take ownership of the regulatory solution presented’.<sup>117</sup> Indeed, enforceable undertakings can be particularly effective in instances where a financial penalty imposed as a result of litigation or prosecution might be absorbed by a company without necessitating or initiating more widespread cultural change. This element is important given that research into compliance:

shows that organisational culture is at the heart of sustained compliance with regulatory requirements, and encouraging, promoting and facilitating organisational change to increase sustained and ongoing compliance is a central concern of all regulators.<sup>118</sup>

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<sup>116</sup> Richard Johnstone and Christine Parker, ‘Enforceable Undertakings In Action –Report of a Roundtable Discussion with Australian Regulators’ (Working Paper No 71, National Research Centre for Occupational Health and Safety, February 2010), 2 (footnote omitted). A more detailed consideration of the FWO’s use of enforceable undertakings than that presented in this section, see Tess Hardy and John Howe, ‘Too Soft or Too Severe? Enforceable Undertakings and the Regulatory Dilemma Facing the Fair Work Ombudsman’ (2013) 41 *Federal Law Review* 1.

<sup>117</sup> Richard Macrory, ‘Regulatory Justice: Making Sanctions Effective’ (Final Report, Better Regulation Executive, November 2006), 65.

<sup>118</sup> Richard Johnstone and Michelle King, ‘A Responsive Sanction to Promote Systematic Compliance? Enforceable Undertakings in Occupational Health and Safety Regulation’ (2008) 21 *Australian Journal of Labour Law* 280, 283. See also Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002).

Enforceable undertakings are also seen to represent a tailored enforcement response to the contours of each specific case and can be varied to take into account individual circumstances of the contravention and the compliance motivations of the firm, industry structures and company size and resources. In this sense, enforceable undertakings can be understood as an important part of responsive regulation.<sup>119</sup> In addition, while there is a level of disagreement about the proper place and use of enforceable undertakings,<sup>120</sup> they are commonly seen as an essential intermediary step in the hierarchy of sanctions frequently represented by the ‘enforcement pyramid’ – another aspect of responsive regulation. They usually sit somewhere between informal warnings and infringement notices and more severe sanctions, such as prosecution.

The FWO is statutorily empowered to enter into enforceable undertakings by the FW Act, although prior to the commencement of that legislation the WO made three enforceable undertakings under the common law. From the time this tool was first used until 30 June 2012, the WO and the FWO accepted approximately 26 enforceable undertakings.<sup>121</sup> Proactive compliance deeds are similar in many ways to enforceable undertakings, except that they are made under the common law rather than the FW Act and therefore are not constrained, or enabled, by statutory provisions. The FWO entered into four of these deeds during the study period.

It is apparent from public statements by the FWO and the interviews we have conducted with FWO staff that the relatively inexpensive and time-efficient nature of enforceable undertakings as a mechanism to achieve compliance is an important factor in making undertakings an attractive enforcement option when compared to litigation.<sup>122</sup> The former head of the FWO has commented that one important motivation for using enforceable

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<sup>119</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002).

<sup>120</sup> See Johnstone and Parker, above n 117, part 3.

<sup>121</sup> Technically speaking, the FWO entered into 29 enforceable undertakings in this period, however, this includes four enforceable undertakings with the same individual – Mr Sadamatsu Katsuyoshi – in his capacity as director of four separate companies all of which were in liquidation at the time the enforceable undertaking was made.

<sup>122</sup> Interview with FWML.

undertakings was to ‘wrap up the matter with an acceptable outcome for...the community, workforce and the offender’.<sup>123</sup> On this basis, he publicly encouraged FW Inspectors to make more extensive use of enforceable undertakings to avoid lengthy and expensive litigation, particularly in cases where employers were prepared to cooperate with the FWO.<sup>124</sup>

### *An Overview of the FWO’s Use of Enforceable Undertakings*

While the FW Act provides few restrictions in these respects, the Act does provide that for the FWO to be authorised to accept an undertaking under s 715, the following conditions must be satisfied:

- a) the FWO must have a *reasonable belief* that a person has contravened a civil remedy provision<sup>125</sup> – which requires that there is sufficient evidence to support this belief;
- b) the enforceable undertaking must be given by *the person in relation to the contravention* – which requires that there must be a sufficient nexus between the person giving the undertaking and the contravention which is the subject of the undertaking.<sup>126</sup>

These two conditions place some constraints on the decision-making powers of the FWO. In particular, it means that enforceable undertakings cannot be entered into where there is a suspected contravention, but not enough evidence to form a reasonable belief that a contravention has occurred. It also suggests that enforceable undertakings cannot be entered into with third parties which are not believed to have contravened, or been

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<sup>123</sup> Nicholas Wilson, Fair Work Ombudsman, quoted in Johnstone and Parker, above n 117, 41.

<sup>124</sup> In particular, Nicholas Wilson has previously commented that: ‘We will be expecting to continue with enforceable undertakings under the legislation and to ramp them up pretty considerably. We take roughly about 80 litigations per year nationally. I can see a role for about the same number of enforceable undertakings in the future’, quoted in Johnstone and Parker, above n 117, 41.

<sup>125</sup> Such provisions can include statutory minimum employment standards set directly by the *FW Act* (for example, the National Employment Standards), or working conditions arising from instruments made under the *FW Act*, such as industry-level ‘modern awards’, or registered enterprise agreements.

<sup>126</sup> This can include persons who directly contravene the provision, such as employer companies, as well as persons who may be involved in a contravention. See *FW Act* s 550.

involved in contravening, a civil remedy provision. These restrictions, while not overly onerous, have meant that enforceable undertakings cannot be used in all circumstances where the FWO believes or suspects there is non-compliance. For example, it is problematic to use enforceable undertakings to bind different companies making up a national group, sub-contractors in supply chains or companies that make up a franchise.<sup>127</sup> It is in these contexts that the FWO has entered into proactive compliance deeds, discussed further below.

Apart from the statutory constraints noted above, the FWO has a very broad discretion to determine when, and in what circumstances, enforceable undertakings should be accepted. Given this, the FWO's Enforceable Undertakings Policy (EU Policy), which is made publicly available on its website,<sup>128</sup> is the core policy document which governs the use of enforceable undertakings under the FW Act. In particular, an enforceable undertaking will be considered where, in addition to the FWO's reasonable belief that there has been a relevant contravention, it is also considered to be in the public interest<sup>129</sup> and appropriate in all the circumstances to resolve the matter through a formal enforcement mechanism; the contravention is admitted; and the alleged wrongdoer is prepared to cooperate with the FWO. In addition, the EU Policy states that:

An Enforceable Undertaking may be considered to be a more effective regulatory outcome where it produces an efficient result that compensates those persons who have suffered loss or damage as a result of the contravention or where it offers opportunities to ensure continuing compliance that may not be available via an order from a court. An Enforceable Undertaking may provide the most effective and flexible enforcement mechanism as a range of compliance outcomes can be achieved. Enforceable Undertakings are not considered an appropriate enforcement mechanism to deal with trivial matters.<sup>130</sup>

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<sup>127</sup> But see discussion of proactive compliance deeds below.

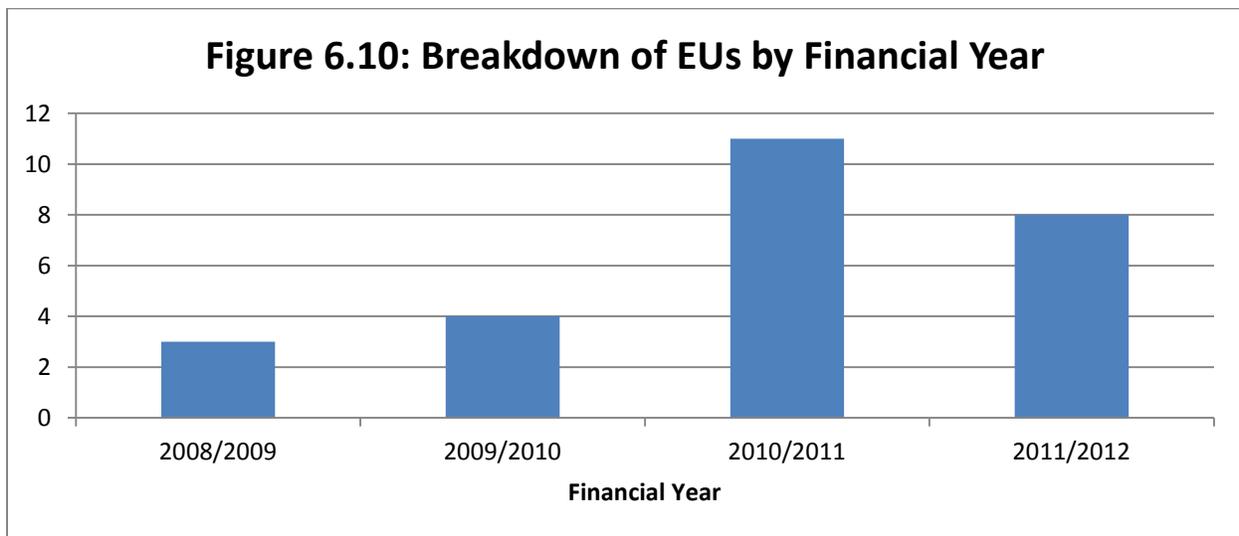
<sup>128</sup> See Fair Work Ombudsman, *Guidance Note 4 – Enforceable Undertakings Policy* (20 July 2011) (EU Policy).

<sup>129</sup> The factors which are relevant to determining whether a particular matter is considered to be in the 'public interest' is set out in some detail in a separate guidance note. See FWO Litigation Policy, above n 13. There are no factors which are specifically used to determine whether an Enforceable Undertaking (EU) is in the 'public interest'.

<sup>130</sup> EU Policy, above n 129, 4.

Conversely, an enforceable undertaking will not be accepted by the FWO if it either fails to admit the contravention or seeks to deny the contravention.<sup>131</sup> The EU Policy further states that the FWO will not accept an enforceable undertaking that is required to be kept confidential from any person.<sup>132</sup>

So far, enforceable undertakings have been used by the FWO as the relevant mechanism in relation to a range of different contraventions in various industries including the failure of a national retail franchise to pay for training,<sup>133</sup> to a small chain of Japanese restaurants failing to pay employees their basic hourly rate of pay and keep employment records.<sup>134</sup> The popularity of enforceable undertakings has been reflected in the numbers made in each financial year since they were first trialled.



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<sup>131</sup> Ibid 5.

<sup>132</sup> EU Policy, above n 129, 8. The Policy states, however, that the person giving an enforceable undertaking may request that certain information, such as information which is commercial in confidence or contains personal details of an individual, is not made publicly available.

<sup>133</sup> See Enforceable Undertaking between Cotton On Services Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 3 June 2010.

<sup>134</sup> See various enforceable undertakings between Mr Sadamatsu Katsuyoshi and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 5 September 2011.

**Figure 6.11: EUs by type of contravention**

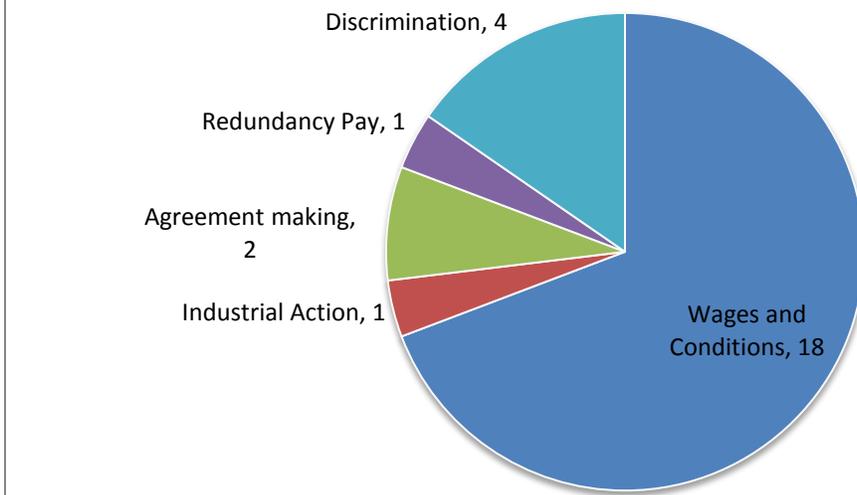
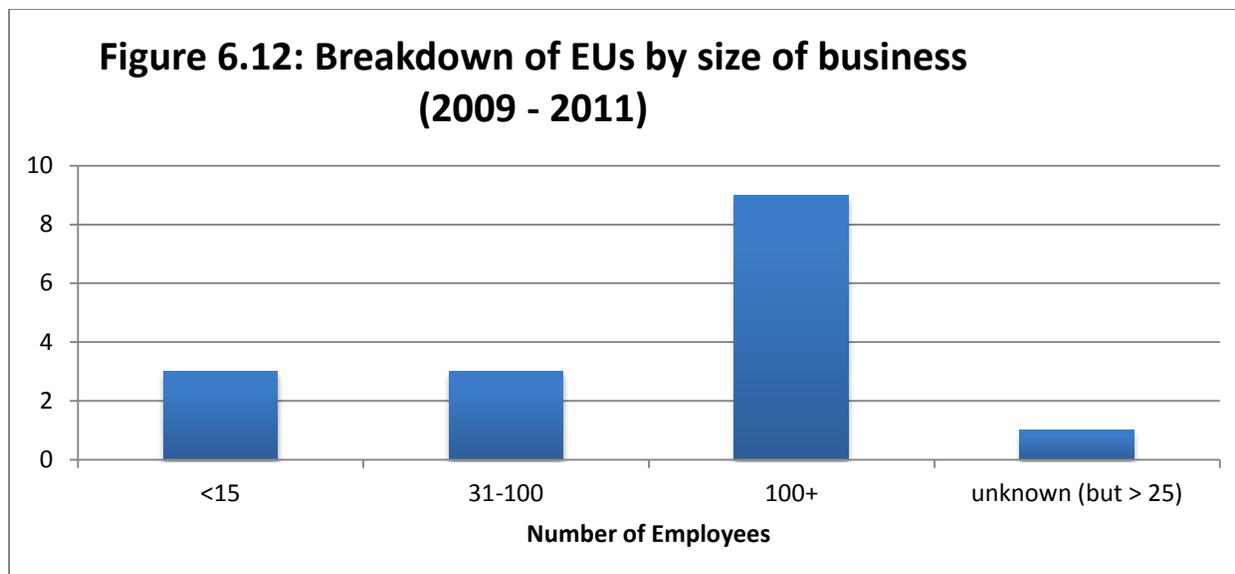


Figure 6.10 shows that after the three EUs made under the common law in the 2008-2009 financial year, the number of undertakings entered into by the FWO rose to four in the following financial year with the introduction of the FW Act and subsequently peaked in 2010-2011 when 11 enforceable undertakings were concluded. This trend was reversed in the 2011-2012 financial year with a decline in the number of enforceable undertakings.<sup>135</sup> Consistent with the data on litigation presented earlier in this chapter, the majority of enforceable undertakings were concerned with underpayment of wages and other minimum working conditions, although the number of EUs entered into in relation to the adverse action provisions in the FW Act was increasing.

<sup>135</sup> Eight enforceable undertakings were made in the 2011-2012 financial year.



A majority of the undertakings we reviewed appeared to have been made with medium to large businesses. For example, of the 15 enforceable undertakings accepted by FWO between 1 July 2009 and 30 June 2011,<sup>136</sup> nine were with businesses of more than 100 employees, while another four were signed with businesses employing between 25-100 workers.<sup>137</sup> These figures suggest that the FWO has preferred to use enforceable undertakings in relation to non-compliance by larger businesses. This can be contrasted with civil litigation by the FWO, as the data we presented earlier in this chapter suggested that the majority of litigation matters were brought against smaller businesses.

