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Title:

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Date:

2013

Citation:

Hardy, T. & Howe, J. (2013). Too Soft or Too Severe? Enforceable Undertakings and the Regulatory Dilemma Facing the Fair Work Ombudsman. *Federal Law Review*, 41 (1), pp.1-33. <https://doi.org/10.22145/flr.41.1.1>.

Persistent Link:

<https://hdl.handle.net/11343/265742>

The final version of this article was published in:
(2013) 41 *Federal Law Review* 1.

Too Soft or Too Severe? Enforceable Undertakings and the Regulatory Dilemma Facing the Fair Work Ombudsman

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1 Introduction

The Office of the Fair Work Ombudsman (FWO), the federal statutory agency responsible for minimum employment standards regulation, is the most recent Australian regulator to make use of enforceable undertakings as a compliance tool. An enforceable undertaking is a statutory agreement between a regulator and an alleged wrongdoer which sets out a number of promises or commitments intended to rectify past contraventions and encourage future compliance. Failure to meet these commitments can lead to the enforcement of the undertaking in court.¹

The FWO and its predecessor, the Workplace Ombudsman, are probably best known for being active in bringing litigation against employers in breach of minimum employment standards, such as wage and leave entitlements.² In this article, we provide a critical analysis of both agencies' use of enforceable undertakings as an alternative to litigation. The FWO was statutorily empowered to use enforceable undertakings by the *Fair Work Act 2009* (Cth), which commenced on 1 July 2009, although the Workplace Ombudsman made three enforceable undertakings framed as common law deeds between January and June 2009. As of 30 June 2012, the Workplace Ombudsman and the FWO have accepted approximately 26 enforceable undertakings.³ The analysis in this article is based on our

* Centre for Employment and Labour Relations Law, University of Melbourne, Australia. The research carried out for this article has been supported by a grant from the Australian Research Council (LP099990298) and is part of a wide research project on the activities and influence of the Fair Work Ombudsman (FWO). This project is partly funded by the FWO. The authors would like to thank the FWO and the anonymous interviewees and participants for cooperating with this research. We would also like to thank Jack Lang for providing research assistance.

¹ It should be noted, however, that contravention of an enforceable undertaking does not itself attract a civil penalty.

² From 2006, the federal agency responsible for enforcement, 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. See 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) and Tess Hardy and John Howe, 'Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 23(3) *Australian Journal of Labour Law* 306.

³ Technically-speaking, the FWO has entered into 29 enforceable undertakings, however, this includes four enforceable undertakings with the same individual – Mr Sadamatsu Katsuyoshi - in his capacity as director

review of the content of all these undertakings, as well as qualitative interviews with approximately 60 inspectors, managers and lawyers of the FWO, and a number of specialist workplace relations lawyers, to explore some of the practicalities with using this particular tool of enforcement.⁴

In conducting our evaluation, we draw upon scholarly analysis of the use of enforceable undertakings in other policy areas. Although enforceable undertakings are somewhat new in the context of employment standards regulation, they have been used extensively in other spheres of business regulation in Australia since the early 1990s. For example, enforceable undertakings have featured in the closely related area of occupational health and safety, and in consumer, competition, corporation, financial and media regulation.⁵

While statutory regulatory agencies share a number of important features, the FWO is operating in a unique context and has a distinct approach to many other regulators. Perhaps the most notable difference is the political vulnerability and sensitivity of the FWO as the regulator overseeing compliance with the legal framework of Australian labour relations, a jurisdiction which has been at the forefront of public debate in recent years.⁶ These distinct characteristics render the FWO's use of this particular sanction an interesting case study in its own right. However, the lessons learned from other jurisdictions are valuable for assessing the FWO's use of enforceable undertakings, and

of four separate companies all of which were in liquidation at the time the enforceable undertaking was made. It also includes the three enforceable undertakings made prior to the commencement of the FW Act.⁴ Our research involved semi-structured qualitative interviews with FW Inspectors (and former Inspectors) in capital cities and some regional areas, as well as with senior managerial staff and lawyers at the FWO with responsibility for decision-making and/or policy in relation to the agency's use of sanctions such as enforceable undertakings. The FWO assisted in the selection of these interviewees. The interviews, carried out in 2010, 2011 and 2012, adopted a semi-structured format using a common set of questions. In addition to reviewing the content of enforceable undertakings, we have researched both internal and publicly available FWO documentation, including relevant FWO Guidance Notes. This research was supplemented by a small number of interviews with legal practitioners with experience in advising clients in relation to FWO enforcement activity. We located practitioners through a variety of sources, including professional contacts, participation in court cases, profiles at law firm websites and publications. Our interviewees were either employment law specialists in large national law firms or partners in boutique workplace practices and traditional labour law firms.

⁵ See, eg, Marina Nehme, 'Enforceable Undertakings in Australia and Beyond' (2005) 18 *Australian Journal of Corporate Law* 68; 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; 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; 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).

⁶ Bennett has argued that historically, federal governments have maintained considerably more direct influence over the employment standards enforcement agency than other institutions within the federal labour relations system, such as the courts and the conciliation and arbitration tribunal: Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (Law Book Co, 1994), p 146. Moreover, the establishment of the Workplace Ombudsman in 2007 was somewhat controversial due to allegations that the agency it replaced, the Office of Workplace Services, had been subject to political influence. 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.

our analysis may have implications for other regulators, in particular the Fair Work Building Industry Inspectorate (formerly the Australian Building and Construction Commission).⁷

In particular, the existing literature and experience in other jurisdictions has highlighted a number of issues with the use of enforceable undertakings. Proponents of enforceable undertakings argue that they deliver value to regulatory agencies as a responsive alternative to traditional, punitive enforcement action.⁸ Enforceable undertakings not only allow for conventional remedies, such as rectification of underpayments, but also enable the regulator to explore other novel sanctions, such as the establishment of ongoing auditing and reporting arrangements or the payment of funds to a community organisation. In this way, enforceable undertakings are said to engender greater cooperation, foster organisational commitment to improved and sustained compliance and contribute to restorative justice.

On the other hand, critics of enforceable undertakings have raised a number of problems with the use of this tool. One area of concern has been around the *accountability* of regulators who rely on, and firms who are subject to, this mechanism. For instance, it has been asserted that the broad discretion held by regulators in relation to enforceable undertakings, and a lack of formal, legal accountability to the courts in some jurisdictions, means that they are unfair to alleged wrongdoers.⁹ Others have contended that enforceable undertakings are *ineffective* at achieving deterrence because they are ‘a “soft option” that gives business offenders another chance to comply voluntarily when it would be more appropriate and effective to punish them’.¹⁰ There are those who contend that a failure to include affected parties in the negotiation process may also hinder the effectiveness of undertakings in achieving restorative justice. Further, a lack of independent monitoring or credible enforcement may foil substantive improvements in compliance.¹¹

In Section 2 of the article, we outline the various arguments for and against enforceable undertakings and highlight the theoretical tension between regulatory enforcement objectives of flexibility and innovation and public law concerns of accountability and procedural fairness. Drawing on these critiques, in Sections 3, 4 and 5 we examine: first, the FWO’s use of enforceable undertakings; second, the decision-making process followed in negotiating and concluding enforceable undertakings; and third, the content of those undertakings. In Section 6, we consider the monitoring and compliance arrangements for enforceable undertakings accepted by the FWO: a critical concern in

⁷ The Director of the Fair Work Building Industry Inspectorate now has the same functions and powers, in relation to a building matter, that the Fair Work Ombudsman has under section 715 of the FW Act. See *Fair Work (Building Industry) Act 2012* (Cth), s 59D.

⁸ See, for example, Parker (2004), above n 5. The arguments in favour of enforceable undertakings are discussed in further detail in Section 2.

⁹ Parker calls this the ‘fairness’ critique: Parker (2004), above n 5, 211. See, for example, Karen Yeung, *Securing Compliance: A Principled Approach* (Hart Publishing, Oxford, 2004), 205-206.

¹⁰ Parker (2004), above n 5, 211, citing numerous commentators critical of alternatives to prosecution and deterrence as an approach to regulatory enforcement and compliance.

¹¹ See the discussion in Section 5 of the article.

relation to both the effectiveness and accountability of these sanctions. Section 7 sets out our conclusions. While we believe that the FWO is endeavouring to use enforceable undertakings in a responsive and accountable manner, it is of concern that the number of enforceable undertakings accepted by the FWO remains fairly limited and appears to be declining. We put forward a number of suggestions as to how the regulator may maximise the utilisation of enforceable takings, and more fully realise the regulatory benefits of this particular compliance tool.

