Reprinted from *International Journal of Comparative Labour Law and Industrial Relations*, Vol 37, Issue 2-3, (2021), 133-160, with permission of Kluwer Law International.

Digging Into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement

Tess HARDY*

In a bid to curb employer non-compliance with wage and hour regulation, policy-makers across many different jurisdictions are seeking to deliver greater doses of deterrence. This trend stems from a series of common assumptions. In particular, it is often assumed that introducing stiffer sanctions, such as criminal penalties for wage theft, will automatically amplify the relevant deterrence effects. This article seeks to unpack these assumptions to better understand: a) how deterrence is conceptualized and understood in the context of wage underpayment; and b) which tools or approaches are likely to be most powerful in enhancing deterrence and promoting compliance. Drawing on recent developments in Australia, the article argues that alternatives to enforcement litigation – such as voluntary agreements or undertakings – may hold critical, albeit under-appreciated, deterrence value. This analysis also reveals that the perceived risk of detection, the speediness of the relevant sanction and the publicity it ultimately generates may all serve to heighten deterrence in ways that encourage and entrench employer compliance with wage and hour laws.

Keywords: Deterrence, Enforcement, Compliance, Employment, Labour, Regulation

1 INTRODUCTION

As the incidence of wage theft skyrockets around the world,[1] conventional enforcement strategies are under pressure. Many jurisdictions that have long relied on private mechanisms of enforcement are expanding the role of the state

* Associate Professor, Melbourne Law School, University of Melbourne, Australia. This research was supported by funding from the Australian Research Council (Discovery Early Career Research Fellow: DE180100279, 'Work in Franchises: Searching for Solutions at the Regulatory Frontier'). The author is grateful for the thoughtful feedback from presenters and participants at the Compliance with and Enforcement of Labour Laws: An International Workshop (Hebrew University of Jerusalem). This article also benefited from the helpful comments of Professor Christine Parker, Professor Guy Davidov and the anonymous reviewer. Thanks also to the excellent research assistance of Louise De Plater. Email: tess.hardy@unimelb.edu.au

1 *See* e.g., Laurie Berg & Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, Research Report (Nov. 2017); Andrea Noack, Leah Vosko & John Grundy, *Measuring Employment Standards Violations, Evasion and Erosion – Using a Telephone Survey*, 70(1) Rel. Industrielles/Indus. Rel. 86 (2015).

Hardy, Tess. 'Digging Into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement'. *International Journal of Comparative Labour Law and Industrial Relations* 37, no. 2&3 (2021): 133–160.

enforcement apparatus.[2] New tools and harsher penalties are being introduced. Notwithstanding these seismic changes, there remains a sense that the enforcement crisis is becoming ever more acute.[3]

Australia is a case in point. Since 2015, there has been a stream of government inquiries and media investigations revealing the severity of the wage theft problem.[4] Mounting concerns led to an overhaul of the enforcement provisions of the *Fair Work Act 2009* (Cth) (FW Act).[5] A central aim of these statutory amendments was 'to effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business'.[6] Among other changes, the amendments raised maximum civil penalties for 'serious contraventions' of prescribed workplace laws to over AUD 500,000, and extended liability to franchisors and holding companies for employment violations committed by subsidiary firms in their respective networks.

Despite these momentous changes, the federal labour inspectorate remains under pressure to 'send a strong message of deterrence to would-be lawbreakers'.[7] In the past two years, a string of public sector organizations and listed companies have been found to have underpaid their direct workforce staggering sums of money.[8] As a result, compliance and enforcement issues remain very much on the political agenda, notwithstanding the pandemic.[9] At least two states have passed legislation creating a criminal offence of wage theft,[10] and the federal government

---

2 Debate about public versus private enforcement is largely outside the scope of this article, but is included to illustrate the different ways in which policy-makers are seeking to address the wage theft problem.

3 Guy Davidov, *The Purposive Approach to Labour Law* 225 (Oxford Univ. Press 2016).

4 *See* e.g., Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Senate Education and Employment References Committee 2016); Victorian Government, *Victorian Inquiry into Labour Hire and Insecure Work – Final Report* (Industrial Relations Victoria Aug. 2016); Parliament of Australia, *Superbad – Wage Theft and Noncompliance of the Superannuation Guarantee* (Senate Economics References Committee 2017); Australian Government, *Report of the Migrant Workers' Taskforce* (Attorney-General's Department Mar. 2019) (Migrant Workers' Taskforce Report).

5 *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).

6 Parliament of Australia, House of Representatives, *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth) Explanatory Memorandum* ii (2017).

7 Sandra Parker, *Address by the Fair Work Ombudsman* 3 (Speech, Australian Industry Group Annual National Policy-Influence Reform Conference June 2019).

8 *See* e.g., Anna Patty, *Worker Underpayment at Woolworths Sparks Calls for Company Payroll Audits*, Sydney Morning Herald (31 Oct. 2019); Jordan Baker, *Sydney Uni Reveals Tens of Millions in Staff Underpayments*, Sydney Morning Herald (13 Aug. 2020).

9 The federal Attorney-General's Department is looking specifically at compliance and enforcement as part of its wide-ranging consultation on the industrial relations framework. Simultaneously, there is a federal senate inquiry underway considering wage and superannuation theft (*see* Parliament of Australia, *Inquiry into the Unlawful Underpayment of Employees' Remuneration* (Senate Standing Committees on Economics 2020.)

10 *See Wage Theft Act 2020* (Vic); and *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020* (Qld).

was poised to follow suit by introducing criminal sanctions for dishonest and systematic underpayment.[11]

Many of the reforms that have been implemented, or are being contemplated, in Australia reflect trends in other jurisdictions.[12] Across various developed economies, much of the recent debate on employment standards enforcement has been dominated by a 'rhetorical push toward criminalization'.[13] More generally, there has been a strong consensus that to combat systemic underpayment, we need greater deterrence. Underpinning this argument is a common assumption that more deterrence will automatically equal more compliance. It has also been assumed that, to achieve enhanced deterrence, we need additional inspectors armed with bigger sticks.[14] Against this background, a key aim of this article is to unpack some of these assumptions to better understand: a) how deterrence is conceptualized and understood in the context of wage theft; and b) which tools or approaches are likely to be most productive or powerful in enhancing deterrence.

This article begins with a summary of orthodox deterrence theory. It then considers the extent to which responsive regulation and strategic enforcement embrace or eschew deterrence. Following this, the article examines empirical research seeking to test the regulatory potential of various deterrence-based mechanisms, including criminal prosecution, civil litigation, investigations and administrative sanctions. Drawing on the preceding analysis, the article then considers recent developments, and proposed reforms, in Australia to explore innovative ways in which to buttress deterrence and boost employer compliance with wage and hour laws. Ultimately, the article argues that to better address the problem of wage theft, one must move away from the assumption that increasing the severity of the sanction will 'supercharge'[15] deterrence in and of itself. Instead, more modest interventions – such as voluntary agreements – may have important deterrence value.

---

[11] Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth), cl 324B. Ultimately, and somewhat unexpectedly, the relevant Schedule of provisions relating to compliance and enforcement was not passed by federal Parliament. *See* Phillip Coorey & David Marin-Guzman, *Gutted IR Bill Passes the Senate*, Australian Financial Review (18 Mar. 2021).

[12] For an overview of recent developments in: the UK *see Criminality at Work* (Alan Bogg et al. eds, Oxford Univ. Press 2020), the US *see* Nicole Hallett, *The Problem of Wage Theft*, 37 Yale L & Pol'y Rev 108 (2018); and Jennifer J. Lee & Annie Smith, *Regulating Wage Theft*, 94 Wash. L. Rev. 759 (2019); and in Ontario, Canada *see Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (Leah Vosko et al. eds, Univ of Toronto Press 2020).

[13] Jennifer Collins, *Exploitation of Persons and the Limits of the Criminal Law*, 3 Crim L Rev 169 (2017).

[14] For further discussion in the Australian context, *see* Tess Hardy, John Howe & Melissa Kennedy, *Criminal Liability for 'Wage Theft': A Regulatory Panacea?*, Mon LR (forthcoming).

[15] Caron Beaton-Wells & Christine Parker, *Justifying Criminal Sanctions for Cartel Conduct: A Hard Case*, 1(1) J. Antitrust Enforcement 198, 215 (2013).

