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Title:

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Date:

2013

Citation:

Hardy, T., Howe, J. & Cooney, S. (2013). Less Energetic but More Enlightened? Exploring the Fair Work Ombudsman's Use of Litigation in Regulatory Enforcement. Sydney Law Review, 35 (3), pp.565-597

Persistent Link:

<https://hdl.handle.net/11343/265743>

Less Energetic but More Enlightened? Exploring the Fair Work Ombudsman's Use of Litigation in Regulatory Enforcement

Tess Hardy,^{} John Howe[#] and Sean Cooney[†]*

Abstract

Since early 2006, the federal labour inspectorate, now known as the Fair Work Ombudsman ('FWO'), has been both active and innovative in promoting and enforcing employment standards. While various enforcement tools are available to the FWO, civil remedy litigation has been an especially visible aspect of the agency's compliance activities. This article surveys the litigation activities of the federal labour inspectorate from 1 July 2006 to 30 June 2012. We explore the extent to which litigation has fluctuated over the past six years; the types of contraventions that have been pursued; the characteristics of respondents; and any patterns in remedies and outcomes. We consider the extent to which the FWO's changing approach to litigation reflects influential approaches to regulatory enforcement, including responsive regulation and strategic enforcement. Our assessment of the data suggests that the FWO has made increasing use of civil remedy litigation and the deterrence effects of this intervention have been amplified through prominent use of media. While the agency has become bolder in its use of litigation by targeting a wider range of individuals and entities, there is still some room to seek alternative court sanctions in order to achieve greater deterrence and more sustainable compliance behaviour.

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I Introduction

In the past, enforcement of minimum employment standards¹ in Australia was largely undertaken by unions and achieved through non-litigious channels.² However, the move away from conciliation and arbitration as the basis for labour relations regulation in recent years has not only marked a new era in standard-setting, but also prompted a watershed in regulatory enforcement of minimum employment standards. Since early 2006, the federal regulatory agency, now known as the Fair Work Ombudsman ('FWO')³ has been more active and innovative than its predecessors in performing its function of promoting and enforcing employment standards. While various enforcement tools are available to the FWO, it is civil remedy litigation that has been an especially visible aspect of the agency's enforcement activities. By way of example, the annual number of matters being litigated by the federal agency increased sharply from six in 2005–06⁴ to a high of 77 in 2008–09.⁵ This led to claims that the FWO was 'the most

¹ For the purposes of this article, 'minimum employment standards' mean those standards regulating minimum wages, maximum working hours and termination and leave entitlements as set out in the *Fair Work Act 2009* (Cth) ('FW Act'), and instruments made under that legislation, including modern awards and enterprise agreements. While this research is primarily confined to such standards, we also acknowledge the extensive literature concerned with workplace regulation and enforcement more broadly, particularly in the occupational health and safety sphere. See, eg, David Walters et al, *Regulating Workplace Risks* (Edward Elgar, 2011).

² See Tess Hardy and John Howe, 'Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22 *Australian Journal of Labour Law* 306.

³ We use the abbreviation 'FWO' when referring to the agency rather than the individual who heads it, who is referred to as the 'Fair Work Ombudsman'. The fact that the agency and its head have the same name is apt to cause confusion. Further, we generally use the term FWO as a shorthand way of referring to the federal labour inspectorate during this period, although between 2006 and 2009 the agency was called the 'Office of Workplace Services' ('OWS') and then the 'Workplace Ombudsman' ('WO'). We distinguish between these entities when necessary.

⁴ There is some discrepancy in the data in relation to the litigation matters commenced by the OWS, the WO and the FWO in the financial years from 2005–06 to 2011–12. For example, the WO's *Annual Report 2006–07* reported that, in 2005–06, Workplace Inspectors from the OWS initiated litigation in four matters. In this same financial year, two litigation matters were commenced through contracted state arrangements (WO, *Annual Report 2006–07*, 24). The Annual Reports for 2007–08 and 2008–09 reported that there were four litigation matters commenced between 27 March 2006 and 30 June 2006 (WO, *Annual Report 2007–08*, 25; WO, *Annual Report 2008–09*, 28). The FWO Annual Reports from 2009–10 onwards state that there were nine 'civil penalty litigation commenced and enforceable undertakings approved for negotiation' in 2005–06 (see, eg, *Annual Report 2011–12*, 57). For the purposes of our analysis, we have used the figures in the WO's *Annual Report 2006–07* as these appear to cover the full financial year and do not include 'enforceable undertakings approved for negotiation'.

⁵ Again, there are some discrepancies in the data in the various Annual Reports in relation to the number of litigation matters commenced in 2008–09. The WO's *Annual Report 2008–09* states that there were 77 litigation matters commenced in that financial year (see WO, *Annual Report 2008–09*, 28). Later Annual Reports produced by the FWO state that there were 78 'civil penalty litigation commenced and enforceable undertakings approved for negotiation' commenced in 2008–09 (see, eg, FWO, *Annual Report 2011–12*, 57). There is no obvious explanation for the discrepancy in this data and for the purposes of this analysis we have assumed that the data set out in the *Annual Report 2008–09* is correct.

energetic and possibly best-resourced award enforcement agency that we've ever had'.⁶

The first aim of this article is to examine patterns in enforcement activity to identify the objectives and outcomes of FWO-initiated litigation. We provide a detailed survey of the litigation activities of the federal labour inspectorate during the period from 1 July 2006 to 30 June 2012.⁷ We explore the extent to which litigation has fluctuated over the past six years; the types of contraventions that have been pursued; the characteristics of respondents; and any patterns in remedies and outcomes. In reviewing this data, we draw on more than 50 interviews with FWO staff and external workplace relations lawyers, as well as analysis of various documentary materials.⁸

The second aim of this article is to explore the extent to which the FWO's changing approach to litigation reflects influential approaches to regulatory enforcement, particularly responsive regulation⁹ and strategic enforcement.¹⁰ While command-and-control models have fallen out of favour in much of the current literature on regulatory compliance,¹¹ we argue that formal enforcement processes remain important. Ayres and Braithwaite suggest that we can only appreciate the full value of responsive regulation by understanding how regulatory agencies construct or fail to construct 'appearances of invincibility by displaying their firepower in strategic contests' and how they 'handle the crucial tests of their strength that occur at watersheds in their history'.¹² We suggest that the past six years have presented such an historical moment and elevated the significance of

⁶ Vice President of Fair Work Australia, Graeme Watson, quoted in 'New System Could Lead to Fall in Bargaining: VP Watson', *Workplace Express* (online), 11 June 2010, <http://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=2&selkey=42825&hlc=2&hlw=New+system+could+lead+to+fall+in+bargaining&s_keyword=New+system+could+lead+to+fall+in+bargaining&s_searchfrom_date=631112400&s_searchto_date=1375330427&s_page_size=10&s_word_match=2&s_articles=2&stream=2>.

⁷ The review period largely coincides with the six years since the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('*Work Choices*') was introduced on 27 March 2006 by the Howard Coalition Government. This legislation introduced far-reaching changes to the workplace relations regulatory framework in Australia and was highly controversial. For consideration of a number of different aspects of the *Work Choices* changes, see Anthony Forsyth and Andrew Stewart (eds) *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009). While there have been reviews of the litigation activity of occupational health and safety regulators in the past (see, eg, Richard Johnstone, *Occupational Health and Safety, Courts and Crime: The Legal Construction of Occupational Health and Safety Offences in Victoria* (Federation Press, 2003), and Neil Gunningham, 'Prosecution for OHS Offences: Deterrent or Disincentive' (2007) 29 *Sydney Law Review* 359), a similar review has not been undertaken of the litigation activity of federal or state employment standards inspectorates in Australia.

⁸ Our research involved semi-structured qualitative interviews in the period 2010–12 with 60 Fair Work Inspectors (and former inspectors), as well as with senior managerial staff and lawyers at the FWO. The interviews were conducted with ethics approval (Human Research Ethics Committee Number: 1034541.1) and the names of the interviewees were coded to preserve anonymity in accordance with the approval. The documentation we reviewed included internal FWO material, Senate Estimates transcripts, speeches, guidance notes, annual reports and media releases.

⁹ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

¹⁰ David Weil, *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division* (United States Department of Labour, May 2010).

¹¹ See, eg, Robert Baldwin, 'The New Punitive Regulation' (2004) 67 *Modern Law Review* 351.

¹² Ayres and Braithwaite, above n 9, 46.

the litigation in this regulatory context. These developments warrant detailed consideration.

This article is organised as follows. Part II discusses the role of civil remedy litigation in promoting compliance in light of the literature concerning optimal enforcement strategies. Part III sets out the relevant legal framework, and also explains that, while the FWO's formal policy on litigation remained constant in the period under review, there have been very significant shifts in litigation strategy. Part IV presents our findings concerning the pattern of civil litigation activity by the FWO, while Part V sets out our overall conclusions.

II Use of Litigation in Regulatory Enforcement

All regulators face the question of what is the best way to conduct their activities in order to achieve effective and efficient outcomes with the resources available.¹³ The FWO is no different. Like most regulators, the FWO has a range of enforcement tools at its disposal, including civil remedy litigation. While it has considerable discretion concerning the deployment of these tools, the agency also has finite resources from which to meet a growing demand for its services.

As has been recognised by the former head of the agency, litigation is very costly and time-consuming.¹⁴ The agency does not have the resources to litigate in all of these cases, nor is litigation necessarily appropriate in relation to every contravention identified. It must therefore choose a proportion of matters to litigate according to the agency's priorities. In other words, a regulator, such as the FWO, will follow some sort of enforcement strategy concerning the deployment of its resources and sanctions.

For many years, the question for regulators was whether to 'punish or persuade' — to focus their resources on deterrence through formal enforcement action resulting in penalties, or instead to engage with regulated actors in a cooperative manner to provide advice and assistance to promote and encourage compliance. These approaches were found to have a number of limitations as 'stand-alone' strategies, and, as a result, it is now largely accepted that 'a judicious mix of compliance and deterrence is likely to be the optimal regulatory strategy'.¹⁵ In recent years, there has been a proliferation of theories and models concerning the most effective mix of these different approaches.¹⁶

In approaching our study of FWO litigation patterns, we were interested in exploring how the FWO had made use of enforcement litigation in fulfilling its

¹³ Neil Gunningham, 'Strategizing Compliance and Enforcement: Responsive Regulation and Beyond' in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011) 199.

¹⁴ Nicholas Wilson, 'Plans and Priorities' (Paper presented at Ai Group and Personnel Industrial Relations Conference, 30 April 2012).

¹⁵ Gunningham, above n 13, 201. See further Ayres and Braithwaite, above n 9; Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford University Press, 2002); Robert Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2001).

¹⁶ See nn 28–32 below for a summary of relevant theories and models.

mandate, and whether this was consistent with theories concerning the strategic use of litigation. Given that the popularity of civil penalty litigation in Australia¹⁷ has been linked to the influential model of 'responsive regulation' devised by Ayres and Braithwaite, we begin by discussing this model of regulation.¹⁸ Responsive regulation is designed to address the problem of restricted resources, overcome the limitations associated with the simple 'compliance' or 'deterrence' enforcement strategies and more effectively respond to the range of pluralistic motivations driving compliance behaviour.¹⁹

One of the key principles associated with responsive regulation is the 'enforcement pyramid', which works on the basis that the 'more the regulated firm refuses to comply, the greater the sanction that should be adopted'.²⁰ The foundation of the pyramid 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, infringement notices and enforceable undertakings. At the apex of the pyramid sit the most punitive sanctions, including pecuniary penalties, criminal prosecution and incapacitation.