2 The Nature of Enforceable Undertakings as a Regulatory Sanction

Legal standards such as 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).’¹² Although it is often assumed that state enforcement action consists of prosecution or other court-based litigation seeking punitive remedies, studies in the field of regulation and compliance suggest that effective regulatory enforcement may also require the use of administrative alternatives to formal legal action, such as the enforceable undertaking.¹³

There is an extensive literature concerning the use of enforceable undertakings as an approach to regulation and compliance.¹⁴ In general, enforceable undertakings are perceived to represent an innovative and strategic approach to regulatory enforcement. The agreement specifies actions that the person or business will take (such as the adoption of new compliance processes) or refrain from taking (such as further non-compliance). It is an alternative to more formal and punitive administrative, civil or criminal sanctions and is designed to provide a quick and effective remedy for contravention of regulatory provisions. In many cases, undertakings are used to formalise administrative sanctions in lieu of enforcement litigation.

At the same time, enforceable undertakings also have the potential to secure employer commitment to, and capacity for, ongoing and sustained compliance. Both the process of negotiation and the content of enforceable undertakings should help to institutionalise positive compliance behaviour. Discussing and then giving an enforceable undertaking allows a business to ‘take ownership of the regulatory solution presented.’¹⁵ Indeed,

¹² Colin Scott, ‘Analysing Regulatory Space: Fragmented Resources and Institutional Design’ [2001] *Public Law* 329 at 331.

¹³ For an introduction to the wider literature on regulatory enforcement, see Bronwyn Morgan and Karen Yeung, *An Introduction To Law And Regulation: Text And Materials* (Cambridge University Press, 2007), pp 176-220.

¹⁴ In particular, studies of the use of undertakings by the Australian Competition and Consumer Commission (ACCC), occupational health and safety (OHS) regulators, and the Australian Securities and Investments Commission (ASIC) have identified a number of advantages and disadvantages of this particular enforcement tool. For examples, see the references listed in n 5 above.

¹⁵ Richard Macrory, *Regulatory Justice: Making Sanctions Effective* (Final Report, Better Regulation Executive, November 2006), 65.

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.¹⁶

In some respects, the enforceable undertaking is designed to shift the burden of compliance to the firms themselves by sparking self-regulatory modes of behaviour. This effectively allows the regulator to take a less interventionist role in terms of monitoring and ensuring ongoing compliance, which is important for agencies with limited resources.

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’.¹⁷ The theory of responsive regulation posits that for regulators to react effectively to the diverse motivations and behaviour of firms, they must be armed with a mix of regulatory tools ranging from persuasive measures to deterrent sanctions and deploy these sensitively and pointedly.

While there is a level of disagreement about the proper place and use of enforceable undertakings,¹⁸ 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. The enforcement pyramid works on the basis that 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. The enforceable undertaking usually sits somewhere between informal warnings and infringement notices and more severe sanctions. 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 the FWO himself who recently commented that: ‘prosecution and the EUs are the lever by which you get voluntary compliance for

¹⁶ Johnstone and King, above n 5, 283. See also Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002).

¹⁷ 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).

¹⁸ See Johnstone and Parker, above n 5, Part 3.

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.'¹⁹ Johnstone and King similarly observed that:

Part of the responsive nature of enforceable undertakings lies in their potential for dynamic deterrence, because enforceable undertakings internalise the costs of contraventions at two stages: the costs of the measures undertaken by the firm, and the cost of the sanctions that will be imposed upon the firm if the undertaking itself is broken.²⁰

Enforceable undertakings are also seen to reflect the goals of rehabilitation and restorative justice. Restorative justice is founded on a collaborative model where the regulator, victims and alleged wrongdoers of a particular offence or contravention work collectively to resolve the matter. In so doing, restorative justice aims to rectify harms done, restore relationships and reduce recidivism.²¹ To achieve restorative justice, senior management within the organisation must be motivated by, and committed to, the relevant regulatory goals. Given that enforceable undertakings are generally negotiated at the upper levels of an organisation and empower the parties to come together to make innovative, flexible and comprehensive agreements they have been described as demonstrating, at the very least, a partial realisation of restorative justice.²²

In sum, enforceable undertakings offer a number of distinct advantages over prosecution: they are generally quicker, less costly and more certain. Further, these benefits do not necessarily come at the expense of deterrent, rehabilitative or restorative outcomes.

As noted in the introduction to this article, the enforceable undertaking is not without its critics. In particular, some have questioned whether enforceable undertakings effectively let non-complying employers 'off the hook', and suggest that they are therefore of dubious value in achieving either specific or general deterrence when compared to prosecution and imposition of sanctions by the courts.²³ Others have suggested that undertakings privilege alleged offenders who are sufficiently sophisticated and well-resourced to engage in negotiation of undertakings on an equal footing with the regulator, and to be in a position to pay fines or compensation to professional associations or charitable organisations.²⁴ This analysis suggests that less sophisticated offenders are instead subject to more punitive treatment.

Further concerns have been raised about the potential shortfalls in public accountability in relation to undertakings. For example, it has been pointed out that the process of making and finalising the terms of an enforceable undertaking is similar to a mediation insofar that it represents a mutually agreed compromise between the parties and negotiation occurs in private. Further, the process and the undertakings themselves are

¹⁹ Quote extracted from Johnstone and Parker, above n 5, 66.

²⁰ Johnstone and King, above n 5, 285.

²¹ Braithwaite, above n 17.

²² Parker (2004), above n 5, 220.

²³ Ibid 211.

²⁴ Neil Andrews, 'If the Dog Catches the Mice: The Civil Settlement of Criminal Conduct under the Corporations Act and the Australian Securities and Investments Act' (2003) 15 *Australian Journal of Corporate Law* 1 at 19.

often excluded from judicial review.²⁵ To this extent, questions have been raised as to whether the negotiation of enforceable undertakings is procedurally fair.²⁶

Moreover, the restricted nature of the negotiation process leads to the exclusion of third parties in a decision that may have a significant impact on them. In the employment standards context, affected employees and their unions have an interest in any settlement by FWO of a breach of standards with employers, albeit these parties continue to have rights of action in relation to the original contravention notwithstanding the enforceable undertaking with the FWO.²⁷ Some commentators believe that failing to consult other interested parties, or consider their views in negotiating and accepting an enforceable undertaking, means that the regulator is 'missing a valuable element that may enhance its regulatory response.'²⁸ The appropriate scope of enforceable undertakings has also been the subject of some debate amongst academics, regulators and law reform agencies.²⁹ Some have argued that the content of enforceable undertakings should not exceed the legislative mandate and should be directly related and proportionate to the breach.³⁰

These issues are not only important from an administrative law perspective.³¹ Perceptions of fairness can also arguably affect the promisor's attitude towards compliance with the terms of the undertaking. Nehme argues that: 'any resentment may stop an undertaking from achieving one of its main aims, which is to change the compliance culture of an organisation.'³² It may also present challenges for monitoring, given that many commitments rely on trust and self-regulation by the promisor. In short, addressing accountability concerns is an important part of ensuring the overall effectiveness of enforceable undertakings insofar that these issues influence the legitimacy of the sanction, and arguably the credibility of the regulator.

²⁵ Ibid; see also Kristy Richardson, 'Judicial Review of Enforceable Undertakings under the Workplace Health and Safety Act 1995' (2007) 27 *Qld Lawyer* 250; Yeung, above n 9; Frank Zumbo, 'Section 87B Undertakings: There's No Accounting for Such Conduct' (1997) 5 *Trade Practices Law Journal* 121; and Marina Nehme, 'Expansion of the Powers of the Administrative Appeals Tribunal in relation to Enforceable Undertakings' (2007) 25 *Corporations and Securities Law Journal* 116.

²⁶ For example, Yeung argues that poor processes for the making of enforceable undertakings can mean that 'the use of undertakings may tend to thwart, rather than nurture, the constitutional values of transparency, accountability, participation and substantive fairness'. Yeung, above n 9, 242.

²⁷ See also Marina Nehme, 'Justice to Outsiders Through Undertakings' (2009) 9(1) *Queensland University of Technology Law and Justice Journal* 85.

²⁸ Nehme (2005), above n 5, 87.

²⁹ See, eg, Johnstone and Parker, above n 5.

³⁰ For example, in its review of federal civil and administrative penalties, the Australian Law Reform Commission noted that 'in the interests of certainty, consistency and fairness, concerns expressed in relation to the scope of enforceable undertakings warrant legislative address. There should be clearly articulated legislative parameters guiding the scope of undertakings that are appropriate for the regulated community to offer, and for regulators to accept.' See Australian Law Reform Commission, 'Principled Regulation: Federal Civil and Administrative Penalties' (ALRC Report No 95, March 2003), 598.

³¹ Yeung, above n 9, 242.

³² Nehme (2010), above n 26, 475.