2 THEORIES OF DETERRENCE AND STRATEGIES OF ENFORCEMENT

2.1 Orthodox deterrence theory

Classical deterrence theory assumes regulated actors, including corporations, are rational and amoral, acting in their self-interest.[16] Actors make decisions to change (or not change) their behaviour based on the perceived costs of legal punishment versus the potential gains of non-compliance. Punishment costs are generally seen to consist of three key variables: the certainty, severity and celerity of sanction.[17] To achieve both specific and general deterrence,[18] the probability of violation detection,[19] and the expected size and swiftness of the penalty, must be such that it is not economically rational to defy the law.[20] This idea is routinely reflected in many sentencing decisions relating to corporate wrongdoing. For example, in a recent underpayment case in Australia, the judge observed:

> Of paramount concern is the need to ensure that the quantum of penalties is such as to act as both a deterrence to those now before the Court and as a deterrence to others. The quantum of the penalties to be imposed has to be such that they are not seen as simply the '*cost of doing business*'.[21]

A deterrence strategy, at least in its pure form, is openly accusatory and adversarial and focused on punishment, rather than prevention.[22] In this regard, it envisages a clear separation between regulated actors and inspectors. Regulatory conversations which may enhance or sustain compliance – such as specific advice on how compliance should be achieved – are not generally condoned. Rather, cooperation, negotiation and flexibility are broadly perceived as counterproductive. They

---

16 Robert Kagan & John Scholz, *Enforcing Regulation* 51 (Keith Hawkins & John M. Thomas eds, Kluwer: Nijhoff, Boston 1984).

17 Punishment properties can be analysed on two dimensions: an objective level (i.e., how certainly, severely and swiftly a jurisdiction actually responds to crime); and a subjective level (i.e., how the three properties of punishment are perceived by the regulated community– which may or may not bear a strong positive correlation with the actual state of affairs). *See* Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100(3) JCL & C 765, 785 (2010).

18 'Specific deterrence' is the notion that a firm previously subject to legal sanction will be more inclined to comply in the future, whereas 'general deterrence' is the idea that punishing one firm will have the effect of discouraging others from committing similar contraventions in the future.

19 The probability of violation detection is a function of the probability of inspection combined with the probability that the inspection will uncover violations. *See* David Weil, *Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage*, 58(2) Indus & Lab Rel Rev 238, 240 (2005).

20 Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Economy 169 (1968); George J. Stigler, *The Theory of Economic Regulation*, 2(1) Bell J. Econ. & Mgmt. Sci. 3 (1971); Orley Ashenfelter & Robert Smith, *Compliance with the Minimum Wage Law*, 87 J. Pol. Economy 333 (1979).

21 *Fair Work Ombudsman v. HSCC Pty Ltd* [2020] FCA 655 (18 May 2020) (Flick J).

22 Neil Gunningham, *Compliance and Enforcement in Environmental Law* 3 (Lee Paddock ed., Edward Elgar 2015).

not only risk regulatory capture, but have the potential to undermine future investigations and litigation and may weaken the deterrence signal to the broader community of duty-holders.[23] Administrative sanctions and alternatives to prosecution are similarly viewed with cynicism as they may undermine the credibility of the regulator.[24]

While these accounts of deterrence continue to hold political salience and public appeal, they have been subject to sustained critique. For example, an accurate cost/benefit analysis is rarely feasible in practice as firms often pay little attention to penalty information and individuals frequently underestimate their chances of getting caught.[25] Moreover, compliance decisions are far from informed or rational.[26]

The threat, or actual imposition of sanctions, may trigger unhelpful behaviours, such as obfuscation and cover-ups.[27] There is no guarantee that the imposition of penalties will change compliance behaviour, particularly where duty-holders can pass on the costs of the non-compliance to consumers or shareholders or otherwise render themselves judgment-proof.[28] Moreover, the imposition of harsh sanctions, such as criminalization, may fail to ultimately address 'the root of power dynamics which may lead to exploitation'.[29]

In practice, deterrence-based strategies are very resource-intensive. When inspectorate funding is limited, it is difficult to routinely detect contraventions and rigorously enforce regulation.[30] Indeed, in jurisdictions where underpayment contraventions already constitute a criminal offence, prosecutions are 'extremely rare'.[31] In addition, in many jurisdictions, employers caught underpaying their

---

[23] Cameron Holley & Darren Sinclair, *Compliance and Enforcement in Environmental Law* 104–105 (Lee Paddock ed., Edward Elgar 2015).

[24] Paul Almond & Judith Van Erp, *Regulation and Governance Versus Criminology: Disciplinary Divides, Intersections and Opportunities*, 14 Reg. & Governance 167, 172 (2020).

[25] Christine Jolls, Cass Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan LR 1471, 1476–1477 (1988). *See also* Tess Hardy & John Howe, *Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman*, 39 Syd L Rev 471 (2017).

[26] Paul Robinson & John Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OJLS 173, 179–197 (2004).

[27] Christine Parker & Vibeke Nielsen, *Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation*, 56(2) Antitrust Bull 377, 383 (2011).

[28] Brent Fisse, *Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties*, 13 Univ of NSWLJ 1 (1992). *See also* Eunice Hyunhye Cho et al., *Hollow Victories: The Crisis in Collecting Unpaid Wages for California's Workers* 111 (Report, National Employment Law Project 2013).

[29] Collins, *supra* n. 13; *See also* Mirko Bagaric & Theo Alexander, *(Marginal) General Deterrence Doesn't Work – and What It Means for Sentencing*, 35 Crim LJ 269 (2011).

[30] Holley & Sinclair, *supra* n. 23, at 104-105.

[31] Eric Tucker et al., *Carrying Little Sticks: Is There a 'Deterrence Gap' in Employment Standards Enforcement in Ontario, Canada?*, 35 Int'l J Comp Lab L & Indus 1, 26 (2019). In the United Kingdom, there have only been fourteen prosecutions since the introduction of the *National Minimum Wage Act 1998* (*see* David Metcalf, *United Kingdom Labour Market Enforcement Annual Report 2017/18*, 19 (United

employees are often only required to rectify the underpayment. Hallett points out: 'With millions of noncomplying employers in the country, the odds of getting convicted for committing wage theft are similar to the odds of getting hit by lightning – in other words, not high enough to change anyone's behaviour'.[32]

To compensate for the low risk of discovery and enforcement, deterrence theorists argue that the quantum of fines must be many times the amount to be gained from the wrongdoing.[33] However, it has been observed that very large, 'optimally' deterrent fines may lead to a 'deterrence trap' – where the size of the penalty is too onerous for an organization to bear, and regulators and courts are reluctant to pursue or impose financial penalties that may lead to innocent employees and investors losing their jobs and savings.[34] These concerns are likely to be heightened in the current economic climate when businesses are already buckling under the financial strain associated with Covid-19.

2.2 Responsive regulation (and its variants)

Responsive regulation is a classical model of regulation and governance. Over twenty-five years since it was first articulated by Ayres and Braithwaite, it continues to be actively debated and developed.[35] The ambition and flexibility of this model is part of its appeal, but this has also made it 'hard to pin down'.[36] However, most would agree that a foundational element of responsive regulation is the idea that regulators 'rarely have the resources to detect, prove, and punish cheating with sufficient consistency for it to be economically rational not to cheat'.[37] The enforcement pyramid – the most renowned element of responsive regulation – recognizes not just the challenges presented by limited regulatory resources, but also the complexities associated with a spectrum of compliance motivations. Under a pyramidal model of enforcement, regulators should have a

---

Kingdom Mar. 2019)). Similarly, in the US, a previous study found that in a two-year period only eleven wage theft prosecutions occurred in the entire country (*see Winning Wage Justice: A Summary of Criminal Prosecutions of Wage Theft in the United States* (Report, National Employment Law Project 2013).

32 Hallett, *supra* n. 12.

33 Ashenfelter & Smith, *supra* n. 20, at 336.

34 Beaton-Wells & Parker, *supra* n. 15, at 204; Christine Parker, *The 'Compliance Trap': The Moral Message in Responsive Regulatory Enforcement*, 40 L. & Soc. Rev. 591 (2006).

35 For example, Braithwaite – an architect of the original model – recently argued there are a number of distinct types of responsiveness which can be identified, including pyramidal responsiveness, networked responsiveness; and meta-regulatory responsiveness (*see* John Braithwaite, *Regulatory Theory: Foundations and Applications* 117–130 (Peter Drahos ed., ANU Press 2017)).

36 Robert Baldwin & Julia Black, *Really Responsive Regulation* 17 (Working Paper, London School of Economics and Political Science 15/2007 2007).

