Trivial to Troubling: The Evolution of Enforcement under the Fair Work Act

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When the Fair Work Act 2009 (Cth) was first introduced, compliance issues were viewed as somewhat trifling and the enforcement framework generated very little discussion, let alone debate. Early reviews of the Office of the Fair Work Ombudsman generally reached positive conclusions about the level of employer noncompliance and the Fair Work Ombudsman's overall response. However, the tide turned in 2015 following the 7-Eleven underpayment scandal. Since this time, there has been, and continues to be, a sense that there is now an enforcement crisis. While the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth) introduced a number of far-reaching reforms, many believe more needs to be done. This article charts some of the most critical forces which have shaped compliance promotion and enforcement processes over the past 10 years and reflects on how this response may continue to evolve into the future.

Introduction

The Work Choices legislation[1] was controversial in many respects, and ultimately condemned in many quarters. However, one enduring legacy of this tumultuous time was the elevation of the federal labour inspectorate. Instead of dismantling the agency, now known as the Office of the Fair Work Ombudsman (FWO), the Fair Work Act 2009 (Cth) (FW Act) effectively sought to strengthen its position and powers. This article will consider the establishment and evolution of the federal statutory body predominantly responsible for overseeing and enforcing employment standards regulation under the FW Act.[2] It will begin by surveying various historical, legal and political forces that have shaped the strategy, resourcing and approach of the FWO over the past decade. It considers the way in which the enforcement crisis that emerged in 2015 following the exposure of systemic underpayment of temporary migrants prompted an unprecedented wave of public concern and a surprising response from policymakers. The pressure to stamp out 'wage

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1 Workplace Relations Amendment (Work Choices) Act 2005 (Cth).

2 The FWO is also responsible for enforcing civil remedy provisions against trade unions, however, this aspect is beyond the scope of this paper. But see T Hardy, 'The State Strikes Back: Supervision and Sanctioning of Unlawful Industrial Activity by Federal Government Agencies in Australia', in S McCrystal, B Creighton and A Forsyth (Eds), *Collective Bargaining under the Fair Work Act*, Federation Press, Sydney, 2018, p 182.

theft' was such that it ultimately led a Coalition Government — more renowned for protecting business interests than vulnerable workers — to introduce substantial statutory amendments in 2017.[3]

In the lead up to, and in the wake of, the 2019 election, there have been heightened calls for further reforms to the enforcement framework, and more strident criticisms of the institutional role played by the FWO and the courts. As Sandra Parker — the current Fair Work Ombudsman — recently observed: 'Australian workplaces are changing, as are the community's expectations of its regulators charged with holding an industry or function of the economy to account.'[4] In light of continuing reviews and proposed reforms, the article will conclude with some reflections on the possible future of enforcement processes and practices in Australia.

The Enforcement Framework

While the FW Act introduced many momentous changes to the workplace relations landscape, the provisions relating to enforcement displayed 'a high degree of continuity with the past'.[5] The civil penalty regime of the Workplace Relations Act 1996 (Cth) (WR Act) remained largely intact, albeit it assumed a more streamlined form in the FW Act. The accessorial liability provisions were transposed without amendment.[6] The level of maximum penalties also remained stable. While there was some strengthening of Fair Work Inspectors' ('FW Inspectors') powers such as an expansion of the small claims jurisdiction, the introduction of a number of new enforcement tools,[7] and a broadening of the remedies available for breach of a civil remedy provision,[8] overall the changes were quite modest.[9]

In the first five years following the enactment of the FW Act, the regulatory framework relating to enforcement was generally viewed as fit for purpose.[10] For example, the 2012 review of the FW Act concluded that 'the FWO has been successful in carrying out its education and enforcement activities, and has the right tools at its disposal to further enhance those activities'.[11] However, by late 2015, the relatively rosy picture of the enforcement

3 Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth) (PVW Act).

4 S Parker, 'Address by the Fair Work Ombudsman', speech delivered at the *2019 Annual National Policy-Influence-Reform Conference*, Canberra, 3 June 2019, at 2 (FWO June 2019 Speech).

5 Productivity Commission, *Workplace Relations Framework*, Inquiry Report No 76, Productivity Commission, Canberra, 30 November 2015, at 141.

6 Workplace Relations Act 1996 (Cth) s 728. Cf Fair Work Act 2009 (Cth) (FW Act) s 550.

7 Notably, compliance notices (FW Act ss 716–17) and enforceable undertakings (FW Act s 715).

8 Ibid, s 545.

9 T Hardy, 'A Changing of the Guard: Enforcement of Workplace Relations Laws Since Work Choices and Beyond', in A Forsyth and A Stewart (Eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, Federation Press, Sydney, 2009, p 75 at pp 93–4.

10 See, eg, Ron Brent, Acting Commonwealth Ombudsman, *Fair Work Ombudsman: Exercise of Coercive Information-Gathering Powers*, Report No 09/2010, Australian Government, Canberra, June 2010; Australian National Audit Office, *Delivery of Workplace Relations Services by the Office of the Fair Work Ombudsman*, Audit Report No 14 2012–13, Australian National Audit Office, Canberra, 2012.

11 R McCallum, M Moore and J Edwards, *Towards More Productive and Equitable*

framework had started to unravel.[12] Following a swathe of high-profile underpayment scandals, including the notorious case of 7-Eleven, the dominant assumption that most Australian employers were law abiding, and most noncompliance arose out of ignorance or misinformation, came unstuck.[13]

Since that time, an unprecedented number of inquiries and reviews have been — directly or indirectly — concerned with employer noncompliance with labour regulation.[14] In this more recent period, there has been a discernible shift in perceptions and emphasis. For example, a federal Senate Inquiry observed that: '[u]nderpayment is so prevalent in some sectors that it can no longer be considered an aberration; it is becoming the norm.'[15] Combined with continuing media attention, these findings led to increasing concerns on the part of communities, regulators and politicians that the overarching regulatory framework was fundamentally flawed.

In the lead up to the 2016 federal election, the Coalition Government sought to curb 'deliberate and systematic exploitation of workers'[16] via the introduction of the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth) (PVW Act). The package of reforms was quite remarkable given Coalition Governments have generally been more renowned for hounding unions[17] than cracking down on employer wrongdoing.

Workplaces: An Evaluation of the Fair Work Legislation, Report, Australian Government, Canberra, 2012, at 255.

12 See, eg, '7-Eleven: The Price of Convenience', *Four Corners*, ABC, 31 August 2015.

13 B Farbenblum and L Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman' (2017) 23 *AJHR* 310; S Clibborn and CF Wright, 'Employer Theft of Temporary Migrant Workers' Wages in Australia: Why Has the State Failed to Act?' (2018) 29 *ELRR* 207.