If properly negotiated and implemented, enforceable undertakings can overcome both criticisms about their effectiveness and accountability.³³ The capacity of enforceable undertakings to provide an alternative to prosecution and have the potential to offer restorative justice makes them a valuable tool for regulators in achieving compliance. Parker has argued that fairness critiques of enforceable undertakings over-estimate the capacity of regulators to abuse their discretion in dictating and enforcing the provisions of enforceable undertakings.³⁴

In building this argument, Parker draws on an extended definition of accountability that we have explored elsewhere in relation to the FWO.³⁵ Under this definition, a distinction is drawn between formal, hierarchical legal accountability to the courts, and ‘more diffuse, informal, deliberative accountability to the public and particular parties with an interest in the matter via publicity, consultation and non-coercive review mechanisms’.³⁶ Parker argues that formal legal accountability is mainly appropriate for the decision-making process in cases of a serious breach of procedural fairness, while extended accountability mechanisms could apply to both the decision-making process of enforceable undertakings, as well as to their content.³⁷

In particular, if the content of the enforceable undertaking is carefully drafted to address organisational deficiencies causing misconduct and secure management commitment as to future compliance, and there are adequate monitoring mechanisms in place, enforceable undertakings have the potential to achieve superior compliance outcomes than enforcement litigation.³⁸ In terms of the decision-making process, consistent with the concept of the enforcement pyramid, enforceable undertakings can only be effective if used as an alternative to litigation in the appropriate cases, and not where they are used to the exclusion of or in preference to enforcement litigation.³⁹ Without the threat of litigation, there is less incentive for offenders to negotiate an enforceable undertaking in the first place, or to comply with its terms after agreement is reached.

Although the FWO’s use of enforceable undertakings is intended as a quick and cost-effective alternative to litigation, there is nevertheless a deterrent element to these agreements. As Parker has explained, ‘[b]usinesses that are subject to an enforceable undertaking are effectively on probation or enjoying amnesty from coercive enforcement action, as long as they comply with their undertakings.’⁴⁰ The fact that the regulator has the statutory right to enforce the agreement in court is intended to motivate the relevant

³³ See, for example, Parker (2004), above n 5; Johnstone and King, above n 5; and Nehme (2010), above n 26.

³⁴ Parker (2004), above n 5, 211.

³⁵ Tess Hardy and John Howe, ‘Accountability and the Fair Work Ombudsman’ (2011) 18 *Australian Journal of Administrative Law* 127.

³⁶ Parker (2004), above n 5, 239 (footnotes omitted).

³⁷ *Ibid* 239-240.

³⁸ *Ibid* 212. See also Johnstone and King, above n 5; Nehme (2005), above n 5.

³⁹ Parker (2004), above n 5, 212.

⁴⁰ *Ibid* 222.

business to adhere to the terms of the undertaking.⁴¹ The public nature of most enforceable undertakings means that they also serve a general deterrence function.

As we detail below, the FW Act provides the FWO with a broad discretion as to when and how enforceable undertakings are negotiated and accepted. Similarly, the FW Act does not circumscribe in any way the proper scope and content of enforceable undertakings. From this review, it seems that key to our evaluation is the extent to which the decision-making process followed by FWO is transparent, cooperative and procedurally fair. A second central question is whether the content of enforceable undertakings achieves regulatory goals, such as to compensate victims, prevent future misconduct and achieve sustained compliance by focusing on systematic reform and change of corporate systems through promoting management commitment. A related question is whether these commitments can be effective in achieving regulatory objectives, while still remaining proportionate and related to the original breach. Finally, we seek to examine whether the monitoring and enforcement arrangements serves to strengthen, rather than weaken, the overall regulatory value of enforceable undertakings and address some of the key accountability concerns identified above.

3 Use of Enforceable Undertakings by the FWO

Since July 2009 the FWO has been empowered to accept enforceable undertakings under the terms of the FW Act.⁴² The Explanatory Memorandum to the legislation stated that the inclusion of this power ‘provides the FWO with another option to deal with non-compliance (by encouraging co-operative compliance) instead of pursuing court proceedings.’⁴³

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 section 715, the following conditions must be satisfied:

- a) the FWO must have a *reasonable belief* that a person has contravened a civil remedy provision⁴⁴ – 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

⁴¹ See Nehme (2009), above n 27, at 77-78.

⁴² The introduction of s 715 of the FW Act – which provides for the making of statutory enforceable undertakings by FWO after 1 July 2009 – essentially recognised and reflected the reality of what was already occurring in practice. In particular, in 2008/2009, the Workplace Ombudsman entered into three ‘enforceable undertakings’ under the common law. These enforceable undertakings were framed as common law deeds enforceable in court in the event of contravention. Since the introduction of a statutory mechanism, no further common law enforceable undertakings have been concluded.

⁴³ Commonwealth of Australia, Explanatory Memorandum to the *Fair Work Bill 2008* (Cth), 400.

⁴⁴ 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.

person giving the undertaking and the contravention which is the subject of the undertaking.⁴⁵

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 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.⁴⁶

Apart from these constraints, 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,⁴⁷ is the core policy document which governs the use of enforceable undertakings under the FW Act. 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 interest⁴⁸ 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.⁴⁹

⁴⁵ 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.

⁴⁶ However, in a bid to try to address systemic non-compliance within these more complex structures and working arrangements, the FWO has 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. As at 30 June 2012, the FWO had entered into four such deeds, sometimes known as 'deeds of proactive compliance', with McDonald's Australia Ltd, Domino's Pizza Enterprises Ltd, Red Rooster Foods Pty Ltd and Spotless Services Ltd respectively.

⁴⁷ See Fair Work Ombudsman, *Guidance Note 4 – Enforceable Undertakings Policy* (20 July 2011) <<http://www.fairwork.gov.au/fwoguidancenotes/GN-4-FWO-Enforceable-Undertakings-Policy.pdf>> (EU Policy).

⁴⁸ 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 Fair Work Ombudsman, *Guidance Note 1 – Litigation Policy* (20 July 2011) <<http://www.fairwork.gov.au/fwoguidancenotes/GN-1-FWO-Litigation-Policy.pdf>>. There are no factors which are specifically used to determine whether an EU is in the 'public interest'.

⁴⁹ EU Policy, above n 47, 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.⁵⁰ The position of the FWO with respect to admissions in enforceable undertakings is considered in further detail as an issue pertaining to the content of undertakings in the following section of the article. For the moment, it is sufficient to note that, the FWO's goals in using enforceable undertakings, insofar as they are articulated in the EU Policy, reflect many of the advantages of this tool discussed in the regulation and compliance literature.

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 training⁵¹ to a small chain of Japanese restaurants failing to pay employees their basic hourly rate of pay and keep employment records.⁵² The popularity of enforceable undertakings has been reflected in the numbers made in each financial year since they were first trialled. For example, three were made under the common law in the 2008-2009 financial year, this 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 last financial year with a decline in the number of enforceable undertakings.⁵³ 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, nine were with businesses of more than 100 employees, while another four were signed with businesses employing between 25-100 workers.⁵⁴

In other jurisdictions, an increase in enforceable undertakings has been associated with an accompanying decline in civil penalty litigation.⁵⁵ It is hoped that this trend is not reflected in the Australian employment standards jurisdiction given our observation that enforceable undertakings should be used in a manner consistent with the enforcement pyramid concept. Without a balanced use of more punitive sanctions, overuse of undertakings may undermine the more deterrent tools at the FWO's disposal. In light of this, it is perhaps slightly concerning to observe a drop in the number of enforcement litigation matters being brought by the FWO since the commencement of the FW Act, particularly in the most recent financial year of 2011-2012.⁵⁶ However, the overall

⁵⁰ Ibid 5.

⁵¹ 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.

⁵² 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.

⁵³ Eight enforceable undertakings were made in the 2011-2012 financial year.

⁵⁴ These figures were provided to us by the FWO.

⁵⁵ See Nehme (2005), above n 5, 69.

⁵⁶ While the numbers in the WO/FWO Annual Reports vary somewhat, it appears that the annual number of civil penalty litigation proceedings commenced by the FWO (excluding enforceable undertakings approved for negotiation) declined from a peak of approximately 78 in 2008-2009 to 53 in 2009-2010. In 2010-2011, the Annual Report states that there were 55 civil penalty litigation matters commenced. However, it is not clear whether this figure also includes 'enforceable undertakings approved for negotiation', the number of which is not specified. See Fair Work Ombudsman, *Annual Report 2010-2011*, 47-48. The FWO's website lists 34 litigation matters commenced in 2011-2012.

reduction in the use of both litigation and enforceable undertakings may be explained by the expansion of the mandate of the FWO,⁵⁷ and a decline in resourcing of the agency, rather than a conscious softening of the enforcement strategy. At least one FWO lawyer confirmed that the recent drop in EUs did not reflect ‘any attitude shift with them’.⁵⁸

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. In difference ways, these clauses provide a means of promoting future compliance with workplace laws.⁵⁹

The existence of a publicly available policy concerning the use of enforceable undertakings by the FWO addresses one of the concerns about the accountability of this instrument in the context of other jurisdictions. The FWO’s EU Policy, however, only sketches out broad criteria to be applied in the decision to negotiate an enforceable undertaking. The following two sections draws on insights from interviews with FWO staff and our examination of the content of enforceable undertakings to evaluate the FWO’s use of enforceable undertaking against both its own goals and the insights from the regulatory literature outlined earlier in this article.