37 Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* 96 (Oxford Univ Press 1992).

mix of tools at their disposal, and these mechanisms should be applied in an ordered manner according to compliance postures, coercive backing, relative formality and underlying expense.[38]

While the concept of responsive regulation has been influential, there have also been many critics. One recurring theme is that a graduated or accommodative response may not be suitable or effective in all situations, particularly where inspections are less frequent or intense.[39] More generally, Baldwin and Black observe that 'tit-for-tat strategies may not be effective where the compliance behaviour is shaped less by the regulator's interventions, and more by corporate cultures or economic pressures'.[40]

Practical application of responsive regulation may also stray from underlying theoretical principles leading to 'an emasculated enforcement pyramid' which can only 'fail to deter'.[41] In Ontario, Canada, it has been argued by Vosko, Grundy and Thomas that an over-reliance on 'soft law' mechanisms by labour inspectorates may run the risk of exacerbating rather than mitigating the enforcement crisis in wage and hour regulation.[42] Davidov has similarly noted: 'when dealing with minimum wage violations … where the law is usually clear and the harm is severe, persuasion or warnings are hardly sufficient'.[43]

Braithwaite himself has acknowledged that moving up and down the pyramid may not be straightforward in practice, but that ordering strategies in a hierarchical way is nonetheless important to promote long-term internalization of norms. In his view, initial deployment of 'softer' forms of social control later legitimizes the regulator's use of more coercive sanctions. This has positive compliance effects in that regulation which is perceived as more procedurally fair tends to strengthen commitments to comply.[44] In the words of Parker: 'The availability of criminal law and high penalties are important not so much because of their deterrent impact but

---

38 Karen Yeung, *Better Regulation, Administrative Sanctions and Constitutional Values*, 33 Leg s. 312, 324–325 (2013).

39 *See* generally, John Braithwaite, *Relational Republican Regulation*, 7 Reg. & Governance 124, 124 (2013).

40 Robert Baldwin & Julia Black, *Really Responsive Regulation*, 72 MLR 59, 62–3 (2008). This weakness has also been recognized by Weil and the strategic enforcement model is consciously designed to respond to this issue.

41 Neil Gunningham & Richard Johnstone, *Regulating Workplace Safety: System and Sanctions* 123 (Oxford Univ. Press 1999).

42 Leah Vosko, John Grundy & Mark Thomas, *Challenging New Governance: Evaluating New Approaches to Employment Standards Enforcement in Common Law Jurisdictions*, 37(2) Econ. & Indus. Democracy 373, 375 (2016).

43 Davidov, *Supra* n. 3, at 243–244.

44 John Braithwaite, *Regulatory Mix, Collective Efficacy and Crimes of the Powerful*, 1 J. White Collar & Corp. Crime 62 (2020). *See also* Kristina Murphy, *Turning Defiance into Compliance with Procedural Justice: Understanding Reactions to Regulatory Encounters Through Motivational Posturing*, 10 Reg. & Governance 93 (2014); Tom Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Cr J 283 (2003).

because of their moral impact in legitimating the substantive content of the message at the bottom of the pyramid'.[45] A hierarchy of sanctions also minimizes the risk of regulatory resistance by firms that have sought to comply in good faith.[46]

This touches on another critical tenet of responsive regulation: the need to 'build a regulatory culture in which players do not want to cheat'.[47] To achieve this, trust, deterrence and tripartism must be invoked and economic theories must work alongside empowerment theories. Engaging non-state actors in the regulatory process has the potential not only to increase the punishment of cheaters and strengthen calculative motivations, but also to strengthen the community denunciation of cheating, enhance social motivations and lead to normative change. Such denunciation is aimed at making 'lawbreaking unthinkable to most business executives most of the time'.[48]

2.3 Strategic enforcement

The model of strategic enforcement broadly aims 'to use the limited enforcement resources available to a regulatory agency to protect workers as proscribed by laws by changing employer behaviour in a sustainable way'.[49] While there are some parallels between responsive regulation and strategic enforcement, there are also differences in emphasis and approach.

One such difference is that strategic enforcement tends to focus on the institutional setting and sectoral pressures driving employer non-compliance and places less emphasis on the compliance posture of isolated firms or individual executives.[50] More specifically, Weil argues that:

> Enforcement and other strategies must seek to change compliance at the bottom of fissured industry structures, among lower-tiered employers, by focusing attention at the point where the incentives driving that behavior originate rather than where compliance problems are observed.[51]

---

45 Parker (2006), *supra* n. 34, at 617.

46 John Braithwaite, *Restorative Justice and Responsive Regulation: The Question of Evidence* (RegNet Research Papers No 51, Regulatory Institutions Network 2016). *See also* Sidney Shapiro & Randy Rabinowitz, *Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA*, 14 Ad LR 713 (1997).

47 Ayres & Braithwaite, *supra* n. 37, at 96.

48 *Ibid*.

49 David Weil, *Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change,* 60(3) J. Indus. Rel. 437-460 (2018); David Weil, *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division* (May 2010).

50 Tucker et al., *supra* n. 31, at 5. It is arguable, however, that responsive regulation – particularly its later iterations which invoke network theory – also contemplate the need for systemic change. *See* Braithwaite (2017), *supra* n. 35.

51 David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It,* 220 (Harvard Univ. Press 2014).

First of all, to achieve this, strategic enforcement seeks to act upon networks of firms and shape market dynamics by shifting the regulatory gaze to the top of the business network.[52] Weil argues that this is essential to ensuring enforcement has systemic rather than local effects.[53]

Second, strategic enforcement expressly contemplates how to enhance detection processes: a neglected aspect of the responsive regulation model.[54] In Weil's view, following the trail of complaints is not only resource-intensive, it may misdirect resources away from the most vulnerable employees and the most egregious violations.[55] Instead of a reactive approach, labour inspectorates should triage incoming complaints and undertake sophisticated data analysis to proactively funnel investigation resources towards priority industries or localities.

Third, and perhaps the most crucial difference in the context of this article, is the way in which strategic enforcement elevates and expands the concept of deterrence. In contrast to some narrower interpretations of responsive regulation, Weil believes coercive mechanisms should not be downplayed.[56] Instead, he argues that the deterrent impact of regulatory interventions should be brought to the fore in all regulatory activities.[57] While deterrence is a 'paramount'[58] element of strategic enforcement, somewhat surprisingly, the imposition of criminal sanctions or crushing fines is not a prominent feature. Instead, Weil promotes a notion of deterrence that goes beyond more traditional conceptions. In Weil's view, deterrent-based mechanisms draw power not just from the formal sanction imposed, but the adoption of more effective detection methods (e.g., directed investigations and private monitoring), as well as the business and reputational costs which flow from relevant regulatory interventions.[59]

Upon becoming head of Wage and Hour Division at the US Department of Labor, Weil sought to implement the strategic enforcement model through a multi-pronged effort, including via deployment of proactive and forensic

---

[52] David Weil, *Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters*, 28 Comp Lab L & Pol'y J 125, 139 (2007).

[53] David Weil, *A Strategic Approach to Labour Inspection*, 147 Int'l Lab. Rev. 349, 356 (2008). *See also* David Weil, *Enforcing Labour Standards in Fissured Workplaces – The US Experience*, 22(2) Econ. & Lab. Rel. Rev. 33 (2011).

[54] Steve Tombs & David Whyte, *Transcending the Deregulation Debate? Regulation, Risk, and the Enforcement of Health and Safety Laws in the UK*, 7 Reg. & Governance 61, 63 (2013).

[55] David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance and the Problem of Enforcement in the US Workplace*, 27(1) Comp. Lab. L. & Pol'y J. 59, 72-73 (2005).

[56] Tucker et al., *supra* n. 31. Not all interpretations or applications of responsive regulation have been overt in their use of coercive sanctions. *See* e.g., Christine Parker & Vibeke Lehmann Nielsen, *The Fels Effect; Responsive Regulation and the Impact of Business Opinions of the ACCC*, 20(1) GLR 91 (2011).

[57] Weil (2010), *supra* n. 49, at 16.

[58] David Weil, *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* 268 (Leah Vosko et al. eds, Univ. of Toronto Press 2020).