Three elements are central to the pyramidal model of enforcement. First, a regulator must have the ability to escalate up and de-escalate down the pyramid in order to facilitate the 'tit-for-tat' response to those who are regulated. The response varies depending, for example, on whether the regulator is dealing with reluctant compliers, the recalcitrant or the incompetent.²¹ Second, it is necessary for the regulator to have a suite of enforcement tools at its disposal. A system with limited regulatory mechanisms may be counterproductive in that it fails to respond sensitively to the 'motivational complexity in regulatory encounters',²² and either encourages complacency or forces actors into adversarial positions.²³ Further, there must be a credible pyramid peak which, if triggered, will be powerful enough to deter even the most egregious or reckless offender. These elements are critical in that agencies:

¹⁷ See, eg, Michelle Welsh, 'Eleven Years On — An Examination of ASIC's Use of an Expanding Civil Penalty Regime' (2004) 17 *Australian Journal of Corporate Law* 175; Helen Bird et al, 'Strategic Regulation and ASIC Enforcement Patterns: Results of an Empirical Study' (2005) 5 *Journal of Corporate Law Studies* 191; Christine Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) 40 *Law and Society Review* 591.

¹⁸ Ayres and Braithwaite, above n 9.

¹⁹ See Sally Simpson and Melissa Rorie, 'Motivating Compliance: Economic and Material Motives for Compliance' in Christine Parker and Vibeke Lehmann Neilsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011).

²⁰ Julia Black, 'Managing Discretion' (Paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001) 18.

²¹ Gunningham, above n 13, 202.

²² Ayres and Braithwaite, above n 9, 35.

²³ Cynthia Estlund, 'Rebuilding the Law of the Workplace in an Era of Self-Regulation' (2005) 105 *Columbia Law Review* 319, 357.

will be more able to speak softly when they carry big sticks (and crucially, a hierarchy of lesser sanctions). Paradoxically, the bigger and the more various are the sticks, the more regulators will achieve success by speaking softly.²⁴

Notwithstanding its popularity, a number of limitations to responsive regulation have been identified. For example, the theory does not really deal with the *detection* of non-compliance. In so far as the 'tit-for-tat' nature of the pyramid is concerned, the theory entails a level of resources and interaction between the inspector and the regulated which may not occur in practice.²⁵ Further, while the enforcement pyramid has been applauded for its ability to connect theoretical models with the real experience of regulators,²⁶ the process of 'escalating and de-escalating of penalties may be far more complex than the proponents of pyramidal enforcement contemplate.'²⁷ Regulators may not have the necessary communication, relational or technical skills to properly implement the pyramid of sanctions and the firm may not know how to interpret and respond to the various regulatory signals.²⁸

Since the concept of responsive regulation was first developed some 20 years ago, there have been various attempts to refine and build on the key principles, including smart regulation,²⁹ risk-based regulation³⁰ and really responsive regulation.³¹ One of the most recent examples is the concept of 'strategic enforcement', which has been developed by Professor David Weil based on his study of the federal wages and hours inspectorate in the United States.³² Strategic enforcement is framed around four central principles which are used to guide the design and implementation of enforcement policy: prioritisation; deterrence; sustainability; and systemic effects.

The first principle, prioritisation, builds on responsive regulation as well as theories of risk-based regulation (which advocate that regulators should target their inspection and enforcement resources based on an assessment of risk posed by the regulated entity or person). Weil argues that labour inspectorates should target those sectors with a significant proportion of vulnerable and low-paid workers who are less likely to complain. In relation to these industries, labour

²⁴ John Braithwaite, 'Convergence in Models of Regulatory Strategy' (1990) 2 *Current Issues in Criminal Justice* 59, 59.

²⁵ See, eg, Fiona Haines, *Corporate Regulation: Beyond 'Punish or Persuade'* (Clarendon Press, 1997).

²⁶ See Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post Regulatory State' in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar, 2004) 145, 160.

²⁷ Haines, above n 25, 219–20.

²⁸ See Vibeke Lehmann Neilsen and Christine Parker, 'Testing Responsive Regulation in Regulatory Enforcement' (2009) 3 *Regulation and Governance* 376.

²⁹ See Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998).

³⁰ 'Risk-based regulation' is an increasingly influential alternative or complement to responsive regulation, particularly in the United Kingdom and Europe. This regulatory model advocates that regulators should target their inspection and enforcement resources based on an assessment of risk posed by the regulated entity. See Bridget Hutter (ed), *Anticipating Risks and Organising Risk Regulation* (Cambridge University Press, 2010).

³¹ Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71 *Modern Law Review* 59.

³² Weil, above n 10.

inspectorates should then consider whether regulatory intervention is likely to be successful in changing compliance behaviour.³³ This requires the inspectorate to have a clear map and a deeper understanding of how industries, supply chains and lead firms operate.

Second, strategic enforcement requires that deterrence effects are factored into all regulatory activities. This principle can be linked to the classical economic theories of deterrence. While the relevant calculus can be framed in a number of distinct ways, a deterrence-based model is generally premised on an assumption that business organisations are wealth-maximising and self-interested, and motivations to comply with the law will depend on the likelihood of detection and the severity of sanctions imposed for contraventions.³⁴ According to Weil, as industries ‘fissure’ into subcontracting chains and businesses become smaller and more numerous,³⁵ the deterrent element grows in importance. In responsive regulation, deterrence is commonly referred to as the ‘benign big gun’: it should be used mainly as a threat and only when necessary. In comparison, the strategic enforcement model places deterrence firmly at the fore of the compliance and enforcement strategy. Strategic enforcement also focuses on the symbolic and expressive value of sanctions; their capacity to influence firms not directly targeted. In some respects, this reflects one of the instrumental purposes of all regulatory regimes, namely general deterrence.³⁶

It is the strategic use of sanctions — such as the targeting of gatekeepers or the use of the ‘hot cargo’ provisions in competitive supply chains³⁷ — that allows the regulator the power to put in place measures that can lead to the institutionalisation of positive compliance behaviours and approaches. This reflects the third objective of strategic enforcement: ensuring sustainable and ongoing compliance among regulated firms and the effective prevention of employer recidivism.

The final principle of strategic enforcement is that of ‘systemic effects’, which serves to focus the regulator’s efforts on addressing the underlying drivers of compliance. Weil explains that:

Increasingly complex workplace settings require inspectorates to consider how to achieve geographic, industrial and/or product-market effects. Employer practices in the workplace are an outgrowth of broader organisational policies and practices, often driven (implicitly or explicitly) by competitive strategies or forces. Bringing an understanding of the impact

³³ Ibid 75.

³⁴ See, eg, O Ashenfelter and R Smith, ‘Compliance with the Minimum Wage Law’ (1979) 87 *Journal of Political Economy* 333.

³⁵ In simple terms, a supply chain can be described as ‘fissured’ where the lead firms that determine the labour market conditions are entirely separate from the employment of workers who provide the relevant goods and services. See David Weil, ‘Enforcing Labour Standards in Fissured Workplaces — The US Experience’ (2011) 22(2) *Economic and Labour Relations Review* 33.

³⁶ See Roberto Pires, ‘Promoting Sustainable Compliance: Styles of Labour Inspection and Compliance Outcomes in Brazil’ (2008) 147 *International Labour Review* 199, 223.

³⁷ In essence, the ‘hot cargo’ provision allowed the United States Wages and Hours Department to embargo goods that were found to have been manufactured in contravention of the minimum employment standards set down by the relevant legislation. For further discussion of use of this provision, see David Weil, ‘Regulating Non-Compliance to Labor Standards: New Tools for an Old Problem’ (2002) 45(1) *Challenge* 47.

of these larger factors into the regulatory scheme potentially allows enforcement to have systemic rather than local effects.³⁸

This requires that inspectorate activities move beyond focusing on changing compliance motivations at the workplace level to altering system-wide incentives for compliance, such as by targeting particular industries or geographic areas.

Some of the major strands in the regulatory literature suggest that it is necessary to use litigation sparingly, but effectively.³⁹ Similarly to the systemic effects principle of strategic enforcement, it has been argued that for responsive regulation to succeed, it is not the number of prosecutions that is critical, rather it is:

the belief that duty holders have of the likelihood and degree of punishment, even if, in actual fact, that belief is overstated. Even a handful of prosecutions in the course of a year can achieve this effect provided the 'right' cases are chosen. That handful of prosecutions will, however, play a crucially important role at the tip of an enforcement pyramid, for without them less coercive policies at the lower levels of the pyramid lose their credibility.⁴⁰

Both regulatory models suggest that litigation must be carefully tailored to the specific circumstances of the relevant industry and properly targeted at the actors — either individuals or firms — who are most likely to respond positively to this type of intervention. A calibrated approach is necessary in order to maximise limited resources, enhance the ripple effects of deterrence beyond the individual firm and boost the credibility of the regulatory regime, while avoiding the counterproductive or adverse effects sometimes associated with the use of formal sanctions. This dynamic approach to enforcement not only increases the costs to firms of non-compliance, but can reinforce the legitimacy of the regulation being enforced and strengthen incentives to comply voluntarily and continually.⁴¹

We now consider patterns of FWO litigation in order to assess whether the agency's approach is consistent with the enforcement strategies discussed above. To provide this assessment, it is important to consider not just the number of civil litigation matters commenced by the regulator, but also the type of contravention; the target of litigation, including size of business; the industry context; whether action is taken against accessories; and the outcomes of the litigation. Before we discuss these patterns, in the next part we outline the regulatory and policy context of the FWO's enforcement activities.

³⁸ David Weil, 'A Strategic Approach to Labour Inspection' (2008) 147 *International Labour Review* 349, 356.

³⁹ The pyramidal model of enforcement — as devised by responsive regulation theorists — is the most obvious example of this approach. Smart regulation, which advocates for an enhanced enforcement pyramid, also reflects this idea.

⁴⁰ Gunningham, above n 7, 389.

⁴¹ Parker, above n 17.

III An Overview of the Legislative Framework and the FWO's Litigation Policy

The FWO is an independent statutory office created by the *FW Act* to promote harmonious, productive and cooperative workplace relations and ensure compliance with minimum employment standards set by the Act and by 'fair work instruments' such as modern awards. Traditionally, the responsibility of the federal inspectorate was largely limited to ensuring employer compliance with laws and instruments regulating minimum wages, maximum working hours, as well as leave and termination entitlements. However, in recent years the federal agency's mandate has expanded to include the enforcement of statutory provisions dealing with anti-discrimination (a jurisdiction it shares with other state and federal bodies), sham contracting, unlawful industrial action and freedom of association.⁴²

In comparison to a number of other federal and state regulators, the *FW Act* does not entrench a particularly stringent enforcement regime.⁴³ With the exception of penalty infringement notices, the FWO has no power to impose penalties of its own, but must pursue such orders through the relevant courts. Further, while contravention of many provisions attracts civil remedies, there is only a limited capacity to seek criminal penalties.⁴⁴ The maximum penalties available under the civil remedy provisions are also much lower than those available under other regimes.⁴⁵ For example, occupational health and safety regulators, which are also concerned with upholding minimum standards in the workplace, have far more powerful sanctions at their disposal.⁴⁶ Indeed, the fact that occupational health and safety is premised on a criminal model, while the FWO is empowered only to act within a civil jurisdiction, is one of the key distinguishing features between these bodies.⁴⁷

⁴² Many of these provisions are found in pt 3-1 of the *FW Act*, which deals with 'general protections'. See generally John Howe, Tess Hardy and Sean Cooney, 'Mandate, Discretion and Professionalisation in an Employment Standards Enforcement Agency: An Antipodean Perspective' (2013) 35 *Law & Policy* 81.

⁴³ For example, the Australian Securities and Investments Commission ('ASIC') and the Australian Competition and Consumer Commission ('ACCC') are able to pursue criminal as well as civil sanctions in relation to various provisions.

⁴⁴ Some breaches of the *FW Act* are designated as criminal offences, such as where a person breaches an order of Fair Work Australia: *FW Act*, ss 674–8.

⁴⁵ For example, consumer protection breaches under the *Competition and Consumer Act 2010* (Cth) can attract maximum fines of A\$1.1 million for a corporation and A\$220 000 for an individual. Maximum penalties in relation to trade practices contraventions are significantly higher than these amounts.

