Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman

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Abstract

This article draws on an empirical study of business responses to the regulation and enforcement of minimum employment standards in two discrete industry sectors in Australia: hairdressing and restaurants. The study aimed to critically assess the concept of general deterrence and explore key questions arising from calculative theories of compliance. In particular, this article considers the extent to which employer businesses were aware of the enforcement activities of the Fair Work Ombudsman ('FWO'); the depth of this knowledge; and whether this knowledge affected business perceptions of enforcement risks and the subsequent compliance response. The article concludes that while firms may not recall the details of enforcement activities with any precision or accuracy, their general awareness of the FWO's efforts in this respect has important ripple effects on risk perception and compliance behaviour.

I Introduction

The plight of temporary migrant workers in Australia has been well publicised in the media,[1] has formed the focus of numerous public inquiries[2] and is the subject of an ongoing and high-profile taskforce.[3] These various investigations have revealed that exploitative practices may be rampant in certain pockets of the labour market,

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1 See, eg, ABC, 'Slaving Away: The Dirty Secrets behind Australia's Fresh Food', *Four Corners*, 4 May 2015; ABC, '7-Eleven: The Price of Convenience', *Four Corners*, 31 August 2015.

2 See eg, Senate Education and Employment References Committee, Parliament of Australia, *Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holder* and the Committee's final report: Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (2016). See also Anthony Forsyth, *Victorian Inquiry into Labour Hire and Insecure Work: Final Report* (2016).

3 In October 2016, the Minister for Employment, Senator the Hon Michaelia Cash, established the Migrant Workers' Taskforce, which is led by Professor Allan Fels, in response to allegations of underpayment and exploitation of migrant workers, including international students and working holiday visa holders: Michaelia Cash, 'Coalition Delivers on Election Commitment to Protect Migrant Workers' (Media Release, 4 October 2016).

including horticulture, hospitality, convenience stores and service stations. While regulators have stepped up their efforts to stamp out flagrant non-compliance with workplace laws, and improve support for vulnerable workers, they have been somewhat hampered by the existing legal framework. In a bid to better protect these workers, the Federal Coalition Government has recently introduced legislative reforms to enhance the compliance and enforcement mechanisms of the *Fair Work Act 2009* (Cth) ('*FW Act*').[4] Under the legislative amendments, the maximum civil penalties available for 'serious contraventions' of the *FW Act* have been raised to unprecedented levels.[5] The ten-fold increase in maximum penalties is directed at addressing concerns that civil penalties under the *FW Act* are insufficient to 'effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business'.[6]

The underlying premise of these new provisions reflects a common assumption shared by policymakers and regulators: that higher sanctions will mean greater deterrence and, in turn, improved compliance.[7] While the classical model of deterrence has been widely criticised as being overly simplistic and failing to account for the full spectrum of compliance motivations,[8] leading regulatory approaches continue to place deterrence firmly at the fore of an idealised compliance and enforcement strategy. Indeed, the strategic enforcement model developed by the United States ('US') economist David Weil, expressly identifies deterrence as one of the four pillars that should be used to achieve compliance. This regulatory model is especially significant given that the Office of the Fair Work Ombudsman ('FWO') has explicitly embraced a 'strategic enforcement' approach in seeking to promote greater compliance with minimum employment standards set by the *FW Act*.[9]

The FWO has a number of distinct statutory functions, including educating employers and employees about workplace rights and obligations. However, it is the deployment of deterrence-based mechanisms, such as the imposition of sanctions

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

5 In particular, the maximum civil penalty proposed for a 'serious contravention' of the *FW Act* has been increased to 600 penalty units for individuals ($126 000) and 3000 penalty units for bodies corporate ($630 000): *FW Act* s 539 (in relation to maximum penalties for contraventions of civil remedy provisions), s 557A (in relation to a serious contravention of a civil remedy provision).

6 'Statement of Compatibility with Human Rights', *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Cth) 2.

7 Christine Parker and Vibeke Lehmann Nielsen, 'Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation' (2011) 56(2) *The Antitrust Bulletin* 377.

8 Keith Purse and Jillian Dorrian, 'Deterrence and Enforcement of Occupational Health and Safety Law' (2011) 27(1) *International Journal of Comparative Labour Law and Industrial Relations* 23, 24.

9 The four pillars are: focusing at the top of industry structures; enhancing deterrence at the industry and geographic level; transforming complaint investigations from reactive to strategic resources; and enhancing the sustainability of initiatives through monitoring and related procedures. The strategic enforcement model was developed by economist David Weil in relation to the US labour inspectorate. See, eg, David Weil, *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division* (May 2010) ('Weil 2010'); David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014) ('Weil 2014'). On the FWO's adoption of the strategic enforcement approach, see Janine Webster, 'More than Underpayments and Civil Penalties — Taking a Strategic Approach to Regulatory Workplace Relations Litigation' (2017) 59(3) *Journal of Industrial Relations* 354.

via civil remedy litigation, that remains the most conspicuous, and contentious, aspect of the agency's activities.[10] Obtaining civil penalties against a contravening employer is intended not only to punish the person found to be in breach of the law and encourage increased compliance efforts in the future, but is also designed to generate broader 'ripple effects' — that is, to actively discourage other employers who have not been the subject of any direct formal sanction from engaging in similar proscribed conduct.[11]

Although concepts of specific and general deterrence underpin most regulatory regimes, there is limited research as to how deterrence works in practice,[12] and almost no research assessing how enforcement of minimum employment standards under the *FW Act* influences the compliance behaviour of employers in Australia.[13] This article seeks partly to address this gap by presenting findings from a telephone survey of employers, across two industries, that was designed to explore business perceptions of, and responses to, the enforcement activities of FWO.[14] The objectives of this empirical study included the following:

(1) to understand the extent to which employer businesses were aware of the enforcement activities of the FWO, including three distinct deterrence-based mechanisms (that is, civil remedy litigation, enforceable undertakings and targeted campaigns) in their own industry and region (or otherwise);
(2) to evaluate the depth of employers' knowledge regarding the regulatory enforcement activities; and

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10 For further details of litigation patterns in the period 2006–2012, see Tess Hardy, John Howe and Sean Cooney, 'Less Energetic but More Enlightened? Exploring the Fair Work Ombudsman's Use of Litigation in Regulatory Enforcement' (2013) 35(3) *Sydney Law Review* 565.

11 Weil (2010), above n 9, 57. See also Fair Work Ombudsman (Cth) ('FWO'), *Litigation Policy* (Guidance Note 1, 4th ed, 3 December 2013) cl 4.4.

12 Notable studies include: Dorothy Thornton, Neil A Gunningham and Robert A Kagan, 'General Deterrence and Corporate Environmental Behavior' (2005) 27(2) *Law & Policy* 262; Christopher Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (Hart, 2015) 47–67.

13 Chris Arup et al, 'Assessing the Impact of Employment Legislation: The Coalition Government's Labour Law Programme 1996–2007 and the Challenge of Research' (Working Paper, Monash University, 1 December 2009). There have been some studies of deterrence and occupational health and safety regulation. For examples of studies in the OHS context, see, eg, Elizabeth Bluff, *Safe Design and Construction of Machinery: Regulation, Practice and Performance* (Ashgate, 2015) 66–72; Ron McCallum, Toni Schofield and Belinda Reeve 'Reflections on General Deterrence and OHS Prosecutions' (Working Paper 75, National Centre for OHS Regulation, March 2010); Toni Schofield, Belinda Reeve and Ronald McCallum, 'Deterrence and OHS Prosecutions' (2009) 25(4) *Journal of Occupational Health and Safety, Australia and New Zealand* 263; Neil Gunningham 'Prosecution for OHS Offences: Deterrent or Disincentive?' (2007) 29(3) *Sydney Law Review* 359. For a discussion of studies of OHS enforcement deterrence effects in other jurisdictions, see Purse and Dorrian, above n 8. On the lack of research on the impact of labour law enforcement more generally, see Linda Dickens and Mark Hall, 'Review of Research into the Impact of Employment Relations Legislation' (Employment Relations Research Series No 45, Department of Trade & Industry (UK), October 2005); Simon Deakin, 'Labour and Employment Laws' in Peter Cane and Herbert M Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) (which notes various studies examining the impact of labour laws on working conditions, but does not identify any studies of deterrence resulting from regulatory enforcement of labour laws).

14 Further details concerning the aims and methodology of the survey research are set out in Part III of the article.

(3) to assess whether awareness and knowledge of the FWO's regulatory enforcement activities influenced:
   (a) employer perceptions of risk of detection and sanction; and/or
   (b) the compliance response of employers.

The business survey also sought to examine the regulatory effect of business size, firm history, market position and publicity on compliance postures, perceptions and responses. However, our findings in this regard are beyond the scope of the present article and will be explored in future research. More generally, it should be noted that the survey research was geared towards exploring messages of general deterrence — accordingly, we tended to focus on those employers who had not been the subject of a direct FWO intervention (such as civil remedy litigation). The core aim of this article is to test systematically some of the assumptions underlying deterrence-based theories of compliance in the context of employment standards enforcement — including that calculated, self-interested businesspeople can be 'frightened into compliance if the costs of noncompliance become weightier'.[15]

The structure of the article is as follows. Part II of the article summarises the existing literature on deterrence theory and other variables affecting compliance behaviour and motivations. Part III explains the methodology of our study. Part IV presents our findings, while Part V discusses the practical and theoretical implications of those findings. In Part VI, conclusions are drawn and future research is outlined.

II Theories of Deterrence and Studies of Compliance Motivations

Orthodox deterrence theory is founded on the assumption that, in determining whether to invest in compliance measures, self-interested, calculative firms will rationally weigh up the costs and gains of compliance.[16] On this basis, it is assumed that regulated businesses will only take action to ensure they are compliant with the law when they believe that the anticipated profits from non-compliance are less than the costs associated with being caught and fined.[17] Imposing sanctions against individual firms is therefore intended not only to remove any direct incentive for law-breaking (that is, specific deterrence), it is designed to send a signal to the wider business community so as to change their 'compliance calculus' (that is, general deterrence).[18]

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15 Parker and Nielsen, above 7, 379.