14 Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, Parliament of Australia, Canberra, March 2016; A Forsyth, *Victorian Inquiry into Labour Hire Industry and Insecure Work*, Final Report, Melbourne, 31 August 2016; Senate Economics References Committee, *Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee*, Parliament of Australia, Canberra, May 2017; Senate Education and Employment References Committee, *Corporate Avoidance of the Fair Work Act 2009*, Parliament of Australia, Canberra, September 2017 (*Corporate Avoidance of the FW Act*); Black Economy Taskforce, *Black Economy Taskforce: Final Report*, Australian Government, Canberra, October 2017; Education, Employment and Small Business Committee, *A Fair Day's Pay for a Fair Day's Work? Exposing the True Cost of Wage Theft in Queensland*, Report No 9, Parliament of Queensland, Queensland, November 2018 (*Queensland Report*); Senate Education and Employment References Committee, *Wage Theft? What Wage Theft?! The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies*, Parliament of Australia, Canberra, November 2018 (*Contract Cleaning Inquiry*). T Beech, *Inquiry into Wage Theft in Western Australia*, Western Australian Government, June 2019.

15 *Corporate Avoidance of the FW Act*, above n 14, at 59. See also L Berg and B Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey*, Migrant Worker Justice Initiative, University of New South Wales and University of Technology Sydney, Sydney, November 2017.

16 Explanatory Memorandum, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth), Parliament of Australia, 2017, at ii.

17 During this same period, the Coalition Government established the Registered Organisations Commission, re-established the Australian Building and Construction Commission and set up a new Commercial Construction Unit within the Australian Competition and Consumer Commission. See A Forsyth, 'Law, Politics and Ideology: The

Ultimately, after a tortured passage through Parliament, the PVW Act finally came into force in late 2017. The Act raised the maximum penalties available in respect of so-called 'serious contraventions', extended liability for breaches to franchisors and holding companies in prescribed circumstances, introduced statutory presumptions for failure to provide employment records, and bolstered the investigative powers of the FWO. While there were differing views on the merits of these reforms, there was little question the PVW Act represented the most significant statutory change to the enforcement framework since the commencement of the FW Act. Although this legislation remains largely untested,[18] in the lead up to the 2019 federal election, there was clearly a desire for still more radical reform.

The Queensland Wage Theft Inquiry, finalised in late 2018, and the Migrant Workers' Taskforce, which concluded in March 2019, both made extensive recommendations in relation to the enforcement framework. While the scope of these separate inquiries was distinct, there was a shared sense that a comprehensive review of the FWO was needed 'to ensure it has the resources, tools and culture necessary to combat effectively the wage underpayment problem'.[19] In light of these recommendations, and the fact that the Attorney-General's Department (AG) is currently undertaking a further review of the industrial relations framework,[20] the next part of this article will consider each of these core elements of enforcement — resources, tools and culture — over the first decade of the FW Act.

Funding and Resources

Given the growing calls to boost the FWO's resources in order to address employer noncompliance,[21] this section analyses and considers the adequacy (or otherwise) of the FWO's budget and staffing levels over the relevant time period.[22] Figure 1 below shows the FWO's annual budget peaked at the very

Regulatory Response to Trade Union Corruption in Australia' (2017) 40 *UNSWLJ* 1336.

18 The FWO has initiated at least five cases under these new laws. So far, only one case has been determined, see *Fair Work Ombudsman v A & K Property Services Pty Ltd* [2019] FCCA 2259.

19 *Report of the Migrant Workers' Taskforce*, Australian Government, Canberra, March 2019, at 6 (*Migrant Workers' Taskforce Report*). See also *Queensland Report*, above n 14, at xi.

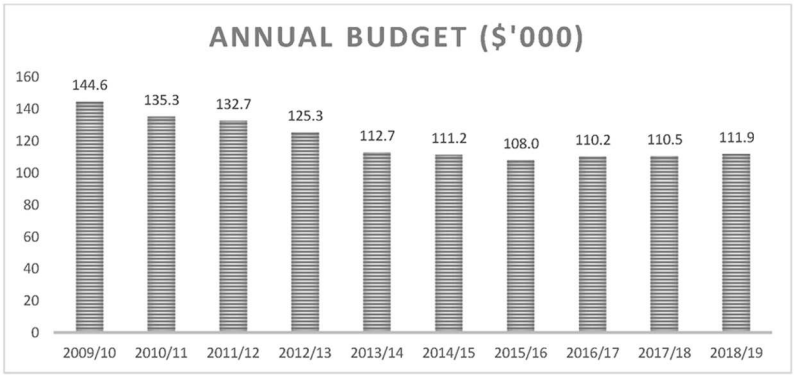
20 Attorney-General's Department, *Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance*, Discussion Paper, Australian Government, Canberra, September 2019; Attorney-General's Department, *Improving Protections of Employees' Wages and Entitlements: Further Strengthening the Civil Compliance and Enforcement Framework*, Discussion Paper, Australian Government, Canberra, 18 February 2020. At the time of writing, this review had been 'paused' due to disruptions caused by COVID-19.

21 See, eg, Productivity Commission, above n 5, at 139.

22 The question of what constitutes 'adequate' resourcing is not straightforward. Historically, the ILO's benchmark was one inspector per 10,000 workers in industrial market economies. See International Labour Conference, *General Survey of the Reports Concerning the Labour Inspection Convention, 1947 (No 81)*, Report III, Part 1B, International Labour Conference, 95th sess, Geneva, 2006. However, more recent ILO material suggests 'there is no internally agreed formula for determining the appropriate number of labour inspectors': see International Labour Organisation, *Minimum Wage Policy Guide*, International Labour Office, Geneva, at 9.

beginning of its inception.[23] Since then, there has been a decline in resourcing, although it has stabilised over the past five years or so. Although the Coalition Government committed in 2015/16 to providing an additional $20.1 million in funding for the FWO over four years, the budget has flatlined. It appears that the funding commitment did not translate to any jump in the FWO's annual budget because it has been absorbed by forecast 'efficiency dividends'. In other words, rather than cutting the agency's budget as originally planned, the government has frozen the funding at around $110 million per year. In the pre-election budget handed down in April 2019, the Coalition Government allocated an extra $10.8 million over four years to strengthen the FWO's ability to conduct investigations into underpayment and related matters. In addition, the FWO received a further $9.2 million over four years to establish a dedicated sham contracting unit.[24] It is quite possible that previous budgetary allocations will now be revised as a result of the disruptions caused by COVID-19. This will have significant implications for enforcement practices in the future.