[59] Roberto Pires, *Promoting Sustainable Compliance: Styles of Labour Inspection and Compliance Outcomes in Brazil*, 147 Int'l Lab. Rev. 199, 223 (2008).

inspections, the use of all enforcement tools, employer and employee outreach, regulatory agreements and strategic communications.[60] Weil recognized that the Wage and Hour Division had not fully utilized the tools that were already available under the *Fair Labor Standards Act*. In particular, the 'hot goods' provision was not just viewed as a punitive mechanism, but as a point of leverage to coerce lead firms to enter into regulatory agreements. These voluntary agreements – which were often forged in the midst of enforcement litigation[61] – were designed to 'have broader and more lasting impacts than simply reaching a settlement with the parties'.[62]

While harnessing the power and resources of lead firms was important, Weil recognized that there remained a 'need to focus on bad actors in an industry'.[63] He explained that recidivist employers:

> can play an outsized role in their sector by sending signals regarding the potential to flout standards to other employers that are similarly situated … More troubling, their actions may send signals even to compliant employers who may view their persistence as an indication of the lack of fairness of the regulatory system as a whole, leading to an erosion of the overall culture of compliance in an industry.[64]

To curb non-compliance at this level, Weil pushed for routine assessment and imposition of civil monetary penalties against wrongdoers, particularly those who had shown a repeated, wilful or serious failure to comply.[65] Similarly, an award of liquidated damages (paid directly to workers rather than the state) was seen to provide a dual benefit of better compensating workers for lost wages and interest, and better motivating employers to change future behaviour via enhanced economic incentives. For all enforcement tools, outcomes were promoted publicly in an attempt to put employers on notice that the cost of violating employment standards was not worth the potential gains.

2.4 Points of tension and overlap

While important differences exist between responsive regulation and strategic enforcement, there are also several 'logical compatibilities'.[66] These intersections

---

60 Weil (2018), *supra* n. 49.
61 There have been instances where lead firms entered into voluntary compliance agreements outside of litigation– partly because the Wage and Hour Division may have struggled to assert the lead firm had legal liability as a joint employer. The 2016 agreement with Subway was one notable example. *See* Weil (2020), *supra* n. 58, at 270.
62 *Ibid*.
63 Weil (2014), *supra* n. 51, at 237.
64 *Ibid*.
65 Weil (2020), *supra* n. 58, at 268.
66 Tombs & Whyte, *supra* n. 54, at 63.

are especially relevant in Australia given that the federal inspectorate has adopted somewhat of a hybrid approach. First, both responsive regulation and strategic enforcement recognize that to change and sustain employer compliance, 'context counts'[67] and regulators must avoid narrow, command-and-control approaches.

There is also a shared understanding that inspectorate resources will always be limited. This underpins two further elements of responsive regulation and strategic enforcement: (1) there is an unavoidable need to shift some of the burden to non-state actors; and (2) a 'regulatory mix' of tools should be applied. Rather than shun administrative sanctions and negotiated agreements in line with orthodox economic theories of deterrence, both models embrace these intermediate tools. The threat of harsh sanctions, such as license revocation or criminal sanctions, is used to coerce the recalcitrant to enter into voluntary agreements, such as enforceable undertakings or enhanced compliance agreements. Proponents of both responsive regulation and strategic enforcement generally agree these types of tools are important in addressing past wrongdoing and creating a platform for future compliance.[68]

However, the conceptualization of these voluntary instruments is distinctive under each model. For strategic enforcement, the focus is very much on their deterrent aspects – for example, emphasis is placed on the way these agreements: require independent monitoring, leading to increased perceptions of detection, potential reputation loss and therefore enhanced ripple effects. However, for responsive regulation, similar types of agreements – containing many of the same substantive commitments – are pitched as a form of restorative justice, which facilitates capacity-building. The deterrent features are not generally emphasized. A final commonality is that, in both models, celerity of punishment rarely rates a mention.[69]

3 DETERRENCE IN PRACTICE: WHAT WORKS?

Although the general concept of deterrence has been well-studied, much of the empirical research has been concerned with deterrence of traditional, rather than white collar, crimes.[70] Even less research has tested the saliency of deterrence in the context of employment standards regulation. The scope and methodology of many of these studies are distinct and often seek to test different forms of deterrence in relation to different violations and different targets.[71] Nonetheless, this short survey

---

67 Holley & Sinclair, *supra* n. 23, at 108.
68 Weil (2018), *supra* n. 49, at 448–449.
69 Cesare Beccaria, *On Crimes and Punishments* 36 (Macmillan 1986[1764]).
70 Samuel Buell, *The Blaming Function of Entity Criminal Liability*, 81 Ind L. J. 473 (2006).
71 Natalie Schell-Busey et al., *What Works: A Systematic Review of Corporate Crime Deterrence*, 15 Criminology & Pub. Pol'y 387, 391 (2016).

of the empirical deterrence terrain provides some critical insights into the complexities of delivering deterrence on the ground.

3.1 Fear of punishment versus fear of detection

One of the most recent and relevant studies is Galvin's analysis of state-based wage theft legislation in the United States (US).[72] Galvin found that most wage theft laws passed in the US had no statistical effect on the rates of wage theft, with one notable exception. States that implemented the strongest penalties – allowing regulators to impose treble damages directly against contravening employers – saw a statistically significant decline in the incidence of wage theft.[73] In reaching this conclusion, Galvin noted that increased penalties alone would not necessarily result in higher levels of compliance if they were not also accompanied by adequate levels of enforcement. This qualification is especially important in light of the weight of empirical deterrence research which finds that a firm's assessment of legal risk is influenced less by the 'objective severity and subjectiveness fearsomeness of the sanctions imposed',[74] and more by the perceived likelihood of detection and punishment.[75]

In 2015, Hardy and Howe tested some key assumptions underpinning deterrence theory by examining Australian businesses' awareness of, and responses to, key enforcement activities of the Fair Work Ombudsman[76] This study revealed that, overall, firms' recollection of the quantum of civil penalties imposed against other employer businesses was 'generally imprecise and inaccurate'.[77] Most employers were not aware of cases the Fair Work Ombudsman had previously brought in their industry and had even less knowledge of the amount, the target of the intervention, or the nature of the sanction.[78] Notwithstanding this lack of knowledge or awareness of actual enforcement activity, 75% of surveyed businesses believed that the likelihood of the Fair Work Ombudsman detecting a relatively small underpayment in their sector was 50/50 or higher. Further, almost 70% felt it was 'highly likely' or 'likely' that the non-compliant business would be penalized

---

72 Daniel J Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 Persps. on Pol. 324 (2016).

73 *Ibid*., at 326. Similarly, a study of competition regulation found that dramatic shifts in law (e.g., changing an offence from a misdemeanour to a felony) led to a decline in recidivism. *See* Sally Simpson & Chris Koper, *Deterring Corporate Crime*, 30 Crim 347 (1992).

74 Beaton-Wells & Parker, *supra* n. 15, at 205-6.

75 Sally Simpson, *Corporate Crime, Law and Social Control* (Cambridge Univ. Press 2002). *See also* Schell-Busey et al., *supra* n. 71; Parker & Nielsen (2011), *supra* n. 27, at 404-405.

76 Hardy & Howe (2017), *supra* n. 25.

77 *Ibid*.; *See also* Mirko Bagaric, Theo Alexander & Athula Pathinayake, *The Fallacy of General Deterrence and the Futility of Imprisoning Offenders for Tax Fraud*, 26 ATF 511, 529 (2011).

78 Beaton-Wells & Parker, *supra* n. 15, at 204.

by a court. Given that the real risk of detection by the Fair Work Ombudsman was much lower in reality, and the objective probability of a court-ordered penalty was extremely small, these findings confirm the importance of perceptions. In other words, it is not necessarily the number of proceedings, or the size of the sanctions imposed, that is critical; rather, it is 'the *belief* that duty holders have of the likelihood and degree of punishment, even if, in actual fact, that belief is overstated'.[79]

This is supported by Johnson's recent study of Occupational Safety and Health Administration (OSHA) press releases in the US, which found that publicizing violations leads to substantial improvements in compliance rates at peer facilities in the same general locality.[80] He concludes that publicity may be a 'highly effective complement to inspections'[81] in enhancing compliance outcomes and should not be overlooked. Another neglected component of deterrence research relates to celerity of punishment. Here, experimental studies have generally confirmed that 'immediate punishment is far more effective than delayed punishment'.[82] However, immediate punishment is difficult to achieve in practice. A recent study by Perry et al found an effective substitute 'is a punishment mechanism that signals immediately to an offender that his violation has been spotted, but the actual penalty is delayed and probabilistic'.[83]

3.2 Complaint versus directed investigation

As to the detection element of the deterrence equation, Weil's analysis of Work and Hour Division investigations[84] found the 'shadow cast by directed [or proactive] investigations is longer and more influential than that of complaint investigations'.[85] The former type of investigation was also found to have stronger ripple effects beyond the worksite being investigated.[86] Weil suggests that because directed investigations are so rare, employers are more sensitive to such investigations as 'they represent a "bolt from the blue"'.[87] This is supported by Weil's

---

79 Neil Gunningham, *Prosecution for OHS Offences: Deterrent or Disincentive*, 29 Syd L Rev 389, 389 (2007) (emphasis added). *See also* Keith Purse & Jillian Dorrian, *Deterrence and Enforcement of Occupational Health and Safety Law*, 27(1) Int'l J Comp. Lab. & Indus. 23, 24 (2011).