<sup>136</sup> These figures were provided to us by the FWO. We do not have data on the other financial years in which Enforceable Undertakings have been used.

<sup>137</sup> There is no data for the group of employers which have more than 15 and less than 30 employees.

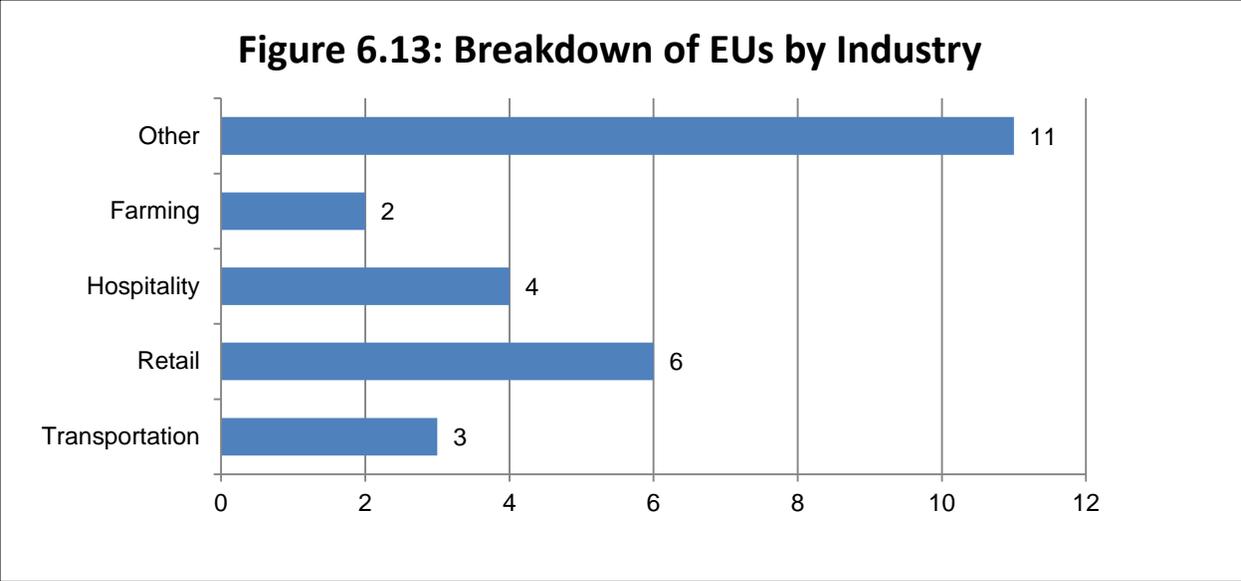


Figure 6.13 shows the industries where more than one EU has been used. Each of the 11 EUs in the ‘other’ category was in a different industry.

*Content of Undertakings*

In order to assess how undertakings were being used, and their value as a regulatory tool, in this section we discuss the content of existing enforceable undertakings. All of the enforceable undertakings in the relevant period have included an admission of contravention of workplace laws, such as minimum wages, and most have included a promise to make good these contraventions. However, it has been the further commitments made by individuals and firms in undertakings that has attracted most interest. In particular, many enforceable undertakings have included clauses whereby employers have agreed to:

- develop systems and processes to ensure future and ongoing workplace compliance;
- organise and ensure that firm managers attend training on the rights and responsibilities of employers; and,

- pay sums of money to external organisations, such as not-for-profit community legal centres, as a way of promoting future compliance with workplace laws.<sup>138</sup>

With some notable exceptions,<sup>139</sup> the enforceable undertakings that we reviewed typically fell within two standard formats depending on when they were made.<sup>140</sup> Generally, those made before July 2010 followed the earlier format that set out the background,<sup>141</sup> admissions and relevant commitments in the main body of the document. In contrast, the more recent format (which has generally been used after July 2010) is more formal, lengthy and prescriptive. That said, the commitments set out in later undertakings were often more ambitious. This observation was also supported by a manager of the FWO who stated that the earlier enforceable undertakings were ‘fairly rigid in their kind of thinking’,<sup>142</sup> however, the more recent undertakings were more experimental and wide-ranging.

Beyond the standard clauses, we were informed in our interviews that enforceable undertakings were tailored to the circumstances of each case. As one lawyer put it, there is no ‘one size fits all EU and what works for big business is not the same as small business – it’s recognising that there’s different circumstances’.<sup>143</sup> This is supported by our review of the content of enforceable undertakings, which reveals a kaleidoscope of different commitments including to: make good any underpayments,<sup>144</sup> conduct FWO-approved workplace relations compliance training,<sup>145</sup> provide a paid meeting of affected employees,<sup>146</sup> report to the FWO regarding future compliance,<sup>147</sup> develop workplace

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<sup>138</sup> See, for example, Enforceable Undertaking between Super A-Mart Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 17 October 2011.

<sup>139</sup> See, eg, Enforceable Undertaking between Toys R Us (Australia) Pty Ltd (Toys R Us) and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 21 January 2011.

<sup>140</sup> Based on comments made in Interview with FWLB.

<sup>141</sup> Background information normally provides a brief overview of the company size, the industry and the nature of the contraventions.

<sup>142</sup> Interview with FWMH.

<sup>143</sup> Interview with FWLD. Another lawyer also commented that in relation to enforceable undertakings: ‘there’s a template that just has the bare minimum, it’s just formatted in the way that we want them formatted, but in terms of the content it’s always dependent on each individual case’. Interview with FWLB.

<sup>144</sup> See, eg, Enforceable Undertaking between Irvine’s Transport (Pt. Pirie) Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 13 December 2010.

<sup>145</sup> See, eg, Enforceable Undertaking between eJack Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 21 January 2011.

<sup>146</sup> See, eg, Enforceable Undertaking between Ascot Haulage (NT) Pty Ltd & Anor and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 15 February 2011.

relations compliance plans<sup>148</sup> and post a public apology on Facebook<sup>149</sup> or the company website.<sup>150</sup>

Most undertakings also included terms designed to foster future compliance with minimum employment standards by the offending firm. An early enforceable undertaking made under the common law included, amongst other things, a general management commitment to ensure compliance with the relevant regulations in the future and conduct a self-audit within 28 days of the execution of the undertaking.<sup>151</sup> In comparison, the commitments in relation to future compliance set out in more recent undertakings were far more prescriptive. For example, an enforceable undertaking entered into with furniture retail chain Super A-Mart Pty Ltd set out a number of additional commitments addressing future compliance. For instance, the company gave an undertaking to have a workplace relations compliance manual prepared by ‘a suitably qualified legal practitioner with expertise in workplace relations law’, organise a workplace relations compliance training course for its store managers with the approval of the FWO, and engage an accounting professional or audit specialist to conduct an annual workplace relations compliance audit for a period of three years.<sup>152</sup> However, crucial to the successful achievement of each stage and securing real change is whether the monitoring process for the undertaking is adequate, which will be considered later in this section.

Other clauses in the enforceable undertakings we reviewed were less concerned with institutionalising compliance as they were with serving a community function. A feature of several FWO enforceable undertakings cited frequently by FWO staff was where businesses agreed to pay sums of money to external bodies such as community legal centres. For

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<sup>147</sup> See, eg, Enforceable Undertaking between CFC Retail Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 4 March 2011.

<sup>148</sup> See, eg, See Enforceable Undertaking between Signature Portrait Studios Pty Ltd and Lyn Brabban and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 28 March 2011.

<sup>149</sup> See, eg, Enforceable Undertaking between Cotton On Services Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 3 June 2010.

<sup>150</sup> See, eg, Enforceable Undertaking between CMA Corporation Ltd & Ors and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 15 June 2011.

<sup>151</sup> See Enforceable Undertaking between Pilbara Iron Company (Services) Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Workplace Ombudsman) dated 26 March 2009.

<sup>152</sup> See Enforceable Undertaking between Super A-Mart Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 17 October 2011.

example, the enforceable undertaking entered into by the toy retail chain Toys R Us included a commitment by the company to pay \$300,000 to various charities, organisations, groups or entities as selected in consultation with the FWO and having regard for the needs of young and vulnerable workers in those states and territories where the contraventions occurred.<sup>153</sup>

The rationale behind these payments appears to be consistent with the concept of restorative justice, which requires outcomes which contribute to broader social and community justice. The payments were also justified by the FWO on the basis of both specific and general deterrence, in that the payment agreed to by the employer was effectively in lieu of the penalty that a firm would have to pay if successfully prosecuted, and sent the signal to other firms that there is a cost to non-compliance. The payment itself is directed toward fostering greater awareness of employment entitlements among employers and employees. One specialist workplace relations lawyer commented that contributions to community organisations made under EUs are particularly useful in terms of educating small business. He elaborated:

the smaller end of town which employs the bulk of Australia's workforce is either deliberately or blissfully ignorant of their obligations and I find that the use of undertakings in that area can have the benefit of providing educational information to more than just the affected employer but employers in industry.<sup>154</sup>

Although these types of payments are no doubt appreciated and used to great effect by the bodies that receive them and similar payments have featured in undertakings made in other jurisdictions, we are concerned that these payments are somewhat symbolic. In particular, we believe that payments made by alleged wrongdoers, particularly firms which are well-resourced, could be used more effectively to contribute to more targeted compliance improvements. In the US, there have been examples where threats of litigation have resulted in settlement agreements whereby a large company has agreed to pay monies into a trust fund which is then used to pay for third party monitors which are

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<sup>153</sup> See, eg, Enforceable Undertaking between Toys R Us (Australia) Pty Ltd (Toys R Us) and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 21 January 2011.

<sup>154</sup> Interview with EXLA.

dedicated to monitoring compliance in that industry.<sup>155</sup> The great benefit of this arrangement is that the large company is sanctioned (and specific deterrence is achieved), but at the same time, it contributes directly to general deterrence by raising the likelihood of detection. The company who is effectively sponsoring these monitors may also feel vindicated in that their ‘punishment’ will ultimately be their reward insofar that it may mean that competitors that are engaging in illegal employment practices are more likely to be detected and sanctioned.

### *Monitoring and Enforcement of Enforceable Undertakings*

Adequate oversight of compliance with the terms of enforceable undertakings is critical to the achievement of the terms of the undertaking and to maximise the deterrence effect of this regulatory tool. Evaluations of enforceable undertakings in other jurisdictions have concluded that monitoring arrangements under enforceable undertakings should be designed to maximise detection of non-compliance and accountability through the involvement of third parties.<sup>156</sup> It is recognised that regulators have finite resources, and that therefore undertakings should facilitate monitoring arrangements which supplement oversight by the inspectorate. These studies also warn against relying solely on monitoring by the party to the undertaking and/or its officers. Instead, the experience in other jurisdictions is that undertakings increasingly have provided for monitoring by external and independent experts, such as auditors.

Our review of the FWO enforceable undertakings revealed that it was common for the FWO’s enforceable undertakings to include commitments which facilitate monitoring of the employer’s compliance with minimum working conditions and other terms of the undertaking. The FWO took a variety of approaches to this issue. For example, FW Inspectors were generally informed, at the time the enforceable undertaking was finalised,

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<sup>155</sup> See the discussion of the Maintenance Cooperation Trust Fund in Cynthia Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (Yale University Press, 2010) 117-21.

<sup>156</sup> See, eg, Christine Parker, ‘Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission’s Use of Enforceable Undertakings’ (2004) 67(2) *Modern Law Review* 209, in relation to the ACCC; Maria Nehme, ‘Justice to Outsiders Through Undertakings’ (2009) 9(1) *Queensland University of Technology Law and Justice Journal* 85, commenting on ASIC; Richard Johnstone and Michelle King, ‘A Responsive Sanction to Promote Systematic Compliance? Enforceable Undertakings in Occupational Health and Safety Regulation’ (2008) 21 *Australian Journal of Labour Law* 280, in relation to OHS regulators.

of any relevant monitoring that had to be carried out in relation to that undertaking. Another important way in which the FWO appeared to have enhanced compliance with enforceable undertakings was to expressly name officers, directors or managers of the company as parties to the agreement, thereby making these individuals directly bound by the terms of the undertaking.<sup>157</sup> Further, a number of FWO enforceable undertakings included a commitment by the employer to undertake self-audits of ongoing compliance and to report the results of these findings as well as ‘details of proactive compliance measures’ to the FWO. Perhaps in acknowledgement of criticisms of self-regulatory approaches, other undertakings included a commitment by the employer to have compliance periodically audited by a third party, such as ‘an accounting professional’ or ‘audit specialist’,<sup>158</sup> and a copy of the relevant results provided to the FWO within a specified timeframe. This is important in reducing the monitoring burden and ensuring that compliance with the terms of the enforceable undertaking, and a change in compliance behaviour, is actually taking place. Further, the involvement of an auditing specialist may allow the company to build the necessary knowledge and expertise necessary to guard against similar contraventions in the future.<sup>159</sup>

By the end of the study period the FWO had not taken enforcement action in respect of any contraventions that have been the subject of enforceable undertakings.<sup>160</sup> Further, it appears that there have been no instances where a party has sought to vary or withdraw from an undertaking.<sup>161</sup> We were informed that most employers were usually quite

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<sup>157</sup> For example, the FWO has entered into an enforceable undertaking with a company, Fueltown Motors Pty Ltd, and four individuals who were allegedly involved in the relevant contraventions of workplace relations laws. One of these individuals was the director of the company, the other three individuals were described as being ‘involved in the management of the business’. In addition, the four individuals were also described as being variously involved in or responsible for: employing staff; determining wage rates; providing information regarding wage rates and hours of work to an external payroll provider; and/or the payment of wages. See Enforceable Undertaking between Fueltown Motors Pty Ltd, Arthur Nestor, Tom Nestor, Brooke Nestor and Jennifer Tomkinson and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 24 May 2011.

<sup>158</sup> See, eg, Enforceable Undertaking between CFC Retail Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 4 March 2011.

<sup>159</sup> Nehme, above n 156, 95.

<sup>160</sup> Interview with FWLF; Interview with FWLE and Interview with FWLD.

<sup>161</sup> Once agreed, a party to an EU can only vary or withdraw from the agreement with the consent of the FWO. The FWO’s EU Policy provides that consent will only be given where the alleged wrongdoer can demonstrate that: a) compliance with the EU is impractical or ineffective; or there has been a relevant material change which renders variation or withdrawal appropriate. See *FW Act* s 715(3); and EU Policy, above n 129, 6.

proactive in reporting on what they had done,<sup>162</sup> and one lawyer believed that the lack of any enforcement action was a sign that ‘they’re obviously working’.<sup>163</sup> While to date there appears to have been few, if any, issues arising concerning compliance with FWO enforceable undertakings, experience from other jurisdictions shows that holding parties accountable to an enforceable undertaking is ‘central to the credibility of undertakings as an enforcement option’<sup>164</sup> and is not necessarily straightforward. In particular, there are cases which suggest that the judiciary may be reluctant to enforce the terms of an enforceable undertaking if they believe that this goes beyond the statutory and constitutional powers of the regulator and/or the court.<sup>165</sup>

The availability of court action is an important mechanism for holding businesses accountable to the commitments they have made in undertakings, and assists in reinforcing the deterrence function of enforceable undertakings. However, it also has the potential to undermine the capacity of undertakings to achieve responsive regulation. Only time will tell if the courts interpret the remedial provisions of the FW Act in a similar way to equivalent provisions in other legislation, and how the judiciary views some of the more innovative or far-reaching commitments included in the FWO undertakings.

### *Assessment of the FWO’s Use of Enforceable Undertakings*

Our interviews with staff revealed that enforceable undertakings were perceived to have a number of strengths as an enforcement tool. We noted earlier that many staff emphasised their potential to be a relatively inexpensive and quick regulatory sanction, although we observed that this goal has not always been realised. Nevertheless, the agency appeared to have addressed some of the reasons for the delay in negotiation of enforceable undertakings. This has been confirmed by external stakeholders such as the Ai Group, which recently commented that, from an employer perspective, undertakings were often

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<sup>162</sup> Based on comments made in Interview with FWLD.