Figure 1: FWO's Annual Budget ($ '000,000)

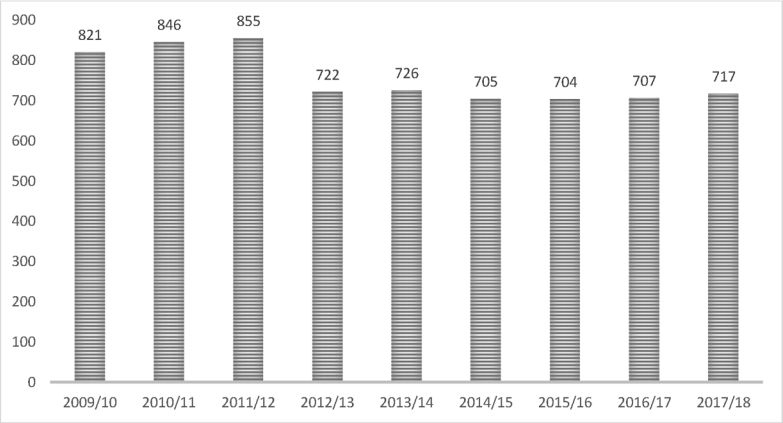


In addition to budgetary allocations, the FWO's staffing levels is another key variable influencing its enforcement approach. As Figure 2 below shows, average staffing levels have remained steady over the past six years or so. The relatively sharp drop in numbers in 2012/13 is partly the result of transitional arrangements with state-based inspectorates coming to an end at that time.

23 This data relates solely to the FWO and does not include funding relating to the Registered Organisations Commission. Cf S Clibborn, *Submission to the Attorney-General's Department in Response to the September 2019 Discussion Paper Titled: Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance*, University of Sydney, Sydney, 25 October 2019.

24 'Budget Funds Labour Hire Scheme, Crackdown on Sham Contracting', *Workplace Express*, 2 April 2019.

Figure 2: FWO's Average Staffing Levels



It is important to note the data set out in Figure 2 indicates total staff engaged by the FWO. As at October 2018, there was a total of 717 staff, of which 188 were FW Inspectors.[25] The remainder were engaged in a range of other operational roles. Assuming around 80% of all employed persons[26] and employing businesses[27] are covered by the core provisions of the FW Act and within FWO's remit,[28] on current data there is roughly 1 FW Inspector for every 54,000 employed persons and 1 FW Inspector for every 3,700 employing businesses. While the average staffing level is set to increase in 2019/20 to 737,[29] it is clear that FWO resources will remain stretched for the foreseeable future.

The data set out in Figures 1 and 2, as well as the inspector ratios, confirm conclusions drawn in various inquiries, such as the Black Economy Taskforce, which noted:

> that the ... FWO need[s] to be adequately resourced to tackle black economy issues and for enforcement activity to be visible on the ground. We heard from stakeholders that the number of FWO inspectors fell far short of what is needed to ensure that workers are correctly paid the right wages and other entitlements such as

25 Michael Campbell, Deputy FWO, Evidence to Senate Education and Employment Legislation Committee, Parliament of Australia, Canberra, 24 October 2018, at 104.

26 As at December 2018, there were 12,711,600 employed persons in Australia (albeit this figure includes 'business owners or self-employed people'). See Australian Bureau of Statistics, *Labour Force, Australia, Dec 2018*, Cat No 6202.0, ABS, Canberra, 24 January 2019.

27 At the end of 2016–17, there were 868,248 (38.8%) employing businesses. See ABS, *Counts of Australian Businesses, Including Entries and Exits, June 2013 to June 2017*, Cat No 8165.0, ABS, Canberra, 20 February 2018.

28 The FWO's remit generally covers common law employees falling within the national system of labour regulation and not employed in the building and construction sector. The number of employed persons and employing businesses falling within state systems is harder to estimate and varies widely. Applying this assumption (of 80% coverage) means that roughly 10,169,280 employed persons and 694,400 employing businesses fall within the FWO's remit.

29 'Budget Funds Labour Hire Scheme, Crackdown on Sham Contracting', above n 24.

> superannuation. We found that the incidence of fair work issues was significantly higher than what we anticipated and agree that the current staffing level is lower than would be expected to deal with this scale of risk.[30]

In early 2019, the Australian Chamber of Commerce and Industry called on the federal government to fund an additional 50 FW Inspectors.[31] In response, the Australian Council of Trade Unions argued that extra FW Inspectors would do little 'in an environment where wage theft has become a business model for many unscrupulous business owners'.[32] Indeed, even with a significant uplift in staff, it remains difficult to see how 'increased resources would be adequate given the enormity of the task of monitoring workplaces for compliance with industrial instruments and the [workplace relations legislation]'.[33]

Some stakeholders have argued that, in order to resolve the current enforcement crisis, it is necessary to look beyond the FWO and expand the roles played by trade unions and community groups.[34] However, given the recent election of the Morrison Coalition Government and its express focus on bringing proceedings against unions[35] rather than working alongside them, this prospect seems increasingly less likely.

The FWO's Approach to Compliance Promotion and Enforcement

Given the FWO's tight funding, decisions about how to allocate resources, and perform key functions, are crucial. While the FWO is an independent statutory agency, these decisions are not made in a vacuum.[36] The FWO's current enforcement approach is shaped by a whole range of factors including: its organisational culture and leadership; idealised models of enforcement; and performance measures and metrics. This section will touch on a number of these factors in exploring the FWO's evolving approach to compliance promotion and enforcement.[37]

When the FW Act was introduced, the then Labor Government expressed a desire for the FWO to take a graduated approach to enforcement, which is one of the most renowned elements of the classical model of responsive regulation.[38] The Explanatory Memorandum to the Act noted:

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30 Black Economy Taskforce, above n 14, at 199.

31 D McCauley, 'Employers Demand Crackdown on Worker Underpayments', *Sydney Morning Herald*, 3 February 2019.

32 Ibid.

33 C Sutherland, 'All Stitched Up? The 2007 Amendments to the Safety Net' (2007) 20 *AJLL* 245 at 256.

34 See *Corporate Avoidance of the FW Act*, above n 14. See also S Clibborn, 'It Takes a Village: Civil Society Regulation of Employment Standards for Temporary Migrant Workers in Australian Horticulture' (2019) 42 *UNSWLJ* 242.

35 'Union Deregistration "Tool" Our Top Priority: Porter', *Workplace Express*, 21 June 2019.

36 But see FW Act s 684.

37 L Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law*, Lawbook, Sydney, 1994, p 247.

38 This is not to ignore other critical elements of responsive regulation theory — including tripartism — which have often been overlooked, but which are no less important than the enforcement pyramid. See I Ayres and J Braithwaite, *Responsive Regulation: Transcending*

> The functions of the FWO emphasise preventative compliance (eg, through education and advice) and co-operative and voluntary compliance (eg, through enforceable undertakings). However, in some circumstances it will be necessary for the FWO to enforce compliance more formally, through compliance notices or court proceedings.[39]

Traditionally, the federal labour inspectorate — including the FWO in its earlier days — relied on complaints from employees to direct much of its work. Soon after the FWO was established, the agency realised that a full investigation of each individual matter was frequently a futile strategy. Inspectors were often undertaking lengthy investigations, compiling documentary evidence and laboriously calculating underpayments, only to find that the employer had disappeared or gone out of business. Even where the matter was pursued through the courts, it was not uncommon for penalties to be relatively low, publicity was virtually non-existent and general deterrence was arguably limited. Complaint-directed enforcement tended to atomise the problem, chew through resources and leave many parties dissatisfied at the end.[40]

By 2012/13, there was increasing frustration with conventional investigative processes, and a growing awareness of idealised regulatory models, including risk-based regulation (a regulatory model popular in the UK)[41] and strategic enforcement (an enforcement approach developed by Professor David Weil in the US). This led to a raft of internal changes from complaints management to a greater emphasis on dispute resolution and targeted activities.