80 Matthew Johnson, *Regulation by Shaming: Deterrence Effects of Publicising Violations of Workplace Safety and Health Laws*, 110(6) Am. Econ. Rev. 1866 (2020).

81 *Ibid.*, at 3.

82 *See* Orit Perry, Ido Erev & Ernan Haruvy, *Frequent Probabilistic Punishment in Law Enforcement*, 3(1) Econ. Governance 71 (2002).

83 *Ibid.*

84 Weil (2010), *supra* n. 49, at 81.

85 *Ibid.*, at 71.

86 *Ibid.*, at 81.

87 *Ibid.*, at 56.

finding that an initial directed investigation had the largest deterrent impact on business behaviour, with weaker effects associated with subsequent or additional directed investigations in the local area. It is important to note that this study specifically focused on the deterrence value of the various investigation modes, rather than the investigation outcome. This is significant given other studies suggest that regulatory inspections that do not involve the imposition of any penalty have little deterrent effect.[88]

3.3 Administrative sanctions

A separate thread of research shows that administrative sanctions – that can be issued by inspectors without the intervention of a court – can lead to a 're-shuffling of managerial priorities',[89] even where the quantum of relevant penalties do not necessarily justify action in pure cost-benefit terms.[90] An Australian study of occupational health and safety infringement notices by Gunningham, Sinclair and Burritt found that receiving a notice was perceived as a 'blot on the record', which had the effect of triggering preventative activities and spurring on the safety performance of individual site or line managers.[91] While penalties associated with infringement notices were quite modest, they still acted as a financial deterrent, especially for individuals and smaller firms.[92] These findings have been reinforced by a recent and important study of employment standards enforcement in Ontario, Canada. This analysis revealed that inspections in and of themselves had a specific deterrent effect on employers, but inspections which were accompanied by a 'ticket' (similar to an on-the-spot fine) enhanced the deterrence effects.[93] Galvin's study suggests increasing administrative fines would further enhance the latent deterrence effects of such notices.

---

88 Liz Bluff & Richard Johnstone, *Infringement Notices: Stimulus for Prevention or Trivialising Offences?*, 19 JOHS 337, 340 (2003); *See also* Shapiro & Rabinowitz, *supra* n. 46.

89 James Baggs, Barbara Silverstein & Michael Foley, *Workplace Health and Safety Regulations: Impact of Enforcement and Consultation on Workers' Compensation Claims Rates in Washington State*, 43 Am. J. Indus. Med. 483 (2003).

90 Wayne B. Gray & John T. Scholz, *Does Regulatory Enforcement Work – A Panel Analysis of OSHA Enforcement Examining Regulatory Impact*, 27 L. & Soc. Rev. 177 (1993); *See also* Purse & Dorrian, *supra* n. 79, at 36.

91 Neil Gunningham, Darren Sinclair & Patricia Burritt, *On-the-Spot Fines and the Prevention of Injury and Disease – The Experience of Australian Workplaces* 30 (National Occupational Health and Safety Commission 1998). *See also* David Weil, *If OSHA Is So Bad, Why Is Compliance So Good!*, 27(3) ZAR J. Econ. 618 (1996); David Weil, *Assessing OSHA Performance: New Evidence from the Construction Industry*, 20(4) J. Pol'y Analysis & Mgmt. 651 (2001).

92 Bluff & Johnstone, *supra* n. 88, at 339.

93 Rebecca Casey et al., *Using Tickets in Employment Standards Inspections: Deterrence as Effective Enforcement in Ontario, Canada*, 29 Econ. & Lab. Rel. Rev. 245 (2018).

3.4 Voluntary agreements

While there have been some empirical studies of the deterrence effects of administrative notices, there have been far fewer investigations of how voluntary agreements, such as 'enforceable undertakings' or enhanced compliance agreements, affect calculative motivations. By way of explanation, an enforceable undertaking is a statutory instrument containing a set of voluntary commitments designed to address past wrongdoing and promote future compliance.

While a range of statutory agreements are widely available in Australia, the Hardy and Howe study referred to earlier found that firms were much less familiar with enforcement tools below the apex of the pyramid, such as enforceable undertakings, despite their routine use by the Fair Work Ombudsman. Given that awareness of sanctions and enforcement is an essential precondition of deterrence, this finding suggests that the general deterrence effects of voluntary instruments were weak – at least when the survey took place. More recently, a small qualitative study of the general deterrence effects of enforceable undertakings made in the financial services sector found that they can motivate behavioural change, not only by tapping into a firm's 'fear' of being caught, but by strengthening the firm's 'duty' to comply.[94] In relation to calculative motivations, respondents broadly confirmed they were keen to avoid: the perceived punishment and intrusion of outsiders meted out as part of an enforceable undertaking; the costs of the commitments made under the enforceable undertaking (including the costs of engaging lawyers and other independent consultants to assist with negotiation and implementation); and the associated reputational damage, including loss of customers, revenue and standing among industry peers.[95] Another risk associated with enforceable undertakings was the potential for steps taken by the firm under the terms of an enforceable undertaking – such as remediation schemes, admissions of liability or acknowledgment of regulatory concerns – to be subsequently used as a '"roadmap" for class action lawyers to build their case'.[96] However, this study also found the deterrent value of these instruments may be undone through a range of factors, including a lack of celerity. It was found that many of these instruments were taking years to finalize and be made public.[97] This is concerning in light of other studies which suggest that one of the reasons for the failure of general deterrence 'is the big delay between detection and the imposition of punishment'.[98]

---

94 Marina Nehme et al., *General Deterrence Effects of Enforceable Undertakings on Financial Services and Credit Providers* 24 (Report to the Australian Securities and Investments Commission, 2018).
95 *Ibid*.
96 *Ibid*., at 20.
97 *Ibid*., at 27.
98 Bagaric, Alexander & Pathinayake, *supra* n. 77, at 529.

Weil's study of voluntary monitoring agreements in the US garment sector found that while these instruments may take time to have an impact, they had the potential to lead to significant compliance improvement, especially where monitoring involved payroll review and unannounced inspections.[99] Detailed data analysis revealed stringent contractor monitoring by manufacturers, under the auspices of voluntary agreements made with the Work and Hour Division, raised the costs of non-compliance faced by contractors, including established firms and new entrants.[100] In the words of Weil:

> The use of supply chain pressure to create monitoring systems leads to changes in contractors' behaviour by altering the basic regulatory calculus facing them. In particular, it introduces substantial *private* penalties that easily swamp in magnitude the civil penalties available to the government as well as appreciably increase the implicit probability of inspection.[101]

3.5 Regulatory target

A number of studies emphasized the importance of the regulatory target – that is, an intervention directed at lead firms, direct competitors, prominent businesses or individual decision-makers, may have outsized deterrence effects. Weil's research regarding the deterrence effects of Work and Hour Division investigations in the hotel sector found the ripple effects of an investigation were often restricted to 'subsets of the industry that tend to "watch" one another'.[102] For example, investigations of the top five branded hotels had the greatest effect on other branded hotels, whereas the compliance behaviour of independent hotels was most influenced by investigations of other independent outlets.[103] This finding lends support to earlier studies of occupational health and safety enforcement, which found that compliance action was more likely to be adopted in circumstances where the nature of the business activity undertaken and the types of compliance risks were the same or similar to those that had been the subject of enforcement.[104]

Similarly, Parker and Nielsen identified that the extent to which firms fear sanctions which trigger informal social and economic losses was likely to depend on their market position and their vulnerability to market competition. Firms with

---

99 David Weil & Carlos Mallo, *Regulating Labour Standards via Supply Chains: Combining Public/Private Interventions to Improve Workplace Compliance*, 45 BJIR 791, 810 (2007).
100 Weil (2005), *supra* n. 19, at 250.
101 *Ibid*., at 255.
102 Weil (2010), *supra* n. 49, at 56.
103 *Ibid*., at 74.
104 Michael Wright et al., *Evaluation of EPS and Enforcement Action: Main Report* (Health and Safety Executive Research Report RR519, HSE Books 2006); Gunningham, Sinclair & Bunitt, *supra* n. 91.