3 Decision-Making Process

The decision-making process for enforceable undertakings is not necessarily straightforward. In particular, in negotiating and concluding enforceable undertakings, the FWO, like other regulators with the power to accept enforceable undertakings, is ‘faced with the tension between the need to act in a consistent and predictable way and the opportunity to use the enforceable undertakings power to negotiate tailored, individual, forward-looking solutions to idiosyncratic problems.’⁶⁰

⁵⁷ Under the FW Act, the FWO assumed responsibility for enforcing anti-discrimination and ‘sham contracting’ laws in the FW Act, in addition to its responsibility for prosecuting breaches of regulation relating to maximum working hours and minimum. The latter ‘time and wages’ issues were traditionally the sole mandate of the federal labour inspectorate. The expanded mandate requires resources being directed to matters which are more difficult to prove, and which raise new opportunities for improving employer behaviour. See generally John Howe, Tess Hardy and Sean Cooney, ‘Mandate, Discretion and Professionalisation at an Employment Standards Enforcement Agency: An Antipodean Experience’ (2013) 35 *Law & Policy* 1.

⁵⁸ FWO Interview: FWLI.

⁵⁹ 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.

⁶⁰ Johnstone and Parker, above n 5, 19.

There are two important issues to consider with respect to the decision-making process of the FWO in light of criticisms concerning the effectiveness and accountability of enforceable undertakings discussed above. The first concerns the type of matter in which an enforceable undertaking is seen (or not seen) as the appropriate sanction. The basis upon which this determination is made is relevant to the question of whether the use of enforceable undertakings by the FWO is likely to be responsive and effective in achieving sustained compliance. Second, what is the process used for making a decision, and how procedurally fair and inclusive is the process? Is decision-making transparent and consistent? To what extent is it subject to judicial review, as well as informal and deliberative accountability? Each of these issues is considered in turn below.

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 appears to be no clear pattern in terms of industry or the nature or extent of the relevant contraventions, except to the extent that there appears to be a tendency to make enforceable undertakings with large or medium-sized businesses rather than small businesses. Although the outcome of these negotiations is generally disclosed, as each enforceable undertaking is made freely available on the FWO website, the process for negotiating enforceable undertakings is not necessarily transparent. While the FWO provides some figures on 'enforceable undertakings approved for negotiation',⁶¹ it does not disclose how many proposed enforceable undertakings were rejected by either the regulator or the alleged wrongdoer before agreement could be reached.⁶²

Rather, it seems the decision of whether to accept an enforceable undertaking turns on the facts of each case, and perhaps more importantly, whether or not senior staff at the FWO view an enforceable undertaking as being in the regulator's strategic interest.⁶³ It is apparent from the interviews we have conducted with FWO staff that the relatively inexpensive and time-efficient nature of enforceable undertakings is an important factor in making undertakings an attractive enforcement option when compared to litigation.⁶⁴ The current head of the FWO has commented that one important motivation for using enforceable undertakings is to 'wrap up the matter with an acceptable outcome for...the community, workforce and the offender'.⁶⁵ On this basis, he has publicly encouraged FW Inspectors to make more extensive use of enforceable undertakings to avoid lengthy and expensive litigation, particularly in cases where employers are prepared to cooperate with the FWO.⁶⁶ The Ai Group has also recently commented that, from an employer

⁶¹ See, eg, Fair Work Ombudsman, *Annual Report 2010-2011*, 48.

⁶² 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 5, 305-306.

⁶³ FWO Interview: FWLI.

⁶⁴ FWO Interview: FWML.

⁶⁵ Nicholas Wilson, Fair Work Ombudsman, quoted in Johnstone and Parker, above n 5, 41.

⁶⁶ 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

perspective, undertakings were often seen as ‘fairer, less costly and more effective in securing compliance than prosecution, particularly where a party has not deliberately broken the law.’⁶⁷

This is not to downplay, however, the perception that enforceable undertakings have a strong compliance impact. Indeed, as compared to remedies available through the courts, enforceable undertakings are 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.’⁶⁸ Indeed, while some believe that enforceable undertakings represent a ‘softer’ option, and are considered suitable for cases where the alleged wrongdoer(s) show contrition,⁶⁹ our evidence suggests that undertakings often allow the FWO to ‘come up with deals that we wouldn’t be able to get in the courts.’⁷⁰

Like many of the litigation outcomes achieved by the FWO, most of the enforceable undertakings are made available on the FWO’s website and are often accompanied by a tailored media release. The Fair Work Ombudsman himself has 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.’⁷¹ Indeed, it seems that the public nature of an enforceable undertaking not only addresses some of the accountability concerns raised above, but makes it more compelling than a mere administrative settlement.

Publicity was viewed as important by FWO staff in several respects. Making an enforceable undertaking public was seen to serve a deterrent function, and one with potentially more weight than a court penalty.⁷² However, the fact that an alleged wrongdoer is likely to suffer damaging publicity when they enter into an enforceable undertaking may potentially weaken the incentives for the firm (or individual) to reach an agreed compromise with the regulator. This is particularly so if the alleged wrongdoer is reputation-sensitive, believes that they have an arguable defence to the litigation, or expects that the court will take into account factors not necessarily considered by the regulator in determining the terms of the undertaking, such as early and voluntary rectification of the contravention. On the other hand, high profile firms may be attracted to EUs on the basis that the publicity associated with these agreements was preferable to that accompanying civil penalty litigation. On the relationship between publicity and

about 80 litigations per year nationally. I can see a role for about the same number of enforceable undertakings in the future.’ Quote extracted from Johnstone and Parker, above n 5, 41.

⁶⁷ Ai Group, Submission to the Fair Work Act Review Panel, *Review of the Fair Work Act 2009*, 29 February 2012. See also 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).

⁶⁸ FWO Interview: FWLF. See also FWO Interview: FWLE.

⁶⁹ FWO Interview: FWMS.

⁷⁰ FWO Interview: FWLF.

⁷¹ Johnstone and Parker, above n 5, 42.

⁷² For example, FWO Interview: FWMG; FWO Interview: FWLI.

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.’⁷³

Perhaps more important than these elements, however, is the way in which enforceable undertakings have been 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:

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.⁷⁴

Although the FWO is aware of the potential of enforceable undertakings to offer a flexible and responsive alternative to other sanctions - and the preceding comment to some extent reflects this - when deciding between enforceable undertakings and litigation, the predominant concern of the FWO appears to be the notion that undertakings present a quicker and less expensive option.

Nevertheless, once an enforceable undertaking has been identified as potentially appropriate by the FWO, there is a comprehensive internal decision-making procedure in place for the making of enforceable undertakings. In our view, the combination of the parameters set by the EU Policy and the procedure followed by the FWO for the approval of undertakings, limits the scope for abuse of discretion and addresses many of the criticisms made by public lawyers noted earlier.

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 are most often initiated by the FWO after being 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.⁷⁵ 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 is often obtained in circumstances where the possibility of litigation by the FWO looms in the background.

When enforceable undertakings were made by the Workplace Ombudsman under the common law, the approval process was fairly informal: they were often negotiated by the

⁷³ FWO Interview: FWLI. See also FWO Interview: FWMG.

⁷⁴ FWO Interview: FWIS. This view was echoed by a FWO lawyer: FWO Interview: FWLD.

⁷⁵ Based on various FWO Interviews. See, eg, FWLF, FWLE.

relevant inspector with the support of his or her team leader or director. A final review was subsequently undertaken by the legal team. According to one interviewee, this changed when the FWO was empowered to accept undertakings by the FW Act:

As soon as it became in the legislation it sort of had this specialness about it, that meant it then had to have a process, and then had to have a system attached to it, whereas previously it was just sort of part of what you did as a litigator.⁷⁶

Even more recently, a decision has been made that enforceable undertakings ‘are of such significance that they can only really be negotiated at the higher levels.’⁷⁷ One manager commented that the process for approving undertakings is now ‘up there with litigation, if not higher’.⁷⁸ In practice, this means that while the inspector may believe that an enforceable undertaking is the most appropriate option in any given case, it will only be pursued if the briefing document prepared by the inspector under the supervision of his or her team leader or manager,⁷⁹ is approved by the Fair Work Ombudsman himself and the Strategic Litigation Committee (i.e. a specialist sub-committee of the FWO which considers all formal sanctions, including litigation, enforceable undertakings and compliance notices). Indeed, before any negotiations can commence between the FWO’s lawyers and the alleged wrongdoer (and/or their legal representative), the Fair Work Ombudsman must agree that the matter is suitable for an enforceable undertaking.⁸⁰ At this time, these senior executives may also provide input regarding the relevant commitment, that is, whether it should be ‘EU heavy’ – setting out a full range of commitments, such as public apologies, training and donations to charity, or ‘EU light’, which includes some media, but is generally less onerous.⁸¹

One possible reason for the comprehensive and centralised approval process is the political sensitivity of the FWO. The head of the FWO is apparently keen to avoid perceptions that the regulator is being arbitrary or preferential by ensuring that the enforcement approach is consistent and the commitments set out in undertakings are proportionate to the relevant contraventions.⁸² Yet another reason may be the fact that the FWO appears to apply a relatively high internal standard when it comes to determining whether there is sufficient evidence to form a reasonable belief that a relevant contravention has occurred. 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

⁷⁶ External Interview: EXE.