However, the agency was treading a delicate political line at the time. The then newly appointed FWO — Natalie James — was acutely aware that the Abbott Coalition Government was focused on driving efficiencies, supporting small businesses and promoting productivity and compliance. Publicly, the FWO confirmed that the agency's 'ultimate goal' was 'to equip workplace participants to manage their workplace relationships and make decisions about their businesses and their jobs without the need for intervention'.[42]

However, by 2015, and against the backdrop of growing concerns about worker exploitation, the agency was emboldened to develop and release a new *Compliance and Enforcement Policy*.[43] This Policy, which was more explicit about the FWO's approach, was stated to be: 'risk-based and proportionate;' 'open and transparent;' 'collaborative;' and aimed at effecting 'cultural change'.[44] The links with strategic enforcement were particularly evident. A

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the Deregulation Debate, Oxford University Press, New York, 1992.

39 Explanatory Memorandum, Fair Work Bill 2008 (Cth), Parliament of Australia, 2008, at para 2554.

40 Productivity Commission, above n 5, at 149.

41 J Black, 'The Emergence of Risk-Based Regulation and the New Public Risk Management in the United Kingdom' [2005] *PLR* 512, 512.

42 Fair Work Ombudsman, *Annual Report 2012–13*, Australian Government, Melbourne, 2013, at 7.

43 Weil has further refined this model in later work. See D Weil, 'Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change' (2018) 60 *JIR* 437.

44 FWO, *Compliance and Enforcement Policy*, 1st ed, May 2015; 2nd ed, July 2017; 3rd ed, August 2017, at 2–3.

core theme of the Policy between 2015 and 2019 was that of prioritisation, with the FWO seeking to 'focus [their] compliance and enforcement efforts where there is serious noncompliance and where [they] can deliver the greatest benefit.'[45] Though not expressly stated, what this implied was that the FWO was not prepared to investigate every complaint or pursue every claim.

This position exposed the agency to criticism, particularly when it came to light — via various inquiries and media reports — that vulnerable workers had been refused agency assistance and that employers who contravened the FW Act appeared to do so with a 'high degree of practical immunity'.[46] Perhaps as a result of these criticisms, and possibly as a consequence of the FWO coming under new leadership,[47] a new *Compliance and Enforcement Policy* was launched in July 2019.[48]

The new Policy appears to focus more on the FWO's statutory powers and less on other novel initiatives, such as 'compliance partnerships' and 'inquiries'. In addition, it lays out a new set of criteria for determining when the FWO will commence an investigation or initiate litigation, albeit many of the relevant public interest factors appear to have been transposed from the previous Policy iterations. For example, in assessing whether to investigate a matter, the FWO will consider its 'strategic priorities', as well as additional public interest factors, such as whether the matter involves vulnerable workers, demonstrates a blatant disregard of laws or repeat offending, or is of significant scale or impact on workers or the community.[49]

The 2019 Policy itself is perhaps less overt about the regulatory models that hold sway, but a recent speech suggests that the agency continues to adopt a hybrid form of responsive regulation and strategic enforcement where the agency's 'efforts are directed at sustainable behavioural change'.[50] While Parker acknowledges that many have called for 'regulators to toughen up',[51] she goes on to observe that:

> Taking a firmer stance on non-compliance, does not, however, give regulators licence to be draconian or irresponsible. The FWO still operates according to an enforcement pyramid that looks at the seriousness and deliberateness of the behaviour we regulate. It's a fact that mistakes happen, and this can lead to underpayment.[52]

Ultimately, theoretical models and strategic objectives are one thing, enforcement outcomes and practical results are quite another. A recurring criticism of many inquiries and recent research has been directed at the 'frequency with which enforcement mechanisms are used' by the FWO.[53] In light of this, the next section will review key aspects of the FWO's operations in the enforcement space.

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45 Ibid, at 2.
46 *Corporate Avoidance of the FW Act*, above n 14, at 11–12.
47 Sandra Parker was appointed as the FWO for a five-year term commencing in July 2018.
48 This new *Compliance and Enforcement Policy* has also replaced the previous Guidance Note 1 — Litigation Policy (on file with author).
49 FWO, *Compliance and Enforcement Policy*, July 2019, at 3 (*FWO Policy 2019*).
50 Parker, FWO June 2019 Speech, above n 4, at 5.
51 Ibid, at 3.
52 Ibid, at 3–4.
53 *Queensland Report*, above n 14, at 147.

Enforcement Practices and Outcomes

An important component of labour inspection is the manner in which contraventions are detected. However, due to space constraints, this article will focus on the FWO's response once a breach has been brought to its attention. More specifically, this section surveys the way in which the FWO has sought to resolve matters via dispute resolution, administrative notices and civil remedy proceedings and the changing balance between these various methods.

Dispute resolution and mediation

Over the past decade, the FWO has continued to receive a flood of individual 'requests for assistance' involving a workplace dispute (RFAs).[54] To manage this case load and provide the agency with the ability to redirect resources towards priority areas, the regulator has increasingly embraced alternative dispute resolution processes. In the last fiscal year, over 96% of RFAs received by the FWO were resolved, and $26.9 million of unpaid entitlements recovered, through education and dispute resolution activities. In comparison, only 4% of RFAs were finalised, and $8.7 million recovered, through 'compliance activities'. In addition, during 2018/19, there were over 3,500 proactive initiatives, which led to a recovery of $4.6 million in unpaid entitlements.[55]

Prioritising self-help and dispute resolution strategies over investigation and deterrence-based approaches is now entrenched in the agency's key performance indicators (KPI). Prior to 2016/17, there was no KPI expressly directed at the ideal mix of compliance promotion and enforcement activities. However, since that time, the FWO has a stated aim to finalise 'at least 90% of requests for assistance involving a workplace dispute ... through education and dispute resolution services' and 'no more than 10% through compliance and enforcement tools'.[56] In addition, the FWO's performance is currently measured by reference to the 'average number of days [RFAs] are finalised'.[57] The time taken to resolve employee complaints was clearly an issue during the early days of the agency, particularly when full individual investigations were still being conducted into each individual claim.[58] However, by 2018/19, the FWO was not only meeting this new efficiency target, it was exceeding it.[59]

54 The number of RFAs 'finalised' by the FWO has varied over time, albeit the figure increased to a peak of around 29,000 complaints/RFAs in the most recent financial year (representing a three percent increase on the previous financial year). See FWO and Registered Organisations Commission Entity, *Annual Report 18–19*, Australian Government, Melbourne, 2019.