<sup>163</sup> Interview with FWME .

<sup>164</sup> Richard Johnstone and Michelle King, above n 156, 313. See also Nehme, above n 156; and Christine Parker, ‘Regulator Required Compliance Program Audits’ (2003) 25 *Law & Policy* 221, 237.

<sup>165</sup> Marina Nehme, ‘Enforceable Undertaking and its Impact on Private Lawsuit’ (2008) 22 *Australian Journal of Corporate Law* 275.

seen as ‘fairer, less costly and more effective in securing compliance than prosecution, particularly where a party has not deliberately broken the law’.<sup>166</sup>

Staff at the FWO also held the view that enforceable undertakings have a strong compliance impact. Indeed, as compared to remedies available through the courts, enforceable undertakings were seen to have an equal or greater capacity to deliver deterrence. In this respect, one FWO lawyer commented that: ‘[t]here is a perception or misconception that enforceable undertakings are not as powerful as court-ordered outcomes. In fact, they are often more powerful’.<sup>167</sup> Indeed, while some believe that enforceable undertakings represent a ‘softer’ option, and are considered suitable for cases where the alleged wrongdoer(s) show contrition,<sup>168</sup> our evidence suggests that undertakings often allowed the FWO to ‘come up with deals that we wouldn’t be able to get in the courts’.<sup>169</sup>

Moreover, like many of the litigation outcomes achieved by the FWO, most of the enforceable undertakings were made available on the FWO’s website and were often accompanied by a tailored media release to maximise general deterrence. The then Fair Work Ombudsman himself said that making enforceable undertakings transparent and available is important given that: ‘[o]ur objective is to be able to use EUs as a demonstration of compliance’.<sup>170</sup> On the relationship between publicity and deterrence, one FWO lawyer observed that in some negotiations, the public nature of the undertaking ‘is the only thing that really worries [alleged wrongdoers], although most employers will see it as much more palatable in the public eye if they just agree to it.’<sup>171</sup>

Perhaps more important than these elements, however, is the way in which enforceable undertakings were used by the FWO to secure ongoing compliance – potentially one of the most significant advantages this sanction holds over litigation. This point was explicitly acknowledged by one FW Inspector who noted:

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<sup>166</sup> Ai Group, Submission to the Fair Work Act Review Panel, *Review of the Fair Work Act 2009*, 29 February 2012.

<sup>167</sup> Interview with FWLF. See also Interview with FWLE .

<sup>168</sup> Interview with FWMS.

<sup>169</sup> Interview with FWLF.

<sup>170</sup> Quoted in Johnstone and Parker, above n 117, 42.

<sup>171</sup> Interview with FWLI .

We only go down...[the enforceable undertaking] road as an alternative to litigation when we have everything we need for litigation but we decide that for whatever reason that the enforceable undertaking is a more appropriate way to go. Basically if we put it in the simplest possible terms that's where we're really more interested in future behaviour than past behaviour. It's not to say what happens in the past doesn't have to be fixed but we're really trying to lock them into the future behaviour.<sup>172</sup>

However, although undertakings are perceived to be effective, and while the content of enforceable undertakings entered into by the FWO has been innovative and far-reaching, the number which have been concluded is somewhat disappointing, particularly in light of earlier predictions by the agency that there would be a significant increase in their use.

There may be a number of reasons for this. Although the FWO's EU Policy fosters transparency and consistency through publication of the criteria to be applied in deciding whether to accept an enforceable undertaking, it has been difficult to ascertain the basis upon which a specific matter and/or firm is chosen as suitable for an enforceable undertaking. From our review of concluded enforceable undertakings, as well as statements from our interviews, there appeared to be no clear pattern in terms of industry or the nature or extent of the relevant contraventions, except to the extent that there appeared to be a tendency to make EUs with large or medium-sized businesses rather than small businesses. Although the outcome of these negotiations was disclosed, as each enforceable undertaking was made freely available on the FWO website, the process for negotiating enforceable undertakings was not necessarily transparent. While the FWO provided some figures on 'enforceable undertakings approved for negotiation',<sup>173</sup> it did not disclose how many proposed enforceable undertakings had been rejected by either the regulator or the alleged wrongdoer before agreement could be reached.<sup>174</sup>

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<sup>172</sup> Interview with FWLI.

<sup>173</sup> See, eg, Fair Work Ombudsman, *Annual Report 2010-2011* (2011) 48.

<sup>174</sup> Contrast, for example, the Department of Employment and Industrial Relations in Queensland, which has responsibility for enforceable undertakings in that State's OHS jurisdiction: Johnstone and King, above n 117, 305-6.

Rather, it seems the decision of whether to accept an enforceable undertaking turned on the facts of each case, and perhaps more importantly, whether or not the regulator, and more specifically the FWO, viewed an enforceable undertaking as being in their strategic interest.<sup>175</sup>

The relevant legislative provisions imply that the process for entering into enforceable undertakings is driven by the alleged wrongdoer, given that the FWO can only accept but not offer enforceable undertakings. In practice, however, enforceable undertakings were most often identified by the FW Inspector or FWO lawyer as a relevant enforcement option in the course of an investigation. On rare occasions, the employer and/or its representative may proactively approach the FWO with a request for such a mechanism to be considered in a bid to avoid the uncertainty and costs associated with litigation.<sup>176</sup> Ultimately, however, enforceable undertakings can only be entered into ‘voluntarily’ and the FWO cannot compel parties to give or accept an enforceable undertaking. While no coercion can take place, in practice, the parties’ consent was often obtained in circumstances where the possibility of litigation by the FWO loomed in the background.

In contrast to the positive assessment of enforceable undertakings by the Ai Group noted earlier, there are some who have argued that the agency has not been sufficiently flexible in its negotiation of undertakings. The Maritime Union of Australia (MUA) asserted in its recent submission to the recent Fair Work Act Review that the full potential of enforceable undertakings was not being achieved because the undertakings sought by the FWO were ‘too onerous or harsh or politically and industrially too sensitive for adoption or acceptance.’<sup>177</sup> A specialist workplace relations lawyer we interviewed observed that the FWO had exhibited a ‘high level of inflexibility’ in relation to the negotiation of an undertaking to the point where the lawyer’s client ‘was thinking well if this is the way they

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<sup>175</sup> One interviewee commented that in deciding whether an EU offers a more effective regulatory outcome: ‘obviously [Field Operations Group – which houses the FW Inspectors] has a view on it, and that would be given to [then Fair Work Ombudsman Nicholas Wilson], and I suppose that the fair answer is the way Nick operates is he’ll take onboard what the public interest comments are, but he might have his own views on the public interest as well. He just doesn’t accept things on that face value, he always delves into it, and quite often he’ll have his own perspective on things’: Interview with FWLI.

<sup>176</sup> Based on various FWO Interviews. See, eg, Interview with FWLF, Interview with FWLE.

<sup>177</sup> Maritime Union of Australia, Submission to the Fair Work Act Review Panel, *Review of the Fair Work Act 2009*, 7.

want to be about it then let's have a fight'.<sup>178</sup> In particular, the MUA submission suggested that, unless there was a change in policy, FWO enforceable undertakings would continue to be seen as 'less acceptable than the likely outcome before the courts, [and] there will be a continued unwillingness to enter such undertakings even if the court process is more time consuming and expensive'.<sup>179</sup>

Another possible reason that there have not been more enforceable undertakings is the centralised decision-making process for their approval. Our interviews revealed that it became the FWO's internal policy that enforceable undertakings 'are of such significance that they can only really be negotiated at the higher levels'.<sup>180</sup> One manager commented that the process for approving undertakings was 'up there with litigation, if not higher'.<sup>181</sup> In practice, this meant that while the Inspector may have believed that an enforceable undertaking was the most appropriate option in any given case, it would only be pursued if the briefing document<sup>182</sup> prepared by the Inspector under the supervision of his or her team leader or manager, was approved by the Fair Work Ombudsman himself and the Strategic Litigation Committee (i.e. a specialist sub-committee of the FWO which considered all formal sanctions, including litigation, enforceable undertakings and compliance notices). Indeed, before any negotiations could commence between the FWO's lawyers and the alleged wrongdoer (and/or their legal representative), the Fair Work Ombudsman had to agree that the matter was suitable for an enforceable undertaking.<sup>183</sup>

One possible reason for the comprehensive and centralised approval process is the political sensitivity of the FWO. The then head of the FWO was apparently keen to avoid perceptions that the regulator was being arbitrary or preferential by ensuring that the enforcement

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<sup>178</sup> Interview with EXLB.

<sup>179</sup> Maritime Union of Australia, above n 178, 7. The Fair Work Act Review Panel declined to recommend any changes to the statutory regime concerning enforceable undertakings: see John Edwards, Ron McCallum and Michael Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (Australian Government, 2012).

<sup>180</sup> Interview with FWLF.

<sup>181</sup> Interview with FWMS.

<sup>182</sup> The briefing document generally sets out, in a matrix form, the specific contraventions under the relevant instrument, the elements of each contravention and the evidence (if any) in support of each element. In many respects, the briefing document used in relation to enforceable undertakings is very similar to that prepared in anticipation of litigation.

<sup>183</sup> See Delegation of Powers and Functions issued by the Fair Work Ombudsman on 24 March 2011 and *FW Act* s 683. One of our interviewees confirmed that the approval of the FWO himself is always sought before negotiating an enforceable undertaking: Interview with FWMS.

approach was consistent and the commitments set out in undertakings were proportionate to the relevant contraventions.<sup>184</sup> Yet another reason may be the fact that the FWO appeared to apply a relatively high internal standard when it came to determining whether there was sufficient evidence to form a reasonable belief that a relevant contravention had occurred.<sup>185</sup> Indeed, while there were some mixed views on this point – perhaps due to a lack of any clear policy guidance – the majority of those we interviewed believed that enforceable undertakings were only appropriate where there was sufficient evidence to proceed with litigation.<sup>186</sup> There were a number of reasons proffered as to why the evidentiary threshold was relatively high. For example, one interviewee commented that the FWO often used the threat of litigation to leverage parties into enforceable undertakings. If the evidence in support of an enforceable undertaking was not sufficiently strong and the likelihood of bringing court action was low, there was a risk of making a ‘hollow threat’.<sup>187</sup> Another view was that the relevant evidence needed to be robust given that undertakings were now authorised by legislation and parties were required to make admissions. In comparison, others suggested that if there were some omissions or gaps in the evidence:

you then lean in favour of an EU over litigation...But again, you know you’ve got to be careful there because if they breach the EU and you don’t follow through with Court action, then you look a bit empty or [like a] paper tiger.<sup>188</sup>

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<sup>184</sup> Ibid.

<sup>185</sup> Yeung has argued that the evidentiary limitations on the use of enforceable undertakings are important because, amongst other reasons, it ensures that the relevant regulatory agency has legislative authority to accept the proposed undertaking. See Australian Law Reform Commission, ‘Principled Regulation: Federal Civil and Administrative Penalties’ (Report No 95, Australian Law Reform Commission, March 2003).

<sup>186</sup> Interview with FWIS. These evidentiary limitations are perhaps elevated in importance in the context of employment standards regulation given that there is no avenue for judicial review of FWO’s decisions to enter (or not enter) into enforceable undertakings under the *FW Act*. Unlike many of the other jurisdictions with the power to use enforceable undertakings, the FWO’s decision to enter (or not enter) into enforceable undertakings under the *FW Act* is exempted under the *Administrative Decisions (Judicial Review) Act 1976* (Cth). While there is still scope to seek review of these decisions under the original jurisdiction of the courts in cases of jurisdictional error, this would be presumably a difficult option to pursue. For comment, see Tess Hardy and John Howe ‘Accountability and the Fair Work Ombudsman’ (2011) 18 *Australian Journal of Administrative Law* 127.

<sup>187</sup> In particular, this interviewee observed: ‘We still always applied a pretty high threshold because you wanted to be in a position where you could say, “Look, it’s either the EU or we’re going to Court.” So if it wasn’t at a level where you could ultimately take it to Court, it would make it a hollow threat, and we would never make that type of hollow threat. So we wanted to be in a position where if they said, “No, get stuffed,” in relation to the EU, we could go down that course. So well, we gave you a choice, you’ve made an election’: Interview with EXE.

<sup>188</sup> Interview with FWMS.

While the high evidentiary thresholds and detailed approval process adopted by the FWO may have guarded against political rumblings and addressed public law concerns, it is arguable that it restricted the utility of enforceable undertakings as a regulatory mechanism. Indeed, in order to obtain the necessary level of evidence, a fairly comprehensive investigation must have first taken place before it reached the approval stage.

In summary, notwithstanding these concerns there is some evidence to suggest that the FWO was achieving the legislators' goal of providing a quick, flexible remedy which encouraged co-operative compliance and delivered deterrence, although not in the numbers the agency would have liked to see. In many instances, it seemed that the negotiations surrounding enforceable undertakings were less adversarial and more constructive than where the FWO was threatening direct litigation. However, although the public availability of the FWO's EU Policy and the public nature of the concluded EUs were positive for the accountability of this sanction, there could be greater transparency around the process of negotiation. For example, it would be helpful to know on what basis any enforceable undertakings have been rejected by the regulator, and also whether any proposed undertakings have been rejected by the alleged wrongdoer. More importantly, it seems that the centralisation of decision-making, combined with high evidentiary requirements, means that enforceable undertakings are only being finalised in a small number of cases, which may be restricting their full regulatory potential. However, measures designed to escalate this process must be implemented in a way that does not compromise the broader objectives.

As mentioned, the content of enforceable undertakings included some far-reaching and innovative commitments. In our view, terms which require firms to engage in workplace training, conduct future auditing and report back to the FWO are all important ways in which to secure management commitment and deliver deterrence.

That said, the effectiveness of such clauses requires the FWO to be mindful of management commitment and vigilant in their monitoring to ensure that the critique of enforceable undertakings as a soft option is not proven correct. Moreover, given the budget cuts experienced by the FWO in the most recent financial year, care must be taken to ensure that enforceable undertakings do not become the preferred enforcement option over litigation simply because they are perceived to be less costly. This approach runs the risk of not only undermining the credibility of enforceable undertakings, but given their integral part in the 'enforcement pyramid', it is also critical to ensure the effectiveness of less formal sanctions and the legitimacy of the regulator as a whole.

### *An Overview of the FWO's Use of Proactive Compliance Deeds*

As noted above, one of the limitations of enforceable undertakings is their capacity to apply to persons beyond the direct employer or persons involved in the management of that corporation. This is partly because they are a statutory creation and must fit within the relevant legislative framework. Over the study period, enforceable undertakings were not used to bind contractors in supply chains or companies that make up a franchise. However, in a bid to try to address systemic non-compliance within these more complex structures and working arrangements, the FWO developed a new tool known as a 'proactive compliance deed'. These deeds are similar in many ways to enforceable undertakings, except that they are made under the common law rather than the FW Act and therefore are not constrained, or enabled, by statutory provisions.