⁴⁶ In particular, occupational health and safety regulators are empowered to seek criminal penalties and impose administrative sanctions against firms and individuals for contraventions of the relevant legislation. See Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: Systems and Sanctions* (Oxford University Press, 1999). Hefty penalties are also available under the work health and safety legislation. Eg, for a category 1 offence (ie a duty holder recklessly endangers a person to risk of death or serious injury), the maximum penalties are as follows: for a corporation, up to A\$3 million; for an individual as a 'person conducting a business or undertaking' or a company officer, up to A\$600 000 or five years imprisonment; for an individual (eg worker) up to A\$300 000 or five years imprisonment. See, eg, *Work Health and Safety Act 2011* (Qld) ss 30–4.

⁴⁷ The other, obvious distinction is the fact that the FWO is a federal agency, whereas occupational health and safety regulators generally operate within one particular state or territory.

Civil remedy litigation has, nevertheless, been a critical component of the overall compliance and enforcement strategy of the FWO and its immediate predecessors, and reflects a number of the agency's key statutory functions.⁴⁸ The labour inspectorate's recent endorsement of enforcement litigation stands in some contrast to the enforcement approach taken by the labour inspectorate prior to 2006. In particular, in this earlier period, the labour inspectorate appears to have virtually stopped prosecuting employers for breaches of the federal legislation.⁴⁹ The burden of enforcing employer compliance by way of legal action was effectively shifted to individual employees and unions.⁵⁰ Further, during this earlier period, numerous legal and practical 'stumbling blocks'⁵¹ impeded the enforcement of minimum labour standards, including low maximum penalties⁵² and the longstanding reluctance of courts to impose significant penalties against non-complying employers.⁵³ The civil penalty provisions of previous statutes were also inherently complex and somewhat inconsistent.⁵⁴

Since then, many of the major legal obstacles have been removed and the workplace relations enforcement framework has been both strengthened and simplified. In particular, ch 4 of the *FW Act* is almost a complete code for the enforcement under the Fair Work regulatory regime.⁵⁵ It provides that the relevant courts may not only make pecuniary penalty orders,⁵⁶ but that they retain a general discretion to 'make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision'.⁵⁷ Such orders may include granting an injunction, awarding compensation, or reinstating a person to his or her employment. The effect of these provisions is that the range of remedies available to the courts has significantly expanded under the *FW Act*.

⁴⁸ See, eg, *FW Act* s 682.

⁴⁹ In the period from 1996–97 to 2005–06 only 35 enforcement proceedings were recommended against employers. 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 *Australian Journal of Political Science* 105.

⁵⁰ See Margaret Lee, 'Whatever Happened to the Arbitration Inspectorate: The Reconstruction of Industrial Enforcement in Australia' in Marian Baird, Rae Cooper and Mark Westcott (eds), *Reworking Work AIRAANZ 05: Proceedings of the 19th Conference of the Association of Industrial Relations Academics of Australia and New Zealand* (The University of Sydney, 2005) vol 1, 339, 345.

⁵¹ Ron McCallum, 'The Imperfect Safety-Net: The Enforcement of Federal Awards and Agreements' in Ron McCallum, Greg McCarty and Paul Ronfeldt (eds), *Employment Security* (Federation Press, 1994) 201, 210.

⁵² The civil penalties available under the workplace relations legislation were significantly increased in 2004. See *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004* (Cth).

⁵³ Miles Goodwin and Glenda Maconachie, 'Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategy and Outcomes 1952–95' (2007) 49 *Journal of Industrial Relations* 523, 539.

⁵⁴ For a helpful analysis of these provisions and some of the inconsistencies, see Helen Anderson and John Howe, 'Making Sense of the Compensation Remedy in Cases of Accessorial Liability under the Fair Work Act' (2012) 36 *Melbourne University Law Review* 335.

⁵⁵ There are some exceptions, such as the unfair dismissal provisions, in pt 3-2 of the *FW Act*.

⁵⁶ The *FW Act* imposes a maximum penalty (depending on the nature of the breach) of either A\$3300 or A\$6600 for individuals, or A\$16 500 or A\$33 000 in the case of a corporation. The maximum penalties have significantly increased in the past 20 years. Prior to 30 March 1994, the maximum penalty that could be imposed on a body corporate was A\$1000 (see *Conciliation and Arbitration Act 1904* (Cth) s 119(1D)(a)(i); *Industrial Relations Act 1988* (Cth) s 178(4)(a)(ii)).

⁵⁷ *FW Act* s 545(1).

Other important changes introduced as part of the *Work Choices* amendments, and retained in the *FW Act*, are the provisions relating to accessorial liability.⁵⁸ Under these provisions, proceedings may be brought against individuals and corporate entities ‘involved in a contravention’ of the principal wrongdoer (for example, the employer entity).⁵⁹ In addition to the changes to the civil remedy provisions, a number of new administrative sanctions, such as compliance notices and enforceable undertakings,⁶⁰ were made available to the FWO from the time the *FW Act* first came into force on 1 July 2009.⁶¹ These administrative sanctions provide the FWO with a wider array of regulatory responses and reflect the suite of tools available to other regulatory agencies, including occupational health and safety regulators.⁶²

The FWO and its immediate predecessors have developed internal policies to assist its officers to apply the statutory scheme. Between 2007 and 2012, the general policy on litigation remained relatively constant.⁶³ Ordinarily, when breaches have been detected or reported, the FWO has tried to remedy the breach without resorting to litigation or coercive sanctions, by seeking to resolve the matter through assisted voluntary resolution, mediation or investigation.⁶⁴ At the conclusion of an investigation, a range of remedies have been deployed. At all stages, there has been a strong focus on resolving the matter by ‘voluntary compliance’ — a recurring theme in the formal *FWO Litigation Policy*, the Annual Reports, and the interviews we undertook. The emphasis on voluntary resolution reflects the approach advocated by the enforcement pyramid with less intrusive enforcement techniques being used more often. This approach offers the advantage of building trust and confidence in the regulator and strengthens normative motivations to comply with the law. In the words of the former head of the FWO:

Our inspectors cannot be in every pay packet nor every workplace, so by necessity, we operate on a voluntary compliance model, which is much easier to achieve if there is a broad industry acceptance of the over-arching policy and our role.⁶⁵

⁵⁸ *FW Act* s 550.

⁵⁹ For further discussion of this issue, see Anderson and Howe, above n 54.

⁶⁰ For analysis of the FWO’s use of enforceable undertakings, see Tess Hardy and John Howe, ‘Too Soft or Too Severe? Enforceable Undertakings and the Regulatory Dilemma Facing the Fair Work Ombudsman’ (2013) 41 *Federal Law Review* 1.

⁶¹ While the central provisions relating to the FWO were proclaimed to take effect on 1 July 2009, the provisions of the *FW Act* relating to the National Employment Standards and ‘modern awards’ did not commence operation until 1 January 2010.

⁶² In particular, most occupational health and safety regulators have been able to impose a variety of administrative sanctions, such as improvement notices and prohibition notices, for some time. In general, these agencies have also been empowered to enter into enforceable undertakings with duty holders.

⁶³ The litigation policy was first adopted on 19 October 2007 by the WO. While the policy has been through a number of incarnations since that time, much of the central content remains unchanged. See FWO, *Guidance Note 1: Litigation Policy of the Office of the Fair Work Ombudsman* (2nd ed, 20 July 2011) (*‘FWO Litigation Policy’*).

⁶⁴ FWO, *Guidance Note 8: Investigative Process of the Fair Work Ombudsman*, (1 December 2011).

⁶⁵ Nicholas Wilson, ‘Update from the Fair Work Ombudsman’ (Paper presented at the Industrial Relations Summit, Sydney, 5 March 2012) 8.

Using prosecution as a ‘last resort’ also reflects the traditional bent of the federal labour inspectorate in Australia, albeit what ‘last resort’ means in this context appears to vary. In particular, Goodwin and Maconachie found, in their historical review of the federal labour inspectorate, that:

the interpretation of ‘last resort’ has not been constant [over the last century] and prosecutorial policy has fluctuated between a weak persuasive compliance model at one extreme, and a strong insistence compliance model at the other.⁶⁶

It seems that the FWO sits at the latter end of the spectrum. Indeed, despite the current emphasis on voluntary and informal resolution of matters, the agency has viewed litigation as essential to its operation. The Fair Work Ombudsman has commented that: ‘the only way you can [achieve voluntary compliance] is because there is an explicit threat as to what will occur if you don’t comply’.⁶⁷ Similarly, the *FWO Litigation Policy* states that the litigation activities of the FWO ‘are part of a broader compliance system which comprises a combination of positive motivators and deterrents aimed at bringing about compliance with Commonwealth workplace laws’.⁶⁸

Litigation is also seen to perform other regulatory functions in the Australian context. Some FWO interviewees noted that litigation was often significant in terms of education, particularly when it was combined with media attention.⁶⁹ There were others that pointed to the way in which ‘the regulator can use litigation to help clarify areas of the law that have been uncertain’.⁷⁰ These features — which are not neatly captured by either responsive regulation or strategic enforcement⁷¹ — are particularly important in light of the significant legislative changes which have taken place over the past six years in Australia.⁷²

In determining when civil remedy litigation may be appropriate, the *FWO Litigation Policy* prescribes a two-stage test which must be satisfied before

⁶⁶ Goodwin and Maconachie, above n 53, 535.

⁶⁷ 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) 66, quoting Nicholas Wilson.

⁶⁸ *FWO Litigation Policy*, above n 63, 5.

⁶⁹ Interview: FWLD and Interview: FWLE.

⁷⁰ Interview: FWLH. Similarly, the *Litigation Policy* also notes that litigation ‘may also be appropriate when there is a need for judicial clarification of Commonwealth laws’: *FWO Litigation Policy*, above n 63, 5.

⁷¹ Knowledge of legal obligations is a critical variable identified in the regulatory compliance literature. Where the nature or content of norms is unsettled, compliance behaviour is likely to be adversely affected. Besides the practical difficulties with trying to comply in the face of uncertainty, an unclear legal standard may undermine normative commitment to the law and encourage ‘creative compliance’ behaviour. While these idealised enforcement models acknowledge the importance of tailoring the regulatory response to the underlying drivers of non-compliance, litigation is most commonly associated with addressing economic motivations (ie by increasing the risk of sanctioning, it aids in specific and general deterrence). However, these models do not necessarily recognise that litigation also has a critical role to play in clarifying the law, building knowledge of the relevant regulatory standards and strengthening normative motivations to comply with such standards.

⁷² For further discussion, see Tess Hardy, ‘A Changing of the Guard: Enforcement of Workplace Relations since Work Choices and Beyond’ in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 75.

litigation is commenced.⁷³ First, there must be sufficient evidence to commence civil proceedings. Second, the facts in the matter and all the surrounding circumstances must demonstrate that civil penalty proceedings are in the public interest. Again, this two-stage test, and the relevant set of public interest factors,⁷⁴ remained relatively stable between 2007 and 2012.

While the formal policy in relation to the place of litigation has not changed substantially over the review period, our data suggests that the strategic resort to litigation has shifted. In the following discussion, we present data concerning patterns in the use of litigation by the federal enforcement agency since 2006 that reflects the changing role of civil remedy litigation and the evolution of the FWO's compliance and enforcement strategy more generally. We consider this data in light of the literature discussed in Part II.

IV FWO Civil Litigation Enforcement Patterns

A Number of Cases Commenced and Completed by the FWO

Figure 1 shows the total number of litigation matters initiated by the federal enforcement agency each financial year since 2005–06, the year in which the *Work Choices* changes commenced.⁷⁵ This first graph illustrates that in the first three

⁷³ This test is similar to that adopted by a number of other regulators. See, eg, WorkSafe Victoria, *WorkSafe's General Prosecution Guidelines* (1 July 2010) <http://www.worksafe.vic.gov.au/_data/assets/pdf_file/0003/10596/General_Prosecution_Guidelines_-_July_2010.pdf>.