a larger brand presence, more consumer-facing services and more substitutable products were found to be more sensitive to risk and adverse publicity associated with regulatory interventions. In comparison, firms in a more vulnerable market position with slim profit margins might believe their business viability hinges on committing violations and 'might value the gains of noncompliance more greatly'.[105]

Studies focusing on how individuals, such as representatives and managers, respond to various regulatory strategies have found that a credible legal threat, combined with informal modes of shame and peer pressure, lower the risk of corporate wrongdoing.[106] While Gunningham accepts deterrence often works better in relation to individuals, he cautions that much depends upon context. In his view, sanctioning the 'wrong' individuals, such as middle managers – who may be easy targets, but lack decision-making power – tends to create 'a considerable sense of injustice and damages the legitimacy of the entire regulatory regime'.[107]

3.6 Other compliance motivations

Even where perceptions of relevant risk variables are high, there is no guarantee that this will ultimately motivate or sustain compliance.[108] Instead, many studies confirm that motivations to comply may be shaped by a range of cognitive biases, individual personality traits and the strength of people's sense of moral or ethical obligation to obey the law. Gunningham, Thornton and Kagan's study of environmental regulation in the US found deterrence plays an important regulatory role, but is not necessarily a *direct* motivator of compliance.[109] Rather, hearing about sanctions imposed against the worst offenders had a 'reminder' and 'reassurance' function for organizations already in compliance. First, it refocused employer attention on regulatory problems that may have been ignored or overlooked. Second, it reassured firms their efforts to invest in compliance were worth it, as competitor firms who sought to evade the system were unlikely to get away with it.[110]

The Hardy and Howe study generated some puzzling findings in this respect. Classical deterrence theory suggests that those firms with the greatest awareness of the Fair Work Ombudsman's enforcement activities would have an increased

---

105 Parker & Nielsen (2011), *supra* n. 27, at 388.
106 Sally Simpson et al., *An Empirical Assessment of Corporate Environmental Crime Control Strategies*, 103 JCL & C 231, 267 (2013).
107 Gunningham (2007), *supra* n. 79, at 370.
108 John Braithwaite & Toni Makkai, *Testing an Expected Utility Model of Corporate Deterrence*, 25 L. & Soc'y Rev. 7 (1991).
109 Gunningham (2015), *supra* n. 22, at 4-5.
110 Neil Gunningham, Dorothy Thornton & Robert Kagan, *Motivating Management: Corporate Compliance in Environmental Protection*, 27(2) L. & Pol'y 289 (2005).

perception of risk of detection and sanction. Instead, this study found the opposite to be true. Those most familiar with the Fair Work Ombudsman's enforcement efforts appeared to fear them the least.[111] In addition, while we expected to find a link between increased risk perception and enhanced compliance responses, we observed only a weak association in this respect. These results may reinforce the point made earlier: context counts and the relationship between deterrence and compliance is not linear.[112] This may be one reason why – after surveying the deterrence literature – Schell-Busey et al concluded that a mix of agency interventions and multiple treatments, at the individual and company levels, 'is apt to have the biggest impact on corporate crime'.[113]

3.7 Summary of empirical literature

While there is some limited evidence that higher sanctions will lead to higher levels of compliance in the context of wage theft, many studies concerned with corporate regulation, and crime more generally, have cast doubt on the efficacy of penalties alone to change behaviour. Findings that formal sanctions have no bearing on compliance outcomes have led some to declare that economic theories of deterrence are a 'stark failure'.[114] Others are less pessimistic, but broadly agree that, when it comes to deterrence, the perceived risk of detection is more significant than the nature or size of the possible penalty. Instead, it seems that consistent public and private monitoring, accessible systems of administrative sanctioning and targeted disclosure and publicity may 'possess greater power, capacity, and deterrent impact than prosecutorial agencies'.[115] The more likely the detection and the swifter the sanction, the better. While actors may be sufficiently rational to be deterred by the threat of sanctions, if there is delay between the contravention and the imposition of punishment, the formal legal system is not well-placed to 'exploit that rationality'.[116] While the perception, and not necessarily the actuality, of risk is critical to delivering general deterrence, it is also important to acknowledge that compliance motivations may stray well outside the assumed cost-benefit calculus.

---

111 Hardy & Howe (2017), *supra* n. 25, at 494.
112 *See* Braithwaite & Makkai, *supra* n. 108.
113 Schell-Busey et al., *supra* n. 71, at 4.
114 Braithwaite & Makkai, *supra* n. 108, at 29.
115 Almond & Van Erp, *supra* n. 24, at 176-177.
116 Paternoster (2010), *supra* n. 17, at 819.

4 THE DETERRENCE DEBATE IN AUSTRALIA

As noted in the introduction, deterrence lies at the heart of law reform debates currently raging in Australia. The recent Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth) included a range of reforms designed to 'more effectively deter non-compliance with workplace laws'.[117] This included a new criminal offence for dishonest and systematic wage underpayments, and a substantial uplift in a range of civil penalties. Much like the Protecting Vulnerable Worker amendments, this latest set of proposed reforms continues to reflect many of the general assumptions underlying classical deterrence theory – that is, harsher sanctions, in and of themselves, will deliver greater doses of deterrence. Rather than survey these recent statutory extensions in detail, the next section is intended to redirect the conversation away from enforcement strategies which attract the most controversy, and instead consider one of the tools which has been neglected in the public debate on deterrence, namely enforceable undertakings. While these instruments have been criticized for failing to deter, such criticisms tend to be based on an unduly narrow notion of deterrence. Drawing on the analysis of theoretical models and empirical literature set out in Parts II and III above, this section seeks to better assess the true deterrence value of enforceable undertakings.

4.1 An overview of enforceable undertakings

Under the Fair Work Act, a Fair Work Inspector can enter into an enforceable undertaking with a 'person' if they hold a reasonable belief a contravention of a civil remedy provision has been committed. These agreements frequently contain admissions, promises and commitments to remedy the harm caused by the contravention and address the root cause of the contravention. It has also been common to require corporate signatories to make a 'contrition payment', which is ostensibly designed to reflect the 'seriousness of their contravening conduct'[118] and 'the community expectation that a company should do more than simply rectify their contraventions'.[119] While negotiations are generally sensitive and highly confidential, once signed, copies of the final agreement are published on the agency's website and accompanied by a press release. Although the use of

[117] Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth) iv.

[118] *See* e.g., Enforceable Undertaking between the Fair Work Ombudsman, IBM Australia Ltd and IBM Global Financing Australia Ltd dated 8 Sept. 2020.

[119] Australian Government, *Improving Protections of Employees' Wages and Entitlements: Further Strengthening the Civil Compliance and Enforcement Framework* 7 (Attorney-General's Department Feb. 2020).

enforceable undertakings has dropped off in the last three years or so, there appears to be a resurgence in their use. This may be partly driven by the wave of corporate self-disclosures received by the agency in the past few years. The Fair Work Ombudsman's Compliance and Enforcement Policy currently states that the agency will only accept an enforceable undertaking in 'limited circumstances', such as where the firm has self-disclosed the wrongdoing and fully cooperated with the Fair Work Ombudsman.[120] If the signatory fails to comply with the terms of the undertaking, it can be enforced in court. In such circumstances, the court is also empowered to make other types of orders, including compensation orders. However, if the undertaking remains on foot, it is not possible to seek pecuniary penalties either in relation to the original contraventions or a subsequent failure to comply with the terms of the enforceable undertaking.[121] Penalties can only be pursued in relation to the original or underlying contravention if and when the instrument is withdrawn. Even though enforceable undertakings have been available under the Fair Work Act for more than a decade, the Fair Work Ombudsman has rarely sought to enforce the terms of an enforceable undertaking in court.[122]

4.2 The deterrence value of enforceable undertakings

In many respects, enforceable undertakings are similar to enhanced compliance agreements used in the US in that both instruments seek to ease the monitoring burden of the regulator, entrench a sustained commitment to compliance by the signatory firm and form a 'bridge between the strategies of persuasion and

[120] Fair Work Ombudsman, *Compliance and Enforcement Policy*, at 8. This position has shifted over time. Initially, the Fair Work Ombudsman had indicated that the 'default position' was that every business that self-reports must enter into an enforceable undertaking. However, this is no longer the case. *See* Parker, *supra* n. 7, at 4-5.

[121] FW Act, s. 715(7).