16 See, eg, Orley Ashenfelter and Robert S Smith, 'Compliance with the Minimum Wage Law' (1979) 87(2) *Journal of Political Economy* 333; John T Scholz, 'Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory' (1997) 60(3) *Law and Contemporary Problems* 253, 254.

17 Anthony Ogus and Carolyn Abbot, 'Sanctions for Pollution: Do We Have the Right Regime?' (2002) 14(3) *Journal of Environmental Law* 283. See also Gary S Becker, 'Crime and Punishment: An Economic Approach' (1968) 76(2) *Journal of Political Economy* 169; George J Stigler, 'The Optimum Enforcement of the Laws' (1970) 78(3) *Journal of Political Economy* 526.

18 Weil (2014), above n 9.

Socio-legal studies have emphasised the importance of empirically testing some of the underlying assumptions of the general deterrence model and assessing the deterrent effects of specific regulatory interventions.[19] For example, a study undertaken by Fairman and Yapp concerned the compliance behaviour of small and medium enterprises with respect to food safety regulation in the United Kingdom, and found that the level of formal enforcement action did not have any significant effect on the number of businesses meeting or exceeding legal requirements.[20] They observed that the overwhelming majority of businesses were unaware of formal enforcement actions and believed that they were already compliant in any event. Deterrence theory was therefore seen as redundant in explaining non-compliance in this context. In their study of the enforcement of US environmental regulation, Thornton, Gunningham and Kagan also found that there was no clear association between knowledge of enforcement actions against other firms and the respondents' perceptions of risk of detection and punishment. While a majority of respondents could describe at least one example of a person or business being penalised for an environmental offence, their recall of the size of the sanctions imposed was far more imprecise. Generally, respondents only remembered those cases where an unusually large financial penalty was imposed or a person was imprisoned as a result of the enforcement proceeding.[21] In line with this, other studies — including research by Parker and Nielsen on the regulatory enforcement of competition and consumer regulation — have found that the perceived likelihood of detection has more regulatory potency than the perceived severity of the sanctions used.[22]

Broadly speaking, studies that set out to explore the simple model of deterrence ultimately found that it could not provide a full explanation of why businesses comply with the law. This led researchers not only to refine deterrence theory, but to develop an alternative paradigm of regulatory compliance, which takes into account other factors affecting corporate decision-making and behaviour.[23]

It is now recognised that compliance motivations are much more diverse than first predicted and may stem from a range of interacting factors, including general agreement with the legitimacy of the regulatory framework, as well as perceived social pressures, shame and guilt.[24] Some firms may be more concerned about informal social or economic sanctions such as damage to their reputation resulting from negative publicity caused by non-compliance, rather than any court-ordered penalty.[25] Indeed, reputational sanctions can often have a greater effect on the business bottom line to the extent that it may alienate the firm's consumers or

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19 See generally Hodges, above n 12, 153.

20 Robyn Fairman and Charlotte Yapp, 'Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement' (2005) 27(4) *Law & Policy* 492, 508.

21 Thornton, Gunningham and Kagan, above n 12, 272.

22 See, eg, Parker and Nielsen, above n 7, 377–8; John Braithwaite and Toni Makkai, 'Testing an Expected Utility Model of Corporate Deterrence' (1991) 25(1) *Law & Society Review* 7; John T Scholz and Wayne B Gray, 'OSHA Enforcement and Workplace Injuries: A Behavioral Approach to Risk Assessment' (1990) 3(3) *Journal of Risk and Uncertainty* 283, 294.

23 Fairman and Yapp, above n 20, 495.

24 See, eg, many of the contributions in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011).

25 Robert A Kagan, Neil Gunningham and Dorothy Thornton, 'Explaining Corporate Environmental Performance: How Does Regulation Matter?' (2003) 37(1) *Law & Society Review* 51.

clientele, reduce market share and trigger closer regulatory oversight from state agencies.[26] This broad conception of deterrence is reflected in the model of strategic enforcement developed by Weil. That model draws power not just from the penalty imposed against the firm, but from the business and reputational costs which flow from the relevant regulatory intervention.[27]

Weil's research of labour standards enforcement in the US — one of the only studies of deterrence in employment standards enforcement — also explored the extent to which the deterrent effects of regulatory investigations were limited by industry and locality. In particular, this study considered whether a previous investigation of fast food outlets enhanced compliance with labour standards regulation by other businesses in the same industry and within the same zip code as the investigated outlets. Ultimately, Weil found that

> all investigations are not created equal. Some investigations have very local effects, essentially limited to the worksite being investigated. But other investigations seem to have much stronger ripple effects that go on to affect the behaviour of other establishments controlled by the firm, or, more interestingly, the behaviour of other companies in the same industry or geographic area.[28]

This finding lends support to earlier studies of OHS enforcement, which found that compliance action was more likely to be adopted in circumstances where the nature of the business activity undertaken and the types of compliance risks were the same or similar to those that had been the subject of enforcement.[29]

A number of other studies of compliance motivations, including those emerging from behavioural studies, suggest that businesses often seek to comply with the law from a sense of social or legal duty or obligation as distinct from fear of punishment, and are therefore not motivated by fear of detection and sanction.[30] Rather, corporations are increasingly sensitive to moral or ethical pressures and this 'helps explain why many firms nowadays regard "overcompliance" with regulatory obligations as a good business strategy'.[31] It also assists in understanding why there may be high levels of compliance in situations where the likelihood of detection and sanction is relatively remote.[32]

In practice, it is likely that there is a spectrum of compliance motivations, with many firms having mixed motives — that is, a combination of both fear of sanction and a sense of duty to be compliant. It has been argued that, in addition to explicit general deterrence, then, general deterrence may operate in other, more

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26 Neil Gunningham, Robert A Kagan and Dorothy Thornton, *Shades of Green: Business, Regulation, and Environment* (Stanford University Press, 2003).

27 Weil (2010), above n 9, 3. See also Parker and Nielsen, above n 7, 382.

28 Weil (2010), above n 9, 81.

29 Michael Wright et al, *Evaluation of EPS and Enforcement Action: Main Report*, Health and Safety Executive Research Report RR519 (HSE Books, 2006).

30 Tom R Tyler, *Why People Cooperate: The Role of Social Motivations* (Princeton University Press, 2011); Robert A Kagan, Neil Gunningham and Dorothy Thornton, 'Fear, Duty, and Regulatory Compliance: Lessons from Three Research Projects' in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011) 37.

31 Thornton, Gunningham and Kagan, above n 12, 264.

32 Michael P Vandenbergh, 'Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance' (2003) 22(1) *Stanford Environmental Law Journal* 55, 129.

subtle ways. For example, for firms motivated by a combination of fear and duty, 'simply learning about an applicable regulatory *requirement* evokes some level of perceived threat (plus a felt legal obligation), inducing it to increase its compliance-related efforts'.[33] Thornton, Gunningham and Kagan refer to this regulatory effect as 'implicit general deterrence'.[34]

General deterrence messages may also have 'reminder' and 'reassurance' functions for those with mixed motives.[35] In the former case, firms that are motivated to comply with the law may recognise that managerial preferences may not always be translated into compliance across an organisation. Hearing about legal penalties against other companies may remind firm managers to check whether compliance policies and practices are being followed. Further, when firms that have invested heavily in compliance subsequently hear about other businesses that have suffered legal penalties, these general deterrence messages offer symbolic reassurance to compliance-sensitive firms about the value of their investment. Thornton, Gunningham and Kagan argue that '[t]he reminder and reassurance functions interact to support and reinforce the assumptions of implicit general deterrence: that rules have associated sanctions, sanctions are enforced, and that compliance is both prudent and right.'[36] Previous studies have identified a number of other factors — such as firm size and resources, market position and firm history — as influencing the extent to which deterrence 'works'.[37] As noted in Part I above, the regulatory effect of these additional variables is beyond the scope of this article and will be explored elsewhere.

III Methodology of Study

A *Background*

As noted earlier, the empirical study upon which this article draws aimed to examine an area that has been the subject of little research — namely, businesses perceptions of, and responses to, the enforcement activities of the FWO. The FWO is the federal regulatory agency responsible for promoting and ensuring compliance with minimum employment standards prescribed in the *FW Act* and industrial instruments made under this legislative framework. In carrying out its responsibilities, the agency has a number of roles, including: educating employers and employees about workplace rights and obligations; conducting investigations to determine compliance with minimum employment standards under the *FW Act*; and commencing enforcement proceedings against persons who breach the terms of the Act, modern awards and/or enterprise agreements.[38]

Prior to 2006, the federal enforcement agency engaged in enforcement litigation only to a very limited extent. This meant that employment regulation in

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33 Thornton, Gunningham and Kagan, above n 12, 265 (emphasis in original).
34 Ibid 266.
35 Ibid.
36 Ibid.
37 Gunningham, above n 13, 369.
38 See FWO, *Compliance and Enforcement Policy* (2017).

Australia provided 'less than fertile ground for examining the impact of deterrence theory'.[39] However, as we have discussed elsewhere, the regulator's enthusiasm for civil remedy litigation exponentially increased with the advent of the Work Choices legislation.[40] While the number of matters brought before the courts have waned in recent years, the imposition of sanctions via civil remedy litigation remains a critical component of its overall compliance and enforcement strategy.[41] In addition to civil remedy litigation, the FWO has used a range of educative, persuasive and coercive mechanisms in a bid to build and strengthen compliance with the *FW Act*. These tools include:

(a) **targeted campaigns**, which are run by the FWO to educate and audit businesses in particular localities and industries;

(b) **compliance notices**, which may be issued by Fair Work Inspectors where there is a reasonable belief that a civil remedy provision has been contravened — such notices normally require a person to take specified action to remedy the contravention, and to produce reasonable evidence of having carried out that action;

(c) **enforceable undertakings**, a voluntary agreement that is enforceable in court made between the FWO and an individual or firm who the FWO reasonably believes has contravened (or has been involved in contravening) the *FW Act*; and

(d) **proactive compliance deeds**, which are similar in many ways to enforceable undertakings in that the signatory firm voluntarily agrees to a set of compliance commitments, but these deeds are made under the common law rather than the *FW Act*.[42]

B *Survey Design*

In undertaking the business survey, we set out to explore broad questions emerging from theories of deterrence and regulatory compliance, and to evaluate the way in which deterrence messages are perceived by the regulated community. To this end, we adapted the methodological approaches of a number of earlier empirical studies concerned with similar questions in distinct regulatory domains.[43] Given that we were particularly interested in the deterrence effect of successful FWO litigation against employers, we framed the survey around two significant enforcement actions

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39 Purse and Dorrian, above n 8, 25.