⁷⁴ The FWO *Litigation Policy* sets out a host of factors that must be considered in determining whether civil remedy litigation can be said to be in the public interest. As a general principle, the more serious the contravention, the more likely proceedings will be viewed as being in the public interest. The other public interest factors considered relevant by the FWO include: the characteristics of the alleged wrongdoer, the level of contrition and the involvement of senior management; the characteristics of the aggrieved party; the impact of the contravention on the affected party; the level of public concern; the need for general and specific deterrence; and the likely effect, outcomes and expense of the litigation.

⁷⁵ The raw data has been necessarily extracted from the annual reports of the FWO and its immediate predecessors over the relevant period. As noted, above nn 4–5, there are some discrepancies in this data and the reasons for these differences are not explained. For example, the Annual Reports issued in each of the years from 2006–07 to 2008–09 state that there were 53, 67 and 77 litigation matters commenced in the respective financial years. However, the Annual Report for 2011–12, which includes a cumulative data set, states that there were 58, 65 and 78 'civil penalty litigation [matters] commenced and enforceable undertakings approved for negotiation' in 2006–07, 2007–08 and 2008–09 respectively. In comparison, the FWO's Annual Report for 2009–10 stated that there were 66 'civil penalty litigation [matters] commenced and enforceable undertakings approved for negotiation'; however, a note below this figure confirms that '13 enforceable undertakings [have been] included in this result.' For the purposes of our analysis, these 13 enforceable undertakings have been excluded, which brings the total number of litigation matters commenced in 2009–10 down to 53. In the Annual Reports for 2010–11 and 2011–12, the FWO reports that there were 55 and 51 'civil penalty litigation [matters] commenced and enforceable undertakings approved for negotiation' in each respective financial year. However, unlike the Annual Report for 2009–10, these later Annual Reports do not specify how many enforceable undertakings have been included in these results. In these years, we have assumed that, as there is no specific note, these figures do not include enforceable undertakings, but rather include only the civil litigation matters commenced in that financial year. This assumption is supported by subsequent information provided by the FWO. See Evidence to Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 17 October 2012 (Response to

years of the review period, the number of litigation matters initiated increased sharply from a low of six matters in 2005–06, to a high of 77 in 2008–09. However, since then, the annual number of litigation matters has fallen, with an average of 53 matters having commenced in the last three financial years. Overall, this data suggests that since 2005–06, there has been a transformation in the profile of the federal agency from an agency that was heavily reliant on persuasive compliance⁷⁶ to one where the threat of litigation is an important element of the agency's enforcement profile.

Notwithstanding the significant increase in the use of litigation since 2006, and the fact that litigation is seen as a critical component of the overall enforcement regime (sometimes described as 'the jewel in the crown'⁷⁷), it has represented a tiny proportion of all matters that the federal labour inspectorate receives and resolves. Indeed, even during the litigation peak in 2008–09, litigation was initiated in less than one per cent of all complaints received by the inspectorate. Further, while the number of complaints rose in 2011–12, the total number of litigation matters that were commenced in this financial year fell slightly.⁷⁸

Figure 1: Total Number of Litigation Matters Commenced from 2005–06 to 2011–12

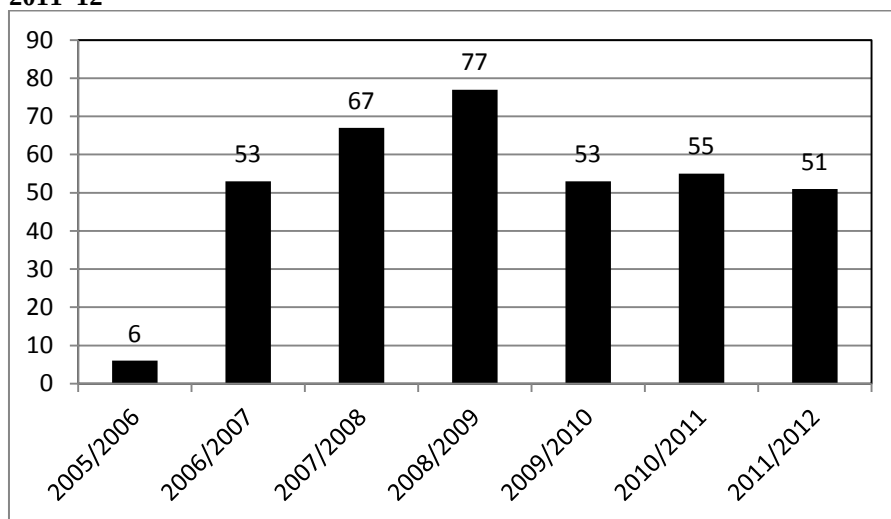


Figure 2 sets out the number of completed litigation matters against employers and individuals associated with the employer (for example, directors, officeholders,

question on notice: ew0614_13). For the purposes of our analysis, we have used the data extracted from the Annual Report issued in respect of each financial year rather than the cumulative data set which appears in more recent annual reports, such as the *Annual Report 2011–12*.

⁷⁶ That is, inducing compliance through heavy reliance on advice and assistance.

⁷⁷ Interview: FWLI.

⁷⁸ In 2011–12, the FWO recorded the receipt of 26 366 complaints, which represents an increase of 20 per cent from the 21 980 complaints received during 2010–11.

senior managers etc).⁷⁹ The subsequent analysis undertaken in this article (that is, characteristics of respondents etc) generally uses this more specific dataset, rather than the total number of completed litigation matters,⁸⁰ given that the focus of our research is on the way the FWO uses litigation to support compliance with, and enforcement of, minimum employment standards, rather than the way the uses litigation against trade unions.

When one compares the number of litigation matters commenced with those completed, the data suggests the length of time between initiating and finalising a claim is highly variable. There is no clear correlation between the numbers commenced in one year and the numbers completed in the next. For example, in 2007–08, 67 matters were commenced, yet in the following financial year, the number of completed litigation matters showed a significant drop to 21 matters.⁸¹

It is also clear from this comparative analysis that not all litigation matters that are commenced are finally determined by the court. We do not have access to settlement rates for all the financial years, but evidence in relation to the 2011–12 financial year gives us some insight into reasons for this gap. In particular, in 2011–12, the FWO filed 51 proceedings. Less than three months later, no matters had been dismissed, four matters had been discontinued, 11 matters had been completed and 36 matters were ongoing. In relation to the discontinued matters, respondents in two of the matters subsequently entered into enforceable undertakings, one matter was discontinued by consent and the remaining matter was discontinued as a result of the company going into liquidation.⁸²

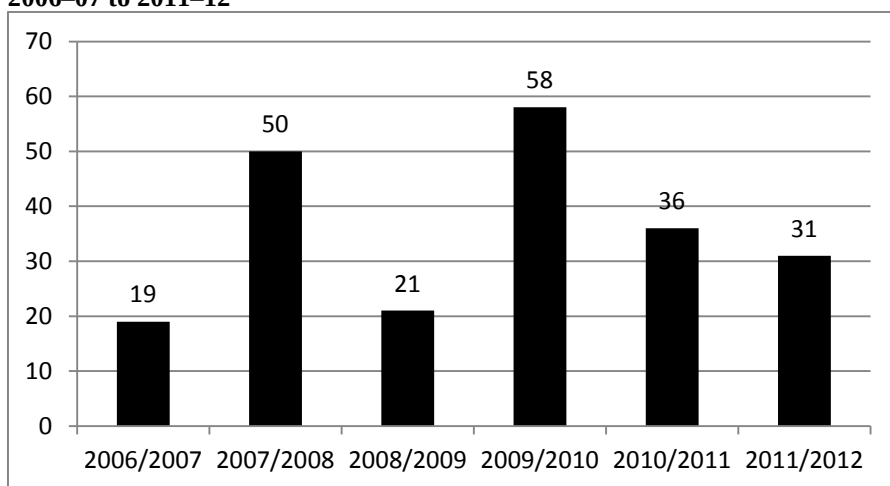
⁷⁹ In determining whether a matter is ‘completed’ for the purposes of preparing the data analysis, we used a set of criteria which does not necessarily reflect internal FWO practice. For example, a matter has been counted as ‘completed’ only where the final penalty decision has been delivered and no appeal is pending.

⁸⁰ The total number of completed litigation matters includes an additional five matters brought against trade union respondents. It should be noted that this partly explains the differences between our data and the FWO litigation data set out in the annual reports. Another reason for some discrepancies in the data is the fact that the FWO have counted matters which are under appeal as being ‘completed’ for that year, whereas we have not counted the matter as ‘completed’ until any relevant appeal is finalised.

⁸¹ We should note that in this particular year, as well as others, there is a difference between our data based on a range of public and internal FWO sources and the data set out in the relevant Annual Report. For example, our data analysis suggests that there were a total of 21 litigation matters completed in 2008–09, whereas the Annual Report for that financial year states that there were 33 litigation matters concluded. More recent Annual Reports (eg, the FWO *Annual Report 2011–12*) suggest that there were 39 litigation matters completed in this financial year. Again, there is no explanation for these differences. As a result of these discrepancies, and the fact that we have limited our data analysis to litigation matters against employers and individuals associated with the employer (as compared to the Annual Reports which refer to all litigation matters including those against unions), we have used our data set for later analysis rather than the data extracted from the Annual Reports.

⁸² Evidence to Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 17 October 2012 (Response to question on notice: ew0614_13).

Figure 2: Number of Completed Litigation Matters against Employers from 2006–07 to 2011–12



Which other factors might explain this shifting litigation pattern, particularly in relation to completed litigation matters against employers? In the wake of the 2006 reforms, the federal inspectorate was keen to develop a reputation as a strong and effective regulator. One manager we interviewed said that during the period from 2006 to 2008, there were two key goals for the regulator: first, to use litigation; and second, to increase the volume of litigation so ‘that we could promote that and people could get an understanding that there was possibly a sanction.’⁸³ These priorities were clearly reflected in the steep rise in litigation matters commenced and completed in this early period.⁸⁴

It was not only the raw numbers that increased, but also the portrayal of the litigation in the public arena. The OWS and later the WO both used the media to great effect to publicise the successful litigations they had brought and firmly ensconce the place of the regulator on the workplace relations stage.⁸⁵ This not only amplified the deterrence effects of these activities, but was a common source of pride for employees within the federal labour inspectorate. For example, one manager observed that in his view the biggest success over the past six years:

is having seen the organisation go from the Office of Workplace Services to the Ombudsman and actually get some litigation up. We’ve gone from essentially an organisation that had a call centre and we had inspectors and we had an investigation process but there were no litigations. I expect the feeling among the world of employers was that we didn’t really have any

⁸³ Interview: EXE.

⁸⁴ Another reason for this rise was that these figures do not account for litigation activity undertaken by the state inspectorates prior to 2006.

⁸⁵ However, the FWO’s media strategy has not been without some criticism. In a number of recent cases, the adverse publicity occasioned by the FWO’s media releases has been found to be a mitigating factor in determining the appropriate penalty: see, eg, *Fair Work Ombudsman v Revolution Martial Arts Pty Ltd* [2013] FMCA 125 (28 February 2013) and *Fair Work Ombudsman v New Image Photographics Pty Ltd (No 2)* [2013] FCCA 209 (8 May 2013).

clout ... Since becoming the Ombudsman I think that the organisation has become quite strategic in picking the cases that it litigates and [has] done a pretty good job of publicising those to get the message out into the community, the business community and the world of the employees to say there is a regulator and we can actually do something about it.⁸⁶

Since the establishment of the FWO in 2009, the relevant enforcement strategy has altered once again. This more recent shift was described by the Fair Work Ombudsman in the following way:

Our general deterrence work remains on a solid footing and it will continue to do so. However our focus *has* shifted, we're now coupling our compliance work with new and innovative ways to engage with the Australian community, encouraging businesses to be more proactive when it comes to complying with workplace laws.⁸⁷

It seems litigation activities have increasingly come to be viewed by the agency as 'generally the last resort of a broader compliance system.'⁸⁸ There are several possible reasons for this development. In some respects, the drop in litigation may reflect the fact that the FWO is becoming more successful at facilitating alternative ways in which to resolve matters, either through dispute resolution or referral to small claims.⁸⁹ The renewed emphasis on advice, education and alternative dispute mechanisms appears to be one response to the apparent perception in some pockets of the regulated community that the FWO is too aggressive in its pursuit of business, particularly at a time when there has been significant legislative change and the application of instruments remains unsettled. Indeed, the inherent uncertainty surrounding the new regulatory regime has underlined a need for more test cases — a development which we discuss in more detail below.