[122] In the first instance, the Fair Work Ombudsman initiated enforcement proceeding against Pristine Employment Solutions Pty Ltd for failure to comply with multiple terms of an enforceable undertaking executed in May 2017. In particular, the signatory firm had failed to review pay practices, and report the results of that review to the Fair Work Ombudsman. It had also failed to audit its pay practices as it had agreed to do so under the EU. A second enforcement proceeding was brought by the Fair Work Ombudsman in 2019 against Saffron Indian Restaurant Pty Ltd for similar failures. In both these cases, the proceeding was discontinued by the Fair Work Ombudsman before a court order was made, but the reasons for this discontinuance are unclear. *See* Fair Work Ombudsman, 'FWO acts on EU non-compliance', Press Release, 20 July 2018 and Fair Work Ombudsman, 'FWO alleges EU non-compliance', Press Release, 5 Dec. 2019. In the third, and most recent, case involving non-compliance with an EU, the court made two orders: 1) a declaration that the employer firm, Double Hats Pty Ltd, failed to comply with a term that required it to commission an external accounting professional to audit its compliance with relevant employment obligations and rectify any underpayments that were identified as part of that audit; and 2) a compensatory order requiring the employer to provide backpay to any affected employee. *See* Fair Work Ombudsman, 'FWO acts to enforce compliance with EU', Press Release, 2 Nov. 2020.

enforcement'.[123] In the context of this article, a key tension is whether enforceable undertakings represent an innovative and flexible solution, or let employers 'off the hook' by providing them another chance to voluntarily comply, and avoid the imposition of more punitive sanctions.[124] In other words, to what extent do enforceable undertakings have the power or potential to deliver deterrence? And how do they compare, from a deterrence perspective, to criminal prosecutions or civil penalty proceedings?

The recent Royal Commission into Banking Misconduct acknowledged the flexibility of enforceable undertakings holds 'undoubted appeal', but also noted that if an entity 'considers the promises made in the EU as no more than the cost of doing business or the cost of placating the regulator',[125] then it is unlikely to constitute a more effective regulatory outcome than legal proceedings.

Concerns over the lack of deterrence associated with enforceable undertakings reached fever pitch following the adoption of this instrument by the Fair Work Ombudsman in relation to MADE Establishment Pty Ltd (the group which runs restaurants owned by celebrity chef, George Calombaris) in 2019. Following a self-disclosure of underpayments at a series of well-known restaurants, the parent company was subsequently investigated by the Fair Work Ombudsman and found to have underpaid over AUD 7 million to more than 500 current and former employees. The Fair Work Ombudsman subsequently entered into an enforceable undertaking which required MADE to: implement systems and processes to monitor compliance; submit annual pay audits to an external specialist for independent vetting, and publish written apologies on MADE's social media and websites, and mainstream and industry media publications.[126] The most contentious term of the enforceable undertaking was the requirement that MADE contribute a 'contrition payment' of AUD 200,000 to Commonwealth consolidated revenue. This provoked a storm of public outrage about the apparent lack of deterrence and strengthened calls for the introduction of a criminal offence.[127] The federal Industrial Relations Minister even weighed in, saying initially that the quantum of the 'contrition payment' was too 'light'.[128]

---

123 Nehme (2020), *supra* n. 94, at 33.

124 Rosemary Owens, *Temporary Labour Migration in the Global Era: The Regulatory Challenges* 406 (Johanna Howe & Rosemary Owens eds, Hart 2016).

125 Australian Government, *Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* 442 (Treasury 1 Feb. 2019).

126 Enforceable Undertaking between the Fair Work Ombudsman and MADE Establishment Pty Ltd, 17 July 2019.

127 Anthony Forsyth, *Stronger Stick Needed to Enforce Workplace Laws*, Sydney Morning Herald (2 Aug. 2019).

128 Dana McCauley, *I Think That's Light': Porter Criticises $200k Fine for Wage Theft*, Sydney Morning Herald (24 July 2019). The Minister later acknowledged that the amount of the contrition payment may have been appropriate given the precarious financial position of the business at the time the enforceable undertaking was signed. *See* Attorney-General for Australia and Minister for Industrial Relations. 'Media Conference – Melbourne', 18 Feb. 2020.

Increasing the penalty components of statutory agreements may face some legal obstacles and practical challenges. While enforceable undertakings commonly contain promises which go beyond what may be ordered by a court, obligations which are too onerous or are otherwise disproportionate may be struck down by the courts as an unconstitutional exercise of penal power.[129] A second obstacle to introducing higher 'contrition payments' as part of an enforceable undertaking is that these instruments are ultimately voluntary. At the end of the day, the Fair Work Ombudsman must reach agreement with the signatory firm. At any time during the negotiations, the firm may elect to walk away from the undertaking. In the past, maximum penalties available under the Fair Work Act have been fairly modest. The penalty amounts are principally calculated with reference to the number of contraventions committed by the firm and are often 'grouped' by the court in circumstances where the contraventions have arisen out of the same course of conduct. The size of the underpayment or the financial standing of the firm does not have any direct bearing on the maximum penalty which can be imposed.[130] Further, it has historically been complicated to bring proceedings against third party firms beyond the direct employer, such as franchisors.[131] Combined, these factors have meant that the Fair Work Ombudsman has generally had fewer points of leverage when seeking to conclude the terms of an enforceable undertaking with a well-resourced, and well-advised, firm – who may be more willing to accept the relatively uncertainty associated with enforcement litigation than the concrete costs associated with an enforceable undertaking. In light of this, it is arguable that the introduction of criminal sanctions, and more severe civil penalties, under recent statutory reforms is not only important for ramping up deterrence once proceedings are on foot, but critical in bolstering the bargaining chip of the regulator in enforceable undertaking negotiations before the matter reaches court.

However, undue focus on the power of criminal penalties or the size of contrition payments fails to properly account for the way in which these voluntary agreements do more than penalize duty-holders or recover back wages.[132] Rather, enforceable undertakings – like enhanced compliance agreements in the US – tend to deliver deterrence through a range of alternative means and should be assessed accordingly.[133]

---

[129] Nehme (2020), *supra* n. 94, at 21.

[130] Under the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth) is ultimately enacted. This Bill proposes to introduce a 'value of benefit' penalty.

[131] Some of these issues have been eased with the secondary liability provisions introduced as part of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth), s. 558B.

[132] Weil (2018), *supra* n. 49, at 438.

[133] Richard Johnstone & Michelle King, *A Responsive Sanction to Promote Systematic Compliance? Enforceable Undertakings in Occupational Health and Safety Regulation*, 21 Austl. J. Lab. L. 280, 285 (2008). Tess

First, as identified in previous studies concerned with enforceable undertakings, the cost of many commitments set out in these instruments – from training to auditing – are often substantial. In the context of employment non-compliance, enormous resources are often required to undertake backpayment calculations, or engage an independent accountant or auditor to do so on the firm's behalf. In the notorious 7-Eleven underpayment case, rectification costs exceeded AUD 100 million. However, there is some evidence to suggest that other costs incurred by the franchisor in the lead up to the enforceable undertakings, and since it was signed in late 2016, may have ultimately eclipsed the backpay amount and gone beyond the costs of any potential court order.[134] These costs included: legal fees incurred in negotiating the terms of the instrument; forensic auditing, reconstruction of payroll records; independent assessment of claims via third party consultants; and rolling out a new biometric payroll and time-recording system throughout the franchise network.[135] The Migrant Workers' Taskforce observed that these 'extremely high'[136] costs 'should be a major deterrent for any company valuing its reputation to fall into a culture of non-compliance with employment and wage laws'. However, the Taskforce also acknowledged that the substantial expense incurred by 7-Eleven under the enforceable undertakings, and otherwise, may have a counterproductive effect in that some firms may see these costs 'as a reason not to emulate the 7-Eleven approach',[137] and instead opt for litigation.

The very public nature of enforceable undertakings enhances their deterrence value. Calombaris was the founder and figurehead of the MADE restaurant empire and it was his reputation which was on the line when the underpayments came to light. From a deterrence perspective, Calombaris, and the company he oversaw, were ideal regulatory targets given that they were personally and financially vulnerable to reputational damage. It also provided excellent media fodder. Shortly after the enforceable undertaking was made public, many consumers boycotted the restaurants owned by MADE. The lucrative contract that Calombaris had with a national television network to act as a judge on MasterChef was not renewed. Within months, the MADE restaurant group went into administration, resulting in the closure of twelve restaurants and the redundancy of 400 employees.[138] While the enforceable undertaking negotiated

---

Hardy & John Howe, *Too Soft or Too Severe? Enforceable Undertakings and the Regulatory Dilemma Facing the Fair Work Ombudsman*, 41(1) Fed. L. Rev. 1 (2013).

134 Laurie Berg & Bassina Farbenblum, *Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program*, 41 Melb. U. L. Rev. 1035 (2018).