40 For further discussion, see Hardy, Howe and Cooney, above n 10.

41 FWO, above n 38.

42 For further discussion on 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(1) *Federal Law Review* 1 ('Hardy and Howe (2013)'); Rosemary Owens, 'Temporary Labour Migration and Workplace Rights in Australia: Is Effective Enforcement Possible?' in Joanna Howe and Rosemary Owens (eds) *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart, 2016) 393. For discussion of the other compliance and enforcement tools, such as proactive compliance deeds, see Tess Hardy and John Howe, 'Chain Reaction: A Strategic Approach to Addressing Employment Noncompliance in Complex Supply Chains' (2015) 57(4) *Journal of Industrial Relations* 563 ('Hardy and Howe (2015)').

43 See, eg, Thornton, Gunningham and Kagan, above n 12; Parker and Nielsen, above n 7.

resulting in sanctions (so-called 'signal cases') determined by the courts in the period from June 2014 to June 2015.[44]

To identify the 'signal cases', we reviewed all relevant court decisions handed down in the two years prior to the scheduled commencement of the survey. From this broad pool of court decisions, two cases were chosen on the basis that they had involved employers who operated in sectors that appeared to be characterised by a high level of non-compliance with workplace laws.[45] It is expected that, in sectors where levels of employer non-compliance are elevated, general deterrence is likely to be most valuable. Both cases involved underpayment of vulnerable workers, but were distinct in relation to amount of the underpayments and number of employees affected, as well as the sector and geographical location in which the contraventions took place. These variations allowed us to explore the 'ripple effects' phenomenon identified by Weil — namely, that enforcement interventions are likely to have greater deterrence effects in relation to employers in the same industry and region in which the intervention takes place.[46] Significant civil penalties were ordered against the relevant employing entities and the respective owners in all the signal cases, but the enforcement outcomes otherwise diverged. The way in which these outcomes were publicised was also different. While both cases attracted a strong level of media interest, written reasons were delivered by the court in one instance and none in the other.

The first signal case involved two 'La Porchetta' franchises in outer metropolitan and regional Victoria. While these franchise outlets were operated via separate corporate entities, these companies were owned by the same director, Ruby Chand.[47] In this instance, the relevant employers were found to have underpaid 111, mostly teenage, employees a total of $258 000. These underpayments had arisen largely as a result of part-time and casual employees being paid flat hourly rates below the minimum legal standard, apprentices and trainees not being paid for the minimum hours worked, and the employer providing employees with half-priced pizza and soft drinks in lieu of their correct pay. In delivering a detailed judgment, the Court observed that the nature and extent of the breaches 'warrants severe sanction by way of penalty'.[48] In addition to compensation orders for backpay, each

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44 This was largely based on the approach adopted in an earlier study of deterrence in the context of environmental regulation in the US: see Thornton, Gunningham and Kagan, above n 12.

45 For example, in the National Hospitality Industry Campaign 2012–14 — Restaurants, Cafes and Catering (Wave 2), 58% of all businesses audited by the FWO were found to have at least one contravention: FWO, *National Hospitality Industry Campaign: Restaurants, Cafes and Catering (Wave 2) Report* (June 2015) 4. Similar levels of employer non-compliance (55%) were identified in the National Hair and Beauty Campaign conducted in 2012–13: FWO, *National Hair and Beauty Campaign 2012–13 Final Report* (July 2013) 6. It should be noted that audit data provides only an imperfect guide to levels of sectoral non-compliance. For further discussion of these issues, see Sean Cooney, Tess Hardy and John Howe, '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, 16–17 November 2012).

46 Weil (2010), above n 9.

47 The fact that employees in each outlet were employed by separate entities led to the FWO initiating separate proceedings, albeit these cases were closely linked — factually and in their outcomes: see *Fair Work Ombudsman v Zillion Zenith International Pty Ltd* [2014] FCCA 433 (6 June 2014); *Fair Work Ombudsman v Bound for Glory Enterprises* [2014] FCCA 432 (6 June 2014).

48 *Fair Work Ombudsman v Bound for Glory Enterprises* [2014] FCCA 432 (6 June 2014) [48].

franchise was fined $139 508 in relation to the contraventions and Mr Chand — the owner of both franchises — was penalised a total of $55 803. The FWO also entered into a proactive compliance deed with the La Porchetta franchisor whereby the franchisor agreed to self-audit the records of one-third of its 65 Australian stores to check that workers were receiving their proper wages and conditions.[49]

The second signal case involved a series of hair salons located in metropolitan Sydney, as well as on the Central and South Coasts of NSW, trading under the name 'House of Colour'. These salons were all owned and operated by the same individual, Nelvin Nitesh Lal.[50] In this case, four young employees had been underpaid a total of $6000 in contravention of minimum wage and overtime penalty rate provisions. In at least two instances, employees had received little to no pay for work performed on a 'trial basis'. The employer had also breached laws relating to payslip obligations and a failure to comply with a Compliance Notice. In addition to orders requiring rectification of the relevant underpayments, Driver J ordered penalties amounting to $142 000 against the relevant businesses, as well as a penalty of $20 000 against Mr Lal.[51] In an unprecedented step, Driver J also imposed an injunction restraining Mr Lal from underpaying any hairdressing employees he may recruit in the future. While Judge Driver did not issue written reasons in the matters, the case was the subject of multiple press releases issued by the FWO and received extensive media coverage online and in regional press.[52]

Following selection of the signal cases, we then identified all businesses in the same state and industry as the two signal cases. In particular, the survey sample was sourced from the credit information bureau, Dun & Bradstreet, and was made up of 3598 businesses from the cafe and restaurant industry and the hair and beauty services industry, across both metropolitan and regional areas of ACT, NSW and Victoria.[53] The respondents came from a mix of small (1–19 employees), medium

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49 See FWO, 'Pay Packet Review for La Porchetta Employees' (Media Release, 25 June 2014). Under the deed, the franchisor made a number of other compliance commitments, including providing new franchisees with employment induction training and employment packs covering key aspects of workplace laws: 'Proactive Compliance Deed between the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) and La Porchetta Franchising Pty Ltd' (1 April 2014).

50 *Fair Work Ombudsman v Hair Industrie Erina Pty Ltd* (Unreported, Federal Circuit Court of Australia, Driver J, 15 April 2015). For details of this decision, see FWO, 'Hairdressing Operator Fined $162 000 over Underpayment of Young Salon Employees' (Media Release, 16 April 2014). Mr Lal has since been the subject of separate proceedings involving another salon, namely House of Colour @ Tuggerah Pty Ltd. This case involved contraventions that took place in 2014, but the decision (including civil penalties) was not finally determined by the Court until May 2016 well after our survey took place. For further details of that decision, see FWO, 'Another Penalty against Salon Operator' (Media Release, 16 May 2016); *Fair Work Ombudsman v House of Colour at Tuggerah Pty Ltd* [2016] FCCA 1148 (13 May 2016).

51 The total amount of civil penalties ordered against the employing entities, included: $80 000 against Hair Industrie Erina Pty Ltd; $40 000 against House of Colour@Hurstville Pty Ltd; $22 000 against The House of Colour@Shellharbour Pty Ltd.

52 See references to FWO media releases in above, n 49. Examples of media coverage include: 'Salon Owner Pays Price', *Illawarra Mercury* (Wollongong), 20 April 2015; 'Hairdresser Fined $162K for Pay Cuts', *Central Coast Express Advocate* (Surry Hills), 22 April 2015.

53 Of the 317 NSW and Australian Capital Territory ('ACT') interviews, some 43 were sourced from the ACT. This small sample means that NSW/ACT results have generally been combined in this article (except in certain instances where statistically significant findings relate to ACT respondents only).

(20–199 employees) and large (200+ employees) businesses. We then conducted a telephone survey of 643 employer firms who agreed to be interviewed. Maximum quotas by state and industry were set and achieved, so as to provide an adequate representation of the variables and allow for meaningful comparisons between them. Once collated, the data was weighted to reflect the actual distribution of the population of the two industries, by size, region and state as advised by a customised data request from the Australian Bureau of Statistics.[54]

In each instance, we sought to interview the relevant individual within the firm who was the most senior manager responsible for the recruitment, payment and management of staff. Although there are various ways empirical research of general deterrence may be carried out, we adopted an approach that assumed interviewing senior managers of the firm — and exploring their perceptions and responses to the costs and gains of compliance — is a 'better test of calculative thinking on businesses as a whole than merely looking at the impact on incidents of non-compliance'.[55] Indeed, as the components of general deterrence are largely subjective and based on personal perception, it has been observed that: 'deterrence can thus be [best] understood and measured by interviewing respondents about their perception of the risks associated with violating particular legal rules'.[56] In other words, self-reported measures are especially valuable where the object of interest is a perception or attitude and this is something that only the respondent is likely to know.[57]

In designing the survey, we were conscious of the possibility of 'social desirability bias' — that respondents to surveys raising issues concerning compliance with the law

> are generally likely (either deliberately or subconsciously) to interpret, remember, and report events in such a way as to exaggerate their compliance with the law and underplay or excuse noncompliance or to over report trivial offenses or underreport serious offenses.[58]

We sought to avoid triggering this bias by ensuring that the survey was conducted anonymously by an independent, University-based research team and not by the regulator, by framing questions about the regulator, compliance and non-compliance in neutral terms requiring factual responses, and by giving respondents a range of ways to admit non-compliance and discuss responses to non-compliance in apparently socially acceptable ways.[59] Our survey measures were also constructed to provide multiple items, which was intended to improve the reliability of data.[60] Despite these efforts, the data should be interpreted in light of the fact that they are

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54 Further detail regarding the methodology, survey sample and earlier pilot survey can be found in John Howe and Tess Hardy, 'Business Responses to Fair Work Ombudsman Compliance Activities' (Centre for Employment and Labour Relations Law, Melbourne Law School, Research Report, January 2017).