A second factor contributing to the decreased emphasis on litigation is the wider range of compliance and enforcement mechanisms available since 2009. One FWO manager commented: 'When I first started you either litigated or there was no further action, you had no in between. What we found is providing a range of compliance tools adds to the effective enforcement of the legislation.'⁹⁰

Third, the FWO is facing a decline in resources.⁹¹ The FWO has made clear that the maximum litigation capacity is around 50 to 60 matters per year.⁹²

⁸⁶ Interview: FWMQ.

⁸⁷ Wilson, above n 14, 2 (emphasis in original).

⁸⁸ FWO, *Annual Report 2009–10*, 35.

⁸⁹ The small claims jurisdiction is intended to provide a more accessible forum for parties to seek legal redress from the courts in relation to certain civil remedy provisions of the *FW Act*. The Act provides that a plaintiff may elect to commence a small claims proceeding. When dealing with a matter under the small claims procedure, the court may act in an informal manner, is not bound by formal rules of evidence, and may act without regard to legal form and technicality: *FW Act* s 548.

⁹⁰ Interview: FWMJ.

⁹¹ Between 2010–11 and 2012–13, the FWO's departmental expenses are forecast to decline by nine per cent. See Australian National Audit Office, *Delivery of Workplace Relations Services by the Office of the Fair Work Ombudsman* (Audit Report No 14, 2012–13) 15.

⁹² Nicholas Wilson and Lynda McAlary-Smith, 'The Fair Work Ombudsman Litigation Policy in Practice' (Paper presented at the Industrial Relations Commission NSW Annual Members Conference, 18 October 2012) 6.

The reduction in the number of litigation cases is not viewed by the agency as resulting in a concomitant reduction in deterrence. As one manager put it, a judgment was made internally ‘that running a hundred litigations wouldn’t necessarily get you twice the deterrence that running 50 would.’⁹³ This position is consistent with the argument of the strategic enforcement literature that regulatory interventions, including litigation, are not created equal. It is the nature of the cases being brought, rather than the number, which is likely to determine the overall deterrence value of formal interventions. Rather than abandoning litigation as a tool for inducing compliance, the FWO appears to be seeking to deploy it in a way that enhances the deterrence effects of these activities by broadening the types of contraventions it targets, by pursuing lead firms and by joining key individuals — patterns which will be discussed in more detail in the following sections.

B *Types of Matters Litigated*

As noted earlier, the FWO now enjoys an expanded mandate compared to its predecessors. The statutory objectives of the federal regulator have also evolved since 2006.⁹⁴ The way in which litigation has been used and portrayed by the federal labour inspectorate has changed quite significantly over the past six years. In particular, this is reflected in the types of contravention that the agency has litigated over that period.

Our analysis reveals that the vast majority of litigation matters brought by the FWO and its immediate predecessors concern underpayments. Indeed, in the early years following *Work Choices*, nearly all litigation matters related to underpayments. The focus of the agency’s approach to litigation was on increasing the numbers of matters that were being litigated, rather than choosing litigation based on whether the particular matter would have a strategic impact, such as maximising general deterrence in a problematic industry or raising awareness of a particular entitlement. In the words of one inspector, so long as the matter fell outside the trivial category, ‘pretty much anything ran’.⁹⁵ Further, the focus on underpayment matters was largely determined by the narrower jurisdictional mandate of the agency in this earlier period. This approach was also seen as appropriate to the extent that the litigation being run essentially reflected ‘the nature of the majority of matters investigated by the agency.’⁹⁶

We pointed out above that the absolute number of cases is falling, but that this would not necessarily reduce the deterrent effect of litigation provided that the remaining cases are targeted in a sophisticated way. What evidence is there that FWO may be litigating more strategically in the types of cases it chooses to run? As we have observed, the large majority of cases have continued to relate to the underpayment of wages and entitlements. There has, however, been a discernible shift in the types of contraventions that are now the focus of remaining litigation. For example, in the earlier period from 2005–06 to 2008–09, agreement-making

⁹³ Interview: FWMH.

⁹⁴ See Howe, Hardy and Cooney, above n 42.

⁹⁵ Interview: FWLI.

⁹⁶ Workplace Ombudsman, *Annual Report 2007–08*, 25.

breaches and duress claims relating to individual statutory agreements were fairly common. These matters declined considerably from 2009–10 consistently with the removal of these instruments from the legislative framework. At the same time, the number of litigation matters concerned with sham contracting, adverse action and unlawful industrial action increased, particularly in the last two financial years. Further, in 2011–12, there were at least two cases concerned with safety net contractual entitlements.⁹⁷

These shifts not only mirror changes to the legislative framework, but also reflect a deliberate rebalancing of the matters being run by the FWO. One inspector commented that there had been a clear direction from senior management to boost the numbers of litigation matters in the more ‘complex’ areas.⁹⁸ Such matters are not only new, but they also tend to attract more media attention and greater political scrutiny.⁹⁹ By comparison, a FWO manager observed that this shift towards more complex cases has come about:

from debates we’ve had about the integrity of the regulator, that the intention is that we work across the Act, and the intention is that we influence large as well small. Now on that kind of basis I don’t think it’s especially profitable to just keep taking the next underpaying cleaner you can find to court, and then not necessarily getting the money out of them when they go into liquidation. And so it’s that sort of issue — what are the levers?¹⁰⁰

Another noticeable shift has been the higher priority placed on test cases in recent years. In the past, the FWO’s predecessors were relatively conservative in running cases without a high probability of success. However, in 2011–12, the FWO initiated test cases in relation to a variety of different issues ranging from the jurisdictional reach of the *FW Act*¹⁰¹ to the use of accessory liability provisions to address fissured employment relationships¹⁰² and complex supply chains,¹⁰³ sham contracting¹⁰⁴ and the difficult problem of phoenixing.¹⁰⁵

⁹⁷ Section 12 of the *FW Act* defines ‘safety net contractual entitlements’ to mean entitlements under an employment contract that relate to any matter also covered by the National Employment Standards or by a modern award. This may include contractual entitlements to pay or leave that are more generous than the ‘safety net’ prescribed by legislation or the applicable modern award.

⁹⁸ Interview: FWIE.

⁹⁹ Sham contracting, in particular, has been the focus of much questioning in Senate Estimates: see, eg, Evidence to Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 20 October 2010.

¹⁰⁰ Interview: FWMH.

¹⁰¹ See, eg, *Fair Work Ombudsman v Jetstar Airways Limited*, (Unreported, Federal Magistrates Court of Australia, 2 April 2012); *Fair Work Ombudsman v Valuair Limited, Tour East (TET) Ltd and Jetstar Airways Pty Ltd* (Unreported, Federal Court of Australia, 25 May 2012).

¹⁰² See, eg, Fair Work Ombudsman, ‘Fair Work Ombudsman Alleges Four Oil Rig Workers Underpaid More than \$120,000’ (Media Release, 27 June 2011) <<http://www.fairwork.gov.au/media-centre/media-releases/2011/06/pages/20110627-pocomwell.aspx>>.

¹⁰³ See, eg, *Fair Work Ombudsman v Al Hilfi* (ongoing, Federal Magistrates Court of Australia); Fair Work Ombudsman, ‘Court Action over Alleged \$149,000 Underpayment of SA Trolley Collectors’ (Media Release, 3 June 2012) <<http://www.fairwork.gov.au/media-centre/media-releases/2012/06/pages/20120603-al-basry-prosecution.aspx>>.

¹⁰⁴ See, eg, *Fair Work Ombudsman v Telco Services Australia Pty Ltd* (Unreported, Federal Court of Australia, 24 June 2011).

¹⁰⁵ See, eg, *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408 (20 April 2012) and *Fair Work Ombudsman v Ramsey* (2011) 198 FCR 174.

The former head of the FWO has expressly acknowledged that these test cases present ‘significant risk for the Agency, as the bounds of the Fair Work Act are explored’.¹⁰⁶ He rightly points out, however, that the regulator has ‘an obligation to endeavour to prove these points.’¹⁰⁷ Running such cases is warranted on several grounds: first, because the clarity and certainty of rules is important to any effective regulatory regime; second, because a number of these cases are designed to address the root cause rather than the manifestation of the compliance problem; and third, because a court decision on these matters allows the FWO to then rely more heavily on less coercive measures to bring about compliance by strengthening normative motivations to comply — an integral element of responsive regulation.

C Characteristics of Respondents and Context of Litigation

In this section, we present data concerning the nature of the respondents to litigation by the federal labour inspectorate, including their industry context. As observed, the characteristics of employing businesses are important to effective enforcement of minimum employment standards in several respects. For example, there may be a number of reasons why businesses fail to comply with regulation. In some cases, this might be due to their size and capacity to comply with complex regulation, and in others it might be as a result of their industry structure and economic pressures specific to that industry. Regulators, such as the FWO, need to be mindful of these plural motivations, and the variable deterrence effects, when designing their overall enforcement strategy. Moreover, we also observed that it is important for regulators, where possible, to target external pressures on employer firms which may affect compliance behaviour, such as where the firm is part of a larger corporate network or supply chain. Consistently with the strategic enforcement model, the FWO acknowledged in 2012 that the agency was:

endeavouring to shift the use of the courts to cases which highlight the worst allegations of wrong-doing or exploitation of vulnerable workers, or to cases which highlight concerns held with procurement chains or coordinated corporate behaviour.¹⁰⁸

In order to track patterns in enforcement litigation in the relevant review period, we have prepared a number of tables showing different aspects of the litigation strategy, such as the proportion of matters decided against small, medium and large businesses, the number of litigation matters determined in key industries and, in the next section, the proportion of cases where accessorial liability provisions have been relied on to target individual company directors and officers, and associated corporate entities.

¹⁰⁶ Wilson and McAlary-Smith, above n 92, 10.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid 5.

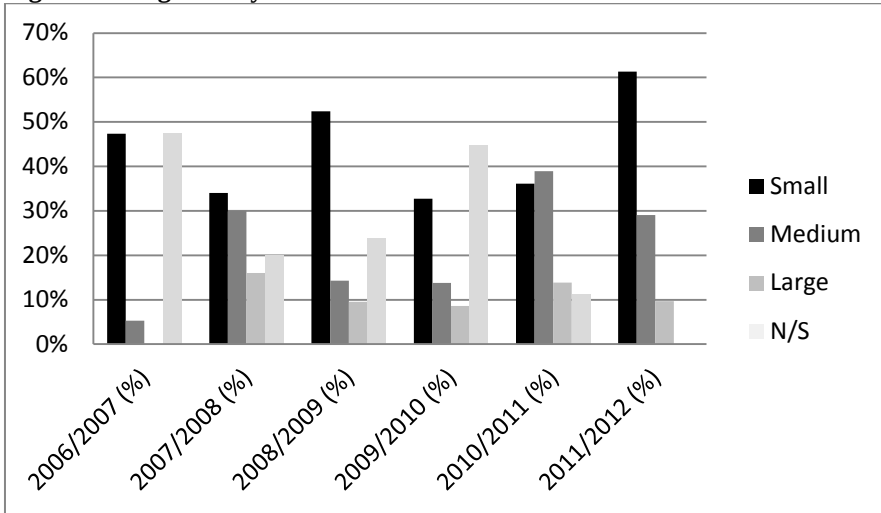
Figure 3: Litigation by Size of Business from 2006–07 to 2011–12

Figure 3 shows the size of the business against which the FWO and its predecessors brought litigation since 2006–07. Unfortunately, it has not been possible to determine the size of the employer respondent in all of the cases brought and completed by the federal enforcement agency, even after a review of each court decision.¹⁰⁹ However, of the cases where it has been possible to determine size, we found that the majority of cases brought by the FWO in relation to breaches of minimum employment standards were against small to medium-sized businesses. This may simply reflect the higher number of small businesses in the regulated community,¹¹⁰ the fact that non-compliance is more extensive in small to medium-sized enterprises, and/or the fact that small businesses are generally more susceptible to scrutiny by the regulator.¹¹¹

However, it is important for the agency to consider whether targeting smaller enterprises is the most effective form of deterrence. Previous research on regulatory compliance suggests that the value of deterrence strategies varies with the context: ‘[d]ifferent types of firms, different sizes of firms, and different types of office holders, are all likely to react differently to the signals sent by

¹⁰⁹ For the purposes of our analysis, a small business is characterised as employing fewer than 15 employees; a medium-sized business is characterised as employing between 15 and 100 employees; and a large-sized business is characterised as employing more than 100 employees. In total, we could not identify the size of business in relation to 54 matters (out of a total of 215 completed matters against employers). Where we have been unable to identify the size of the relevant business, we have marked the matter as ‘N/S’ (ie, not specified).