The FWO entered into four deeds with large companies or franchises in 2010-2012, namely: McDonald's, Domino's Pizza, Red Rooster and Spotless Services.<sup>189</sup> As proactive compliance deeds sit outside the legislative framework, there is no formal policy on when

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<sup>189</sup> As at 31 October 2012, the FWO had entered into four such deeds, namely: Proactive Compliance Deed between McDonald's Australia Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 8 April 2011 (McDonald's Proactive Compliance Deed); Proactive Compliance Deed between Domino's Pizza Enterprises Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 19 December 2011 (Domino's Proactive Compliance Deed); Proactive Compliance Deed between Red Rooster Foods Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 14 February 2012 (Red Rooster Proactive Compliance Deed); and Proactive Compliance Deed between Spotless Services Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 22 March 2012 (Spotless Proactive Compliance Deed).

they will be made. Indeed, in comparison to enforceable undertakings and other statutory instruments, there is very little visibility into when and in what circumstances they will be considered the most appropriate regulatory response by the FWO. It appeared that proactive compliance deeds were generally approved by the highest levels of the FWO.<sup>190</sup> By 2012, they had only been used in limited circumstances with particular types of companies, namely large, high-profile employers or franchises. Like enforceable undertakings, they are a voluntary instrument and there is no compulsion or requirement for these companies to necessarily agree to the terms.

It is somewhat difficult to identify a pattern from simply reviewing the deeds that have been signed so far, particularly as there has been only a limited number. Other materials, together with the FWO interviews, have given us some insights into when this tool was viewed as appropriate. For example, in relation to the McDonalds Proactive Compliance Deed, it seemed that deed negotiations commenced 'because the initial information indicated low levels of non-compliance and mass-scale auditing on our part did not appear to be an effective use of resource.'<sup>191</sup> In contrast, the Spotless Proactive Compliance Deed was concluded on the back of a number of separate investigations involving significant underpayments to large numbers of employees.<sup>192</sup> According to Nicholas Wilson, there are mutual benefits to be gained under these deeds. From the perspective of the FWO:

Engaging with these large national employers through proactive compliance deeds is an efficient way of helping to ensure compliance in relation to the significant number of workers currently employed. Working closely with these large organisations to identify and improve policies and practices that are inconsistent with workplace laws means that the impact of the Fair Work Ombudsman's work will continue to directly benefit future employees of these companies.<sup>193</sup>

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<sup>190</sup> For example, all four proactive compliance deeds have been personally signed by Nicholas Wilson, the then head of the FWO.

<sup>191</sup> Nicholas Wilson, 'Fairness over the First Year' (Speech delivered to the Industrial Relations Society of Victoria, 8 October 2010). For example, the background to the McDonalds Proactive Compliance Deed states, amongst other things, that: 'Commissioner McKenna stated at paragraph 382 in the Decision that she proposed to direct a copy of the Decision [in *McDonald's Australia Pty Ltd on behalf of Operators of McDonald's Outlets re McDonald's Enterprise Agreement 2009* [2010] FWA 1347] to the Fair Work Ombudsman as there was evidence that McDonald's or its licensees, or both, "may have been underpaying some employees". McDonald's denied and continues to deny the purported contraventions identified by Commissioner McKenna and objected to the Decision'. See McDonalds Proactive Compliance Deed, above n 190, Attachment A.

<sup>192</sup> See Spotless Proactive Compliance Deed, above n 190, Attachment A.

<sup>193</sup> FWO Annual Report 2011-2012 (2012) 53.

On the other hand, for the relevant franchises and companies:

Entering into Pro-active Compliance Deeds has allowed the companies to publicly show corporate responsibility and to demonstrate to the thousands of workers on their payrolls their commitment to ensuring the payment of full lawful entitlements.<sup>194</sup>

While the background circumstances seem to vary quite significantly, the four deeds are alike in the obligations they seek to impose. Further, they display a number of similar features with enforceable undertakings. For instance, both types of agreements appear to share some common objectives insofar that they are generally directed towards saving inspectorate resources, entrenching corporate commitment to compliance and prompting self-regulatory behaviour. One FWO lawyer described proactive compliance deeds as a:

non legislative outcome, probably less under the rung than an EU, but they're also effective as well in having employers fix up their own backyard if you like, and reporting to us on outcomes. Again for the same significant benefit, that we don't have to send in a whole lot of inspectors to tie up time and resources, and costs to fix up what's going on.<sup>195</sup>

While there is a level of publicity associated with both enforceable undertakings and proactive compliance deeds, the way in which the FWO portrayed the relevant signatory companies was quite different. In general, the message in relation to proactive compliance deeds was far more encouraging. Indeed, under the express terms of the deeds, there was a commitment to ensure that the FWO's media releases '[would] reflect the positive cooperation' of the relevant companies.<sup>196</sup> For example, in relation to the McDonalds Proactive Compliance Deed, the FWO Annual Report stated that:

The review is in line with McDonald's goal of being an employer of choice for young people and operating its business ethically. The review is part of a Pro-active Compliance Deed McDonald's signed with the Fair Work Ombudsman. This initiative

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<sup>194</sup> Ibid.

<sup>195</sup> Interview with FWLE.

<sup>196</sup> See, eg, Spotless Proactive Compliance Deed, above n 190, cl 4.3.

served as a model for other companies, large and small, who want to be seen as a great place to work for young employees or people looking to gain foundation skills for their careers. It also provided an opportunity for McDonald's to show corporate responsibility to its thousands of young and casual workers and leadership to the rest of the franchising industry.<sup>197</sup>

In actual fact, it seems that negotiations in relation to this first deed were prompted by the fact that following a FWA decision which reflected poorly on some of McDonald's workplace relations practices, the company 'sought to obviously ameliorate that kind of publicity as best they could'.<sup>198</sup> One way in which they sought to achieve this objective was by entering into the proactive compliance deed. The ability to control the public message obviously provides some incentive for brand-sensitive companies to prefer this type of instrument over others, such as enforceable undertakings, which are portrayed much more like a formal, punitive sanction and much less like a voluntary, constructive initiative.

The other important incentive for companies is that the commitments set out in the deeds that have been concluded are not nearly as wide-ranging or as varied as those set out in enforceable undertakings. In particular, the deeds contain a number of standard terms dealing with acknowledgements, publicity, no inconsistent statements, termination by the FWO, severance and competency, amongst others.<sup>199</sup>

In addition, the deeds normally include a set of attachments, which set out the background, the proactive compliance activities and, in some cases, the scope and methodology of the self-audit.<sup>200</sup> As part of the 'proactive compliance activities', the head franchisor or company generally agreed to commit to audits of particular employing entities or

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<sup>197</sup> Fair Work Ombudsman, *Annual Report 2010-2011* (2011).

<sup>198</sup> Interview with FWLC.

<sup>199</sup> While they are generally on the same terms, there are a number of minor differences which appear to reflect the involvement of lawyers – which is a common feature of dealing with large businesses and arguably signals their greater capacity to influence compliance outcomes. For example, the Spotless Proactive Compliance Deed, above n 190, does not contain a continuing obligations clause. Indeed, this clause which was fairly broad in application in relation to the first McDonalds Proactive Compliance Deed appears to have grown increasingly weaker in later deeds (i.e. the Domino's and Red Rooster Proactive Compliance Deeds, above n 190, do not contain any 'general survival' clauses).

<sup>200</sup> See, eg, Spotless Proactive Compliance Deed, above n 190, Attachments A, B and C. There are some exceptions to this general rule. For example, the McDonald's Proactive Compliance Deed, above n 190, does not set out the scope and methodology of the self-audit.

franchises, promptly rectify any underpayments and report key information to the FWO regarding these activities.

An additional obligation set out in the majority of the deeds is for the company to establish an employee reporting facility whereby employees are generally invited to contact a specified contact person about any concerns about the payment of wages and entitlements. While this may lead to increased detection of issues or a deeper understanding of employee concerns, this reporting facility does not appear to offer employees an opportunity to make anonymous or confidential complaints to a third party, and as such it may not necessarily address some of the barriers facing vulnerable employees noted in Chapter 5.

### *Comparison with Enforceable Undertakings*

While there are a number of similarities between enforceable undertakings and proactive compliance deeds, there are also some important differences. One such difference is that, unlike enforceable undertakings, there is no requirement for the FWO to reasonably believe that contraventions have taken place before entering into a proactive compliance deed. This means that deeds were often used at an earlier stage in an investigation where contraventions may be suspected, but not necessarily concretely established. Further, it was highly unlikely for the FWO to consider entering into a proactive compliance deed after enforcement proceedings commenced<sup>201</sup> – an approach which was adopted in relation to a number of enforceable undertakings.<sup>202</sup> One FWO lawyer commented:

The proactive compliance deed is a little bit lighter [than an enforceable undertaking]. We might not have gone in to the whole frame, we might have looked at one or two areas and got a snippet of information about particular things, and what that's doing is then getting the employer to then go through and have a look, fix it all up. So we're at a more advanced state of knowledge and decision making in terms of contraventions for an EU, than we are for a proactive compliance deed.<sup>203</sup>

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<sup>201</sup> Based on comments in Interview with FWLD.

<sup>202</sup> See, eg, between Toys R Us (Australia) Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 21 January 2011.

<sup>203</sup> Interview with FWLE.

A further notable difference between enforceable undertakings and proactive compliance deeds is the fact that the companies were not required to make any admissions (qualified or otherwise) in relation to the ‘purported’ contraventions. The standard acknowledgements clause in all the relevant deeds simply states that the company acknowledges that ‘there are opportunities for continuing improvement in relation to its workplace practices to ensure its compliance with Commonwealth workplace laws’.<sup>204</sup> In addition, in the McDonalds deed, there is an express denial of the purported contraventions.<sup>205</sup> In the other deeds, the background details generally appear to be drafted in a way that demonstrates that the contraventions were generally of a technical or inadvertent nature.<sup>206</sup>

The other key difference is the enforceability of deeds. Indeed, this is potentially the most significant weakness when compared to enforceable undertakings. For a start, the deeds contain a standard termination provision allowing the FWO to terminate the deed immediately without notice if the company commits a serious or persistent breach or non-observance of the term(s) of the deed. In other words, ‘if the partnership breaks down because we lack trust or respect, then they’re over, and we can just walk away from it’.<sup>207</sup>

Further, all of the proactive compliance deeds contain an acknowledgement to the effect that in the event that the relevant company contravenes the terms of the deed, the FWO may investigate and take enforcement action in relation to the purported contraventions. That said, it is likely that the public interest in pursuing enforcement action may be fairly weak in circumstances where the relevant underpayments have been rectified and the contraventions are relatively stale. Further, actually enforcing a non-statutory instrument is likely to be somewhat challenging given that a number of terms are fairly broad<sup>208</sup>

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<sup>204</sup> See, eg, McDonald’s Proactive Compliance Deed, above n 190, cl 1.1(a).

<sup>205</sup> See McDonald’s Proactive Compliance Deed, above n 190, Attachment A, cl 4.

<sup>206</sup> For example, the contraventions in relation to Domino’s appear to have arisen due to the interaction between agreed-based transitional instruments and modern awards introduced by the *FW Act*. See, eg, Domino’s Proactive Compliance Deed, above n 190, Attachment A.

<sup>207</sup> Interview with FWMS.

<sup>208</sup> For example, under the McDonald’s Proactive Compliance Deed, above n 190, the head company has made a broad and indefinite commitment to ensure its licensees ‘comply at all times and in all respects’ with Commonwealth workplace relations laws by developing systems and processes to ensure ongoing compliance. It is not clear in what circumstances

and/or ambiguous.<sup>209</sup> In addition, the FWO would have to rely on common law remedies, which are likely to be somewhat limited in these circumstances.<sup>210</sup> The FWO officers appear to be aware that in the deed is more about building a ‘partnership’ and less about punishing or threatening the company. In this sense, it has been described as a ‘bit of a hollow document’<sup>211</sup> in that if the company fails to comply with the relevant commitments, there may be very few formal enforcement options realistically available to the FWO. That said, it is ‘the spirit of the deed’<sup>212</sup> which is potentially of more importance and weight in relation to these types of high profile companies. Indeed, given that most companies initially entered into proactive compliance deeds because it was seen as good for the brand, it would seem that concerns about brand protection and consumer confidence will be far more persuasive than a threat of civil remedy litigation when it comes to honouring the relevant obligations.

#### **6.4 Summary of Enforceable Undertakings and Proactive Compliance Deeds**

The findings presented above confirm that the FWO devoted significant resources and energy to exploring the benefits of enforceable undertakings and compliance deeds as alternative approaches to civil litigation in securing compliance. The result was a number of innovative agreements with mostly larger employers which have great potential to engender changes in compliance culture at these firms. Nevertheless, our findings concerning the number of undertakings and compliance deeds suggest that these tools were not being fully utilised. There is also a need for an assessment of the effectiveness of those agreements that have been reached in bringing about sustained compliance with the FW Act and industrial instruments made under that legislation, and also their general deterrence value.

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the FWO would be satisfied that any systems and processes put in place by McDonald’s is likely to satisfy this commitment.

<sup>209</sup> For example, the Red Rooster Proactive Compliance Deed, above n 190, refers to an Attachment C – which is intended to set out the applicable rate used for offsetting calculations. However, Attachment C is not included in the copy of the Red Rooster Proactive Compliance Deed available on the FWO website.

<sup>210</sup> For example, an order for compensatory damages may require the FWO to prove that it has suffered some loss as a result of the breach, which would be potentially difficult in this context.

<sup>211</sup> Interview with FWMS.

<sup>212</sup> Interview with FWMS.



## 6.5 Compliance Notices

One of the new enforcement tools introduced by the FW Act was the power of FW Inspectors to issue a 'compliance notice'.<sup>213</sup> Compliance notices are similar to the improvement notice used by OHS inspectorates in Australia.<sup>214</sup> They may be issued where an inspector reasonably believes that a person has contravened 'an entitlement provision',<sup>215</sup> and may require a person to either take specified action to remedy the direct effects of the contravention, and/or produce reasonable evidence of the person's compliance with the notice within the time specified in the notice.<sup>216</sup> Along with enforceable undertakings, compliance notices were intended to provide 'inspectors with another option to deal with non-compliance instead of pursuing court proceedings'.<sup>217</sup>

There is no requirement that compliance notices be issued in relation to the employer, and therefore it appears open to the FWO to issue compliance notices against the direct employer firm, as well as other persons 'involved in' the contravention, including other firms or individuals who may fall within the accessorial liability provisions.<sup>218</sup> The only person empowered to issue a compliance notice is a FW Inspector – for instance, there is no option for representatives of employee associations to issue a compliance notice, provisional or otherwise.<sup>219</sup>

The recipient of a compliance notice must comply with its terms,<sup>220</sup> unless they can show that they have a reasonable excuse for failing to comply.<sup>221</sup> Failure to comply with a

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<sup>213</sup> *FW Act* s 716.

<sup>214</sup> See the provisions of the model OHS legislation: see, eg, *Work Health and Safety Act 2011* (Qld) ss 90-102.

<sup>215</sup> Such provisions are specified as: a provision of the NES; a term of a modern award; a term of an enterprise agreement; a term of a workplace determination; a term of a national minimum wage order; or a term of an equal remuneration order: *FW Act* s 716(1).

<sup>216</sup> *FW Act* s 716(2).

<sup>217</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth) [2673].

<sup>218</sup> *FW Act* s 550.

<sup>219</sup> Cf the provisions of the model OHS legislation: see, eg, *Work Health and Safety Act 2011* (Qld) ss 90-102. Under these provisions, a health and safety representative, who has completed approved training and has engaged in the relevant consultation, can issue a provisional improvement notice requiring a contravention against the WHS Act or Regulations to be remedied within a certain period or steps taken to prevent a likely contravention. Provisional improvement notices (known as PINs in this context) can be reviewed by Inspectors, who may confirm, vary or cancel the PIN.

<sup>220</sup> *FW Act* s 716(5).