⁷⁷ FWO Interview: FWLF.

⁷⁸ FWO Interview: FWMS.

⁷⁹ 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.

⁸⁰ 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: FWO Interview: FWMS.

⁸¹ FWO Interview: FWLI.

⁸² FWO Interview: FWMS.

evidence to proceed with litigation.⁸³ 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’.⁸⁴ 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.⁸⁵

Yeung has argued that the evidentiary limitations on the use of enforceable undertakings are important because, among other reasons, it ensures that the relevant regulatory agency has legislative authority to accept the proposed undertaking.⁸⁶ 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.⁸⁷ The evidentiary restrictions can also have important implications for the enforceability of the enforceable undertaking, and the credibility of this tool in the regulatory process.

While the high evidentiary thresholds and detailed approval process adopted by the FWO may guard against political rumblings and address public law concerns, it is arguable that it has restricted the utility of enforceable undertakings as a regulatory mechanism. In order to obtain the necessary level of evidence for an undertaking, a fairly comprehensive investigation must have first taken place before it reaches the approval stage. In our view, while the content of enforceable undertakings entered into by the FWO has been innovative and far-reaching, the number of undertakings concluded is somewhat disappointing. This is particularly so in light of earlier predictions by the FWO that there would be a significant increase in their use.

⁸³ FWO Interview: FWIS.

⁸⁴ 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.’ External Interview: EXE.

⁸⁵ FWO Interview: FWMS.

⁸⁶ See ALRC - Principled Regulation, above n 30.

⁸⁷ 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 Hardy and Howe (2011), above n 35.

On a comparative basis, the number of enforceable undertakings accepted by the FWO appears to be lower than has been achieved by regulators in other jurisdictions, even taking into account the generally slow uptake of new tools by regulators.⁸⁸ Several inspectors we interviewed expressed the view that while enforceable undertakings were valuable, they were not being used often enough because of the amount of work involved and because of the requirement that it be approved by the FWO himself.⁸⁹ We were informed by one inspector that some enforceable undertakings have taken up to 18 months to finalise.⁹⁰

Given this, it seems that there has been an internal push to limit the level of negotiation and speed up the process by shortening the window of opportunity that an employer has to accept the terms of an enforceable undertaking before the matter proceeds to litigation.⁹¹ Restricting the negotiating process in this way may minimise the risk faced by another inspector who found that when the negotiation process stalled, ‘it just went to custard.’⁹² By the time this impasse occurred, the contraventions were stale, the employees had been repaid and the public interest in pursuing the matter through the courts had weakened. Another manager commented that the frequently protracted negotiation process meant that: ‘it was just getting crazy; we were getting played, and we were getting gamed, and we were just losing, and so we just came in, it’s like here it is, you’ve got ten days otherwise we reserve our rights to sue you.’⁹³

From a practical point of view, this approach reflects a legitimate concern about time and costs at a time when inspectorate resources are dwindling.⁹⁴ From a theoretical perspective, however, escalating the process in this way may introduce separate risks and mean that other rehabilitative or restorative benefits are not fully realised. For instance, we found little evidence that the staff within the FWO gave much consideration as to whether affected employees, unions or other interested parties, should be consulted as part of discussions or negotiations. Another one of the purported benefits of enforceable undertakings is that, by being involved in the negotiation and settlement of the commitments contained in the undertaking, the regulated firm takes ownership of the regulatory solution. If, however, the terms are largely dictated by the FWO and presented on a ‘take it or leave it’ basis, this objective may not be achieved. In fact, it may have the opposite effect of building resentment and entrenching regulatory resistance. A proper

⁸⁸ See the comparative data in Johnstone and King, above n 5. For example, in the first three years after the ACCC was authorised to accept enforceable undertakings, the ACCC concluded 14 undertakings in the first year, 35 in the second and 39 in the third year after this tool was introduced. In some years, such as 2007, the ACCC accepted 99 enforceable undertakings.

⁸⁹ FWO Interview: FWIP; FWO Interview: FWIR.

⁹⁰ FWO Interview: FWIL.

⁹¹ Based on comments made in FWO Interview: FWLD.

⁹² FWO Interview: FWML.

⁹³ FWO Interview: FWMS.

⁹⁴ Although inadequate resourcing is a perennial challenge of labour inspectorates, the FWO has been relatively well resourced until recent budget cuts. The 2010-2011 Portfolio Budget Statement states that in 2009-2010, the funding received from the federal government was over \$144 million. This was estimated to decrease to just over \$134 million in the 2010-2011 and 2011-12 financial years. The 2012 federal budget included further funding cuts to the FWO for the 2012-2013 financial year: see Workplace Express, ‘Budget 2012: IR Spending Drops’, 8 May 2012.

appreciation of the level of corporate commitment is crucial to the success of enforceable undertakings. While some FWO staff indicated that undertakings would only be considered where parties were contrite and willing to cooperate, there were others who indicated that they would be contemplated where litigation was perceived as too difficult for evidentiary reasons or otherwise. Indeed, the FWO sometimes enters into enforceable undertakings where corporate commitment is clearly absent i.e. the directors have wound up or intend to wind up the company.⁹⁵ One specialist workplace relations lawyer commented that understanding the nature of the breach, the attitudes of the responsible officers and the drivers of the non-compliance were all important in crafting an undertaking and being satisfied that it will work.⁹⁶

In summary, there is some evidence to suggest that the process of negotiation of enforceable undertakings is achieving the legislators' goal of providing a quick, flexible remedy which encourages co-operative compliance and delivers deterrence. In many instances, it seems that the negotiations surrounding enforceable undertakings are less adversarial and more constructive than where the FWO is threatening direct litigation. Many of the concerns raised about accountability and procedural fairness have also been addressed in the FWO's decision-making process and the public nature of the concluded undertakings. Nevertheless, 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. Further, it seems there could be greater consideration given to whether or not it is appropriate to involve the victims of the contravention – generally employees and their representatives – to maximise the restorative or rehabilitative benefits of enforceable undertakings. 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. This 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.

4 Content of Enforceable Undertakings

As noted above, the FW Act does not provide any specific guidance as to what must be included in, or excluded from, an enforceable undertaking. It is therefore necessary to consider the content of existing enforceable undertakings in order to assess how they are being used and their value as a regulatory tool.

While one FWO lawyer observed that in considering the terms of an enforceable undertaking, 'it's all up for negotiation',⁹⁷ the EU Policy suggests that some terms are

⁹⁵ See, eg, 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.

⁹⁶ External Interview: EXLA.

⁹⁷ FWO Interview: FWLF.

mandatory. This is consistent with the observations of another FWO lawyer who commented that:

As a regulator we see ourselves as having a very different role from [a commercial litigant], because we have to have that education, that deterrence, that corrective workplace behaviour, and so if we sort of settled our litigations, or just came up with compromises left, right, centre, then there's issues about the strength of our role, the independence of our role, and our functioning as a regulator.⁹⁸

As we noted in Section 3, the EU Policy states that, at a minimum, the alleged wrongdoer must admit the contraventions and agree to remedy the contraventions in the manner and timeframe specified by the undertaking (unless it has already been rectified). As a general rule, the enforceable undertaking should also prescribe any other actions that the alleged wrongdoer has agreed to undertake. The EU Policy further states that the FWO will not accept an enforceable undertaking that is required to be kept confidential from any person.⁹⁹

With some notable exceptions,¹⁰⁰ the enforceable undertakings that we reviewed typically fell within two standard formats depending on when they were made.¹⁰¹ Generally, those made before July 2010 followed the earlier format that set out the background,¹⁰² admissions and relevant commitments in the main body of the document. In contrast, the more recent format (which has been generally used after July 2010) is more formal, lengthy and legalistic. However, the commitments set out in later undertakings are 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',¹⁰³ and that more recent undertakings were more experimental and wide-ranging.

Consistent with its EU Policy, all FWO enforceable undertakings have included an admission of contravention. The position of the FWO in respect of admissions in enforceable undertakings appears to stand in some contrast to the approach taken by the ACCC in trade practices matters and ASIC in financial regulation.¹⁰⁴ The relevant

⁹⁸ FWO Interview: FWLD.

⁹⁹ EU Policy, above n 47, 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.

¹⁰⁰ 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.

¹⁰¹ Based on comments made in FWO Interview: FWLB.

¹⁰² Background information normally provides a brief overview of the company size, the industry and the nature of the contraventions.

¹⁰³ FWO Interview: FWMH.