55 Parker and Nielsen, above n 7, 388.

56 Benjamin Van Rooij et al, 'Comparative Compliance: Digital Piracy, Deterrence, Social Norms, and Duty in China and the United States' (2017) 39(1) *Law & Policy* 73, 76.

57 Parker and Nielsen, above n 7, 394.

58 Christine Parker and Vibeke Nielsen 'The Challenge of Empirical Research on Business Compliance in Regulatory Capitalism' (2009) 5 *Annual Review of Law & Social Science* 45, 61 (citations omitted).

59 Ibid 63.

60 Parker and Nielsen, above n 7, 394.

ultimately based on self-reports and may consequently reflect the way respondents feel they should think or behave.[61]

The survey was conducted between 24 June and 14 July 2015 by Wallis Market & Social Research on behalf of the research team at the Melbourne Law School and the FWO. We should note that this was shortly after the ABC television's Four Corners program revealing exploitation of workers in the horticulture and food processing industries, but before media allegations of serious and systemic underpayment of international student workers by the 7-Eleven franchise were aired.[62] The timing is significant given that these various cases led to a subsequent explosion in media interest in non-compliance, a number of public inquiries and several law reform proposals,[63] including the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth). The possible implications of these subsequent developments will be discussed in Part VI below.

IV Findings

A *Knowledge of, and Previous Contact with, the FWO Regulator*

Survey respondents were asked about their awareness of a government body responsible for ensuring compliance with minimum wages and entitlements in Australia, and if they recalled the name of that body. They were then asked whether they had had any previous direct contact with the FWO and, if so, they were asked to confirm the nature of that contact.

Almost all (91%) of the respondents were aware there that there is a government body responsible for ensuring compliance with employment standards. However, only 6% of these businesses were able to name the FWO without prompting — a much larger proportion incorrectly referred to the relevant government body as 'Fair Work Australia' (15%).[64] Upon prompting, most of the respondents (83%) said that they had heard of the FWO.

Awareness of the FWO differed depending on location (regional or larger metropolitan area) and the size of business. For example, we found that respondents in regional areas were more likely to name the FWO (10%) than respondents in metropolitan areas (5%), and overall regional respondents were more likely to be aware of the FWO (90%) than those in metropolitan areas (81%). This result is somewhat surprising given that the FWO has far fewer offices in regional areas than in metropolitan regions.[65] Further research is required to uncover whether increased recognition in regional areas is likely to be a reflection of the greater pick up and penetration of the stories about the FWO in local media, as compared to metropolitan media, or whether respondents in regional areas appear to pay more attention to

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61 Ibid 395.

62 See Part I of this article and above nn 1–3.

63 See also Fair Work Amendment (Recovering Unpaid Amounts for Franchisee Employees) Bill 2015 (Cth).

64 'Fair Work Australia' was the name of the federal workplace tribunal from 2010 until the end of 2012, when its name was changed to the 'Fair Work Commission'.

65 As at December 2017, the FWO has offices in all capital cities and 14 regional locations across Australia: FWO, 'Contact Us: Offices' <http://www.fairwork.gov.au/contact-us/offices>.

advice and information provided by other trusted sources, including advisors and industry associations.

Almost one-third of respondents (29%) reported that they had experienced direct contact with the FWO at some time in the past. The most common reasons for contact were to make an enquiry about wages or entitlements (51%), in relation to a complaint by an employee (26%) or as part of an audit by the FWO (18%).[66] This last result is notable in light of the fact that the likelihood of having been audited by the FWO is fairly low. For example, the estimated number of businesses operating in the cafe and restaurant sector in NSW/ACT and Victoria is just under 24 000.[67] As part of the National Hospitality Campaign in the Restaurants, Cafes and Catering Sector, the regulator completed audits of 565 businesses across NSW/ACT and Victoria.[68] In short, this means that there was less than a 2% chance of being audited by the FWO, at least as part of this campaign.[69] The relatively high proportion of respondents who had previously had direct contact with the FWO via an audit may help explain some of our later findings regarding the perceived risk of detection by the FWO.

B *Knowledge of Regulatory Enforcement Action*

Respondents were also asked about three key compliance and enforcement activities of the FWO. First, the respondents were asked about their awareness of targeted campaigns run by the FWO to educate and audit businesses in particular localities and industries, and to describe the first campaign that came to mind, if any.[70] Second, respondents were asked about enforceable undertakings (the nature of these agreements were explained to the respondent). Respondents who were aware of enforceable undertakings were then asked questions about the first undertaking that came to mind, and the nature of what the business did wrong.[71] Third, respondents

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66 It should be noted that the survey was conducted shortly after the transitional period of the *FW Act* had expired, which may have influenced the proportion of respondents making enquiries to the FWO.

67 In particular, the ABS estimates suggested that there are 13 774 cafes/restaurants in NSW/ACT and 10 629 cafes/restaurants in Victoria: Australian Bureau of Statistics, 'Counts of Australian Businesses, including Entries and Exits, Jun 2012 to Jun 2016' (Commonwealth of Australia, 8165.0, 21 February 2017).

68 FWO, *National Hospitality Industry Campaign: Restaurants, Cafes and Catering (Wave 2) Report* (June 2015) 7–8.

69 It should be noted that the FWO has previously conducted a number of targeted campaigns in the cafes and restaurants sector — both on a national and regional basis. See, eg, FWO, *ACT Restaurant Industry Audit Program Final Report* (June 2013).

70 Prior to the survey taking place, there had been state-based and at least one national targeted campaigns in the relevant sectors in the recent past, including: the Victorian Hairdressing Apprenticeship Audit Program (final report issued in May 2013); the ACT Restaurant Industry Audit Program (final report issued in June 2013); the National Hair and Beauty Campaign 2012–13 (final report issued in July 2013); the National Hospitality Industry Campaign 2012–14 Restaurants, Cafes and Catering (Wave 2) (final report issued in June 2015).

71 There had also been a number of enforceable undertakings ('EUs') entered into by firms in the relevant sectors and regions over the recent past, albeit there were a number of EUs made in the cafe/restaurants sector and none in the hairdressing sector in the relevant period from July 2013 to June 2015 (see, eg, 'Enforceable Undertaking between Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) and 85 Degrees Coffee Australia Pty Ltd' (5 June 2015)). There were, however, a number of EUs made with hairdressers in late 2012 (see, eg, 'Enforceable Undertaking between the Commonwealth of Australia (as represented by the Office of

were asked whether they were aware of litigation against businesses in relation to breaches of laws regulating minimum wages and other employment entitlements, and if so, to describe the first case that came to mind. Respondents who recalled a case were then asked further questions about what the business did wrong (with a number of prompts, if required), their recollection of the size of the business, the industry context, and what orders were made (that is, compensation, backpay or monetary penalties) and against whom. In addition to general questions about awareness of the enforcement activities of the FWO, respondents were asked about their awareness of the signal cases — La Porchetta and House of Colour — and the nature of any details they recalled.

The overall results suggested that targeted campaigns and litigation featured most strongly in the relative awareness of respondents' of these different actions. Targeted campaigns were the most widely recalled (17%), slightly ahead of litigation against businesses (15%). Enforceable undertakings were less well recognised (9%). The fact that targeted campaigns were more widely recalled than litigation possibly reflects the way in which targeted campaigns are promoted and publicised by the FWO as compared to litigation. For targeted campaigns, the FWO sends individual letters to businesses advising them of the campaign and actively reaches out to industry stakeholders such as employer and industry associations. For example, as part of the National Hospitality Industry Campaign referred to above, the FWO contacted over 52 789 employers across Australia advising them of the campaign and directing them to the dedicated webpage for hospitality businesses. In addition, the campaign received extensive coverage through digital platforms[72] and mainstream media channels, including multiple TV stations, over 200 radio broadcasts, coverage on over 80 websites and exposure through print media.[73] By comparison, in relation to litigation, the FWO will generally issue a press release at the commencement and conclusion of the litigation — businesses will generally only be alerted to the litigation if it is later reported in the mainstream or industry press.[74] This potentially underlines the regulatory power of the media and publicity, and the fact that the deterrence value of any intervention will depend, to a large extent, on whether the business community is alerted to, and appreciates the meaning and relevance of, this activity. The fact that there was relatively low recognition and recall of enforceable undertakings suggests that more needs to be done to educate the regulated community about these novel, but important, regulatory tools.

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the Fair Work Ombudsman) and Hennesy Lane Hair Design Pty Ltd and Craig Francis Lane' (27 September 2012)).

[72] An industry-specific webinar promoting the campaign had 105 attendees, 101 further FWO YouTube channel views and 108 visits to the FWO website following the webinar. The campaign also received extensive coverage via social and digital media (including Twitter, Facebook advertisements and website visits). See FWO, *National Hospitality Industry Campaign: Restaurants, Cafes and Catering (Wave 2) Report* (June 2015) 12.

[73] This included the *Hobart Mercury*, *Herald Sun*, *Northern Territory News* and *The Canberra Times*, as well as 45 other regional and community publications.

[74] For example, in relation to the La Porchetta litigation, the FWO issued the following press release at the commencement of litigation: FWO, 'Young Restaurant Workers Allegedly Underpaid more than $250 000' (Media Release, 3 July 2013). Subsequently, the regulator released the following press release upon conclusion of court proceedings: FWO, 'Restaurant Operators Fined $334 000 after Paying Employees with Pizza and Soft Drink' (Media Release, 10 June 2014).