<sup>221</sup> *FW Act* s 716(6).

compliance notice is a civil remedy provision. The provisions also make clear that multiple enforcement mechanisms cannot be pursued by an Inspector in relation to the same contravention.<sup>222</sup> This does not, however, restrict any person with standing to pursue the contraventions separately. In light of this, the FW Act expressly provides that a person who complies with a compliance notice is not taken to have admitted to contravening the provision or been found to have contravened the provision.<sup>223</sup>

It appears that the availability of compliance notices was intended to provide FW Inspectors with a sanction that is less time consuming and costly than court proceedings, yet more formal than an infringement notice (discussed in the following section). In terms of where compliance notices sit within the hierarchy of sanctions, the relevant FWO Guidance Note states:

The FWO will consider giving a person a Compliance Notice where the issue of a Compliance Notice would offer the more effective regulatory outcome. The issue of a Compliance Notice may offer the more effective regulatory outcome where rectification of the contravention and specific deterrence can be achieved without the expense and delay associated with litigation. In particular, a Compliance Notice may be a more effective regulatory outcome where it ensures that persons who have suffered loss or damage as a result of the contravention of the civil remedy provision are swiftly compensated.<sup>224</sup>

### *An Overview of the FWO's Use of Compliance Notices*

Figures provided by the FWO suggest that there was only moderate use of compliance notices in the first two years after 1 July 2009. This stands in some contrast to the regular use of improvement notices by OHS inspectorates.<sup>225</sup> For example, in 2010-2011 only 16 compliance notices were issued, although this rose to 67 in 2011-2012.

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<sup>222</sup> In particular, an Inspector cannot issue a compliance notice in relation to a contravention where the person has entered into an enforceable undertaking and that undertaking has not been withdrawn: *FW Act* s 716(4). Further, an Inspector must not apply for court orders in relation to a contravention of a civil remedy provision if a compliance notice has been issued in relation to that contravention and the notice has not been withdrawn and the person has complied with the notice; or the person has made an application for review in relation to the notice: *FW Act* s 716(4A).

<sup>223</sup> *FW Act* s 716(4B).

<sup>224</sup> Fair Work Ombudsman, *Guidance Note 3 - Compliance Notices*, 4.

<sup>225</sup> See Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety* (March 2010), 122.

One of the main reasons why this might be the case appears to be the limits imposed by the statutory provisions governing the use of compliance notices. For example, while compliance notices can be issued in relation to contraventions which took place on or after 1 July 2009, they have to relate to an entitlement provision, which only applied from 1 January 2010.<sup>226</sup> A number of our interviewees at the FWO indicated that complaints often straddled the critical cut-off date of 1 July 2009, and therefore compliance notices could not be issued,<sup>227</sup> thus limiting the pool of matters where it might otherwise have been appropriate to issue a compliance notice. It is not clear, however, why even in these cases compliance notices could still not be used for any underpayment that arose after 1 July 2009, particularly if the bulk of the underpayment arose after this time.

Perhaps the most important restriction in the statutory provisions, however, is the requirement that the compliance notice direct the recipient to take specified action to remedy the direct effects of the contravention and/or produce reasonable evidence of the person's compliance with the notice. This is quite different to improvement notices issued under occupational health and safety laws which generally only require the inspector to include directions and/or recommendations about how to fix or prevent a contravention.<sup>228</sup> It is also far narrower than the range of options available via enforceable undertakings. Indeed, while s 716(2) is not necessarily ambiguous on its face, the Explanatory Memorandum (EM) provides an 'illustrative example' which implies that the scope of this provision is even more restrictive than that set out above. In particular, the EM states that a compliance notice which has been issued against an employer who is reasonably believed to have contravened an entitlement provision in relation to one employee cannot direct the employer to undertake an audit of all of its employees' wage records because such a requirement 'goes beyond remedying the direct effects of the contravention for which the notice was given'.<sup>229</sup> Given that shifting the auditing burden to

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<sup>226</sup> Another statutory restriction is that they cannot be issued in relation to any contravention of safety net contractual entitlements.

<sup>227</sup> Interview with FWLF and Interview with FWIM.

<sup>228</sup> See Safe Work Australia, *Guide to the Work Health and Safety Act* (Safe Work Australia, 2012).

<sup>229</sup> More specifically, the Explanatory Memorandum sets out the example as follows: 'An inspector reasonably believed that Katie G's Bar had underpaid Aaron \$250 that he was entitled to under the Katie G's Bar Enterprise Agreement 2010.'

employers is perceived to be one of the distinct advantages of enforceable undertakings and proactive compliance deeds, this restriction is potentially far-reaching.

Another reason for the apparent reluctance of FW Inspectors to use compliance notices may be the decision-making process followed by the FWO in relation to this enforcement option. Unlike enforceable undertakings which require that the Fair Work Ombudsman herself hold a reasonable belief that a person has contravened a civil remedy provision, the provisions dealing with compliance notices turn on whether or not an Inspector reasonably believes that a relevant provision or term has been contravened. This means, at least in theory, that there is no strict statutory requirement for the Fair Work Ombudsman or an authorised delegate to approve the issuing of compliance notices.

However, while the FW Act appears to assume that decision-making around compliance notices may be made at lower levels of the organisation, given that they can be issued directly by Inspectors rather than the Fair Work Ombudsman,<sup>230</sup> this was not necessarily reflected in practice. While one FWO manager commented that '[t]here's no reason from my perspective why Inspectors couldn't use [compliance notices] on a daily basis',<sup>231</sup> it is clear that this was not the prevailing attitude within the inspectorate. We were informed that generally a compliance notice needed the same level of approval as the commencement of litigation, or the conclusion of an enforceable undertaking. As one manager put it: '[t]here are a lot of hoops to jump through if you want to do one of those three things'.<sup>232</sup> This generally meant that a brief of evidence needed to be prepared by an Inspector and reviewed by the Strategic Litigation Committee before being sent to the Fair Work Ombudsman and the authorised delegates for final approval.<sup>233</sup>

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The inspector issued a compliance notice in relation to the contravention, requiring Katie G's Bar to pay Aaron \$250 to remedy the underpayment. The compliance notice also required Katie G's Bar to conduct an audit of all its employees' wage entitlements to make sure that it was not underpaying Aaron. In this situation, Katie G's Bar could seek review of the compliance notice on the ground that the notice did not comply with clause 716 because the requirement to audit its employees' wage records goes beyond remedying the direct effects of the contravention for which the notice was given. If the Katie G's Bar Enterprise Agreement 2010 did not apply to Aaron, Katie G's Bar could also seek review of the compliance notice on the ground that it had not committed the contravention set out in the notice.' Explanatory Memorandum, Fair Work Bill (2008) [2687].

<sup>230</sup> Cf *FW Act* s 715 which requires the FWO to 'accept' enforceable undertakings.

<sup>231</sup> Interview with EXE.

<sup>232</sup> Interview with FWMQ.

<sup>233</sup> Based on comments in Interview with FWII.

On the one hand, this level of internal scrutiny is appropriate given that failure to comply with a compliance notice constitutes a civil remedy provision, and issuance of the notices can be reviewed by a court. Indeed, it seems the view within FWO management is that the ability for a recipient to contest the compliance notice raises the ‘risk profile’<sup>234</sup> of the instrument. As another FWO manager observed: ‘We’ve got to make sure [compliance notices are] right because the worst is to issue one, it gets challenged and rejected. That’s not good form.’<sup>235</sup> Indeed, we were informed that while only a limited number of compliance notices were issued, there were ‘a couple of false starts’<sup>236</sup> – that is, where compliance notices were issued and later withdrawn by the FWO on the basis that they were procedurally invalid.

While it is true that using enforcement mechanisms without authority or justification may render them invalid, and undermine the credibility of the regulator more generally, it seems a side-effect of this fear of judicial review is that legitimate use of this tool was also stymied. As one Inspector put it, the compliance notice, while useful, has ‘been dramatically under-utilised’.<sup>237</sup>

One way in which this risk could be minimised is to use compliance notices only after a contravention letter has been issued and the employer or individual has been given an opportunity to respond to the relevant allegations. This reflects the view of at least one Inspector, who commented:

natural justice dictates that you can’t take action against somebody until you’ve made them absolutely completely clear of what it is that you’re taking action about. And it would be completely unjust to just plonk a [compliance notice] on someone’s desk...because their only option is to take it to court, at probably considerable expense and time.<sup>238</sup>

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<sup>234</sup> Interview with FWLI.

<sup>235</sup> Interview with FWMJ.

<sup>236</sup> Interview with FWLI.

<sup>237</sup> Interview with FWLI.

<sup>238</sup> Ibid.

Aside from the statutory restrictions on the use of compliance notices, our interviews with Inspectors and FWO lawyers about compliance notices also indicated there were a range of other reasons given as to why very few were issued between 2009 and 2011. . A number of other Inspectors simply said they could not comment on compliance notices because they had no direct experience with this tool. In some cases, Inspectors indicated that they did not even contemplate using compliance notices in their day-to-day activities. Another lawyer noted that there was a level of confusion about when they could be used and many Inspectors still focused on the ‘old methods’,<sup>239</sup> such as contravention letters and enforceable undertakings for resolving complaints.<sup>240</sup>

Another possible reason for the apparent lack of enthusiasm for compliance notices was the perception that they were not necessarily helpful in achieving the relevant regulatory objectives, such as specific compliance in relation to the relevant individual or firm, or deterrence more generally. This position was echoed by a FWO lawyer who commented:

The type of person that you have to issue a compliance notice on is not the type of person that is likely to comply with a compliance notice. These are the type of people that have refused to voluntarily comply despite prolonged negotiations. Compliance notices wouldn’t work anyway as the employer has already demonstrated that they are not co-operative.<sup>241</sup>

There was a common view that compliance notices were similar in effect to a contravention letter (see below), but more cumbersome. One FW Inspector explained that previously it was understood in his state office:

that if you put out a compliance notice and it wasn’t complied with, you could effectively go to court on that compliance notice. What we’ve found in recent months when we’ve tried to go down that path is, well no, you still need to prove your case in its entirety, in which case well what’s the use of the compliance notice? I mean you’ve already put out a contravention letter...and it’s usually after them that

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<sup>239</sup> Interview with FWLB.

<sup>240</sup> Similar comments were made in Interview with FWIP.

<sup>241</sup> Interview with FWLF.

you'd consider putting out a compliance notice. Well isn't that just another delaying, or pretty please will you pay sort of tactic...<sup>242</sup>

Indeed, one FWO lawyer speculated that one of the reasons for the slow uptake of compliance notices may have been the work perceived to be involved on the part of Inspectors. In particular, the lawyer noted that:

there might be a bit of pushback because I know most people in the legal group are of the view that a compliance notice should only be issued where we think if it's not complied with we can take the matter to court, not only for contravention of the compliance notice, but also for contraventions that are within the compliance notice. And so there might be from a resourcing point of view in the inspectorate...well if I have to do a complete investigation anyway, why should I just do a compliance notice when I could just refer it up to legal for litigation? And maybe that's why they might just do a contravention letter, and if that doesn't resolve they don't go the next step because it's a lot more work.<sup>243</sup>

While failure to comply with a compliance notice, without a reasonable excuse,<sup>244</sup> is a civil remedy provision, the maximum penalties that can be ordered are generally lower than the maximum penalties which apply for contraventions of entitlement provisions.<sup>245</sup> This suggests that different considerations should potentially apply when deciding whether to pursue proceedings in this context. Further, in light of the comments above about the nature of the contraventions which are best suited to compliance notices (e.g. small underpayments, termination entitlements), it seems that it would be appropriate in some circumstances for the FWO to pursue civil remedy proceedings for the employer's failure to comply with a compliance notice, while at the same time, pursuing the original contraventions by way of small claims proceedings. That said, this option does not appear to be available under the current Guidance Note.

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<sup>242</sup> Interview with FWIE.

<sup>243</sup> Interview with FWLB.

<sup>244</sup> The Guidance Note states that: 'A reasonable excuse could include a physical or practical difficulty in complying with the Compliance Notice such as being unable to find the person to whom payments are to be made or the payment being delayed because, for example, the employee's banking details were incorrect or the employee's account had closed. The recipient of the Compliance Notice bears the burden of proving that the person had a reasonable excuse for failing to comply with the Compliance Notice.' See Fair Work Ombudsman, *Guidance Note 3 – Compliance Notices*, 8.

<sup>245</sup> The maximum penalty for failure to comply with a compliance notice is \$16,500 for a body corporate and \$3,300 for an individual, as compared to \$33,000 and \$6,600 respectively for a contravention of an entitlement provision.

Finally, it should be noted that while the Guidance Note expressly reserves the right of the FWO ‘to publish information about Compliance Notices it has issued, including identifying employers who have been the subject of such notices and the nature of the contraventions involved’,<sup>246</sup> no such information has been made publicly available so far. This stands in stark contrast to the level of transparency associated with litigation, enforceable undertakings and the FWO more generally. This lack of publicity is potentially significant given that many employers do not seem to appreciate the increased significance of compliance notices and are therefore unaware of the ‘enforcement game’ that they are meant to be playing.

### *Summary of Compliance Notices*

Given that the equivalent of the compliance notice appears to be a valuable tool in OHS enforcement, there is potential for the FWO to make greater use of compliance notices in its enforcement activities. Perhaps because of the limitations outlined above, some of our interviewees suggested that the agency should focus the use of compliance notices in specific circumstances where the sanction may be most appropriate. One of the FWO lawyers believed that compliance notices were best suited to particular types of contraventions, smaller underpayments and small to medium businesses.<sup>247</sup> Another lawyer suggested that compliance notices could be used strategically to build pressure on head franchisors to take steps to encourage or require greater workplace relations compliance in the relevant network or industry. In particular, the FWO lawyer observed that compliance notices were useful in the franchise context insofar that you can: ‘just tell the franchisor we either go around issuing a whole heap of compliance notices against the individual franchisees, or you cooperate and coordinate it, and make sure there’s compliance’.<sup>248</sup> It is perhaps in these contexts that compliance notices have a significant role to play in the future.

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<sup>246</sup> Fair Work Ombudsman, *Guidance Note 3 – Compliance Notices*, 10.

<sup>247</sup> Interview with FWLD.

<sup>248</sup> Interview with FWLI.

## 6.5 Penalty Infringement Notices

The Penalty Infringement Notice (or PIN) is an administrative sanction or ‘on the spot fine’ which provides FW Inspectors with an alternative to civil litigation in relation to particular instances of non-compliance. It has precedents in OHS regulation, where PINs are intended ‘to highlight that the breach is serious enough to warrant a fine while avoiding court action’.<sup>249</sup> Unlike a compliance notice, it does not necessarily require any action to be taken to rectify the breach which gave rise to the PIN. Presently, the FW Regulations provide that PINs may be issued only in relation to breaches of the employee record and pay slip provisions, and the associated regulations.<sup>250</sup> Similar to OHS regulation, PINs imposed under the FW Act attract a lesser penalty than that which applies when breaches are proven through civil litigation, equal to one-tenth of the maximum penalty.<sup>251</sup> While the amount of the penalty is prescribed by legislation, FW Inspectors retain discretion whether to initially impose or later withdraw the penalty (in circumstances where the facts on which the breach is based are incorrect).<sup>252</sup>

Once a PIN has been paid, this does not result in any admission of fault, and a person’s liability is discharged.<sup>253</sup> While the regulations dealing with PINs are fairly prescriptive, there is some statutory uncertainty regarding the consequences (if any) for failing to comply with the PIN. It seems that there is no additional or increased liability attached to such a failure – this potentially reflects the fact that a PIN is issued only in relation to alleged and not proven contraventions. Rather, in circumstances where the person has not paid the PIN within the statutory timeframe, the FW Inspector must make a decision about

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<sup>249</sup> Australian Government, *National Review into Model Occupational Health and Safety Laws: Second Report* (January 2009).

321.

<sup>250</sup> *FW Act* ss 535-536. See also *Fair Work Regulations 2009* (Cth) reg 4.03 (*FW Regulations*). In particular, infringement notices may be issued for: failing to make or keep time and wage type records; failing to comply with the contents requirements for records; failing to issue pay slips within one working day of paying an amount; and failing to comply with the contents requirements for pay slips.