¹⁰⁴ The issue of admissions in enforceable undertakings being subsequently used in court proceedings has been raised in respect of the ACCC, which has, on occasion, combined enforceable undertakings with court action via a consent order or contested proceedings. See, for example, *Australian Competition and Consumer Commission v Colgate-Palmolive Ltd* [2002] FCA 619 (15 May 2002). For further discussion, see Marina Nehme, 'Enforceable Undertaking and its Impact on Private Lawsuit' (2008) 22 *Australian Journal of Corporate Law* 275.

guidelines of both regulators expressly state that they will not insist on admissions in enforceable undertakings. but may instead require that the party offering the undertaking acknowledge the regulator's concerns about the alleged contravention.¹⁰⁵ In this respect, Yeung argues that: '[r]egulators should, as a matter of procedural fairness and ethical duty, formally inform suspects that they are not obliged to provide admissions in giving enforceable undertakings.'¹⁰⁶

This issue is not insignificant when one considers the fact that while the FWO is prevented from pursuing civil penalty litigation where an enforceable undertaking is in place,¹⁰⁷ this 'in no way impedes the ability of another party with standing to bring proceedings in relation to the contravention'.¹⁰⁸ This position is in accordance with the fundamental principles of the rule of law, which allow parties to enforce their rights and seek redress when the law is contravened.¹⁰⁹

The treatment of admissions has obviously been the subject of some review within the FWO. It is one of the key differences between the earlier enforceable undertakings accepted by the FWO and more recent ones. The standard clause now limits the use of admissions by third parties to support a cause of action in any other civil penalty proceeding, while still reserving the right for any matter in the enforceable undertaking being relied on in future proceedings of the details of the conduct that was the evidentiary foundation for the person entering into the undertaking.¹¹⁰ When we asked FWO lawyers about the reasons why the regulator insisted on admissions, the response was not uniform or definitive.¹¹¹

Aside from public law concerns, the FWO's current position on admissions may also impair the regulatory value of undertakings. Insisting on the inclusion of admissions can have a chilling effect on wrongdoers who may fear that doing so may inspire others to bring separate litigation. In addition, to the extent that EUs mimic settlement deeds, they must buck the dominant position adopted by lawyers acting on behalf of employers. That is, rather than include an express admission, settlement deeds more often include express

¹⁰⁵ See ALRC – Principled Regulation, above n 30, 603.

¹⁰⁶ Karen Yeung as cited in ALRC – Principled Regulation, above n 30, 605.

¹⁰⁷ Cf with the ACCC which is entitled to bring legal proceedings in relation to the same or a related matter which is the subject of an enforceable undertaking. See Australian Competition and Consumer Commission, *Section 87B of the Trade Practices Act – Guidelines on the Use of Enforceable Undertakings by the Australian Competition and Consumer Commission*, September 2009, 6.

¹⁰⁸ See EU Policy, above n 47, 5. A note to s 715(4) of the FW Act also states that: 'A person other than an inspector who is otherwise entitled to apply for an order in relation to the contravention may do so.' However, the Explanatory Memorandum to the Fair Work Bill 2008 (Cth) notes that, in circumstances where a person has brought enforcement proceedings against a firm or individual who has previously entered into an enforceable undertaking in relation to the same contravention(s), '[i]t is envisaged that a court would take an enforceable undertaking into account when making orders to remedy a contravention, including when it is considering whether to impose a pecuniary penalty.' See Explanatory Memorandum, Fair Work Bill 2008 (Cth), [2670].

¹⁰⁹ See Nehme (2009), above n 27, 90, citing *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 35.

¹¹⁰ See Cotton On Group Services Pty Ltd Enforceable Undertaking, above n 51, compared with the Super A-Mart Enforceable Undertaking, above n 59.

¹¹¹ FWO Interviews: FWLG and FWLI.

terms to contrary effect (i.e. commitments are made without any admission as to liability). The issue of admissions presents a dilemma for regulators. In particular, does the value of admissions (e.g. the acknowledgement of wrongdoing and the showing of remorse) outweigh the potential for EUs to be used more widely against alleged, but not self-confessed, wrongdoers?

Nevertheless, there is evidence that enforceable undertakings are being used to craft remedies consistent with the ideals of responsive regulation and some aspects of restorative justice. Beyond the standard clauses, we were informed in our interviews that enforceable undertakings were tailored to the circumstances of each case. As one FWO 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’.¹¹² This is supported by our review of the content of enforceable undertakings, which reveals a kaleidoscope of different commitments including the need to: make good any underpayments,¹¹³ conduct FWO-approved workplace relations compliance training,¹¹⁴ provide a paid meeting of affected employees,¹¹⁵ report to the FWO regarding future compliance,¹¹⁶ develop workplace relations compliance plans¹¹⁷ and post a public apology on Facebook¹¹⁸ or the company website.¹¹⁹ We are yet to see, however, whether this range of commitments narrows in light of the new fast-paced negotiation strategy adopted by the FWO. With less time to negotiate over the wording of undertakings, employers and their advisors may be reluctant to agree to more innovative clauses.

Most undertakings also include 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.¹²⁰ 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

¹¹² FWO Interview: 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.’ FWO Interview: FWLB.

¹¹³ 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.

¹¹⁴ 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.

¹¹⁵ 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.

¹¹⁶ 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.

¹¹⁷ See, eg, Signature Portrait Studios Enforceable Undertaking, above n 95.

¹¹⁸ See, eg, Cotton On Enforceable Undertaking, above n 51.

¹¹⁹ 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.

¹²⁰ 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.

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.¹²¹

We can see in these more recent undertakings an attempt to secure an ongoing organisational commitment to compliance consistent with the findings of previous empirical research. This research has shown that there are three stages to achieving sustained corporate compliance:

First is management commitment to comply – which itself is frequently prompted only by the shock of the crisis of enforcement. The second stage is learning how to comply – often by appointing a person at a high level in the organisation to be responsible for implementing and operating a compliance programme. The third stage is the ongoing institutionalisation of compliance in everyday operating procedures and corporate culture.¹²²

The older undertaking only addressed the first stage – securing management commitment to comply. The Super A-Mart enforceable undertaking establishes processes to achieve the second and third stages as well. The reasons for the shift in approach is reflected in the comments of one FWO manager who observed:

Although litigation is very, very important as a compliance tool, it can be pretty limiting because you get penalties and compensation, when sometimes what you want is some real change. And so we could build into enforceable undertakings education, training, and those sorts of things, to try and bring about systemic change in organisations.¹²³

However, crucial to the successful achievement of each stage and securing real change is whether the monitoring process for the undertaking is adequate, an issue considered in the following section. Another issue, which is linked to the effectiveness critique outlined earlier, is ensuring that EUs are used only in the appropriate circumstances, that is, where it is likely that the three stages of sustained compliance can be achieved. If management commitment is doubtful, and monitoring is likely to be onerous, other sanctions should be pursued. As one specialist employer lawyer commented:

There are some contraventions [where] enforceable undertakings are appropriate, but there are lots where it’s difficult to accept that a lot will change or that you can be satisfied that they’ll do what they say they’ll do.¹²⁴

Other clauses in the enforceable undertakings we reviewed are less concerned with institutionalising compliance as they are with serving a community function. A feature of several FWO enforceable undertakings cited frequently by FWO staff is where

¹²¹ See Super A-Mart Enforceable Undertaking, above n 59.

¹²² Parker (2004), above n 5, 238-239; see also Johnstone and King, above n 5, 283-284. This conceptualisation of compliance is drawn from Parker (2002), above n 16.

¹²³ External Interview: EXE.

¹²⁴ External Interview: EXLA.

businesses agree to pay sums of money to external bodies such as community legal centres. For 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.¹²⁵

The rationale behind these payments appears to be consistent with restorative justice, which requires outcomes which contribute to broader social and community justice. The payments have also been justified by FWO on the basis of both specific and general deterrence, in that the payment agreed to by the employer is effectively in lieu of the penalty that a firm would have to pay if successfully prosecuted, and sends 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.¹²⁶

Similar payments have featured in undertakings made in other jurisdictions, and the funds are no doubt appreciated and used to great effect by the bodies that receive them. We are concerned, however, that these payments are somewhat symbolic. Payments made by alleged wrongdoers, particularly firms which are well-resourced, might be more productive if directed to targeted compliance improvements, thereby enhancing the effectiveness of regulatory enforcement. 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 dedicated to monitoring compliance in that industry.¹²⁷ 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, as it is more likely that any competitors engaging in illegal employment practices will be detected and sanctioned. This alternative approach does not necessarily answer the criticism (made by public lawyers) that a commitment to pay a large sum for a community benefit is punitive and therefore beyond the powers of the FWO. However, it arguably strengthens broader public accountability through wider consultation and community involvement.¹²⁸

¹²⁵ See, eg, Toys R Us Enforceable Undertaking, above n 100.

¹²⁶ External Interview: EXLA.

¹²⁷ 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) 117-121.

¹²⁸ See Parker (2002), above n 16, 43-61; Parker (2004), above n 5, 253; Johnstone and King, above n 5, 284-285.