Overall, knowledge of the FWO's enforcement activities was much lower than in comparable studies that assessed respondents' knowledge and awareness of enforcement actions. For example, in the Thornton, Gunningham and Kagan study of environmental regulation in the US, 89% of respondents remembered at least one instance of a fine against some other company.[75] In comparison, only 32% of all respondents in this study were aware of any (either or both) of the FWO's enforcement activities (including targeted campaigns, enforceable undertakings and civil remedy litigation).

While awareness of targeted campaigns and enforceable undertakings was broadly similar across industries, there was a substantial difference in recollection of litigation, with respondents in cafes/restaurants (18%) much more likely to be aware of litigation brought by the FWO than hairdressers (7%) (see Figure 1 below). This may reflect the fact that, historically at least, there have been a higher number of litigation matters relating to cafes and restaurants than hairdressers. For example, our 2012 analysis of litigation patterns revealed that FWO litigation was most concentrated in the Accommodation and Food Services sector, which includes cafes and restaurants.[76] In particular, 24% of all matters finalised in the period from 1 July 2006 to 30 June 2012 were in Accommodation and Food Services.[77] In comparison, only 4% of litigious matters finalised in the same period were in the 'Other Services' sector, which includes hairdressing and beauty services.[78]

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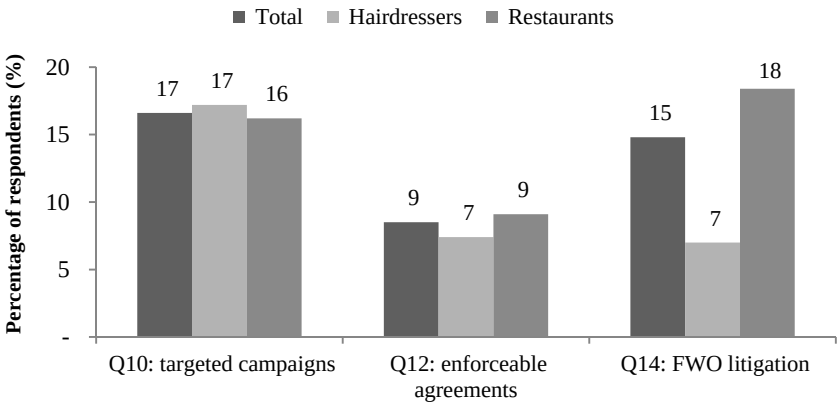
75 Thornton, Gunningham and Kagan, above n 12, 271.

76 See Hardy, Howe and Cooney, above n 10, 587.

77 The Australian Bureau of Statistics has adopted a classification framework to organise data about business organisations — commonly known as Australian and New Zealand Standard Industrial Classification ('ANZSIC'). Under this tiered classification framework, businesses are first broadly classified by 'Divisions', which is then split into 'Subdivisions', then into 'Groups', and finally into 'Classes'. For example, 'Cafes and Restaurants' (Class 4511), falls within the 'Cafe, Restaurants and Takeaway Food Services' (Group 451), which is part of the 'Food and Beverage Services' (Subdivision 45), which comes within the category of 'Accommodation and Food Services' (Division F). Very limited data is collected at the class or group level, which makes it challenging to conduct nuanced sectoral analysis. For further discussion of this classification system and the challenges it presents for empirical research, see John Howe, Tess Hardy and Sean Cooney, 'The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006–2012' (Centre for Employment and Labour Relations Law, Melbourne Law School, Report, 2014).

78 In particular, 'Hairdressing and Beauty Services' (Class 9511), falls within the 'Personal Care Services' (Group 951), which is part of 'Personal and Other Services' (Subdivision 95), which comes within the broad category of 'Other Services' (Division S).

Figure 1: Awareness of FWO activities by industry[79]



C *Knowledge of Litigation and Signal Cases*

As noted earlier, around 15% of respondents were aware of litigation being taken by the FWO against another business. Almost all the respondents who were aware of litigation (96%) identified that the relevant wrong on the part of the business was underpayment of employees. This is squarely within the FWO's jurisdiction and forms a large part of their workload. However, a significant proportion of respondents identified contraventions relating to immigration or visa status (10%) and superannuation (5%) as relevant contraventions committed by the business that were the subject of FWO litigation. This is somewhat unexpected given that these matters are largely outside the FWO's mandate and primarily the responsibility of other government departments and agencies, such as the Department of Immigration and Border Protection.

As we hypothesised, recall of litigation appears to vary by industry. Awareness of hairdressing cases are almost entirely confined to hairdressers. However, cases relating to restaurants are recalled more evenly across both industries. For example, respondents from the hairdressing industry were almost as likely to describe the La Porchetta litigation as the first case of litigation that came to mind (11%) as respondents from restaurants/cafes (9%) (see Table 1 below).

This last statistic suggests that industry-specific awareness can vary depending on other factors. For example, it is possible that general awareness of the litigation against La Porchetta and other cafe/restaurants could result from the nature of restaurants as businesses utilised by the general public, and by awareness of the

[79] Q10: Are you aware of any examples of targeted campaigns which have taken place in the last two years?
Q12: Are you aware of any examples of where businesses have entered into these types of enforceable agreements in the last two years?
Q14: Are you aware of any examples of where the Fair Work Ombudsman has brought litigation against businesses in the last two years?
Base: All respondents, n=643.

La Porchetta brand. It may also be because the facts of the La Porchetta case were more memorable (that is, significant underpayment of employees, partly as a result of them being paid in pizza and soft drink) than that of House of Colour (that is, much smaller underpayment of young employees arising as a result of unpaid trial work). As a result, the La Porchetta case became better lodged in the minds of the respondents (even where they operated outside the relevant sector).

Table 1: FWO litigation identified, by industry[80]

Subject of litigation	Total	Hairdressers	Restaurants
Local restaurant	26%	18%	28%
La Porchetta	9%	11%	9%
Retail outlet	6%	4%	6%
Farm	6%	4%	6%
Franchised fast food operator	6%	1%	6%
'House of Colour' or hairdressers more generally	2%	14%	0%

1 *La Porchetta Signal Case*

In looking more closely at the knowledge and awareness of the La Porchetta signal case, we found that respondents were more likely to have knowledge of the La Porchetta signal case than other litigation, with around 30% of respondents aware of the case (see Figure 2 below; 19% recalled the case without prompting by the interviewer, while 11% confirmed awareness after being prompted with further information about the case).

Both geographic locality and industry context were clearly important. Overall, there was significantly higher awareness of La Porchetta among Victorian businesses (42%), where the breaches occurred, than in NSW (21%) (see Figure 3 below). Industry context was also important, with 34% of respondents in cafes/restaurants having knowledge, compared to 22% of hairdressers. Reinforcing the importance of geographic location, within the cafes/restaurants industry, recall of the case was much higher in Victoria (44%) than in NSW (26%). Recall among hairdressers, while lower than their cafe/restaurant counterparts, is also higher in Victoria (37%) than in NSW (11%).

To the extent that knowledge and awareness of enforcement activities has a deterrent impact (see discussion in Part V below for further analysis of this question), it is arguable that this finding partly supports Weil's earlier research — that is,

[80] Q15a: Can you please describe the first such case [of litigation] that comes to mind? Base: All aware of litigation, n=87.

enforcement activities undertaken in a particular sector or region is likely to have a greater 'ripple effect' on other employers operating in that same industry or locality.

Figure 2: Overall awareness of La Porchetta signal case[81]

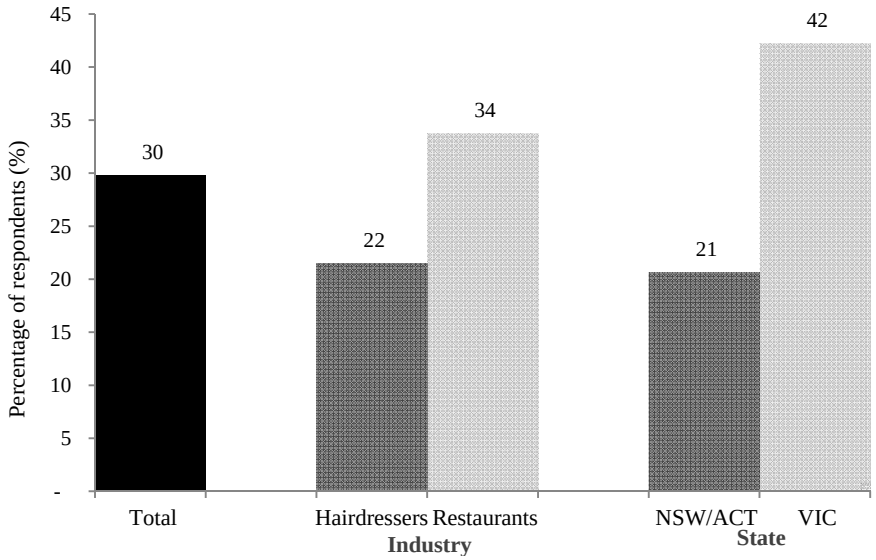
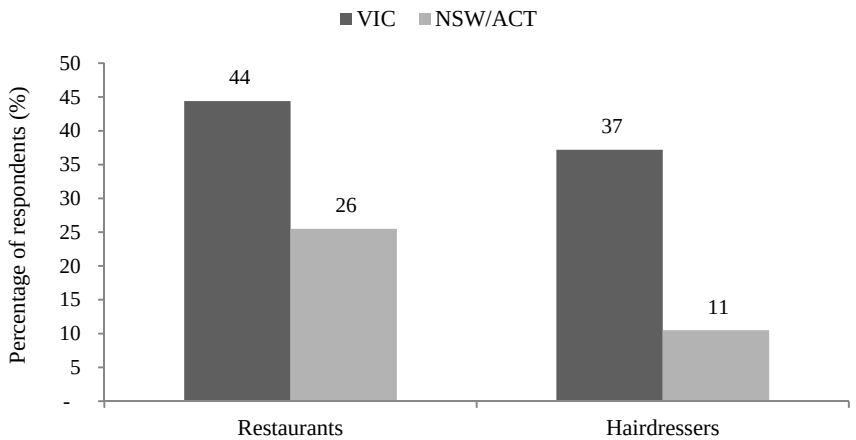


Figure 3: Awareness of La Porchetta signal case, by state and industry[82]



[81] Q16: Have you heard of the [La Porchetta] case?
Q18: Do you recognise this case now?
Base: All respondents, n=643.