<sup>251</sup> *FW Act* s 558.

<sup>252</sup> *FW Regulations* reg 4.02. Currently, the penalty amounts are \$330 per contravention for an individual and \$1,650 per contravention for a corporation.

<sup>253</sup> *FW Regulations* reg 4.09. This is also the case with PINs in most Australian OHS jurisdictions: *OHS Review, Second Report*, above n 251, 321.

whether to withdraw the PIN, continue with the investigation and possibly impose an alternative sanction.

### *An Overview of the FWO's Use of PINs*

The FWO does not have a separate guidance note on the use of PINs. Rather, the circumstances in which PINs may be issued, withdrawn and reviewed are set out in general terms in a 'fact sheet' available on the FWO website.<sup>254</sup> In particular, the PIN fact sheet states:

In general, the Fair Work Inspector may decide not to issue an infringement notice if it is the first time the employer has contravened record-keeping and pay slip obligations, or if the issue is minor in nature.

Instead, they may seek to resolve the matter with the employer and / or give the employer a contravention letter (a formal warning). An example of a minor matter is an employer's failure to record the full name of an employee when the identity of the employee is not in dispute. Seeking to resolve the matter with the employer provides a chance to fix any problems, and the Fair Work Inspector will often revisit the employer to ensure the issue has been resolved.

However, if the Fair Work Inspector finds the contravention is wilful, repetitive, or a way to avoid paying employees what they are owed, an infringement notice may be issued or they may recommend the matter be taken to court. This is regardless of whether it is a first time contravention.<sup>255</sup>

As with compliance notices, there is no publicly available data on the number of PINs that have been issued by the FWO or its predecessors. Data provided to us by FWO suggests that apart from 2008-2009, PINs have been used somewhat sparingly.

<b>Number of PINs Issued/Withdrawn</b>							
<b>ACTION TAKEN</b>	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12	TOTAL
PINs Issued	0	33	86	12	13	18	162
PINs Withdrawn	0	0	1	0	3	3	7
<b>PINs Total</b>	0	33	85	12	10	15	155

<sup>254</sup> There is also limited information regarding PINs set out in Fair Work Ombudsman, *Guidance Note 8 – Investigative Process*, 1 December 2011.

<sup>255</sup> Fair Work Ombudsman, *Fact Sheet - Infringement Notices*, 16 December 2011.

In conducting interviews with the FWO staff we were generally informed that PINs were being issued rarely, if at all, by the inspectorate.<sup>256</sup> This is confirmed by figures in the FWO's Annual Report 2011-2012. The report indicates that revenue from PINs in 2010-2011 amounted to \$2,640.00, increasing to \$12,710.00 in 2011-2012.<sup>257</sup> By way of comparison, a Productivity Commission study of OHS inspectorates in 2009 found that the number of infringement notices issued by the OHS inspectorates in NSW and Queensland, while relatively low compared to improvement notices, was up to 6 times the number of prosecutions undertaken.<sup>258</sup> On the other hand, the Victorian OHS inspectorate issued no infringement notices.

Nevertheless, it appears from our interviews that the influence of PINs may be greater than these numbers suggest. It is interesting that in relation to a sanction which, in theory, is meant to be a mechanical application of the law with little or no regard to the 'mental element', it appears that in exercising discretion as to whether or not to issue a PIN in any given instance, the FWO would directly consider the compliance attitude of the alleged wrongdoer. In this respect, one Inspector confirmed that PINs could sometimes be issued in order to gain leverage with an employer which was resisting compliance. She explained:

With the situation of PINs, it's often a case of matters where we've gotten really frustrated with an employer and their non cooperation and it's "what else can we do to make people understand and get them to listen to us?" It may really be that the bigger issues we're dealing with...are not actually about record keeping or issuing payslips, but that's something we can do something with. We can issue a PIN on that, so that's when we would probably look at that. There would often be other motivations than just the contraventions around it.<sup>259</sup>

Indeed, it seems it was not uncommon for the FWO to use PINs as part of a broader strategy to achieve compliance in matters where the employer was either intentionally or

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<sup>256</sup> See, eg, Interview with FWMJ, Interview with FWIP and Interview with FWIJ.

<sup>257</sup> Fair Work Ombudsman, *Annual Report 2011-2012* (2012).

<sup>258</sup> Productivity Commission, above n 226, 122. NSW issued 686 infringement notices in 2009, compared to 108 prosecutions. Queensland issued 471 infringement notices, compared to 141 prosecutions.

<sup>259</sup> Interview with FWIT.

reckless to underpaying its employees. One Inspector said that in these cases, issuing PINs 'should almost be par for the course' given that without records, Inspectors cannot make a determination and therefore cannot aid in resolving the matter. He noted that, in most cases, the FWO preferred rectification of the underpayment than payment of a PIN. To change the compliance calculus of a resistant employer, the Inspector could point out to the employer that if there was a \$3000 underpayment in dispute, they could either resolve the matter in mediation or the FWO could issue \$3000 worth of PINs for failure to comply with the record-keeping requirements. If the employer decides not to rectify the amount, he or she risks not only being faced with multiple PINs, but potentially an order of the court. Conversely, at other times, if the employer agrees to rectify the underpayment, even after the PINs have been issued, the PINs would later be withdrawn in acknowledgement of the employer's action. On the other hand, this Inspector noted that if the employment records were simply not kept or not correct because the employer was genuinely unaware of this requirement, then PINs may not be appropriate.<sup>260</sup>

Nevertheless, the number of PINs issued seems to be quite low. The FW Inspectors we interviewed identified various limitations to the use of PINs which may explain this. One interviewee told us that, in contrast to the above examples, if the nature of the contraventions meant that civil remedy litigation was being considered, then the FWO managers generally preferred to avoid issuing a PIN, even where there might have been grounds for doing so. According to this Inspector:

If it's going to go down the litigation line then they're probably trying to keep the lines of communication open as much as possible whereas a PIN can...have the potential to shut someone down and shut them off from you.<sup>261</sup>

That said, another Inspector observed that she had a matter that was originally flagged as appropriate for litigation. However, the age of the matter meant that it was not ultimately approved for litigation. In this instance, it was determined to issue a PIN instead to provide

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<sup>260</sup> Based on comments in participant observation.

<sup>261</sup> , Interview with FWIB.

at least some sanction to the employer who was a repeat offender who failed to respond to FWO offers to cooperate.

One of the most significant limitations identified by FW Inspectors in relation to PINs was the circumstances in which they can be issued. For example, while PINs may be issued for a failure to comply with the record-keeping requirements, they cannot be issued in circumstances where a person has failed to comply or respond to a Notice to Produce which requests the provision of employment records.<sup>262</sup> In these circumstances, while the FW Inspector may suspect that no such records exist, are falsified or are otherwise deficient, this is rarely enough to form a reasonable belief that record-keeping requirements have been contravened and validly issue a PIN.

The problem of how to properly respond to non-compliance with a Notice to Produce is further exacerbated by a Federal Magistrates Court (now Federal Circuit Court) decision which appeared to underplay the significance of this breach.<sup>263</sup> This decision is perhaps more surprising given that failure to comply with a Notice to Produce was previously a criminal offence under the *Workplace Relations Act 1996* (Cth) and therefore treated as arguably more serious than other civil remedy contraventions.<sup>264</sup> In this respect, one particular Inspector reflected:

because the PINs are quite limiting in what they're in relation to – it's only in relation to record keeping – ...people don't necessarily see it as an option in a first instance, that we're more concerned generally about recovering monies or something like that, that records often don't come into the picture, which is really weird because that's what we rely upon to make determinations.<sup>265</sup>

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<sup>262</sup> This power was available under the previous legislation. See *Workplace Relations Regulations 2006* (Cth) regs 19.18, 19.19 and 19.46. A number of Inspectors commented that this previous power was, in some ways, more effective than the PINs that are available under the *FW Act*. For example, one Inspector observed: 'I think that would be a much stronger option than what we've got now, which is we might litigate if you don't give us the records. I think it would be much more effective to turn up and be able to say, you didn't give us the records when we asked you to, therefore you've got this fine to pay'. Interview with FWIJ.

<sup>263</sup> See *Fair Work Ombudsman v Ballina Island Resort & Anor* [2010] FMCA 500.

<sup>264</sup> See *Workplace Relations Act 1996* (Cth) s 819.

<sup>265</sup> Interview with FWIC.

Further, one FW Inspector thought that there should be a wider range of contraventions in respect of which PINs could be issued. He stated:

You're only allowed to use [PINs] for time and wage breaches; I think that's a joke. Like, someone fails to give a Fair Work information statement, you can't use a PIN; you have to prosecute them. That's ludicrous...You don't want to throw them around like confetti, because when you consider that it could be up to \$1,500 for a PIN, you know that's an enormous fine, it's an enormous stick to use, and you can use this very wisely to get good compliance, especially in relation to time and wage records, but other smaller issues that you wouldn't waste your time with if you have to litigate the matter.<sup>266</sup>

Another limitation discussed by a number of FW Inspectors was that the approval process associated with PINs served to discourage more widespread use. While the provisions imply that it is the FW Inspector who must form a reasonable belief as to whether a relevant contravention has occurred and whether a PIN is appropriate in the circumstances, this does not necessarily reflect the decision-making reality. While a FW Inspector or their team leader may make a recommendation to issue a PIN, it generally cannot be issued without prior approval from the Assistant Director and often the State Director. Further, there is evidence to suggest that PINs have at times not necessarily been supported by management.<sup>267</sup>

Other interviewees suggested that while there may have been an impression among Inspectors that PINs were overly bureaucratic, this was mistaken. Indeed, one manager put the lack of PINs down to the fact that some Inspectors found it 'culturally difficult' to issue a PIN. In his opinion, some Inspectors may not have liked issuing PINs given that this changed the nature of their role from acting as a 'conduit between employees and employers who are trying to solve a dispute' to more of an 'enforcer'.<sup>268</sup>

On the other hand, at least one FWO manager has defended the decision-making process relating to PINs on the following grounds:

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<sup>266</sup> Interview with EXA.

<sup>267</sup> Interview with FWIM.

<sup>268</sup> Interview with FWMB.

it is a bit of a convoluted process because a PIN can be challenged and they're only new so we've got to make sure that when they're issued for the right thing that there is consistency in there and there's a process they have to go through before they actually issue them. So they're right, it's convoluted but we've got to make sure the methodology is right before we issue them.<sup>269</sup>

Some have argued the low amounts levied by PINs do not necessarily reflect the gravity of the offence, particularly when they are issued against larger, well-resourced companies. While record-keeping and payslip contraventions are generally characterised as 'trivial' or 'technical' by the FWO, the problem is that without this information, employees are often left in the dark and investigations often come to a grinding halt. For example, without proper pay slips employees may not be able to determine whether they have been paid in accordance with the relevant legal obligations, which may discourage them from making a complaint. Further, without detailed time and wage records, it is difficult for the FWO to obtain sufficient evidence to support civil remedy litigation or form a reasonable belief that a contravention has occurred (and enter into an enforceable undertaking or issue a compliance notice). The resulting effect may be that the less the employer does in terms of complying with the provisions of the FW Act and FW Regulations, the less likely a sanction will be imposed, which may potentially undermine the entire enforcement regime.

### *Summary of Penalty Infringement Notices*

Like compliance notices, PINs appeared to be an under-utilised enforcement tool at the FWO. It appears that the agency needs to provide more incentives to FW Inspectors to make more use of PINs. This might be achieved through streamlining the approval process, or by otherwise promoting and encouraging the use of PINs by staff.

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<sup>269</sup> Interview with FWMJ.

## 6.6 Prevention and Voluntary Resolution Techniques

The main focus of our research has been in relation to the FWO's use of enforcement sanctions, and ultimately the potential effects of these interventions in achieving general deterrence. However, it is also important to give brief consideration to initiatives at the base of the enforcement pyramid, which in many ways constituted the bulk of the regulator's enforcement activities, at least in a qualitative sense. In Chapter 5, we observed that the FWO placed a strong emphasis on prevention and voluntary rectification of non-compliance through the agency's multi-faceted education program. At one level, this operated through provision of information via the agency's website and social media tools, and beyond this through the agency's telephone advice services. We also discussed the focus on education under the agency's targeted campaign initiatives. In addition to these strategies, in this section we discuss some of the more formal administrative processes that the agency utilised once it received a complaint, or otherwise identified a contravention, that along with education, form the base of the enforcement pyramid. First, we discuss the use of alternative dispute resolution mechanisms, particularly mediation, in addressing alleged contraventions; and second, the use of contravention letters and letters of caution.

### *AVR and Mediation*

From 2009, the federal agency increased its emphasis on dispute resolution mechanisms as an approach to achieving voluntary resolution of alleged breach of minimum employment standards. In Chapter 5, we noted that the agency used 'assisted voluntary resolution' (AVR) as a way of resolving complaints and reducing the number of complaint investigations. The agency also offered mediation in relation to selected complaints, often after a complaint investigation was initiated. However, in March 2012, the FWO moved to formalise and extend the use of mediation as one of its enforcement options through the establishment of a one year Mediation Pilot Program (MPP). The Fair Work Ombudsman observed that the objective behind both AVR and the MPP was 'to ensure that in most cases the duty-holder is made aware of the complaint, so they can themselves, enquire into and correct any problem that might exist. Our objective is to have this done without the need

for the matter to be dealt with by a FW Inspector.<sup>270</sup> The FWO reports that in the 2011-2012 financial year, over one-third of all underpayment complaints were resolved through these systematised voluntary compliance mechanisms.<sup>271</sup> For example, the FWO says that 34% of all complaints (9,754) were resolved by the AVR process in 2011-2012, which it says was an increase of 19% on the previous financial year.<sup>272</sup>

The MPP involved the establishment of a specialist team of accredited mediators within the organisation who were offered to employers and employees to assist them in reaching 'a mutual agreement about how to resolve their disagreement on their own terms'.<sup>273</sup> According to the agency, mediation is 'a voluntary and confidential process, which usually involves a telephone meeting between the complainant, the party complained against and a mediator from the Fair Work Ombudsman.'<sup>274</sup> The offer of mediation is at the discretion of the FWO. It can be used at any stage of the complaint process, whether before an investigation is commenced, or during an investigation. The FWO reported that '[w]ith the exception of deliberate and systemic noncompliance, most matters are suitable for referral to mediation'.<sup>275</sup>

In its 2011-2012 Annual Report, the FWO stated that 608 matters were scheduled for mediation during the financial year. Of these, 83% were listed as 'settled', with the remaining 108 matters 'not settled'. We understand that settlement in this context does not necessarily entail full rectification of an alleged contravention, given that there was no full or proper assessment of whether any contraventions occurred and the potential underpayment that may have arisen as a consequence. Rather, it is quite possible that settlement may mean that the employee accepted something less than full rectification (if the claim had proceeded to full investigation).

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<sup>270</sup> Fair Work Ombudsman, *Annual Report 2011-2012* (2012) 5.

<sup>271</sup> *Ibid.*

<sup>272</sup> *Ibid* 34.

<sup>273</sup> *Ibid* 35.

<sup>274</sup> *Ibid.*

<sup>275</sup> *Ibid* 77.