Other administrative law concerns relate to the flexibility and breadth of some of the commitments contained in enforceable undertakings. While there has been some judicial recognition that the power of a statutory agency authorised by a legislative provision to accept enforceable undertakings is more comprehensive than that of a court, it is not without certain limitations.¹²⁹ In particular, Yeung argues that enforceable undertakings although wide, are not unfettered and should not go beyond the scope of the legislative grant. One of the managers we interviewed also expressed some discomfort at accepting undertakings which were too expansive. In particular, this interviewee commented:

I like [EUs] as a concept but when you start putting in things in those enforceable undertakings that probably fall outside of the intention of the Act – I’m thinking about where we’re asking companies to put ads in newspapers about how naughty they’ve been or donating money to charity which is a recent one with Toys R Us – then I think you’re stepping into waters that are a little bit murky and who decides what charity and all those sort of things. I’m concerned about some of the things that get put into our enforceable undertakings.¹³⁰

On a practical level, the Maritime Union of Australia (MUA) asserted in its submission to the recent Fair Work Act Review¹³¹ that the full potential of enforceable undertakings was not being achieved. The MUA argued that this was because the undertakings sought by the FWO were ‘too onerous or harsh or politically and industrially too sensitive for adoption or acceptance.’¹³² 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 want to be about it then let’s have a fight.’¹³³ In particular, the MUA submission suggested that, unless there was a change in policy, and FWO enforceable undertakings were seen as ‘less acceptable than the likely outcome before the courts, there will be a continued unwillingness to enter such undertakings even if the court process is more time consuming and expensive.’¹³⁴

These comments strike at one of the fundamental dilemmas facing the FWO and highlight the underlying tension in the theoretical literature between those pushing for more flexible and innovative remedies and those who seek to guard against excessive administrative power. In particular, under Australian constitutional law principles, administrative power cannot lawfully be applied for penal purposes. In other words,

¹²⁹ See Nehme (2007), above n 25, 117, citing *Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd* (2003) 198 ALR 417, 433.

¹³⁰ FWO Interview: FWMP. Similar concerns were expressed in the External Interview: EXC.

¹³¹ The Explanatory Memorandum to the Fair Work Bill 2008 committed the federal government to a review of the operation of the legislation two years after its full commencement (that is, after 1 January 2012). The review was conducted in the first half of 2012 by an expert panel, comprising Reserve Bank Board Member Dr John Edwards, former Federal Court Judge, the Honourable Michael Moore and Professor Emeritus Ron McCallum AO. See FW Act Review Report, above n 67.

¹³² Maritime Union of Australia, Submission to the Fair Work Act Review Panel, *Review of the Fair Work Act 2009*, Undated, 7.

¹³³ External Interview: EXLB.

¹³⁴ Maritime Union of Australia, above n 132, 7. The Fair Work Act Review Panel declined to recommend any changes to the statutory regime concerning enforceable undertakings: see FW Act Review Report, above n 67.

enforceable undertakings should only go so far as is necessary to correct the relevant contraventions, which should not amount to punishing the alleged wrongdoer through the imposition of onerous or disproportionate commitments. For example, while publicity carries an important deterrent element, where the mandated disclosure goes beyond mere correction, it can be viewed as punitive and therefore unenforceable.¹³⁵ However, without publicity, the specific and general deterrence of enforceable undertakings is seriously compromised. Similarly, commitments to pay large sums of money to community organisations may be viewed as groundbreaking by some, and punitive by others.

We acknowledge there may be legitimate accountability concerns regarding some of the content of enforceable undertakings. Nevertheless, in our view the value of many of these terms in securing sustained compliance is balanced by existing accountability mechanisms. We note that enforceable undertakings are negotiated with parties who for the most part are legally represented. Further, while litigation is used as a threat, undertakings are ultimately voluntary agreements. Once an undertaking has been signed, the person giving the undertaking has the right to vary or withdraw from the undertaking, albeit such a right may only be exercised with the FWO's consent.¹³⁶ Moreover, although the content of enforceable undertakings is not subject to merits or judicial review as such, the terms of enforceable undertakings must be enforced by a court. They are therefore subject to de facto judicial review. Indeed, while there was a common perception shared amongst managers and lawyers that the commitments set out in enforceable undertakings were far more expansive than what could be sought in a court, it is not clear that this position has necessarily been tested, particularly under the FW Act.¹³⁷ We return to the issue of enforceability in the next section of our article.

5 Monitoring and Enforcement of Enforceable Undertakings

Adequate oversight of compliance with the terms of an enforceable undertaking is critical to the achievement of the terms of the undertaking and to maximise its specific and general deterrence impact. Additionally, an audit or review of compliance can ensure the accountability of the party giving the undertaking to the FWO, and potentially increase the FWO's accountability to both the public and the business concerned.¹³⁸

Many of the commitments set out in FWO enforceable undertakings are premised on the assumption that the promisor is willing to actively comply as necessary.¹³⁹ The

¹³⁵ See *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* [2003] FCA 3 [46]. Cited in Nehme (2009), above n 27, 93.

¹³⁶ FW Act, s 715(3).

¹³⁷ In particular, section 545(1) of the FW Act states that the federal courts may 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. It should be noted that there are some limitations on orders made in relation to costs (FW Act, s 570) and orders made in relation to contraventions of those civil penalty provisions which deals with reasonable business grounds and protected action ballot orders (FW Act, ss 44(2), 463(3) and 745(2)).

¹³⁸ Christine Parker, 'Regulator-Required Corporate Compliance Program Audits' (2003) 25(3) *Law & Policy* 221, 244.

¹³⁹ See the obligations imposed on Ms Lynne Brabban in the Signature Portrait Studios Enforceable Undertaking, above n 95.

expectation of self-regulation is particularly problematic where there is a conflict between compliance with the enforceable undertaking and the economic or private interests of the firm and/or individual.¹⁴⁰ It is therefore important that compliance with the terms of enforceable undertaking is monitored so that the signatory knows it is likely that any breaches to the terms of the undertaking can be detected.¹⁴¹ The potential for court action to enforce the undertaking, although not attracting a civil penalty, ensures the formal legal accountability of the party to the undertaking to the FWO and the public.

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.¹⁴² These studies warn against relying solely on monitoring by the party to the undertaking and/or the agency's officers. It is recognised that regulators have finite resources, and that therefore undertakings should facilitate monitoring arrangements that supplement oversight by the inspectorate through the involvement of third parties. 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 is 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 has taken a variety of approaches to this issue. For example, FW Inspectors are generally informed, at the time the enforceable undertaking is finalised, of any relevant monitoring that must be carried out in relation to that undertaking.

Another important way in which the FWO appears to have enhanced compliance with enforceable undertakings is 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.¹⁴³ This approach has two significant benefits from the perspective of regulatory enforcement. First, the fact that these individuals are potentially liable in their personal capacity for breaches of the terms of the enforceable undertaking increases the incentives for compliance. One FW lawyer commented that 'roping in' an individual may mean the person 'take[s] the whole thing a lot more seriously.'¹⁴⁴ Second, the express involvement of directors and managers in the enforceable undertaking potentially increases the likelihood of inducing a positive change in the overall

¹⁴⁰ Nehme (2009), above n 27, 91.

¹⁴¹ Ibid.

¹⁴² See, for example, Parker (2003), above n 139, in relation to the ACCC; Nehme (2009), above n 27, commenting on ASIC; Johnstone and King, above n 5, in relation to OHS regulators.

¹⁴³ 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.' 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.

¹⁴⁴ FWO Interview: FWLI.

compliance culture of the firm.¹⁴⁵ Another reason for this approach is to try to ensure that the undertaking continues to have a deterrent effect in circumstances where a corporate employer bound by the undertaking goes into liquidation before the expiry of the relevant commitments.¹⁴⁶

The drawback of this approach is independence and enforceability. For example, many of the commitments imposed on individuals are very broad, and apply indefinitely. This means that the circumstances and consequences of contravention are not entirely clear.¹⁴⁷ Further, it is not yet evident how courts may treat these types of undertakings.

A number of FWO enforceable undertakings have 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 FWO. Perhaps in acknowledgement of criticisms of self-regulatory approaches, other undertakings have included a commitment by the employer to have compliance periodically audited by a third party, such as ‘an accounting professional’ or ‘audit specialist’,¹⁴⁸ 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.¹⁴⁹

So far, the FWO has not had to take enforcement action in respect of any contraventions that have been the subject of enforceable undertakings.¹⁵⁰ Further, it appears that there have been no instances where a party has sought to vary or withdraw from an undertaking.¹⁵¹ We were informed that most employers were usually quite proactive in reporting on what they had done,¹⁵² and one lawyer believed that the lack of any enforcement action was a sign that ‘they’re obviously working’.¹⁵³ While to date there appears to have been few, if any, issues arise concerning compliance with FWO enforceable undertakings, experience from other jurisdictions shows that holding parties

¹⁴⁵ Nehme (2009), above n 27, 90.

¹⁴⁶ FWO Interview: FWMS.