[82] Ibid.

Three-quarters (75%) of the respondents who recognised this signal case by name were able to correctly identify the nature of the infraction as underpayment of wages. However, far fewer respondents recalled the sanctions imposed against La Porchetta. More than half of these respondents (57%) did not know what sanctions were imposed on the La Porchetta franchisees. Of those respondents who recognised the signal case, 15% believed that the employer companies were only required to pay compensation for backpay (and no penalty was levied). While 10% thought a financial penalty of some sort was imposed, there was a level of confusion about who was being penalised. Almost an equal proportion of respondents thought that, in addition to backpay orders, a penalty was imposed against the employer entity, but no individual was fined (6%), or conversely, that the responsible individual was fined, but not the company (5%). Only a small percentage correctly identified that a penalty was imposed against both the company and an individual behind the company, in addition to compensation orders (5%).[83] The fact that only a relatively small proportion of respondents appreciated that, in both of the signal cases, the individual director faced a penalty (separate from the company) is somewhat surprising in light of the fact that the FWO pursues individual accessories in the vast majority of its civil remedy litigation.[84] The existing literature suggests that the threat of individual penalties are potentially more powerful in provoking positive changes in the compliance behaviour of the firm. Given this, the survey results suggest that to amplify the general deterrence message, more needs to be done to promote public awareness of penalties imposed against individuals.[85]

Even fewer of the respondents were aware of how the FWO dealt with the head franchisor of La Porchetta, with 92% of respondents, including a La Porchetta franchisee, not aware that the FWO had entered into a proactive compliance deed with the franchisor. While enforceable undertakings and proactive compliance deeds are generally seen as sound ways in which to build and sustain compliance commitment in complex business networks,[86] the lack of awareness and understanding of these instruments within the broader regulated community suggests that they are presently delivering limited (if any) general deterrence effects.

2 *House of Colour Signal Case*

We expected that there would be lower levels of awareness of the House of Colour signal case overall, given the higher profile of the La Porchetta restaurant franchise, the smaller underpayment involved in this case and the fact that the court did not publish any written reasons in this instance. This was confirmed by the survey results, with around 13% of respondents aware of the case (10% unprompted, 3%

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83 See Part III above for discussion of the orders made in the La Porchetta case.

84 For example, in 2014–15 (the financial year in which the survey took place), a total of 33 matters were decided in court. Of these, 26 (79%) involved an accessory (ie a person other than the employer who was found to be involved in the contravention, such as a director). Combined, the court ordered total penalties of $1 909 093 in relation to the matters determined in this period. This included $571 889 against the relevant individual accessories (ie over a quarter of the total penalties were imposed against persons other than the employer entity). See FWO, *Annual Report 2014–15*, 34.

85 Gunningham, above n 13.

86 For further discussion of the regulatory value of these mechanisms, see Hardy and Howe (2013), above n 42; Hardy and Howe (2015), above n 42.

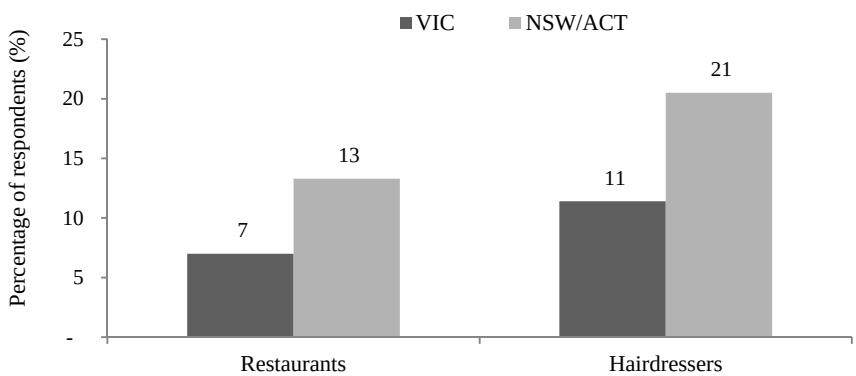
prompted). We also expected that awareness would be higher in NSW, where the case was located and, again, this was confirmed by the survey results, with 17% of NSW respondents aware of it compared to 9% in Victoria.

Similar to the first signal case, we also found a strong industry effect, with recall of the 'House of Colour' case highest among hairdresser respondents, and again, particularly in NSW (see Figure 4 below). Together, our results from the two signal cases indicate that there are industry-specific and geographic-specific effects, at least on levels of knowledge and awareness among respondents. The more difficult question, in the context of a study of deterrence, is whether, and to what extent, this knowledge and awareness affects risk perception and compliance responses in the select industries in the way predicted by Weil.

Around two-thirds (67%) of those respondents aware of this case by name correctly identified underpayment as the focus of the litigation, but like the La Porchetta case, a significant proportion of respondents identified a range of other issues that were not directly pursued in this case, such as superannuation. None of the respondents who were aware of the House of Colour case identified failure to comply with a compliance notice as a relevant form of wrongdoing — even though this was a fairly distinctive feature of this case and was emphasised in the relevant press releases. It seems that information about regulatory tools that are novel are simply ignored by businesses, or not absorbed in any meaningful way.

Respondents here were also very uncertain of the sanctions imposed on the House of Colour business and associates. Less than 20% of respondents were aware penalties had been imposed in addition to backpay, with 13% unable to elaborate on the details of penalties. Almost three-quarters (72%) did not know what action was taken. In relation to House of Colour, there was even less recognition that individuals behind the corporation may have been penalised (less than 5% identified this as a possibility).

Figure 4: Awareness of 'House of Colour' signal case, by state and industry[87]



[87] Q16: Have you heard of (the 'House of Colour') case?
Q18: Do you recognise this case now?
Base: All main survey respondents (question not asked during the pilot), n=601.

D *Business Perceptions of Risk*

According to deterrence theories, business awareness of sanctions imposed for non-compliance will not necessarily alter their behavior if they do not think the risk of detection and punishment is high.[88] To test business perceptions of the risk of detection and punishment of non-compliance by the FWO, respondents were presented with a number of hypothetical situations regarding compliance with employment standards regulation. By using hypotheticals, we aimed to distance the issue of non-compliance from the respondents' own businesses. First, respondents were asked to assume there was a small business in the same industry that deliberately underpaid its workers by $5000 in the past 12 months. Respondents were then asked what they thought the chances were that the FWO would find out, with a range of possible responses suggested: highly unlikely, unlikely, 50/50, likely, or highly likely. If the respondent answered 'don't know', that response was recorded by the interviewer.

Almost half of respondents said that it would be either 'highly likely' (24%) or 'likely' (20%) that the FWO would find out about the breach. A further third of businesses (31%) believed that it would be a '50/50' chance whether or not such a business would be caught. Nevertheless, one in five respondents said that it was 'highly unlikely' (10%), or 'unlikely' (11%) that a business underpaying its workers would be detected by the FWO. Significantly more hairdressers (31%) think it is 'highly likely' that a business would be caught, relative to 21% of cafes/restaurants.

This finding — that 75% of respondents believed that the risk of detection by the FWO was 50/50 or higher — is very significant in a number of respects. First, it appears to overestimate the likelihood of detection, especially in those sectors characterised by high numbers of vulnerable employees, such as young and migrant workers. This feature normally has the effect of reducing the number of complaints made by employees.[89] Second, this finding seems to overrate the effectiveness of proactive detection measures, given that the number of audits undertaken by the FWO represents a very small slice of all businesses in operation at any given time. For example, in 2014–15, the financial year in which the survey took place, the FWO conducted 4 564 audits of employers across all industries and regions in Australia.[90] The total number of employer firms at this time was around 800 000, which means that less than 0.5% of businesses were audited in that period.

A higher proportion of respondents considered that if detected, a non-compliant business would be fined by a court: almost 70% said that this was 'highly likely' (39%) or 'likely' (29%). Again, these estimations appear to overstate the power and potency of the regulator given that the vast majority of claims brought before FWO are resolved on a voluntary basis without the commencement of court proceedings. In 2014–15, the FWO reported that it had received 25 000 workplace

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88 Christine Parker and Vibeke Lehmann Nielsen, 'How Much Does It Hurt? How Australian Businesses Think About the Costs and Gains of Compliance and Noncompliance with the *Trade Practices Act*?' (2008) 32(2) *Melbourne University Law Review* 554, 576.

89 David Weil and Amanda Pyles, 'Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace' (2005) 27(1) *Comparative Labor Law and Policy Journal* 59.

90 FWO, above n 84, 28.

disputes and 77% of these requests for assistance were finalised through internal 'dispute resolution' processes, which includes 'early intervention' strategies and formal mediation.[91] Indeed, as a result of resource constraints, enforcement litigation is reserved for a tiny fraction of the claims received in any given year. For example, in 2014–15, the FWO initiated 50 civil litigation proceedings — that is, around 0.2% of all claims received by the regulator ultimately reached the courts.[92]

However, in relation to the seriousness of the sanction, the majority of respondents (41%) thought that the fine would be between $1000 and $9999 and 31% estimated that it would be between $10 000 and $100 000. Only 1% believed that it would be more than $100 000. This represents a significant underestimation of the quantum of penalties awarded by courts in cases brought by the FWO. In a separate study, we assessed that the average penalty imposed on corporate employers in the financial year from 2007–08 to 2011–12 has been in excess of $30 000 in each financial year.[93] Since the conclusion of that study, courts have routinely been awarding significant penalties against employer entities.[94] By way of illustration, in the House of Colour litigation, penalties totalling $142 000 were awarded against the relevant employer entities, which is especially severe in light of the fact that the total underpayments were just over $6000.