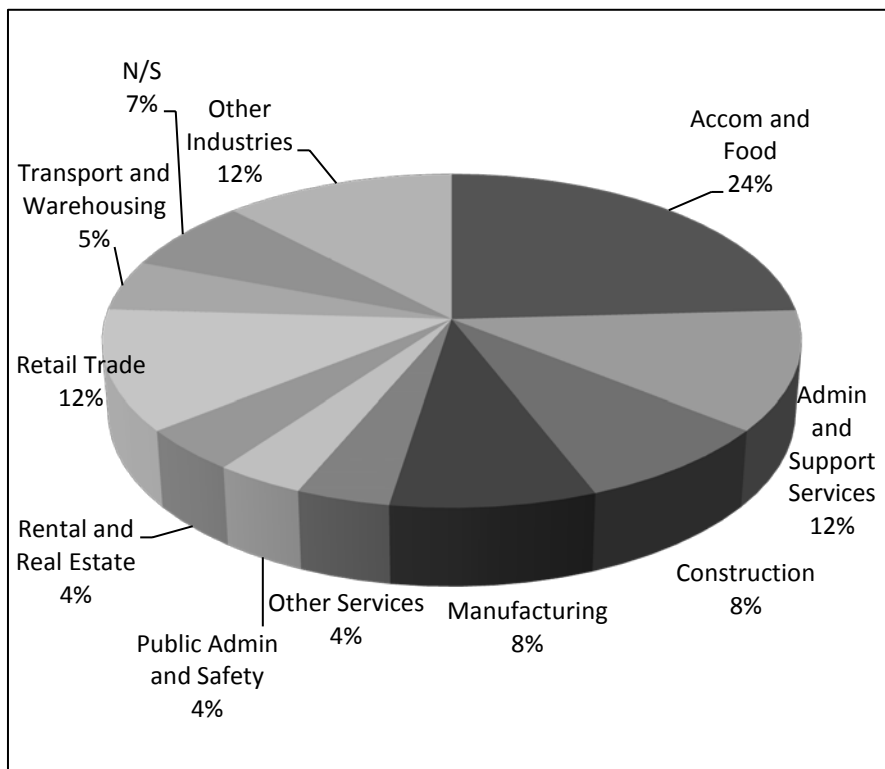
¹¹⁰ As at June 2011, there were 826 389 employing businesses, of which 739 312 (89.5 per cent) employed fewer than 20 employees. See Australian Bureau of Statistics, *Counts of Australian Businesses, including Entries and Exits*, Cat no 8165.0 (AGPS, 2012).

¹¹¹ See Neil Gunningham, Dorothy Thornton and Robert Kagan, ‘Motivating Management: Corporate Compliance in Environmental Protection’ (2005) 27 *Law & Policy* 289; Robyn Fairman and Charlotte Yapp, ‘Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement’ (2005) 27 *Law & Policy* 491.

prosecutions'.¹¹² For example, deterrence appears to be more effective in relation to individuals than organisations.¹¹³ Further, small and medium-sized businesses appear to be more readily influenced by regulatory action.¹¹⁴ Weil's research suggests, however, that unless there is some link that binds small businesses together, such as an active employer association, bringing enforcement actions against small businesses may successfully recover lost wages and achieve specific deterrence, but may do little to change behaviour more broadly in the industry.¹¹⁵

The model of strategic enforcement, and particularly the principles of prioritisation and systemic effects, suggests that resources and attention should be focused on lead firms within industries that present the greatest risk — that is, those that have a large proportion of vulnerable and/or low-paid employees and where industry structure is likely to perpetuate increased levels of employer non-compliance, such as highly competitive, and highly fissured, supply chains. In this respect, Figure 4 reports the distribution of litigation matters by industry.

Figure 4: Litigation by Industry from 2006–07 to 2011–12



¹¹² Gunningham, above n 7, 369.

¹¹³ Ibid 370.

¹¹⁴ Gunningham, Thornton and Kagan, above n 111.

¹¹⁵ Weil, above n 10.

This pie chart shows that, in the relevant period, litigation matters have consistently been concentrated in the following industries: accommodation and food services; administrative and support services; retail trade; manufacturing; and construction. This data is not sufficient to enable a conclusion that litigation resources are being targeted in the most effective manner.¹¹⁶ This problem is not solely, or even chiefly, attributable to the FWO. It is true that the FWO has not, until recently, collected industry data in a systematic manner. However, the more fundamental difficulty is that, with few exceptions, there is insufficient national data from any source to enable the precise identification of industry sectors that would be most responsive to litigation, having regard to industry structure, such as supply chain and business networks, the number of vulnerable workers, and the level of employer compliance. In order to implement strategic enforcement, it is first necessary to have the necessary data on industry structure, employment patterns and compliance levels. While this data has not been routinely collected by the FWO, it has sought to remedy this issue in the last 12 months with the appointment of a dedicated team, focused on identifying and measuring the effect of strategic interventions.

D *Types of Respondents*

While the absence of data makes targeting industries problematic, the effectiveness of litigation can nevertheless be increased by focusing on the appropriate individuals and entities to sue. We referred above to the accessorial liability provisions that enable the FWO to join individuals or corporate entities other than the employer. Further, the *FWO Litigation Policy* states that the agency:

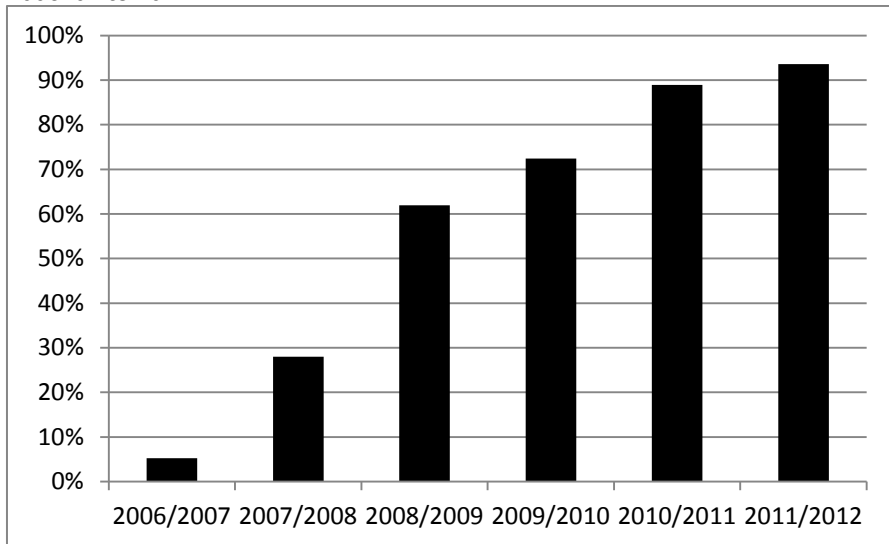
considers that holding individuals accountable for contraventions in which they are involved in is an appropriate compliance tool ... Accordingly, in each and every matter considered for litigation action the FWO will look to determine if s 550 proceedings can also be commenced.¹¹⁷

While the *FWO Litigation Policy* has remained virtually unchanged in this respect, the data reveals a striking increase in the number of matters where proceedings have been brought against a person (or persons) involved in a contravention of a civil remedy provision under the accessorial liability provisions in the *FW Act*.

¹¹⁶ This point is developed at length in John Howe, Tess Hardy and Sean Cooney, *Complaints, Campaigns and Compliance: The Fair Work Ombudsman and Detection of Fair Work Law Violations* (Paper presented at the Australian Labour Law Association National Conference, Canberra, 16–17 November 2012).

¹¹⁷ *FWO Litigation Policy*, above n 63, 7.

Figure 5: Proceedings involving one or more Accessory (percentage) from 2006–07 to 2011–12



The data presented in Figure 5 indicates that the FWO is increasingly making use of the accessorial liability provisions. Of the 31 completed litigation matters brought against employers in 2011–12, accessories were named in all but two of these matters.¹¹⁸ By way of comparison, in 2007–08, accessories were named in only 14 of the 50 litigation matters concluded against employers that year. A senior FWO lawyer we interviewed emphasised the agency’s goal of achieving general deterrence through this avenue:

most of the matters that we run do [name an accessory pursuant to s 550] and I think that [these actions] do have an impact upon individuals’ behaviours, and at the end of the day individuals are the ones who are in the driving seat.¹¹⁹

This statement reflects a key criticism of enforcement regimes that focus on punishment of the firm through penalties. Such a strategy is seen to lack proper regard for the shareholders’ limited liability and the fact that firms are actually made up of key individuals with their own sets of beliefs, worldviews and motivations. In punishing the corporation for breaches of social regulation, individual company officers and managers are not held to account and, accordingly, there is no incentive for them to improve their employer’s compliance profile in the future. One approach to motivating corporate compliance, which takes into account the individuals within the firm, is to hold officers and managers of corporations personally liable when the company breaches the law, usually in

¹¹⁸ We note that in some of these matters, the accessories named may have been corporate entities rather than individual directors or managers of a corporate employer. See, eg, *Balding v Ten Talents Pty Ltd (No 4)* (2008) 60 AILR 100-864.

¹¹⁹ Interview: FWLF.

addition to litigation against the corporate wrongdoer itself.¹²⁰ As noted earlier, studies have shown that if officers and managers are threatened with personal liability for harms done by the business, they are more likely to cause the corporation to comply with the law in order to avoid being held to account.¹²¹ In many respects, this reflects the deterrence principle of strategic enforcement. The recently harmonised work health and safety laws take this concept a step further in that they impose a positive, proactive duty on company officers to undertake due diligence to prevent breaches of the relevant obligations.¹²²

The most common targets for the FWO in relying on these provisions are the directors of corporate employers in cases where there has been a history of misuse of the corporate form to avoid payment of employment entitlements, and/or where the corporate employer is or is likely to become insolvent, externally administered or deregistered and consequently unable to meet its obligations to employees.¹²³ For example, of the 29 matters which involved accessories in 2011–12, 11 of these matters involved companies that were in administration, insolvent or deregistered at the time of the penalty hearing.¹²⁴ The right to pursue a party other than the employer company is particularly important in the insolvency context because of the doctrine of limited liability. If a company has insufficient funds to meet unpaid wages and other entitlements, the shareholders of a company are legally protected from being personally liable for such debts.¹²⁵ At a more practical level, proceedings against a company in liquidation are stayed,¹²⁶ and in the absence of another party to sue, no penalty or remedy will be forthcoming.

Aside from directors and managers, regulatory regimes may also attribute liability to other individuals within the firm who may be conceived of as ‘gatekeepers’ because they are in a position to monitor and control corporate conduct, such as compliance officers, in-house counsel, human resources managers, accountants, auditors or legal advisers.¹²⁷ Holding more, rather than fewer, parties liable for contraventions can mean that, even if the penalties hold limited deterrent value, the deterrent threat is spread to individuals who are likely

¹²⁰ See, eg, Helen Anderson (ed), *Directors’ Personal Liability for Corporate Fault: A Comparative Analysis* (Kluwer, 2008); Neil Foster, ‘Manslaughter by Managers: The Personal Liability of Company Officers for Deaths Flowing from Company Workplace Safety Breach’ (2006) 9 *Flinders Journal of Law Reform* 79; Brent Fisse and John Braithwaite, ‘The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism, and Accountability’ (1988) 11 *Sydney Law Review* 468.