### *Contravention Letters and Letters of Caution*

At the conclusion of an investigation which uncovered contraventions of the FW Act, a FW Inspector would normally notify the relevant parties of this outcome. The Inspector has the option of issuing a formal 'Contravention Letter', which informs the employer of the alleged contravention and the reasons behind this determination, and requiring the employer to take action to rectify the contravention within a period of 14 days.<sup>276</sup> The Notice will normally require the employer to inform the inspector of any action taken to comply with the Notice. The FWO's Investigations Policy notes that where an employer complies with the contravention letter, 'the matter is considered to be resolved by voluntary compliance'. This will not preclude the FWO from taking further enforcement action against the employer, although the FWO will take into account the employer's actions in deciding whether or not to take further steps.<sup>277</sup>

Alternatively, the FWO may decide that further action is not deemed necessary, but that the employer should be sent a 'letter of caution' which outlines the nature of the alleged contravention, and indicates the possible consequences if there is a further contravention. This has commonly been used in instances where employees have been misclassified as independent contractors rather than as employees, but there is not sufficient intention or knowledge to bring the matter within the scope of the 'sham contracting' provisions. In this instance, a letter of caution is used to effectively put the employer on notice so that if further claims of this nature arise in the future, the FWO will have stronger grounds on which to pursue an allegation of sham contracting.

We do not have access to any data concerning the number of contravention letters or letters of caution that were issued. However, our interviews suggested that contravention letters were frequently used by FW Inspectors where contraventions were detected and formal notification of the employer was thought to assist in achieving voluntary rectification of the contravention.

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<sup>276</sup> The Fair Work Regulations provide that a FW Inspector has the power to issue such a letter: *FW Regulations* reg 5.05. See also Fair Work Ombudsman, *Guidance Note 8: FWO Investigative Process*, cl 5.3(d).

<sup>277</sup> Fair Work Ombudsman, *Guidance Note 8: FWO Investigative Process*, cl 5.3(d).

### *Summary of Prevention and Voluntary Resolution Techniques*

The achievement of voluntary resolution through education, the provision of information, and 'softer', cooperative and/or persuasive enforcement approaches is an important element of any regulatory regime, given limited resources and the different compliance motivations of employers. However, caution must be exercised lest too much emphasis is placed on voluntary mechanisms at the expense of more formal sanctions higher up the enforcement pyramid.

This caution is advised for a number of reasons. A reputation for voluntary or persuasive compliance can undermine the general deterrence value of the agency's other activities. It was this sort of reputation that the federal arbitration inspectorate had achieved in the decade prior to 2006, a reputation which, as we noted in Chapter 3, the FWO's predecessors were determined to change.

Moreover, voluntary compliance measures such as the use of mediation and AVR tend to obscure from public view the resolution of contraventions, as has been noted in other jurisdictions.<sup>278</sup> In addition, mediation necessarily gives greater involvement to employees in the resolution of their own complaint, similar to the referral of some matters to small claims that was discussed earlier in this chapter. While this may be an appropriate way to resolve matters in circumstances where resources are limited, it is important that the workers affected by these contraventions are equipped to handle this level of involvement. As noted in Chapter Five, there is a need to ensure that any assessment of whether a worker is 'vulnerable' should be comprehensive and identified as early as possible after the complaint is lodged. In addition, to address the lack of transparency in relation to these resolution mechanisms, it would be helpful if there was more detailed disclosure of the outcomes of these matters.

Finally, it is noted that further research is needed to explore the implications of the FWO's increasing use of mediation in the resolution of contraventions, given that it is relatively

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<sup>278</sup> Leah Vosko, 'Rights Without Remedies: Enforcing Employment Standards in Ontario by Maximising Voice Among Workers in Precarious Jobs' (Paper presented at 'Voices at Work' Workshop, Canada, May 2012).

early in the FWO's expansion of this approach.

## 6.7 Media and Communication

Governments frequently use education and informational strategies, or communication, to shape or steer behaviour by those they seek to regulate, whether individuals, businesses or other organisations.<sup>279</sup> Yeung has observed that a key goal of public communication activities is 'providing information and explanations to the public, thereby enabling them to make more informed choices concerning their behaviour'.<sup>280</sup> The strategies employed in the use of communication as a regulatory strategy vary, and may include distribution of information to regulated actors in order to bring about the desired change of behaviour, for example through advertising campaigns, or provision of technical assistance and dissemination of research findings.

The FW Act empowers the FWO to *promote* compliance with the FW Act and instruments made under that Act 'including by providing education, assistance and advice to employees, employers... and organisations and producing best practice guides to workplace relations or workplace practices' (s 682(1)(a) FW Act). In Chapter 5, we observed that the FWO has been active in using education strategies and targeted campaigns to promote compliance with the Act. This was in addition to the assistance and advice it provided to employers and employees since the FWO assumed these responsibilities from the Workplace Authority in 2009.

However, although not strictly falling within the concept of the enforcement pyramid, from 2006 to 2012, the federal agency was particularly effective and innovative in using public communication as part of its overall strategy in the enforcement of minimum employment standards. It used the media to disseminate information about its enforcement activities to the public, particularly the use of sanctions, in order to maximise the deterrence impact of

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<sup>279</sup> Bronwen Morgan and Karen Yeung, *Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 96; for consideration in the context of the UK, see Karen Yeung, 'Government by Publicity Management: Sunlight or Spin?' [2005] *Public Law* 360; in relation to the US, see Weiss, Janet A 'Public Information' in Lester M Salomon (ed) *The Tools of Government: A Guide to the New Governance* (Oxford University Press, 2002).

<sup>280</sup> Karen Yeung, 'Government by Publicity Management: Sunlight or Spin?', above n 281, 372.

its actions. Indeed, the FWO was so successful at harnessing the media to its advantage that other regulators are seeking to emulate the FWO's approach in this respect.<sup>281</sup>

### *An Overview of the FWO's Use of Media*

In general, the FWO would issue a media release in relation to most major activities, such as: the launch of a targeted campaign; the release of a campaign report and a summary of the key findings; the commencement of litigation; the determination of court proceedings; and the finalisation of an enforceable undertaking. That said, by the end of the study period, there was no media generally associated with matters heard in the small claims jurisdiction, the issue of compliance notices or the issue of penalty infringement notices.

It is clear that the FWO had little hesitation in using the media to enhance the deterrence effects of interventions. The Litigation Policy expressly acknowledges that publishing information about the nature and outcome of its enforcement activities 'is a valuable tool for educating workplace participants and deterring non-compliance'.<sup>282</sup> The role of media in aiding general deterrence was widely acknowledged by staff within the FWO. A similar sentiment was expressed by another manager within the FWO who stated:

I firmly believe that by publicising our prosecutions we're getting the message out that there is a price to pay if you do the wrong thing. I think evidence of the impact that we've started to have is the increase in commentary by Industrial Relations Advisors. We're now seeing regularly columns being published by IR consultants to say what to do if the Fair Work Ombudsman knocks on your front door. I think IR consultants are out there touting for business and trying to get clients, to advise them about their responsibilities, on the back of our publicity about what can go wrong for them.<sup>283</sup>

In terms of who was 'named and shamed' when the agency publicised legal proceedings, it appears that the FWO made no distinction between whether the litigation related to corporations or individuals. If the party was named in the statement of claim, then they were generally named in any associated media releases. On the other hand, the FWO did

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<sup>281</sup> Interview with EXB and Interview with EXC.

<sup>282</sup> FWO Litigation Policy, above n 13, 20.

<sup>283</sup> Interview with FWMG . Similar comments were made in Interview with EXE.

make an effort to avoid naming the complainants given that this could potentially have compromised their willingness to be involved in the case.<sup>284</sup>

Media was also seen to play a critical role in educating the broader community. One FWO lawyer said that while it was not the case that a matter would be pursued by the FWO simply because it had capacity for greater media exposure, in weighing up whether litigation in a particular matter was in the public interest, there was an interrelationship between litigation, education and media. He explained:

our media function plays an integral role in getting that educative message across, so if we can identify matters that are going to succeed in achieving our educative function, then that's also going to have a direct link to the media coverage it gets.<sup>285</sup>

Publishing this information can also add to the organisation's 'image of invincibility'<sup>286</sup> thereby encouraging greater co-operative and voluntary compliance.

However, there is a risk that publicity of enforcement proceedings, particularly prior to judgment, can effectively penalise 'companies before they have been found guilty and before a penalty has been imposed'.<sup>287</sup> The FWO has been criticised for its use of media in relation to litigation and whether issuing media releases at the commencement of or during civil remedy litigation upholds the model litigant obligations to which it subscribes.<sup>288</sup> Some have argued that it is not appropriate for employers to suffer adverse publicity and the resultant loss of business before contraventions have been determined by a court. One external workplace relations lawyer we interviewed observed that:

it can be quite difficult to run these cases. I must say I think that the pre-litigation press release in light of that is completely inappropriate, because generally the case /they make at first instance is not the case they run at trial. Generally I think there's

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<sup>284</sup> Based on comments in Interview with FWMG.

<sup>285</sup> Interview with FWLC.

<sup>286</sup> Ayres and Braithwaite, above n 120, 44-7.

<sup>287</sup> Australian Corporate Lawyers Association, *Consultation*, Melbourne, 26 February 2001, cited in Australian Law Reform Commission, 'Principled Regulation: Federal Civil and Administrative Penalties' (Report No 95, Australian Law Reform Commission, March 2003), 260.

<sup>288</sup> Eric Abetz, Senate Estimates, Supplementary Budget Estimates Hearing, 20 October 2010. See also the comments of Lucev FM regarding the FWO's use of media in *Crosthwaite v National Jet Systems Pty Ltd (No 5)* [2011] FMCA 136.

quite a road that should be travelled first, and I think that there is definitely a question of guilty by suspicion.<sup>289</sup>

The FWO and its officers have defended their approach of issuing media releases on public interest grounds and have argued that such an approach is consistent with the model litigant standards.<sup>290</sup> Further, they have made it clear that the media releases were carefully worded to ensure that '[n]othing in our public statements about [litigious] matter[s] hold out that we have determined that there has been a contravention. We make it very clear that we are prosecuting allegations...based on certain facts that we have identified throughout an investigation'.<sup>291</sup> A separate criticism is that the FWO did not put as much effort into publicising their losses as they did in publicising their wins.<sup>292</sup> We have made no assessment of whether such an allegation is accurate, but note that it is arguably not consistent with the FWO's general position to be as transparent and fair as possible.

Indeed, whether in response to these criticisms or in aid of the changing focus of the FWO, it is clear that in the past two years of the study period, the media message softened somewhat. This appeared to be a deliberate decision in line with the shift in the dominant compliance and enforcement strategy. As one manager observed:

our message has probably changed in the media...it used to be purely compliance, it used to really be look at this bad employer, look at what they've done, because of this they've been prosecuted, and there's a fine of \$30,000 been handed down. It's more now look at this employer; it is unfortunate how they've got it wrong. They've had to pay \$30,000. We've had to prosecute; they've had to pay \$30,000 in fines. If only they'd come to us in the first place we could have helped them get it right. Which I think is a message that makes commonsense anyway.<sup>293</sup>

On the other hand, the then Fair Work Ombudsman himself flagged the possibility of the agency using its own website to provide easily accessible information to the public about employers that had been non-compliant with minimum employment standards, whether

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<sup>289</sup> Interview with EXLE.

<sup>290</sup> Nicholas Wilson, Senate Estimates, Supplementary Budget Estimates Hearing, 20 October 2010.

<sup>291</sup> Michael Campbell, Senate Estimates, Supplementary Budget Estimates Hearing, 20 October 2010.

<sup>292</sup> Based on comments in Interview with EXE.

<sup>293</sup> Interview with FWME.

that had been established through voluntary compliance, litigation or other sanctions.<sup>294</sup> If pursued, this would extend the ‘name and shame’ approach that the agency had used to some effect between 2006 and 2012.

### *Summary of Media and Communication*

In summary, it is apparent that the agency’s use of the media to promote its enforcement activities has been an important aspect of the agency’s overall compliance strategy. The general deterrence effects of the federal agency’s enforcement activities can only be enhanced by wider public communication through the media.

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<sup>294</sup> Nicholas Wilson (Speech delivered to the ALERA National Conference, Fremantle 2011).

## 6.8 Conclusion

The aim of this chapter was to explain and assess the FWO's use of the range of enforcement tools and approaches at its disposal over the period 2006-2012. In discussing and critiquing the patterns of enforcement followed by the FWO, we drew on a combination of data, including interviews with FWO staff verified through participant observation and review of FWO documentation, data provided by the FWO, and data obtained through publicly available sources. Most of the data we have reviewed on patterns of enforcement related to the approaches at the higher end of the enforcement pyramid – namely civil remedy litigation and enforceable undertakings. However, we have been able to draw some conclusions concerning the prevalence of other approaches through our interviews and other data sources.

The discussion in this chapter establishes that there was a significant transformation in enforcement activity in the federal system of employment standards regulation since Work Choices in 2006 to 2012. In particular, we have shown that not only did the extent of litigation against non-compliant employers increase substantially during the study period, but the federal agency made innovations in terms of who it pursued through reliance on the accessorial liability provisions in the FW Act to litigate against company directors and, in one case, a human resources manager.

The FWO was also innovative in its use of intermediate, administrative sanctions which drew on a cooperative approach to enforcement, such as enforceable undertakings and compliance deeds, particularly in relation to breaches by larger enterprises.

The FWO was also active at the base of the enforcement pyramid, through its education and targeted campaign initiatives, and also through the frequent use of warnings in the form of contravention letters as part of the investigation process. In addition, between 2010-2012, the FWO increased its use of AVR and mediation, both as a form of triage to reduce the extent of resources used by complaint investigation, but also to expand the agency's focus on dispute resolution as an enforcement mechanism. We raised a number of concerns

about this trend, particularly when the agency's referral of matters to small claims is taken into account. The agency should be conscious of these concerns as it moves forward in this space.

Many aspects of the FWO's approach to enforcement of minimum employment standards were consistent with the examples of good practice which we outlined in Chapter 2. Certainly the FWO employed a mix of enforcement tools. It endeavoured to be strategic, both in its investigation activities, but also in its choice of matters for litigation. However, in relation to the latter, it is only relatively recently that the FWO began to explore the potential for litigation against non-employer entities with the capacity to influence employer compliance, in reliance on the accessorial liability provisions.

Nevertheless, although the agency's enforcement practice was consistent with some aspects of the enforcement pyramid, in particular the higher and lower ends of the pyramid, the under-utilisation of compliance notices and PINs over the study period suggests that the agency was yet to achieve an approach which was consistent with this aspect of the responsive regulation model. As noted in the introduction of the chapter, this is only a broad assessment of the FWO's enforcement approach based on the data available.

The findings presented in this chapter, although preliminary, and not purporting to be a full assessment of the FWO's enforcement approach during the study period, will nevertheless be useful in relation to further research into the compliance effects of the FWO's enforcement activities.

## POSTSCRIPT: CHANGE AND THE FAIR WORK OMBUDSMAN

As noted in the introduction to this Report, resourcing of the federal enforcement agency has declined significantly over the past year or so. The FWO's primary response to these funding constraints has been to become more strategic and sophisticated in its detection approach, dispute resolution methods and enforcement activities. These changes which have been introduced, along with a major internal restructure, all underline the agency's commitment to continual improvement and change. Some of these changes have addressed recommendations set out in this report.

From early 2013, the FWO announced its intention to move away from the traditional compliance and enforcement model of its predecessors – which generally involved undertaking a detailed investigation of every workplace complaint that was lodged with the agency. In its place, the FWO has sought to implement a 'strategic enforcement' model based largely on the work of David Weil. Some of the key drivers behind the FWO's new compliance and enforcement strategy have been outlined as follows:

This strategic approach seeks to resolve matters at a workplace level between the parties. In turn, the FWO is able to focus our efforts where they are most needed...Our experience under [the traditional enforcement] model was that the vast majority of employers sought to do the right thing, and that matters were resolved more often than not, through assistance and education rather than through the use of statutory powers and a detailed linear investigation. This same experience tells us that each case is not the same and they do not all require the same deployment of resources, or use of statutory powers, to achieve a quality outcome.<sup>295</sup>

The FWO's revised regulatory strategy has resulted in a number of significant changes in the way that compliance is promoted and contraventions are detected. It has also transformed the method by which employee complaints are processed and resolved by the agency.<sup>296</sup>

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<sup>295</sup> Michael Campbell, 'The FWO's Approach to Compliance and Enforcement' (Speech delivered to the Ai Group National PIR Group Conference, 6 May 2013) 2-3.