In relation to the target of the sanctions, we asked respondents to estimate the chances that an individual (such as a director, or a human resources ('HR') manager) would be fined if the company was found out by the FWO. While most businesses did not have a high level of knowledge or awareness of an individual being fined in the signal cases (or the FWO's litigation activities generally), in the context of this hypothetical, more than half of the respondents predicted that it was 'highly likely' (28%) or 'likely' (28%) that an individual would be fined by a court in these circumstances. As noted earlier, these predictions more closely reflect the reality — that individual accessories are named and penalised in the vast majority of litigation matters initiated by the FWO.

We also sought to explore the connection (if any) between the respondents' awareness of the FWO's enforcement activities and their perception of the risks associated with detection and sanction (see Figure 5 below). Our results in this respect are surprising and run counter to the theoretical predictions of classical deterrence theory. We would expect to see that those who have greater awareness of the FWO's enforcement activities (for example, civil remedy litigation, EUs, targeted campaigns and signal cases) to have an increased perception of risk of detection and sanction. But what we found was the complete reverse. Those who were most aware of the FWO's enforcement activities, thought it highly unlikely (18%) or unlikely (22%) that the FWO would find out. Comparatively, those who were least aware of the FWO's enforcement activities, thought it highly likely (27%) that the FWO would find out.

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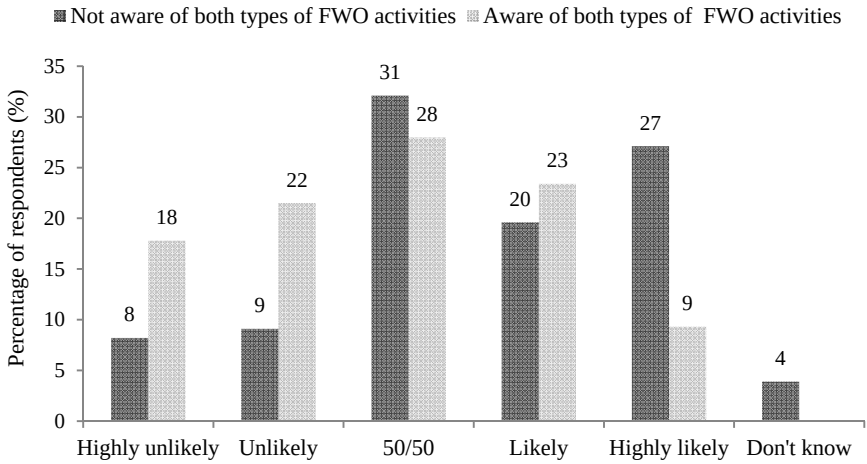
91 Ibid 21.
92 Ibid 33.
93 Hardy, Howe and Cooney, above n 10.
94 In 2014–15, the average amount of penalties awarded in cases finalised in that period was around $72 000: FWO, above n 84, 36.

Figure 5: Awareness of FWO enforcement activities and perceptions of risk of detection



Upon closer examination, the results continued to confound predictions. For example, we would expect that those who were aware of targeted campaigns would perceive that the risks of detection were higher (than those who were not so aware). But again, what we found was precisely the opposite. Those aware of targeted campaigns were more likely, on average, to think it was 'unlikely' (23%) or 'very unlikely' (14%) that the FWO would find out about a $5000 underpayment, as compared to those that were not aware of these campaigns (9% and 9%, respectively).

Responses to FWO Enforcement Activities

As noted earlier, we were also interested in the relationship (if any) between knowledge of the FWO enforcement activities and perceptions of risk on the the compliance motivations and subsequent behaviour of the relevant business. Respondents who were aware of any of the FWO's enforcement interventions were asked if they had responded in any of the following ways:

(a) by reviewing your systems to make sure that they comply with Australian work law;

(b) by changing your procedures to ensure that you comply with the laws relating to minimum wages and entitlements (such as leave and termination entitlements);

(c) by seeking external advice (for example, from a legal or HR professional);

(d) by increasing the resources devoted to HR; and/or

(e) in some other way (specify).

If respondents answered that they had taken no action or did not know, that was recorded. Of the respondents that had heard about the FWO's enforcement activities (any or all of the targeted campaigns, EUs, litigation or signal cases), more

than half (62%) had taken no action as a direct result (see Table 2 below). The majority of these businesses (88%) were confident that their business was already compliant with Australian workplace law. This finding seems to confirm the 'reassurance function' of general deterrence messages — that the significance of litigation lies not necessarily in the threat they signal, but the reassurance they provide to employers that have incurred costs to ensure compliance. In other words, 'penalizing the "bad apples" helps keep the "contingently good apples" good'.[95]

Where respondents had taken action in response to FWO activities, the most common actions were to review their systems to ensure compliance (25%) and to seek external advice such as from a legal or HR professional (18%). Around one-in-ten businesses (11%) had changed their procedures to ensure that they comply, after hearing about the FWO's activities. Table 2 below shows the proportion of businesses undertaking various actions subsequent to hearing about FWO activities.

These results suggest that the FWO's enforcement activities serve a significant reminder function for many businesses, causing them to check on their compliance processes. The fact that 27% of these businesses either sought external advice or increased HR resources suggests that their response to awareness was strong enough for them to incur costs in ensuring compliance.

Table 2: Action taken following awareness of FWO activities[96]

Action taken	**Total**
Reviewed systems to ensure they comply with Australian work law	25%
Sought external advice	18%
Changed procedures to ensure compliance with laws relating to minimum wages and entitlements	11%
Increased HR resources	9%
Joined/contacted employer association	1%
Spoke to employees	1%
Other	3%
Took no action	62%

Although few respondents reported that their business had changed behaviours specifically as a result of the FWO's enforcement activities, most said that they are influenced either very much (35%), or to some extent (23%) by the FWO's activities. This was further supported by the fact that a majority of

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95 Thornton, Gunningham and Kagan, above n 12, 266, citing Eugene Bardach and Robert A Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Transaction Publishers, revised ed, 2002).

96 Q21: After hearing about any of the ([campaigns] [enforceable undertakings] [litigation] by the Fair Work Ombudsman, did you respond in any of the following ways?
Base: All aware of campaigns/enforceable undertakings/litigation, n=360.

respondents (60%) were of the view that detecting non-compliance and imposing sanctions on non-complying employers was equally as important as providing information, education and advice to employers. There were no significant differences in opinion by industry, business size, state or location, indicating that this level of influence is perceived in a similar fashion across industries and geographic locations.

Reassurance also seemed to be a factor in firms' reactions to awareness of FWO activities more generally. As noted above, almost 90% of those respondents who took no action, did so because they were confident that they were already compliant with employment standards. However, a majority of respondents were of the view that other firms in their industry comply with workplace laws, due to FWO activities, to either a great (26%) or moderate extent (39%). Only 6% said that firms comply 'not at all' due to the FWO's oversight.

Figure 6: Extent other firms in industry take steps to ensure compliance due to FWO oversight[97]

Finally, on the relationship between perceived risk of detection and compliance action, we found a weak, positive association. Those who believed it was 'likely' or 'highly likely' that the FWO would find out about a $5000 underpayment (which was the hypothetical presented to the respondents) were more likely, on average, to have taken compliance action (than those who thought it was 'unlikely' or 'highly unlikely' that the FWO would detect this underpayment). This finding lends some support to previous research that has suggested it is not necessarily the number of proceedings, or the size of the sanctions imposed, that is critical; rather, it is 'the *belief* that duty holders have of the likelihood and degree of punishment, even if, in actual fact, that belief is overstated'.[98]

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97 Q34: To what extent do you believe firms in your industry take active steps to ensure workplace relations compliance because of the oversight of the Fair Work Ombudsman?
Base: All respondents, n=643.

98 Gunningham, above n 13, 389 (emphasis added).

V Analysis

As outlined above in Part II, classical deterrence theory is premised on three key assumptions: first, that regulated entities are likely to become aware of high profile enforcement litigation; second, this awareness increases perceived risks and expected costs associated with non-compliance; and third, this perception leads to overall improvements in compliance behaviour in the wider business community. Our findings support the growing line of socio-legal studies that have found 'employers do not gauge general deterrence in accordance with cost-benefit calculus presumed by traditional deterrence theory'.[99]

While business awareness of the existence of a government body ensuring compliance with employment standards regulation was very high (over 90% of respondents), there was far less awareness and recognition of the FWO, especially in metropolitan areas. The fact that a majority of respondents were unable to spontaneously recall the name of the FWO is not especially surprising given that the federal workplace inspectorate has been through several iterations in the past decade and renamed a number of times as a result (for example, it was previously known as the Office of Workplace Services, then the Office of the Workplace Ombudsman, before being named the Office of the Fair Work Ombudsman under the Fair Work legislative framework).[100] The regulator now has a very similar name to the industrial tribunal (the Fair Work Commission) and it is common for employers (and others) to conflate the two institutions, despite their distinct regulatory roles and notwithstanding numerous attempts made to distinguish the two.[101] The various developments since the survey was conducted in mid-2015 — including the swathe of underpayment scandals involving the 7-Eleven and Domino's Pizza franchise networks,[102] among others — may actually be positive for the FWO in so far that it has effectively raised community awareness of employer non-compliance and the FWO's distinct regulatory role in seeking to address this problem.

Although recall of the name of the regulator was relatively poor, almost one-third of respondents were able to identify either or all of the FWO's enforcement activities, albeit recollection of the relevant sanctions and outcomes was somewhat vague. Indeed, consistent with other studies of general deterrence, our findings revealed that firms' recollection of the quantum of civil penalties imposed against other employer businesses was generally imprecise and inaccurate. The fact that only 40% of all respondents indicated awareness of one or both of the signal cases, and, of those respondents, most did not correctly recall the relevant targets and ensuing outcomes, suggests 'a very significant degree of inattentiveness to information on

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99 Purse and Dorrian, above 8, 36.

100 For further discussion of this evolution, 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).

101 See, eg, FWO, *The Fair Work Commission and Us — What's the Difference?* <http://www.fairwork.gov.au/about-us/our-role/the-fair-work-commission-and-us-whats-the-difference>.