135 Fair Work Ombudsman, *7-Eleven Partnership Improves Compliance*, Press Release (30 Oct. 2020).

136 Migrant Workers' Taskforce Report, *supra* n. 4, at 47.

137 *Ibid*.

138 Patrick Durkin, David Marin-Guzman & Liz Main, *Who Killed George Calombaris' Empire?*, Austl. Fin. Rev. (12 Feb. 2020).

with MADE was initially met with much cynicism, the fact that it triggered widespread media coverage may have enhanced knowledge and awareness of intermediate sanctions amongst the broader business community.

While further research is required to fully assess the ripple effect of the MADE enforcecable undertaking, and intermediate sanctions more generally, anecedotally, it appears that the MADE enforceable undertaking triggered a range of constructive regulatory responses. First, it is arguable that the undertaking, combined with widespread media coverage, performed a 'reminder' and 'reassurance' function by refocusing the attention of comparable firms on compliance issues that may have been neglected or overlooked, such as the legal entitlements of salaried staff. Indeed, in the period since the enforceable undertaking was agreed with MADE, there has been a wave of high-profile corporate self-disclosures involving similar payroll issues.

Second, as Weil pointed out in his study of US compliance agreements, increasing the risk of detection through third-party monitoring is critically important for enhancing deterrence, especially when it uncovers the full extent of violations across the workforce (as opposed to only those violations which have been self-reported or the subject of an employee complaint). Most enforceable undertakings made by the Fair Work Ombudsman aid in improving detection through a variety of means, including establishment of whistle-blowing hotlines and third party auditing, which is especially powerful from a deterrence perspective. As noted earlier, directed investigations, particularly when combined with unannounced inspections, have been found to be more influential than individual complaint investigations, and more far-reaching than investigations confined to single worksite investigations, in shaping compliance behaviour across business networks. From a resourcing perspective, auditing performed under the auspices of an EU also represents one way to shift the detection burden from the state to lead firms.

Third, and finally, some enforceable undertakings have been deliberately designed to 'disrupt the use of wage theft as a business model'.[139] Similar to the study of enforceable undertakings made in the financial services industry, it is arguable that undertakings made in the context of employment standards regulation are effective in tapping into a range of compliance motivations on the part of the firm. A number of agreements have led to sweeping changes in the sourcing and organization of labour in the relevant business network suggesting a significant shift in social norms. The Fair Work Ombudsman's enforceable undertaking with Coles Supermarkets Australia Pty Ltd (Coles) is especially instructive in this regard. This instrument related to underpaid trolley collectors working in Coles'

[139] Hallett, *supra* n. 12, at 134.

supermarket carparks. The affected employees were engaged through a string of companies with Coles assuming the position of 'lead firm' – at the top of the supply chain. As part of the enforceable undertaking, Coles acknowledged that it had an 'ethical and moral responsibility to require standards of conduct from all entities and individuals directly involved in the conduct of its enterprise'. In addition to a number of fairly standard commitments, Coles also expressly agreed to make 'fundamental, permanent and sustainable changes to its trolley-collection services model'.[140] In practical terms, this led to Coles abandoning its multiple contractor model by moving initially to a single national trolley services provider (which entered into a separate agreement with the Fair Work Ombudsman) and later to an in-house model (where Coles now directly engages almost all trolley-collectors and cleaners working at its sites).[141] This case illustrates the latent power of voluntary agreements – here, such an agreement shifted the compliance calculus of the whole supply chain, if not the sector more generally.

Voluntary agreements are not infallible, and there remains a host of challenges relating to their negotiation, scope, content and implementation. The time between detection of the relevant contravention and the conclusion of an enforceable undertaking also suggests that celerity of sanction is an issue. Further research is required to better understand to what extent, and in what circumstances, these undertakings deliver deterrence and promote compliance. However, this preliminary analysis reveals that enforceable undertakings should not be perceived as the poor regulatory cousin of enforcement litigation given that these instruments have the potential to contribute to deterrence-based strategies in unique and important ways. This includes: amplifying the costs associated with employment non-compliance by requiring firms to invest heavily in rectification and preventative measures (on top of any backpay amount or contrition payment); increasing reputational-based costs through publicly conveying the nature of the wrongdoing and the firm's response; enhancing the perceived risk of detection via more effective monitoring; and triggering long-term changes in sourcing arrangements and business models. These elements do not all fit neatly within the classical conception of deterrence. Rather, they tend to reflect a broader notion of deterrence that takes into account not just formal, monetary penalties, but a range of other costs, sanctions and mechanisms that are designed to trigger and entrench long-term behavioural change.

---

[140] Enforceable Undertaking between the Fair Work Ombudsman and Coles Supermarkets Australia Pty Ltd dated 6 Oct. 2014, at 4.

[141] Australian Government, *Final Report– Enforceable Undertaking between the Fair Work Ombudsman and Coles Supermarkets Australia Pty Ltd* (Fair Work Ombudsman 2019).

5 CONCLUSION

This article stemmed from the debate that is currently brewing in Australia over the role of deterrence in labour law enforcement. Many assume that a criminal offence of wage theft will aid in deterrence, and that greater deterrence equates to greater compliance. The article explores some of these assumptions by surveying leading models of employment standards enforcement and conducting a broad sweep of the empirical literature concerned with deterrence, compliance and enforcement.

In reviewing the core features of orthodox deterrence theory, responsive regulation and strategic enforcement, it became clear that punitive sanctions were an essential element of all models.[142] The theoretical and empirical literature suggests that the relationship between deterrence and compliance is complex, multidimensional and cannot always be explained via a simple cost-benefit prism.[143] In the end, it is likely that a 'detailed and "messy" mix of enforcement strategies and practices'[144] may be most effective. However, there is still much that remains uncertain about how deterrence 'works' and how to make it work better in the context of wage theft.[145] More research is urgently required.

On the evidence available, it appears that a drastic increase in sanctions – such as the introduction of imprisonment or a huge uplift in the size of civil penalties – may make some difference by projecting a serious threat.[146] Further, characterizing employment standards violations as 'wage theft', backed by criminal sanctions or heavy fines, may shift social norms[147] and provide a level of 'implicit general deterrence' by 'challenging dominant normative, political, and cultural understandings of the law as one that merely regulates private and consensual relations between workers, rather than as a law that addresses a serious public wrong'.[148] However, there is limited evidentiary support for the idea that criminalization of wage theft will alone act as a regulatory salve, particularly if the enforcement apparatus is not sufficiently resourced to pursue formal sanctions on a frequent, swift and sophisticated basis.[149] Instead, the weight of empirical data suggests that 'the only way to encourage people to comply with the law is to put in place mechanisms to detect breaches of the law and increase the perception in the minds of people

142 Tucker et al. (2019), *supra* n. 31, at 29.
143 Gunningham, Thornton & Kagan (2005), *supra* n. 110, at 290; Parker & Nielsen (2011), *supra* n. 27, at 412.
144 Holley & Sinclair, *supra* n. 23, at 112.
145 *Ibid*.
146 Galvin, *supra* n. 72; Parker & Nielsen (2011), *supra* n. 27, at 414.
147 Hallett, *supra* n. 12, at 143.
148 Tucker et al. (2019), *supra* n. 31, at 30.
149 Bagaric, Alexander & Pathinayake, *supra* n. 77, at 523.

that if they breach the law they will be caught'.[150] Further, a number of seemingly less popular techniques may be better at tapping into calculative motivations.[151] In particular, targeted inspections, particularly when accompanied by administrative sanctions and combined with strategic use of media, may be more powerful in fuelling a firm's perception of risk and foster a greater willingness to commit to long-term compliance.

The subsidiary objective of this article was to redirect attention towards elements which have been neglected or overlooked in recent debates on reform. In the latter part of the article, I sought to advance a purposive discussion on how to promote employer compliance in Australia. The analysis of enforceable undertakings revealed their capacity to produce deterrence effects which are more diffuse, but no less powerful. For example, by shifting the oversight burden to lead firms and employers, these instruments may simultaneously enhance the risk of detection, ease the pressure on the inspectorate, create impetus for subsequent legal action and lay the foundations for future compliance by changing the conditions that result in rule violations in the first place.[152]

---

[150] Mirko Bagaric, *Jailing Bosses for Wage 'Theft' No Payback for Dudded Workers*, The Australian (2 Aug. 2019).

[151] *See* e.g., Bronwen Morgan & Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* 176–220 (Cambridge Univ. Press 2007).

[152] Weil (2018), *supra* n. 49, at 230; Davidov (2016), *supra* n. 3, at 250.