<sup>296</sup> For completeness, it is noted that the FWO also has jurisdiction to receive complaints from a range of people, including employers. Employer complaints may be received in relation to an alleged breach of provisions relating to freedom of

In particular, in addition to continuing to expand and refine educational programs and self-help mechanisms, including best practice guides, fact sheets and pay checking tools, the FWO has placed a renewed emphasis on proactive detection measures. For example, by 2016, the FWO aims to devote 50% of the inspectorate resources towards proactive education and compliance activities.<sup>297</sup> The FWO has also introduced a number of specialist investigative groups on the basis of a belief that it is in their strategic interest to support and develop Inspectors, legal and managerial staff who 'are trained to observe industry patterns, locate specific issues and to engage with the community to enhance strategic compliance efforts'.<sup>298</sup> To this end, the FWO has continued to actively champion the work of the Targeted Campaigns Unit and continued to refine its data collection and analysis. In addition, the FWO has revised its internal structure so that key investigation resources and legal services now fall within four national, subject-based teams which cover misclassification, general protections/industrial action, young workers and overseas workers respectively.<sup>299</sup>

Notwithstanding the agency's renewed focus on proactive models of detection, the majority of the FWO's activities are, at present, still consumed with registering and resolving individual complaints. In this respect, the new dispute resolution model adopted by the FWO is critical. In particular, there has been an overt move towards informal dispute resolution mechanisms and away from detailed, coercive investigation.

This means that in most instances, and as a first step, the FWO encourages the complainant to directly raise the relevant issues of concern with the employer in a bid to try to resolve those issues without the need for external intervention. If this direct method is ineffective or inappropriate, a team of experienced FW Inspectors evaluates the matter using a fixed

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association and/or unlawful industrial action. It is also possible that, in unusual circumstances, the dispute resolution process will apply to a matter which was initially identified as part of an audit undertaken by the FW Inspectors.

<sup>297</sup> Michael Campbell, 'The FWO's Approach to Compliance and Enforcement' (Speech delivered to the Ai Group National PIR Group Conference, 6 May 2013) 14.

<sup>298</sup> Ibid 9.

<sup>299</sup> See Fair Work Ombudsman, 'Organisation Chart' (1 August 2013) *Fair Work Ombudsman* <<http://www.fairwork.gov.au/Documents/FWO-Organisation-Chart-1-August-2013.pdf>>.

set of criteria to determine the level of resources and assistance to devote to resolving the complaint. In particular, the FW Inspector will generally consider the nature of the complaint (i.e. whether it is a 'routine' or 'complex' matter), the characteristics of the complainant (i.e. whether the employee falls within a vulnerable category) and the compliance history of the relevant employer.

In the majority of matters, the complainant will be invited to participate in the 'assisted voluntary resolution' (AVR) process administered by FW Inspectors. The AVR process generally involves a FW Inspector contacting both the employer and the employee separately by telephone in order to work through the issues and discuss potential solutions. The stated objective of the transformed AVR process is to provide a quick and accessible forum so that parties can arrive at a 'mutually acceptable' outcome.

If these options are not suitable or are refused, the matter may be referred straight to the FWO's internal mediation service – which has replaced investigation as the primary platform for complaint resolution. Mediation is conducted over the telephone by an accredited FWO Mediator on an informal, voluntary and confidential basis. Similar to AVR, the mediation process also appears to be principally designed to help employers and employees find 'mutually acceptable' or 'flexible' solutions to workplace issues.<sup>300</sup>

However, if at the initial assessment stage the matter is deemed to be serious and/or 'complex', then voluntary resolution mechanisms may be skipped in favour of a more formal investigation process. Further, where a party refuses to participate in mediation, or the matter fails to settle, the complaint is then likely to be referred to the 'Resolution' team. In this team, senior FW Inspectors conduct a condensed investigation process which may (or may not) lead to rectification of any underpayment and the imposition of administrative sanctions, such as penalty infringement notices (i.e. a fine) or compliance notices (i.e. a formal direction to take certain remedial steps enforceable in court).

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<sup>300</sup> Fair Work Ombudsman 'Mediation' (27 August 2013) *Fair Work Ombudsman*  
<<http://www.fairwork.gov.au/complaints/the-complaints-process/pages/mediation.aspx>>.

As noted above, the 'strategic' approach has also had significant implications for investigation and enforcement practices. In particular, in the 2012/2013 financial year, there has been a stronger focus on utilising administrative sanctions, such as compliance notices and PINs. This new direction has been reflected by a substantial increase in use of these tools in the last financial year.<sup>301</sup> In comparison, the numbers of completed litigation matters have risen only slightly, although there is some evidence to suggest that the matters are generally growing in sophistication and complexity.<sup>302</sup> The acting head of the FWO has stated that the: 'full value of these changes to our regulatory approach is yet to be realised but I am confident that as the FWO moves forwards the benefits will be evident'.<sup>303</sup> The value of this changed enforcement strategy, and those that came before it, is the subject of our ongoing research.

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<sup>301</sup> For example, in the period from 1 July 2012 to 31 March 2013, Fair Work Inspectors had issued 94 PINs (with 13 withdrawn) and 64 compliance notices.

<sup>302</sup> As at 30 June 2013, it appears that there were 42 litigation matters completed – 40 of which were brought against employers (or people involved in contraventions committed by the relevant employer entity). The number of litigation matters commenced is around the same as 2011/2012. See Michael Campbell, 'The FWO's Approach to Compliance and Enforcement' (Speech delivered to the Ai Group National PIR Group Conference, 6 May 2013) 10.

<sup>303</sup> See *ibid* 14.

## APPENDIX 1 USING BROAD ANZSIC CATEGORIES TO IDENTIFY NON-COMPLIANCE

The problem with the use of broad industry categories is illustrated by the data in the Figure below.

This draws on data from the Household Income and Labour Dynamics in Australia Survey (HILDA), produced by the Melbourne Institute at the University of Melbourne. This data can be used to identify those industry categories with relatively high numbers of low paid employees. This can be done by comparing, in relation to any one industry division:

- (1) the percentage of all employees who are in that division with
- (2) the percentage of the total number of low paid employees in Australia who are in that division, where low paid is defined in relation to the Federal Minimum Wage (now the National Minimum Wage).

To take an extreme example, 2.1% of Australian employees work in the mining industry, but mining workers constitute close to 0% of Australians who are paid below the minimum wage. By contrast, those industries with high proportions of low paid workers relative to their overall share of the workforce include accommodation and food services; administrative and support services, agriculture, forestry and fishing; arts and recreation services; other services and the retail trade. These industries cover a large proportion of the Australian workforce, so a closer analysis is required in order to prioritise campaign resources.

## Using broad ANZSIC categories to identify non-compliance in industries

INDUSTRY CATEGORIES (ANZSIC CODES 2006)	Characteristics of employees in income category <80% FMW (defined by main job and adjusted for casual loading) (%) - HILDA 2007/2008	Characteristics of employees in income category 80 - <100% FMW (defined by main job and adjusted for casual loading) (%) - HILDA 2007/2008	Characteristics of employees in income category 100 - <120% FMW (defined by main job and adjusted for casual loading) (%) - HILDA 2007/2008	All Adult Employees (%) - HILDA 2007/2008	# of Employees (excluding OMIES) without Paid Leave Entitlements as % of Total Employees - ABS 2011	Proportion of Trade Union Members in Main Job (excluding OMIES) (%) - ABS 2011
<b>Accommodation and food services</b> (includes: accommodation; and food and beverage services)	13.2	13.6	9.5	4.7	65.70%	5.10%
<b>Administrative and support services</b> (includes: administrative services; and building cleaning, pest control and other support services)	8.6	4.7	3.3	2.7	35.70%	7.50%
<b>Agriculture, forestry and fishing</b> (includes: agriculture; aquaculture; forestry and logging; fishing, hunting and trapping; and agriculture, forestry and fishing support services)	6.2	4.5	3.1	1.6	40.20%	5.20%
<b>Arts and recreation services</b> (includes heritage activities; creative and performing arts activities; sports and recreation activities; and gambling activities)	3.4	2.3	1.5	1.5	40.60%	11.20%
<b>Construction</b> (includes: building construction, heavy and civil engineering construction, construction services and construction nfd)	4.0	5.5	5.0	5.5	23.50%	17.80%
<b>Education and training</b> (includes: preschool and school education; tertiary education; adult, community and other education and education and training nfd)	7.9	6.0	6.7	10.9	18.30%	39.20%

<b>Electricity, gas, water and waste services</b> (includes: electricity supply; gas supply; water supply, sewerage and drainage services; waste collection, treatment and disposal services)	0.6	1.0	0.1	1.0	9.70%	32.80%
<b>Financial and insurance services</b> (includes: finance, insurance and superannuation funds; auxiliary finance and insurance services)	0.0	0.6	2.6	4.7	6.70%	11.70%
<b>Health care and social assistance</b> (includes: hospitals; medical and healthcare services; residential care services; social assistance services)	13.2	11.7	13.6	14.7	17.50%	28.30%
<b>Information, media and communication</b> (includes: publishing; motion picture and sound recording activities; broadcasting; telecommunications services; internet service providers, web search portals and data processing services; library and other information services)	1.2	1.1	1.7	2.9	16.60%	14.70%
<b>Manufacturing</b> (includes a range of manufacturing activities from food product manufacturing to printing to fabricated metal product manufacturing. Refer to ABS data for full list)	8.0	6.3	10.2	10.3	17.10%	20.90%
<b>Mining</b> (includes: coal mining; oil and gas extraction; metal ore mining; non-metallic mineral mining and quarrying; exploration and other mining support services; mining nfd)	0.0	0.0	0.8	2.1	13.00%	20.40%
<b>Other services</b> (includes: repair and maintenance; personal and other services; private households employing staff and undifferentiated goods and service-producing activities of households for own use)	4.7	7.5	3.5	3.0	20.40%	8.50%

<b>Professional, scientific and technical services</b> (includes: professional, scientific and technical services; and computer system design and related services)	5.8	4.3	5.2	7.9	15.40%	3.00%
<b>Public administration and safety</b> (includes: public administration; defence; public order, safety and regulatory services)	2.7	2.7	3.3	7.9	9.20%	35.70%
<b>Rental, hiring and real estate services</b> (includes: rental and hiring services; and property operators and real estate services)	1.4	2.2	1.3	1.3	20.60%	5.50%
<b>Retail trade</b> (includes: motor vehicle and motor vehicle parts retailing; fuel retailing; food retailing; other store-based retailing; non-store retailing and retail commission-based buying and/or selling; retail trade nfd)	13.8	17.6	20.7	9.1	42.00%	13.80%
<b>Transport, postal and warehousing</b> (includes: road transport; rail transport; water transport; air and space transport; other transport; postal and courier pick-up and delivery services; transport support services; warehousing and storage services; transport, postal and warehousing nfd)	4.0	3.4	2.6	4.9	21.90%	33.60%
<b>Wholesale trade</b> (includes: basic material wholesaling; machinery and equipment wholesaling; motor vehicle and motor vehicle parts wholesaling; grocery, liquor and tobacco product wholesaling; and commission-based wholesaling)	1.4	5.3	5.3	3.1	16.50%	6.50%
<b>TOTAL</b>						

## APPENDIX 2

### *Reviewing Litigation Data – Explanation of Methodology*

As part of this report, we reviewed all ‘completed’ litigation matters of the FWO and its predecessors in the period from 1 July 2006 to 30 June 2012. This data has been prepared on the basis of all information that can be either publicly sourced (via FWO website or Austlii) or which has been provided to us by the FWO. That said, in some cases, there is very limited information available (no orders, transcripts or decisions). In these instances, we have relied on the FWO summaries available on the Legal section of the website, albeit this also appears to be incomplete in relation to some financial years.

For the purposes of determining whether a matter is ‘completed’ for the purposes of preparing the data analysis, please note:

- A matter has been counted as ‘completed’ only where a penalty decision has been delivered. In some cases, there are separate decisions relating to the merits and penalty respectively. We have had regard to the merits decisions insofar that they contain details of orders relating to underpayments. Otherwise, key information, such as the date of the decision, has been derived with reference to the penalty decision. This generally reflects FWO practice.
- If a decision was appealed (or currently subject to an appeal), it is only counted as one completed matter when the appeal was delivered. To avoid counting the same matter twice, the penalty amounts and other information have been counted in the year that the appeal was finally determined. For example, the decision in *McAlary-Smith v Australian Ophthalmic Supplies Pty Ltd* (Unreported, VCM, Hawkins M, 19 April 2007) was originally decided in 2006/2007, but was later appealed to the Full Court of the Federal Court and finally determined in 2007/2008. The data relating to this matter would be included in the 2007/2008 financial year, including the relevant penalty amounts that were ultimately ordered (the penalty was reduced on appeal from \$88,000 to \$66,000). While reference is made to the original decision in 2006/2007, limited information is included in the 2006/2007 financial year in order to avoid double-counting of penalty amounts etc. NB: the original decisions that have been appealed, as well as the appeal decisions. This does not necessarily reflect FWO practice.
- Criminal matters initiated by the FWO have been included as a ‘completed matter’ if they were brought on behalf of the FWO. This generally reflects FWO practice.

- Interlocutory matters and any separate costs applications have generally been excluded as ‘completed matters’. This does not necessarily reflect FWO practice.
- If there was one application brought by the FWO (or its predecessors), but it resulted in two separate penalty decisions, we have counted this as two ‘completed’ matters. This generally reflects FWO practice.
- If there were two separate applications brought by the FWO (or its predecessors), but one penalty decision, we have counted this as two ‘completed’ matters. This generally reflects FWO practice.
- If underpayments were rectified at any time before or after proceedings were commenced, these underpayment amounts have been included as being recovered through litigation.
- In some of the earlier years (2006/2007 and 2007/2008), there were a number of contraventions which took place prior to the increase in maximum penalties in August 2004 – which increased the maximum penalty for a body corporate from \$10,000 to \$33,000. This may have affected the size of penalties being awarded in some cases.
- In categorising whether the business was small, medium or large, we have used the following indicators:
  - A small business is characterised as employing less than 15 employees (including regular and systematic casuals etc);
  - A medium-sized business is characterised as employing between 15-100 employees (including regular and systematic casuals etc)
  - A large-sized business is characterised as employing more than 100 employees (including regular and systematic casuals etc).
- In some cases, the number of employees employed by the business was not specified, but the business was described as small, medium or large respectively. In these cases, we have relied on this description and categorised the business accordingly.
- In collating the data relating to contravention type, we analysed the matters as follows:
  - Where a matter involved an underpayment contravention and some other type of substantive contravention (such as agreement-making, adverse action, duress, sham contracting), the matter has been categorised according to this other contravention (i.e. it has not been included in the underpayments data);

- Where a matter involved a mix of different contraventions (e.g. agreement-making, adverse action, duress, sham contracting), the matter has been categorised in the mixed contravention category;
  - Where a matter involved a substantive contravention (e.g. underpayment, agreement-making, adverse action, duress, sham contracting) and a record-keeping/investigation contravention, the matter has been categorised according to the substantive contravention;
  - Where a matter involves contraventions solely relating to record-keeping and/or investigation, it has been categorised as a 'record-keeping/investigation' matter;
  - Adverse action includes discrimination contraventions.
- Where there was any inconsistency between the information available on the FWO website and the information set out in the relevant judgement, the information set out in the judgement has been used.