55 Ibid, at 15.

56 Ibid, at 11.

57 FWO and Registered Organisations Commission Entity, *Annual Report 2017–18*, Australian Government, Melbourne, 2018, at 11.

58 Eg, in 2009/10, 2010/11 and 2011/12, the FWO had a target to finalise at least 80% of 'investigations into complaints about breaches of federal agreements or awards within 90 days'. It failed to meet this target in each of these financial years.

59 FWO and Registered Organisations Commission Entity, *Annual Report 18–19*, above n 54, at 11.

Another important advantage of early intervention and mediation treatments — and a key reason for speedier resolutions — is that it avoids the need to precisely quantify the underpayment amount. Rather, the burden of calculation, or the willingness to agree upon a solution, is shifted to the parties. In practical terms, a rapid resolution may be critical to recovery prospects where the business is financially precarious, and may be beneficial for workers who are out of pocket and out of work. From a regulatory perspective, however, the speed or quantity of the resolution is not a solid indicator of the nature or quality of the outcome.

Many submissions to inquiries were scathing of the use of dispute resolution techniques by the FWO. Some raised concerns about the voluntary nature of mediation, which meant that many employers elected not to participate constructively in the forum, if at all.[60] Others noted that settlement agreements negotiated as part of FWO mediations were often difficult to enforce. A separate, more substantive criticism relates to the fact that mediation, by its very nature, is intended to 'allow parties to create their own solutions to disputes, instead of having a decision made by someone else'.[61] This process threatens to undermine the integrity of the system given that it may lead employees to accept an amount which is less than the legal minimum.[62] The Queensland Wage Theft Inquiry was especially critical concluding that the FWO's early intervention process 'does not reflect a fair or just system for workers who are only trying to recover what they are legally and duly owed.'[63] More generally, the Black Economy Taskforce concluded that the preference of many regulators, such as the FWO, is 'to settle rather than seeking to prosecute'. This means that many activities have become 'invisible'.[64] While these criticisms may be valid, they do not necessarily address a number of fundamental tensions with which the FWO has sought to grapple over the past decade, including: how to ensure the most vulnerable workers, who are often the least likely to complain, are not overlooked; and how to best entrench sustained compliance at the industry level whilst also providing efficient forms of individual redress.

Administrative tools and coercive sanctions

Where a contravention is detected, but employer compliance is not forthcoming, the FWO may decline to investigate further and wrap up its involvement. The employee must then decide whether to pursue proceedings

60 *Queensland Report*, above n 14.

61 FWO and Registered Organisations Commission Entity, *Annual Report 17–18*, above n 57.

62 LF Vosko, J Grundy and MP Thomas, 'Challenging New Governance: Evaluating New Approaches to Employment Standards Enforcement in Common Law Jurisdictions' (2016) 37 *EID* 373; T Hardy, '"It's Oh So Quiet?" Employee Voice and the Enforcement of Employment Standards in Australia', in A Bogg and T Novitz (Eds), *Voices at Work: Continuity and Change in the Common Law World*, Oxford University Press, Oxford, 2014, p 249.

63 *Queensland Report*, above n 14, at 128.

64 Black Economy Taskforce, above n 14, at 183.

in the small claims jurisdiction,[65] or through the ordinary courts. This is often a daunting prospect for claimants, particularly where they are vulnerable due to visa status, language barriers or otherwise.[66] Alternatively, an investigation may ensue where the FWO has determined that use of its investigative powers is in the 'public interest' — that is, where 'any proposed compliance activity [that] would be an efficient, effective and ethical use of public resources'.[67]

Following an investigation, possible outcomes range from assessment letters at one end of the spectrum to civil remedy litigation at the other. In between these two extremes, the FWO may provide an infringement notice, issue a compliance notice, or enter into an enforceable undertaking, amongst other interventions. The statutory tools were originally made available under the FW Act so as to provide the agency with 'another option to deal with noncompliance instead of pursuing court proceedings'.[68] While routine use of administrative notices is encouraged under a pyramidal model of enforcement, and is integral to amplifying the deterrence element of strategic enforcement,[69] the FWO has been somewhat reticent in using these intermediate tools.

Infringement notices, compliance notices and contravention letters

As Figures 4 and 5 show, there was very limited deployment of infringement notices[70] and compliance notices[71] prior to 2014/15.

65 The FWO has a team of FW Inspectors that provide assistance to parties in navigating the small claims jurisdiction. However, FWO lawyers do not normally act as an advocate or representative in these matters.

66 C Arup and C Sutherland, 'The Recovery of Wages: Legal Services and Access to Justice' (2009) 35 *Mon LR* 96.

67 *FWO Policy 2019*, above n 49, at 3.

68 Explanatory Memorandum, Fair Work Bill 2008 (Cth), Parliament of Australia, 2008, at para 2673.

69 D Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard University Press, London, 2014.

70 As per Fair Work Regulations 2009 (Cth) (FW Regulations) regs 4.03–4.04, infringement notices may be issued by a FW Inspector where they reasonably believe that there has been a contravention of record-keeping or pay slip obligations. The recipient of the infringement notice must then pay a fixed penalty.

71 FW Act s 716.

Figure 4: Infringement Notices Issued by the FWO

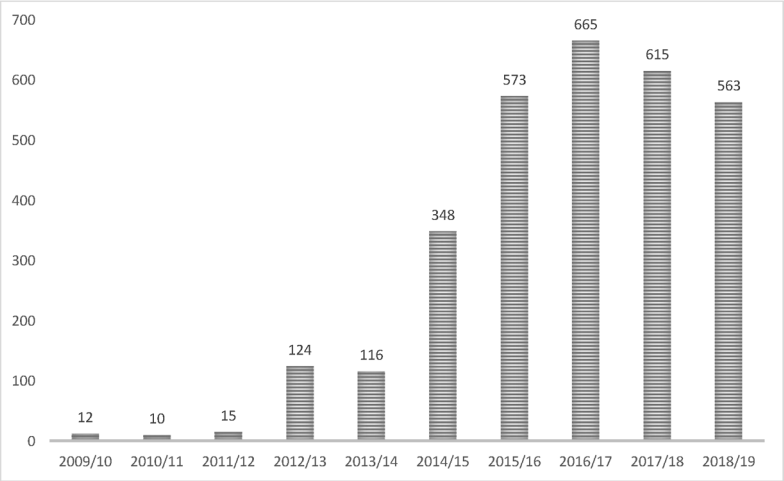
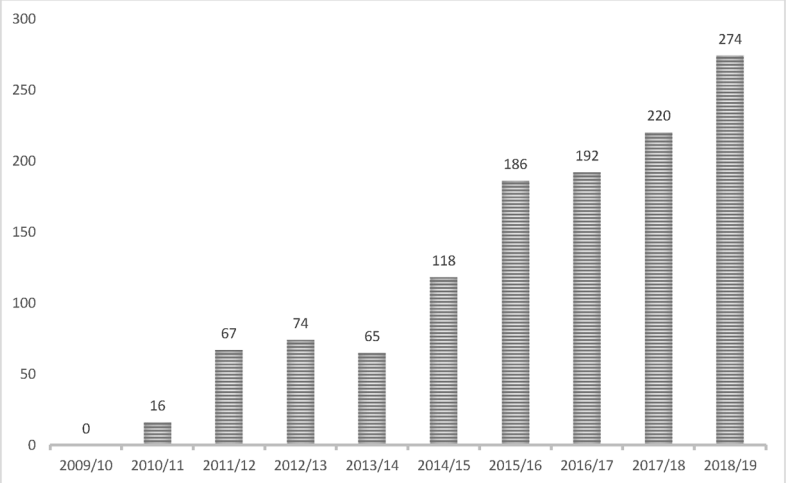