¹⁴⁷ For example, as part of the Fweltown enforceable undertaking, the company and each of the four individuals undertake to ‘ensure that all businesses managed by any or all of Arthur Nestor, Tom Nestor, Brooke Nestor and Jennifer Tomkinson comply at all times and in all respects with the FW Act and other applicable industrial instruments...by developing systems and processes to ensure ongoing compliance with Commonwealth workplace laws.’ See Fweltown Motors Enforceable Undertaking, above n 143.

¹⁴⁸ See, eg, CFC Retail Enforceable Undertaking, above n 116.

¹⁴⁹ Nehme (2009), above n 27, 95.

¹⁵⁰ Various FWO interviews: FWLF, FWLE and FWLD.

¹⁵¹ 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 47, 6.

¹⁵² Based on comments made in FWO Interview: FWLD.

¹⁵³ FWO Interview: FWME.

accountable to an enforceable undertaking is ‘central to the credibility of undertakings as an enforcement option’¹⁵⁴ and is not necessarily straightforward.

For example, where the regulator relies on the relevant inspector who conducted the original investigation to monitor compliance, a turnover of staff and workload pressures can compromise the rigor applied to the monitoring function. In this respect, it is promising that the FWO has minimised this risk and streamlined this process by ensuring that there is at least one person within the agency who is dedicated to monitoring and updating a central enforceable undertaking database, which sets out the relevant commitments and reporting dates.¹⁵⁵ Further, commentators have pointed out that outsourcing audits to third parties can introduce new issues. For example, the auditor may lack independence, may be captured by management concerns or may fail to engage in full and frank disclosure to the regulator.¹⁵⁶

The FWO enforceable undertakings, while adopting third party monitoring, are therefore still susceptible to some of the problems which can arise with these arrangements. The FWO could take a number of additional steps to address these problems, such as by ensuring that enforceable undertakings are clear about the level of expertise and independence required of the auditor and the audit methodology they apply. This information, along with the reports prepared by the auditors, should be made public in order to harness the scrutiny of outside stakeholders and strengthen the informal, deliberative accountability of regulators and companies to the public.¹⁵⁷

If the FWO (or third party) detects that a term of an enforceable undertaking has been contravened, then what is the consequence? As noted earlier, the FWO is expressly prohibited from bringing civil penalty litigation if an enforceable undertaking is in place. If the promisor breaches the terms of an enforceable undertaking, the FWO can either terminate the undertaking and pursue the original contraventions that led to the enforceable undertaking in the first place, or alternatively, enforce the terms of the undertaking in a relevant court.¹⁵⁸

While the scope and content of the FWO undertakings are yet to be tested in court, cases emerging from other policy spheres suggest that the courts are likely to consider three aspects before enforcing an enforceable undertaking: what circumstances led to the making and acceptance of the undertaking; whether there is a breach of the undertaking; and if so, whether the court can and should enforce the undertaking.¹⁵⁹ In relation to the last point, 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.¹⁶⁰ In some instances, the court

¹⁵⁴ Johnstone and King, above n 5, 313. See also Nehme (2009), above n 27; and Parker (2003), above n 138.

¹⁵⁵ FWO Interview: FWMS.

¹⁵⁶ Parker (2003), above n 138, 234. See also Nehme (2009), above n 28, 98-99.

¹⁵⁷ Parker (2003), above n 138, 237.

¹⁵⁸ FW Act, s 715(7).

¹⁵⁹ Nehme (2008), above n 104, 160.

¹⁶⁰ Ibid.

has refused to grant an order enforcing the terms of an undertaking where it considers that the remedy has an insufficient nexus or relationship with the conduct which is alleged, the relevant contraventions or the issues in dispute between the parties – a key concern raised by public lawyers and touched on earlier.¹⁶¹ The extent to which the terms of the enforceable undertaking are clear and unambiguous is another relevant consideration, as is the duration of the undertaking.¹⁶² If the terms of the undertaking are vague, or apply for an undefined time period, the court may consider that there is no contravention, or be unwilling to exercise its discretion in favour of enforcing the undertaking.¹⁶³ We positively note that as the FWO enforceable undertakings have evolved, they have generally become more detailed and specific and therefore, in light of the principles set out above, more likely to be upheld by a court. Nevertheless, the earlier discussion about the way in which EUs have been used to bind individuals illustrates some of the problems that remain.

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.

6 Conclusion

Our research has revealed that the FWO has made limited but promising use of enforceable undertakings since receiving statutory authorisation to accept them. Through deployment of enforceable undertakings, the FWO has demonstrated that it has a mix of regulatory approaches available to it that is consistent with the key principles of responsive regulation. We have also observed that the enforceable undertakings entered into by the agency have become more sophisticated and ambitious in their content from 2011 onwards. For example, we noted that commitments to future compliance in enforceable undertakings had become more detailed in their prescription of steps to be taken by firms to meet this goal, whether through training and/or compliance audits. This evidence suggests that the FWO is endeavouring to improve organisational capacity to comply with minimum employment standards through its use of enforceable undertakings. Certainly, in requiring firms to take specific steps, the newer enforceable undertakings require firms to do more to institutionalise compliance than the general statements in the earlier documents. In addition, through its public EU Policy and

¹⁶¹ See Tania Voon, 'Overstated Undertakings: Recent Developments for Compliance Programs' (1998) 6 *Trade Practices Law Journal* 196, which considers the implications arising from the case of *Australian Competition and Consumer Commission v Z-Tek Computers Pty Ltd* (1997) 148 ALR 339.

¹⁶² Nehme (2008), above n 104.

¹⁶³ See *ibid*; Christopher Hodgekiss, 'Section 87B Undertakings – Status and Interpretation: Toll Holdings Ltd v ACCC' (2010) 18 *Trade Practices Law Journal* 124.

disclosure of concluded enforceable undertakings, the FWO has addressed at least some of the key concerns about the public accountability of this particular regulatory sanction.

However, the enforceable undertakings entered into by FWO do not necessarily address all of the criticisms in this respect. Although all enforceable undertakings and their content have been made public by the FWO, they are nevertheless negotiated in private through a process that potentially excludes interested third parties, thus raising questions about their accountability and doubts about whether restorative justice has been fully achieved. We nevertheless recognise that these issues are not easily resolved. While the FWO could increase transparency by releasing data on the numbers of enforceable undertakings rejected (as well as accepted), this may be problematic. An even more difficult exercise, at least from a practical point of view, is how to consult affected third parties without leading to excessive delays. This would be especially challenging where a contravention affects a large group of employees who may not be collectively represented.

Indeed, the time it is taking to finalise enforceable undertakings is a separate issue that the FWO is aware needs improvement. While the FWO is taking steps to ensure that this process is swifter, it seems a heavily centralised decision-making process, combined with high evidentiary thresholds, mean that the uptake of enforceable undertakings has been less than predicted or expected. It is likely that these issues will become more pressing as the resources of the FWO contract.¹⁶⁴ However, tightening the negotiation timeframes must not come at the expense of securing management commitment and ensuring that the undertaking is tailored and proportionate to the contravention.

One way in which the FWO could achieve the objective of increasing the use of enforceable undertakings, without necessarily heightening the risk profile, is to authorise senior managers, other than the head of the FWO, to approve enforceable undertakings in relation to less serious contraventions and/or lower profile businesses. This may mean that undertakings are used more readily in relation to small and medium businesses – which has not necessarily been the case up until now.¹⁶⁵ Another way that the FWO could address concerns of timeliness is by escalating status of EUs in the investigation process. While there must still be sufficient evidence for the FWO to form a ‘reasonable belief’ that a contravention has occurred, if enforceable undertakings were proposed at the beginning, rather than at the end, of an investigation, it may lead to greater cooperation and disclosure by employers rather than less.

To further encourage firms to positively engage in the enforceable undertakings process, the FWO may also need to reconsider its position on admissions and the scope of some of the more onerous commitments, particularly in less serious cases. In order to enhance the regulatory potential of enforceable undertakings, it may be preferable to have a greater number of undertakings which are potentially less burdensome instead of fewer, more comprehensive undertakings. In relation to admissions, we consider the approach taken by other regulators – which require the wrongdoer to acknowledge the concerns of the

¹⁶⁴ See discussion above n 94.

¹⁶⁵ FWO Interview: FWMS.

regulator, but not necessarily admit to the contraventions – as being quite instructive. Again, if a softening in respect of admissions means that more firms are more willing to enter into commitments which encourage greater compliance and ease the enforcement burden of the regulator, we view this as a positive regulatory development.

As mentioned, the content of enforceable undertakings includes 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 undermining the credibility of enforceable undertakings. Given the integral role of undertakings 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.

As yet, however, there is little empirical evidence of how effective enforceable undertakings have been in bringing about greater organisational commitment to compliance on the part of business signatories in practice. In future research, we hope to garner the responses of employers who have entered into an enforceable undertaking, as well as those in the industry who may have been aware of the undertaking, to shed some light on how this sanction has influenced firm and industry behaviour.