¹²¹ Gunningham, above n 7.

¹²² See Richard Johnstone, *Work Health and Safety Regulation in Australia: The Model Act* (Federation Press, 2012). A similar due diligence model has been proposed for minimum wage contraventions in the United States: see Timothy Glynn, ‘Taking Self-Regulation Seriously: High-Ranking Officer Sanctions for Work-Law Violations’ (2011) 32 *Berkeley Journal of Employment and Labor Law* 279.

¹²³ See, eg, *Fair Work Ombudsman v Shrek Pty Ltd* [2010] FMCA 907 (24 November 2010). See also *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408 (20 April 2012). See also the earlier decision of *Fair Work Ombudsman v Ramsey* (2011) 198 FCR 174.

¹²⁴ See Anderson and Howe, above n 54.

¹²⁵ See Kevin Davis and Geoff Burrows, ‘Protecting Employee Entitlements’ (2003) 36 *Australian Economic Review* 173.

¹²⁶ *Corporations Act 2001* (Cth) s 471B.

¹²⁷ See Reinier H Kraakman, ‘Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy’ (1986) 2 *Journal of Law, Economics and Organisation* 53.

to be sensitive to smaller penalties and concerned about being found personally liable.¹²⁸ Prosecution of these third-party firms and individuals also has:

the capacity to improve business compliance by putting in place a web of controls that reduce[s] the opportunities for, of the advantages of, offences and embedding norms and practices for avoiding non-compliance in the social structure of industry.¹²⁹

In addition to the proceedings it has brought against company directors, the FWO has also been willing to pursue internal ‘gatekeepers’ in order to promote compliance, although this has been the exception rather than the rule. The Fair Work Ombudsman has referred to these cases when urging human resources and industrial relations practitioners to:

assure yourselves that the arrangements in your company are not about to leave you with a large and ultimately costly problem ... You should also be alert that you may have some personal responsibility for what goes on with your organisation's employee relations.¹³⁰

It is therefore apparent that the FWO is aware of the specific and general deterrence that may be achieved by pursuing personal liability against company employees who are key gatekeepers in relation to employment standards. Notwithstanding these comments, we are aware of only one matter that where the FWO has joined an internal advisor — in this instance, a human resources manager — to enforcement proceedings.¹³¹

In relation to supply chains, the FWO has recently commenced a number of matters against corporations other than the direct employer of employees under the accessory liability provisions.¹³² For example, in two related cases, the FWO has brought proceedings against Coles Supermarkets as the principal contractor of a supply chain that included the direct employer of workers to collect supermarket trolleys in Coles’ car parks.¹³³ The FWO has alleged that the trolley collectors were underpaid and that Coles was ‘involved in’ the contravention to the extent that it induced or was knowingly concerned in or party to the relevant contraventions that led to the underpayments. Coles’ application to dismiss the

¹²⁸ See Parker, above n 17.

¹²⁹ Ibid 601.

¹³⁰ Nicholas Wilson (Paper presented to the Australian Industry Group National PIR Group Conference, 3 May 2011) <http://services.thomsonreuters.com.au/cpdnews/docs/Workforce/Nick_Wilson_AiG_3%20May_2011_FINAL.pdf>.

¹³¹ See *Fair Work Ombudsman v Centennial Financial Services* (2011) 63 AILR 101-377. There have also been some isolated instances where external consultants have been joined as accessories, but these are less well-known: see, eg, *Balding v Ten Talents Pty Ltd* (No 4) [2008] FMCA 463 (18 April 2008).

¹³² The FWO has also used a number of other legal techniques and legislative provisions to pierce the corporate veil: eg, relying on sham contracting provisions of the *FW Act* or making novel arguments of joint employment. See, eg, *Fair Work Ombudsman v Contracting Solutions Australia Pty Ltd* [2013] FCA 7 (15 January 2013); *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (No 2) [2013] FCA 582 (14 June 2013); *Fair Work Ombudsman v Eastern Colour Pty Ltd* (2011) 209 IR 263.

¹³³ See *Fair Work Ombudsman*, above n 103.

FWO's action by way of summary judgment was recently rejected by the Federal Court of Australia.¹³⁴

As these cases are not yet finalised, they are not reflected in our data. However, the fact that these cases have been commenced indicates that the FWO is willing to consider the root causes of non-compliance and, where appropriate, to consider litigation against entities other than the direct employer of workers in order to maximise the deterrence effects of its litigation and place the agency in a stronger position to encourage more sustainable and self-regulatory approaches, in line with the principles of the enforcement pyramid and the concept of strategic enforcement.

E Enforcement Outcomes

In this section, we present our findings on the outcomes of civil litigation brought by the agency between 2006–07 and 2011–12. This data provides both a measure of the agency's success in redressing breaches of federal labour legislation and an indication of the willingness of the courts to make use of the various orders available under the *FW Act*, including the higher maximum penalties.

As noted earlier, the agency is able to seek a range of remedies from the court in relation to breaches of the Act or instruments made under the Act. The key remedies sought by the FWO and its predecessors have been declarations, compensation for loss or damage suffered by the aggrieved person (commonly, compensation is equal to the underpayment of wages and other entitlements), and pecuniary penalties. In at least one case, injunctive relief has been obtained.¹³⁵ Further, in some rare instances, costs have been successfully awarded in favour of the FWO.¹³⁶

The data discloses that although the FWO uses litigation in only a small proportion of matters that come to its attention, it has a very high success rate.¹³⁷ Our review of all litigation outcomes between 1 July 2006 and 30 June 2012 found that the FWO was successful in more than 90 per cent of the litigation matters completed in each financial year, for an average success rate over that period of 95 per cent. In addition, there has been a relatively low rate of appeals.

The following graphs present our findings concerning the total underpayments recovered by the FWO and its predecessors in each financial year,

¹³⁴ *Fair Work Ombudsman v Al Hilfi* [2012] FCA 1166 (26 October 2012).

¹³⁵ See *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408 (20 April 2012) and *Fair Work Ombudsman v Ramsey* (2011) 198 FCR 174.

¹³⁶ It is relatively difficult to obtain costs in this jurisdiction because of express statutory limitations: *FW Act* s 570.

¹³⁷ For the purposes of this study, 'success' is defined as when the court finds that there is one or more contraventions of a civil remedy provision and makes at least one or all of the orders sought by the FWO. However, we have been unable to obtain data on whether the FWO was able to enforce the judgments it was successful in obtaining. The fact that companies are often insolvent, in external administration or deregistered at the time of the penalty hearing suggests that this may be a significant problem. See, eg, *Fair Work Ombudsman v Garfield Berry Farm Pty Ltd* [2012] FMCA 103 (24 February 2012).

and the total penalties assessed by the courts in successful FWO litigation by financial year.

Figure 6: Total Underpayments Recovered in Completed Litigation Matters against Employers from 2006–07 to 2011–12

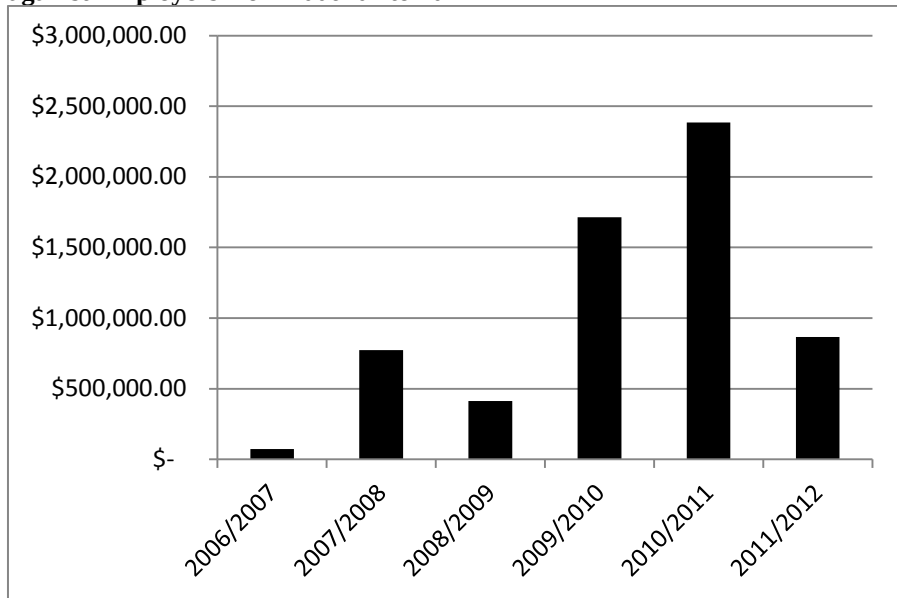
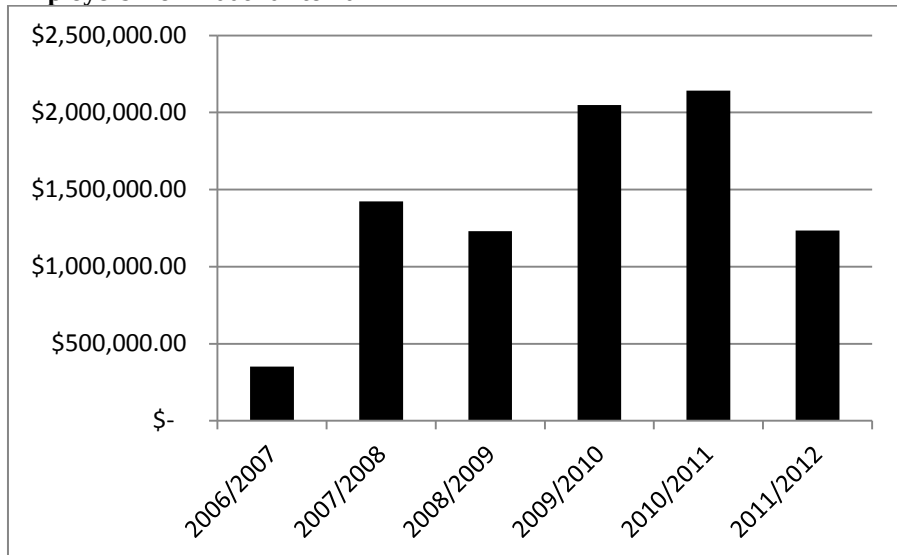


Figure 7: Total Penalties Recovered in Completed Litigation Matters against Employers from 2006–07 to 2011–12



Figures 6 and 7 show a relatively steady increase in the amount of underpayments recovered and penalties imposed by the courts by financial year

between 2006–07 and 2010–11. The average recovery of underpayments increased from around A\$4000 in 2006–07 to a high of more than A\$72 000 in 2010–11. In each financial year since 2008–09, the average recovery has been in excess of A\$25 000.

Further, the data also discloses that in this same period the agency has achieved strong results in terms of the penalties imposed by the courts. In particular, in each of 2009–10 and 2010–11, approximately A\$2 million in penalties has been imposed for breach of the *FW Act*. The 2010–11 result is particularly strong given that the number of litigation matters completed was significantly lower compared to the previous year.¹³⁸ A number of factors may have contributed to this development, such as the increased penalties that have applied in this jurisdiction since 2004 and the increasing willingness of the courts to treat such contraventions seriously.¹³⁹

While the total number of underpayments recovered and penalties imposed dropped in the 2011–12 financial year, there were a number of high-profile cases during this period, where the courts ordered penalties very close to the maximum amount.¹⁴⁰ This is important in strengthening the legitimacy of the regulatory intervention. It is also arguable that the significant size of these penalty amounts may effectively penetrate the corporate consciousness and stimulate positive changes in compliance behaviour in such a way that could not be achieved by initiating more litigation proceedings with lesser penalty amounts awarded.¹⁴¹ The high rate of successful litigation is also likely to have increased the bargaining power of the FWO in relation to more cooperative approaches further down the pyramid, because there is a credible threat of the FWO succeeding if court proceedings are initiated.