Figure 5: Compliance Notices Issued by the FWO



The underutilisation of compliance notices in this early period may be explained, at least in part, by the fact they could only be issued in relation to a set of provisions,[72] many of which only applied from 1 January 2010. However, even with the passage of time, compliance notices have not been readily embraced by the agency.

72 Ibid s 716(1).

An additional statutory hurdle is that compliance notices may only be given where an inspector 'reasonably believes' that a person has committed a contravention of a specified provision, commonly referred to as an 'entitlement provision'.[73] They cannot be issued in relation to all civil remedy provisions of the FW Act nor can such notices be used where there is mere suspicion of underpayment.

The scope of compliance notices is also constrained. Under s 716(2), a compliance notice can only require that the recipient 'take specified action to remedy the direct effects of the contravention' or produce reasonable evidence of their compliance with the notice. Another potential barrier is that the recipient of a compliance notice has an express right to apply for judicial review of the circumstances and content of the notice.[74] It is possible that the prospect of judicial review has led the FWO to exercise a further level of caution in using this tool. In comparison to compliance notices, contravention letters[75] can be issued in relation to almost any requirement imposed under the legislation or an industrial instrument, and are not confined to remedying the specific effects of the contravention. While contravention letters may be attractive in terms of scope and flexibility, they are potentially less powerful than compliance notices in that failure to comply does not give rise to any direct consequence or penalty.[76]

On the back of recommendations made by the Migrant Workers' Taskforce, Parker has indicated there is 'certainly a bigger role for compliance notices to address underpayments ... where lesser tools might have been reached for in the past'.[77] This strategic shift is already beginning to shape the regulator's day-to-day operations. In the first half of 2019/20, the FWO had issued 602 compliance notices, which is more than double the number of notices issued in the preceding 12-month period.[78]

Enforceable undertakings and proactive compliance deeds

Similar to compliance notices, EUs may only be entered into where the FWO holds a reasonable belief that a person has contravened a civil remedy provision.[79] In addition to EUs the FWO has also been actively using proactive compliance deeds (PCDs) — a separate instrument which bears some similarities to EUs. For example, under both EUs and PCDs, it has been common for firms to rectify any outstanding underpayments, undertake

73 This is the term adopted in the Explanatory Memorandum to refer to the relevant contraventions for which compliance notices may be used. It is not a term that is used or defined in the FW Act itself. See Explanatory Memorandum, Fair Work Bill 2008 (Cth), Parliament of Australia, 2008, at para 2675.

74 FW Act s 717.

75 FW Regulations reg 5.05.

76 Cf FW Act ss 716(5)–(6).

77 Parker, FWO June 2019 Speech, above n 4, at 4.

78 FWO, *Senate Inquiry into the Unlawful Underpayment of Employees' Remuneration*, Australian Government, Canberra, 6 March 2020.

79 Ibid s 715.

workplace training, set up an employee complaints hotline and engage an independent auditor or accountant to undertake auditing of a sample of employment records.

However, there are several important differences between EUs and PCDs. First, PCDs are not made under the FW Act and are not directly enforceable in court. The lack of any statutory boundary means that PCDs were viewed as especially well-suited to addressing systemic contraventions in franchise networks where the FWO has found it more difficult to conclude that the franchisor has committed any wrongdoing under the FW Act.[80] That being said, since the introduction of the PVW Act, the dividing line between these two tools is not as clear cut as it once was. For example, it is now arguable that if the FWO reasonably believes that a 'responsible franchisor entity' has contravened a civil remedy provision (under s 558B or otherwise), it then has the power to enter into an EU with that franchisor (and is no longer restricted to entering into a non-statutory instrument, such as a PCD).

Both EUs and PCDs align with the 'top-focused enforcement strategy' advocated by Weil's model of strategic enforcement. They are also an integral part of the responsive regulation model. More practically, these instruments have allowed the FWO to preserve agency resources: first, by shifting some of the detection and enforcement burden to powerful lead businesses; and second, by avoiding costly and lengthy litigation.

However, the data on EUs and PCDs suggests that, notwithstanding the theoretical value and practical benefits, frequency of their use has significantly waned. Figure 6 reveals that while utilisation of EUs has jumped around considerably over the past decade, the number finalised by the FWO dropped off sharply in the last couple of years. However, it is possible that the wave of self-disclosures by large corporate firms in the past 12 months may prompt a renewed surge in EUs. Certainly, the FWO's stated position is that a company who has voluntary reported large-scale contraventions to the regulator will be 'required as a minimum'[81] to enter into an EU.

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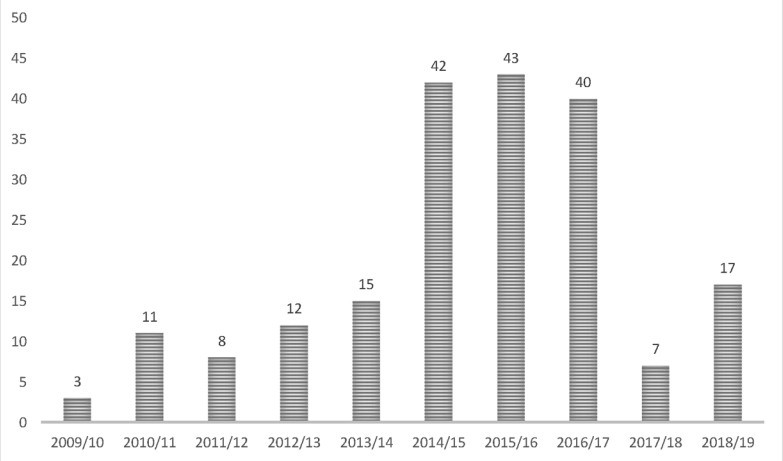
80 See, eg, FWO, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and Addressing the Drivers of Non-Compliance in the 7-Eleven Network*, Australian Government, Melbourne, April 2016; Proactive Compliance Deed between the Fair Work Ombudsman and 7-Eleven Stores Pty Ltd, 6 December 2012. See also T Hardy, 'Shifting Risk and Shirking Responsibility? The Challenge of Upholding Employment Standards Regulation within Franchise Networks' (2019) 32 *AJLL* 62.