102 See, eg, Sue Lannin, '7-Eleven and Fair Work Sign Deal to Combat Exploitation Using Biometrics, CCTV', *ABC News (The World Today)*, 7 December 2016; Mario Christodoulou, 'Fair Work Expands Investigation into Domino's Pizza', *The Sydney Morning Herald (Sydney)*, 31 May 2017.

penalties for non-compliance'.[103] There was even less knowledge and awareness of sanctions that had been imposed on third parties — such as civil penalties against individual directors (in the case of House of Colour) or the proactive compliance deed made with the franchisor (in the case of La Porchetta). While these types of enforcement mechanisms may serve other regulatory purposes (including specific deterrence and sustainable compliance respectively), they appear to do little in terms of general deterrence.

At the time when the survey took place (mid-2015), it seemed that employers did not make any special efforts to actively obtain or closely examine information relating to enforcement and sanctions — rather they were far more passive in acquiring this knowledge. This is aligned with previous socio-legal research that suggests

> managers in regulated firms do not resemble those pictured in the economic model of the firm, carefully calculating the probabilities of detection and the cost of legal sanctions to determine what they can get away with. Amidst the cacophony of information and urgent demands that business managers receive, the deterrence messages sent by legal penalties often do not get through or soon drift out of consciousness.[104]

This finding is noteworthy in that it seems to run counter to the idea that businesses are rational and calculative — if they cannot recall the target or amount of the penalty (that is, the potential costs), then they cannot weigh this up against the costs associated with compliance.

The lack of knowledge about the quantum of fines may also be a product of the fact that civil penalties in this area have historically been quite low and there is little capacity to seek criminal sanctions in this jurisdiction unlike other spheres of corporate and work regulation.[105] Even though the FWO has pursued individual accessories via enforcement litigation for some time, it is only recently (and after the survey was completed) that the FWO has sought to pursue underpayment orders against these individuals (in addition to pecuniary penalties).[106] The absence of sufficiently harsh and punitive sanctions may have had adverse effects on firms' knowledge and awareness of enforcement interventions.

As noted at the beginning of the article, civil penalties for 'serious contraventions' of the *FW Act* are about to be significantly increased as a result of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth). This may allow the regulator to seek severe fines against employers who deliberately or recklessly contravene prescribed employment standards. Previous studies suggest that harsher sanctions against egregious offenders have the power to 'penetrate the corporate consciousness in a way that other penalties do not'.[107] Only further research would reveal whether this holds true in this context. Certainly, the results

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103 Purse and Dorrian, above n 8, 32.

104 Kagan, Gunningham and Thornton, above n 30, 40.

105 But see *FW Act* ss 674–678 cf occupational health and safety regulation in Australia, such as the *Work Health and Safety Act 2011* (Cth) and the harmonised Work Health and Safety Acts passed in all Australian states except Victoria and Western Australia.

106 See, eg, *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd* [2016] FCCA 1482 (17 June 2016).

107 Hodges, above n 12, 142, citing Gunningham, Kagan and Thornton, above n 26.

of our survey suggest that the business community has limited insight into the nature, target and severity of the sanctions imposed under the current Fair Work framework.

In relation to the interplay between knowledge and risk perception, our findings were somewhat confounding. On the basis of classical deterrence theory, we expected to find that those with more knowledge of the FWO's activities would believe that there was more risk of detection and sanction. However, we found the opposite to be true. Those who knew more about the FWO's activities, appeared to fear them the least. What could be the reasons for this puzzling result? Could it be that those who are better informed about the nature of FWO's activities have a more realistic assessment of FWO's reach and scope (that is, the fact that the FWO has limited resources and conducts only a select number of audits, investigations and litigation matters in any given year)? And if so, does this have implications for their subsequent behaviour? Generally speaking, our data did not reveal any significant connection between increased risk perception and an enhanced compliance response — albeit there was a weak association between higher perceived risk of detection and a slightly greater propensity to take compliance action. This association could not be discerned with respect to perceived risks of the probability and severity of sanction. This finding may signal that in order to strengthen the power of deterrence and enhance compliance by this means, regulators should try to increase business' perceptions of the likelihood of being caught, rather than simply focusing on increasing penalties.[108] An alternative explanation for this unexpected result is simply that the archetype 'amoral calculator'[109] — who sought out knowledge of the costs and gains of compliance and adjusted their behaviour in order to reduce the compliance risks — did not participate in this survey. As noted in Part III, this is one of the inevitable challenges associated with undertaking a voluntary survey of this nature.

Although we found that levels of awareness concerning enforcement activities, including civil remedy litigation, were influenced by both geography and industry, we could not conclude that the FWO's enforcement activities have the likely 'ripple effects' predicted by Weil's model of strategic enforcement. Our analysis in this respect was foiled by our findings in relation to key assumptions underpinning deterrence — that is, greater knowledge of enforcement activities in the respondents' locality and sector did not necessarily translate to increased perceptions of risk or enhanced compliance responses in that particular region or industry.

However, even when FWO enforcement activities do not appear to be having a direct deterrent effect on deliberately non-compliant employer firms, our findings suggest that they may nevertheless be having a compliance impact. Even though there was no straightforward relationship between increased knowledge of enforcement activities and increased risk perception, the fact that almost half of businesses believed that it would be likely or highly likely that the FWO would detect business underpayment of workers, and that almost 70% felt that it was at least likely that underpayment would be penalised, provides insight into general

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[108] Parker and Nielsen, above n 7, 407.

[109] Robert A Kagan and John T Scholz 'The "Criminology of the Corporation" and Regulatory Enforcement Strategies' in Keith Hawkins and John M Thomas (eds), *Enforcing Regulation (*Kluwer-Nijhoff, 1984) 67, 67.

business perceptions of the regulatory capacity and influence of the FWO. Even though the constrained resources of the FWO mean that it can conduct audits of a small subsection of all employing businesses, and pursues litigation only in limited instances, the results suggest that the FWO is generally seen as much more powerful by the regulated community. This is a critical finding given that previous research has found that 'the perception of deterrence itself can make a significant difference to any deterrent effect, over and above that associated with the likelihood of detection of … offences and the imposition of sanctions'.[110]

Finally, while our results did not confirm that deterrence-based mechanisms function in the way predicted by theory, our survey findings supported the idea that many firms — who were already motivated to comply with the law — took knowledge of the FWO's enforcement activities as either reassurance that competitors who were not compliant would be detected and punished, or took the knowledge as a reminder to review their internal systems to ensure that they were compliant.

VI Conclusion

This study sought to investigate the extent to which regulatory enforcement actions taken by the FWO against non-compliant employers were achieving 'ripple effects' on employers not subject to any direct formal sanction. Our findings go some way to addressing the dearth of research on general deterrence in the context of employment standards regulation, but as we note below, there is more work to be done if we are to understand 'the salience and functions of general deterrence in regulatory settings'.[111]

The survey research supports the conclusions of earlier socio-legal work, which found that many of the assumptions underlying the concept of general deterrence tend to break down when tested in a systematic way. Our findings suggest that perceptions may be more important than reality when it comes to improving compliance using deterrence-based mechanisms. These results also indicate that the probability of detection may hold more regulatory potency than the severity of sanctions.[112] In particular, our results show that firms tend to have better awareness of targeted campaigns than litigation, and very little recollection of the quantum of penalties imposed by the courts and against whom. There also appears to be limited understanding and awareness of alternative compliance mechanisms, such as enforceable undertakings, proactive compliance deeds or compliance notices.

These findings are important in a number of respects. First, it signals that 'a greater emphasis on concentrated and sustained enforcement activity in the form of well-targeted campaigns may facilitate increased compliance'.[113] Second, it suggests if the FWO wishes to enhance the deterrence element associated with the use of novel compliance tools and strategies, it needs to reconsider how it currently presents and promotes these enforcement mechanisms to the wider business

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110 Purse and Dorrian, above n 8, 24.

111 Neil A Gunningham, Dorothy Thornton and Robert A Kagan, 'Motivating Management: Corporate Compliance in Environmental Protection' (2005) 27(2) *Law & Policy* 289, 290.

112 Parker and Nielsen, above n 7, 413.

113 Purse and Dorrian, above n 8, 36.

community. Indeed, a number of our findings suggests that understanding the regulatory effects of media — through traditional and new channels — is essential to understanding deterrence more generally. Media appears to be particularly critical where it is being used not to simply report on relevant facts (such as the number of audits undertaken in any given campaign), but is being deployed to actively shape business perceptions of the regulatory framework, including the FWO's steadfast commitment to enforcing the law.

Third, our survey results suggest that simply increasing the size of the penalties available under the *FW Act* may not necessarily enhance deterrence in the way expected. As others have cautioned: '[w]e must be wary of falling for the simple fairy tale that higher sanctions lead to greater compliance'.[114] In order to understand whether a substantial uplift in penalties is likely to increase the ripple effects of deterrence, further research is required to compare business perceptions and responses before and after higher penalties are introduced. Other critical developments since the survey period may also influence risk perception and compliance postures, including the huge groundswell in media interest and public awareness regarding worker exploitation and the FWO's overt commitment to addressing this problem in a strategic, and potentially coercive, way.

To the extent that our survey results underscore the need to better understand business motivations for compliance beyond calculative concerns, it is critical to conduct further research exploring how, and in what ways, key variables affect the regulatory power and influence of deterrence-based mechanisms, such as business size, firm history, market position and branding. It is evident from this study that compliance is not one-dimensional and cannot be simply explained in terms of a cost–benefit calculus.[115] Rather, it seems that regulation is mediated through a prism of fear, social and economic pressures and normative commitment to comply with the law.[116] While our findings do not support a simplistic model of deterrence, this is not to suggest that 'fear of legal punishment is unimportant in explaining compliance, or that lack of fear is unimportant in explaining noncompliance'.[117] Our research supports earlier work that concluded a sense of regulatory oversight and a perception of enforcement inevitability is essential to buttressing business commitment to compliance with employment standards regulation.

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114 Parker and Nielsen, above n 7, 415.
115 Purse and Dorrian, above n 8, 38.
116 Gunningham, Thornton and Kagan, above n 111, 313.
117 Kagan, Gunningham and Thornton, above n 30, 41.