Overall, the average penalty imposed on corporate employers since 2007–08 has been in excess of A\$30 000 in each financial year. While this is higher than past average penalties, it is not clear whether penalties of this magnitude will serve a deterrence function for larger businesses that are better able to absorb penalties of this size, or better placed to pass the cost on to shareholders or consumers. The penalty amount by itself does not, however, account for the ways in which publicity can augment the deterrence effects of these outcomes, particularly when the litigation is directed at reputation-sensitive or lead firms. Research undertaken in relation to the ACCC has shown that the process of investigations, combined with the publicity associated with enforcement action, is a more effective motivator of compliance than penalties.¹⁴² Media has also been found to serve a

¹³⁸ In some of the earlier years (2006–07 and 2007–08), there were a number of contraventions which took place prior to the increase in maximum penalties in August 2004 — which increased the maximum penalty for a body corporate from A\$10 000 to A\$33 000. This may affect the size of penalties being awarded in some cases and may affect comparisons across financial years.

¹³⁹ See, eg, the comments of Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14. There have, however, been some cases where the courts have been less sympathetic to the enforcement position taken by the FWO: see, eg, *Fair Work Ombudsman v Ballina Island Resort Pty Ltd* (2011) 207 IR 312.

¹⁴⁰ In *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408 (20 April 2012), the level of penalty imposed represented 97 per cent of the maximum penalty available.

¹⁴¹ Gunningham, above n 7, 369.

¹⁴² Parker, above n 17, 599.

useful regulatory function in the occupational health and safety context.¹⁴³ Many within the FWO felt that agency's use of publicity was effective and that it held a strong regulatory value in this context.¹⁴⁴ The deterrence effects of publicity could be further enhanced, however, by way of formal publicity orders from the court.¹⁴⁵

Indeed, publicity orders are just one set of remedies that may be available under the broad remedial provisions of the *FW Act*, but which the FWO has not yet sought from the courts. In particular, there are a number of alternative remedies which may aid in building a culture of compliance, rather than simply strengthening deterrence signals. Such remedies include remedial orders in lieu of civil penalties; corporate rehabilitation orders; probationary orders; and community service orders. The FWO's ongoing focus on pecuniary penalties may limit its capacity to institutionalise positive compliance behaviours within organisations. This stands in some contrast to the ACCC, which frequently seeks non-monetary orders, such as injunctions and corporate rehabilitation orders.¹⁴⁶

These types of orders are not only useful in relation to companies or individuals that are not in a financial position to comply with court-ordered penalties or compensation orders, but may also strengthen the tip of the pyramid and the overall regulatory regime. For example, research into the enforcement practices of ASIC found that injunctions and management banning orders were much more popular than civil penalties among investigators. Injunctions were perceived a useful 'real-time' remedy and a highly visible resolution in that they allow the public to see 'the direct effects within a short time of injunctions freezing assets and shutting down rogue companies'.¹⁴⁷ By comparison, civil penalties were seen to be less swift, decisive and obvious in their effects. The imposition of management banning orders, which can be done as an administrative sanction by ASIC investigators, was also viewed as an effective remedy in that took offenders out of action. In many ways, the sanctions utilised by ASIC and the ACCC partly replicate the strategic use of 'hot cargo' provisions in the United States in that these broader sanctions may effectively change the 'compliance calculus'¹⁴⁸ of the regulated firm and provide the necessary incentives for lead companies to establish and support ongoing monitoring regimes.

The absence of both stiffer and more flexible court-based sanctions is arguably what is lacking from the FWO's enforcement arsenal. In other words, the 'tip' of the sanctions hierarchy is not sufficiently strong to induce compliance at lower levels or curb the most recalcitrant at higher levels. In other spheres of

¹⁴³ See Gunningham and Johnstone, above n 46.

¹⁴⁴ Interview: FWMG.

¹⁴⁵ Unlike the FWO-issued media releases, publicity orders can be more directed and do not rely on press agencies picking up the story in the media as the advertisements are paid for by the company. See Gunningham and Johnstone, above n 46.

¹⁴⁶ For example, there have been cases where court orders, which are often agreed between the parties, include a requirement to implement a trade practices compliance program and to engage an independent auditor to monitor compliance: see, eg, *Australian Competition and Consumer Commission v Pioneer Concrete (Qld) Pty Ltd* [1996] ATPR 41-457. See also Parker, above n 17.

¹⁴⁷ George Gilligan, Helen Bird and Ian Ramsay, 'Civil Penalties and the Enforcement of Directors' Duties' (1999) 22 *University of New South Wales Law Journal* 417, 452.

¹⁴⁸ Weil, above n 10, 88.

corporate and workplace regulation, such as occupational health and safety, incapacitation sits at the peak of the pyramid — a sanction which can be achieved by way of an injunction, suspension or withdrawal of an operating licence, suspension of trading, asset seizure or imposing a state-authorised management team. The virtual absence of criminal penalties under the *FW Act*, the difficulties of seeking banning orders¹⁴⁹ and the fact that there is no licensing regime that allows for suspension and/or incapacitation makes it much more difficult for the FWO to deter the most egregious offenders and prevent some of the most alarming regulatory behaviour, such as phoenixing.¹⁵⁰ This has meant that, in at least one instance, companies that have previously been fined for contraventions of their workplace relations obligations have not only avoided the consequences of their breach, but continued to engage in non-compliant behaviour with some impunity.¹⁵¹

As outlined in the previous section, the FWO has sought to address some of these weaknesses principally through its use of the accessorial liability provisions. However, the deterrence value is potentially weakened because the maximum penalty amounts are lower for natural persons than for corporations, and further, the FWO generally has not applied to have compensation orders awarded against individuals on the basis of a belief that such orders can only be made against the employer. In relation to the remedies sought by the agency, it seems that the FWO's approach has potentially fallen short of the optimal models of regulatory enforcement in some respects.

V Conclusion

This article has detailed and analysed the findings of an empirical study of the FWO's litigation activities in the period from 1 July 2006 to 30 June 2012. This analysis was conducted within a framework of socio-legal theories of regulatory compliance, with particular focus on responsive regulation and strategic enforcement.

We examined four central aspects of FWO court-based enforcement: the numbers of proceedings commenced and completed; the types of contraventions that were the subject of litigation; the characteristics of respondents; and enforcement outcomes.

Our data confirms that in the review period there was a significant increase in the number of litigation matters brought by the federal agency. This litigation activity was in contrast to the relative antipathy toward litigation demonstrated by the federal enforcement agency in the decade prior to *Work Choices*. It has

¹⁴⁹ Unlike ASIC and the ACCC, the FWO does not currently have any capacity to seek an order disqualifying directors or officeholders from managing corporations for a relevant period in relation to their involvement in particular contraventions. Compare *Corporations Act 2001* (Cth) s 206C.

¹⁵⁰ For further discussion of these issues, see Helen Anderson, 'Phoenix Activity and the Recovery of Unpaid Employee Entitlements — 10 Years On' (2011) 24 *Australian Journal of Labour Law* 141; PricewaterhouseCoopers, 'Phoenix Activity: Sizing the Problem and Matching Solutions' (Report prepared for the Fair Work Ombudsman, June 2012).

¹⁵¹ See *Fair Work Ombudsman v Shrek Pty Ltd* [2010] FMCA 907 (24 November 2010).

contributed to the high profile now enjoyed by the FWO, and is broadly consistent with the enforcement pyramid model in that there needs to be activity at the peak of the pyramid for the softer approaches to work.

Strikingly, the fluctuation in litigation numbers from 2006–07 to 2011–12 has occurred at a time where there have been relatively minor shifts in the formal litigation guidelines. This suggests that while the *FWO Litigation Policy* sets out helpful parameters which increase transparency and accountability, key decision-makers within the agency retain a very large discretion in this area.

The evolution of the FWO's compliance and enforcement strategy over the past six years, and the use of enforcement litigation in particular during this period, reflect a number of parallel developments. First, as the agency has matured, it has become more sophisticated in the way it seeks to manage and resolve complaints through alternative dispute resolution processes. Second, since the *FW Act* commenced, the suite of enforcement tools has expanded and the FWO has been able to make more ready use of administrative sanctions that provide 'meaningful alternatives to litigation, which ultimately is a very blunt and costly tool'.¹⁵² Litigation has, however, been a critical device for inducing employer compliance in that it has enabled the FWO to develop a reputation as a strong regulator. Both the models of responsive regulation and strategic enforcement would suggest that using litigation in this way places the regulator in a more formidable position to encourage firms to voluntarily comply without recourse to coercive sanctions.

The types of litigation matters that are now being run signal a growing awareness of the importance of targeting the right individuals and firms in order to enhance the deterrence effects of formal interventions. The former head of the FWO referred to the variations in litigation numbers to demonstrate that: '[o]verall, our litigation posture is strategic and used sparingly'.¹⁵³ Indeed, while there has been a decline in the raw numbers of litigation matters, this is not a true indication of the deterrence effects and potential compliance impact of recent FWO-initiated litigation.

The data revealed a widening in the types of matters that the agency is willing to litigate, consistent with its broader mandate. Notwithstanding these shifts, the majority of litigation matters over the relevant review period involved some form of underpayment of minimum entitlements. Our data also suggested that the FWO is increasingly willing to run test cases in order to explore novel provisions or clarify areas of uncertainty. Litigation of this type is particularly critical in circumstances where the interpretation of rules is unclear, the meaning of compliance is contested and/or the credibility of the regulator is threatened. Along with broader political and community support for these actions, test cases can also provide important motivation to comply, and to institute self-regulatory behaviour.

The data in relation to business size and industry is not sufficiently fine-grained to enable firm conclusions to be drawn about whether litigation has been targeted in a way that reflects some of the regulatory models discussed earlier.

¹⁵² Nicholas Wilson, 'Fairness over the First Year' (Paper presented to Industrial Relations Society of Victoria, Melbourne, 8 October 2010) 9.

¹⁵³ Wilson and McAlary-Smith, above n 92, 11.

Data collection in this area by the FWO (and indeed other federal agencies) needs to become more accurate and refined. The influence of responsive regulation and strategic enforcement can be seen, however, in the characteristics of respondents to FWO-initiated litigation, particularly in the most recent three years. The FWO has increasingly made use of accessorial liability to leverage the specific and general deterrence effects of litigation by targeting lead firms and key individuals.

In terms of enforcement outcomes, the FWO and its predecessors have been highly successful in obtaining declarations, compensation and penalties against respondents, although it is not clear that compliance with court orders is necessarily secured in every case.¹⁵⁴ While the FWO's success in obtaining pecuniary penalties, and other orders, is important for deterrence and redressing the loss suffered by the relevant aggrieved party, it is also critical for strengthening the credibility of the regulator and the legitimacy of the regulation it is seeking to enforce. That said, the nature of the remedies that the FWO has sought in enforcement proceedings do not necessarily encourage the institutionalisation of positive compliance practices or lead to sustainable compliance. This could be strengthened by seeking alternative remedies, such as injunctions and corporate probation orders. Further, while the introduction of compliance notices and enforceable undertakings has had the effect of expanding remedies in the middle of the enforcement pyramid, it is arguable that the tip of the pyramid is not as powerful compared to other contexts where criminal sanctions, incapacitation orders, licence suspension and banning orders are available. This presents a critical challenge for the FWO and may require the agency to consider a more innovative approach to its use of injunctions, among other court-based sanctions.

Overall, however, our data suggests that the FWO has been successful in increasing its use of civil remedy litigation in the period under review and has enhanced the deterrence effects of these interventions by targeting a wide range of individuals and entities. It has magnified the direct costs of litigation by adding the possibility of damaging publicity.¹⁵⁵ Taking some additional steps to strengthen the peak of the pyramid could, however, lead to more sustainable compliance and aid the regulator in achieving systemic effects — both key objectives of responsive regulation and strategic enforcement.

¹⁵⁴ See Evidence to Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, Canberra, 13 February 2013.

¹⁵⁵ Parker, above n 17, 609.