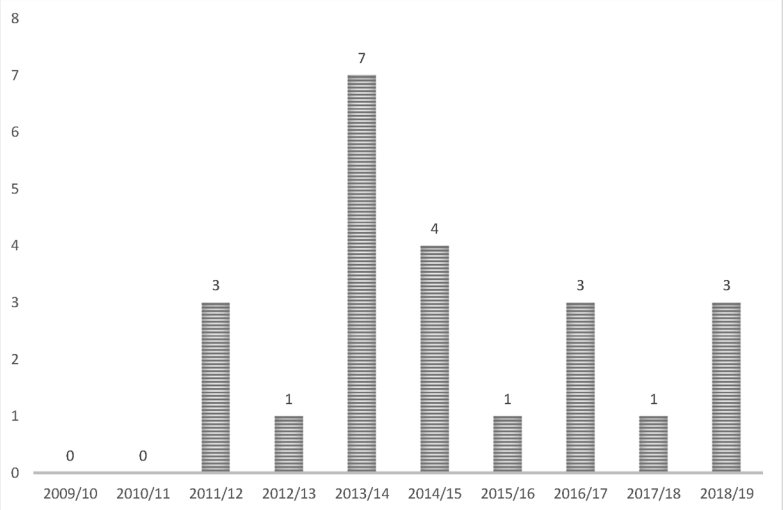
81 S Parker, 'Address by the Fair Work Ombudsman', speech delivered at the *NSW Employee Relations/Industrial Relations Network Forum*, Australian Human Resource Institute, Sydney, 17 October 2019, at 3.

Figure 6: EUs Executed by the FWO



Similarly, Figure 7 below shows that PCDs, first used in 2011/12, have also become increasingly rarefied.

Figure 7: PCDs Executed by the FWO



One possible reason for their declining use is that prospective signatories may no longer believe these voluntary instruments are valuable in terms of avoiding litigation, reducing reputational risk or minimising the commercial costs of noncompliance. The former head of the FWO, Natalie James, hinted at this issue when she observed:

> Reputational leverage works as a 'push' factor for franchisors to act, but has had limited effect as a general deterrence measure to encourage other franchisors to take

reasonable steps to detect non-compliance and support franchisees to be compliant.[82]

Further, under its current *Compliance and Enforcement Policy*, it appears the FWO is now only willing to accept EUs in 'limited circumstances', such as matters involving self-disclosure or where a person has demonstrated a willingness to rectify underpayments, take additional steps to address the impact of their contraventions and otherwise demonstrate an adequate level of cooperation.[83] A number of more recent EUs have required signatories to make a 'contrition payment', which is ostensibly intended to not only reflect the seriousness of the contravening conduct, but to make clear that 'it is simply not acceptable for businesses to throw their hands up when they've been underpaying workers and expect to move on without consequences once the back pay is in the workers' accounts.'[84]

Another possible explanation for the recent reduction in use of EUs and PCDs is that they have fallen out of favour following several inquiries, including the Hayne Royal Commission.[85] Indeed, recent outrage over the FWO's EU with MADE Establishment Pty Ltd (which runs restaurants owned by celebrity chef, George Calombaris) demonstrates that there is a continuing scepticism about the appropriateness of these instruments in the face of significant underpayments.[86] The new IR Minister, Christian Porter, indicated that he believed the $200,000 contrition payment was too 'light',[87] despite it being the highest amount ever paid by any signatory firm under any EU or PCD over the past decade. Others believed that the approach adopted by the FWO was 'heavy-handed' and partly to blame for the collapse of the restaurant group in early 2020.[88]

Civil remedy proceedings

While the FWO is under pressure to bring more legal proceedings against employers, its most recent *Compliance and Enforcement Policy* echoes the predecessor policies in confirming litigation 'is generally reserved for more serious cases of noncompliance.'[89] This is borne out by Figure 8 which shows the number of litigation proceedings commenced by the FWO is a tiny proportion of the total matters that come its attention.

82 FWO, *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017: Fair Work Ombudsman Submission*, Australian Government, Canberra, 6 April 2017.

83 *FWO Policy 2019*, above n 49, at 7.

84 Parker, FWO June 2019 Speech, above n 4, at 4–5.

85 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, Final Report, 2019, vol 1 at 442. See also *Contract Cleaning Inquiry*, above n 14, at 25.

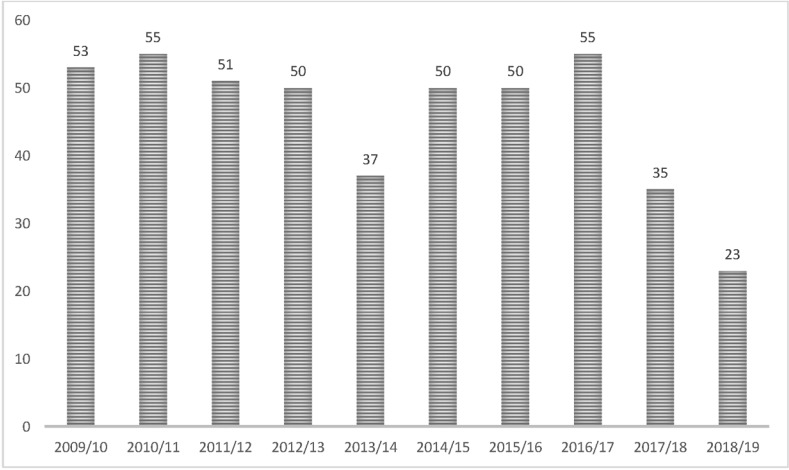
86 Enforceable Undertaking between the Commonwealth of Australia (as Represented by the Office of the Fair Work Ombudsman) and MADE Establishment Pty Ltd, 17 July 2019.

87 E Hannan, 'At $200k, Celebrity Chef George Calombaris "Got Off Light"', *The Australian*, 21 July 2019.

88 'Administrators Want Quick Sale of George Calombaris's MADE Establishment Restaurants', *ABC News*, 11 February 2020.

89 *FWO Policy 2019*, above n 49, at 9.

Figure 8: Litigation Matters Commenced by the FWO



What this raw data fails to show is the number of current proceedings being managed by the FWO at the relevant time. This is significant given that matters pursued via the courts take on average 1,712 days (4.7 years) to resolve.[90] The length of time proceedings currently take is not just an issue for workers awaiting back payments; it also acts as a drain on the FWO's resources. For example, in 2018/19, the FWO had commenced 23 litigation matters which was the lowest number on record. However, as at 30 June 2019, it still had 67 matters before the courts, two appeals on foot and eight debt recovery actions.[91]

Another obvious issue with looking only at the quantitative measure of litigation proceedings is that it does not capture the complexity nor does it reflect the possible impact of the proceeding. It is arguable that the scale and scope of litigation matters is one of the most striking shifts in the FWO's operations over the past decade.[92] Initiating test cases, or pursuing a case on appeal, is an especially critical component of the FWO's work. The current *Compliance and Enforcement Policy* confirms that litigation is 'an essential enforcement mechanism' not just because it provides general and specific deterrence, but because 'clarifying the law helps the community understand the various obligations and rights arising from Commonwealth workplace laws'.[93] Test cases may not even be successful, and if they are, they may not yield a significant penalty. However, there is substantial value in seeking an authoritative judgment in relation to murky areas of the law. The FWO has been at the forefront of exploring the reach of the accessorial liability provisions,[94] challenging potentially restrictive interpretations of Part 3-1

90 *Migrant Workers' Taskforce Report*, above n 19.

91 FWO and Registered Organisations Commission Entity, *Annual Report 18–19*, above n 54, at 14.

92 T Hardy, J Howe and S Cooney, 'Less Energetic but More Enlightened? Exploring the Fair Work Ombudsman's Use of Litigation in Regulatory Enforcement' (2013) 35 *Syd LR* 565.

93 *FWO Policy 2019*, above n 49, at 9.

94 See, eg, *Fair Work Ombudsman v Hu* (2019) 289 IR 240; [2019] FCAFC 133; 'FWO Seeks

protections,[95] and willing to seek novel remedial orders under s 545.[96] However, its recent decisions to discontinue litigation against Foodora,[97] and to not initiate proceedings against Uber[98] appear to be short-sighted to some degree given the continuing legal uncertainty raised by the 'gig economy'.[99]

Finally, it is worth underlining the point that litigation, including the size of the penalty and the potential for delivering deterrence, is not just dependant on the FWO, but hinges on the discretion and the determination of a court. It appears the judiciary is not immune to concerns about the growing problem of 'wage theft'. For example, in 2017/18, a total of $7.2 million was awarded by courts, setting the record as the highest amount of penalties ever secured by the FWO in a financial year.[100] This is even more noteworthy given the higher maximum penalties introduced under the PVW Act had not flowed through at that time.

Notwithstanding the elevation of maximum penalties for 'serious contraventions', the Migrant Workers' Taskforce ultimately concluded that the persistence and prevalence of underpayments 'might suggest that penalty levels for underpayments are insufficient to deter wrongdoing or drive behavioural change'.[101] This issue is front and centre of the current AG's review of the enforcement framework. Further, since the latest underpayment scandal engulfing Woolworths supermarkets,[102] the focus on penalties and liability looks set to persist.

What Lies Ahead?

In the early years of the FW Act, employer noncompliance with employment standards regulation was perceived as relatively benign, if not trivial. Since the 7-Eleven scandal of 2015, however, there has been a growing crisis of confidence in the adequacy of the statutory framework and the efficacy of the FWO's regulatory response. This article has surveyed the evolution of the enforcement response over the past decade, including consideration of the FWO's resources, culture and tools. This review confirms that wage theft is now perceived as seriously troubling from a political, social, economic and

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to Take Piecework Case to High Court', *Workplace Express*, 25 September 2019.

95 See, eg, *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 256 CLR 137; 326 ALR 470; [2015] HCA 45.

96 See, eg, *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd* [2016] FCCA 1482 (17 June 2016); *Fair Work Ombudsman v Grouped Property Services Pty Ltd* (2016) 152 ALD 209; [2016] FCA 1034.

97 'FWO Abandons Foodora Pursuit', *Workplace Express*, 21 June 2019.

98 'Uber's Contractor Model Given FWO tick', *Workplace Express,* 7 June 2019.

99 While the Full Bench of the Fair Work Commission has recently considered this issue (see *Gupta v Portier Pacific Pty Ltd* [2020] FWCFB 1698 (21 April 2020)), there has been no authoritative decision of a superior court which has considered the employment status of 'gig workers' at common law.

100 *Migrant Workers' Taskforce Report*, above n 19, at 85–6.

101 Ibid, at 86.

102 P Ryan and D Chau, 'Woolworths Investigated after Admitting It Underpaid 5,700 Staff up to $300 Million', *ABC News*, 30 October 2019.

regulatory perspective. It also reveals that many believe the FWO has been too cautious in its use of enforcement tools and 'risks being viewed as a mediator rather than a regulator'.[103]

As noted, there have been almost relentless inquiries into the problems of wage theft, and a plethora of suggestions advanced about how the situation might be improved. Recommendations include extending liability beyond employers to supply chain heads and host companies;[104] mandating the payment of wages into bank accounts to improve transparency;[105] increasing maximum civil penalties;[106] providing courts with specific powers to make adverse publicity and banning orders;[107] expanding the scope and application of infringement and compliance notices;[108] and reviewing forums for redress either by enhancing the small claims process[109] or directing claims to the Fair Work Commission.[110]

While various state governments are actively considering criminalising wage theft, and a number have already put in place labour hire licensing schemes, it may be that these are ultimately superseded by developments in the federal sphere. Most notably, the Morrison Coalition Government — both before and after the 2019 election — confirmed it would implement key recommendations of the Migrant Workers' Taskforce,[111] including establishing a national labour hire registration scheme in high risk industries,[112] and introducing criminal sanctions 'for the most serious forms of exploitative conduct'.[113] More far-reaching reforms may yet be forthcoming from the AG's review of the industrial relations framework. At least before the arrival of COVID-19, there was strong community support and political momentum behind the idea that the FWO needed to 'send a strong message of deterrence to would-be lawbreakers'.[114] However, in the midst of the current health and economic crisis engulfing Australia and the world, it is far less clear as to which way the regulatory pendulum is now about to swing.

103 Ibid.
104 *Contract Cleaning Inquiry*, above n 14, at 50.
105 Black Economy Taskforce, above n 14, at 58
106 *Migrant Workers' Taskforce Report*, above n 19, Recommendation 5.
107 Ibid, Recommendation 7.
108 Ibid, Recommendation 10.
109 Ibid, Recommendation 12.
110 S McManus, 'Change the Rules: For More Secure Jobs and Fair Pay', speech delivered at the Press Club, Canberra, 21 March 2018.
111 See, eg, 'Coalition Seeking to Criminalise Bad Employer Conduct: PM', *Workplace Express*, 24 July 2019.
112 *Migrant Workers' Taskforce Report*, above n 19, Recommendation 14.
113 Ibid, Recommendation 6.
114 Parker, FWO June 2019 Speech, above n 4, at 3.