# Compliance Defiance: Reviewing the Role of Deterrence in Employment Standards Enforcement

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## I Introduction

As the incidence of wage theft skyrockets around the world,[1] traditional legal frameworks and conventional enforcement strategies are under pressure. Underpayment of wages and entitlements – which has often been treated as a civil matter in many jurisdictions – is now being transformed into a criminal offence. Liability for wage theft contraventions – which has traditionally rested on the direct employer – is now being extended to a host of parties within and beyond the employing firm. Many jurisdictions – which have long relied on private mechanisms of enforcement – are expanding the role of the state enforcement apparatus. Notwithstanding these seismic changes, there remains a sense that the enforcement crisis is becoming ever more acute.[2] In many countries, including Australia, this situation has led to a call for more and greater deterrence in the context of employer non-compliance with labour law.

The debates over whether to punish or persuade are long-standing.[3] For the purposes of this paper, I accept that, in most regulatory encounters in the employment context, economic drivers are likely to be at play, and that deterrence can and should play an important role in an overall enforcement policy.[4] Nevertheless, questions over the proper place of deterrence continue to abound.[5] For example, do more severe penalties, such as criminal sanctions, provide the optimal, deterrent solution or can alternative tools, such as voluntary compliance agreements, deliver similar effects at higher speed and lower cost?[6] Is the deployment of non-

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[1] See, eg, Laurie Berg and Bassina Farbenblum, "Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey" (Research Report, November 2017); Andrea Noack, Leah Vosko and John Grundy, "Measuring Employment Standards Violations, Evasion and Erosion – Using a Telephone Survey" (2015) 70(1) *Relations Industrielles/Industrial Relations* 86; Nick Clark and Eva Herman, "Unpaid Britain: Wage Default in the British Labour Market" (Report, Middlesex University, November 2017)).

[2] Guy Davidov, *The Purposive Approach to Labour Law* (OUP, 2016) at 225.

[3] John Braithwaite, *To Punish or Persuade: The Enforcement of Coal Mine Safety* (SUNY Press, 1985). See also F Pearce and S Tombs, 'Ideology, Hegemony, and Empiricism: Compliance Theories of Regulation' (1990) 30 *British Journal of Criminology* 423; Keith Hawkins, 'Compliance Policy, Prosecution Policy, and Aunt Sally: A Comment on Pearce and Tombs' (1990) 30 *British Journal of Criminology* 444; 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.

[4] For an overview of different compliance motivations, see Christine Parker and Vibeke Lehmann Nielsen, 'Compliance: 14 Questions' in Peter Drahos (ed) *Regulatory Theory: Foundations and Applications* (ANU Press, 2017). See also Guy Davidov, 'The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions' (2010) 26 *International Journal of Comparative Labour Law and Industrial Relations* 61.

[5] For discussion of some of the key features of this debate, see Eric Tucker et al, 'Carrying Little Sticks: Is There a "Deterrence Gap" in Employment Standards Enforcement in Ontario, Canada?' (2019) 35 *International Journal of Comparative Labour Law* 1; Leah Vosko et al, 'The Compliance Model of Employment Standards Enforcement: An Evidence-based Assessment of Its Efficacy in Instances of Wage Theft' (2017) 48 *Journal of Industrial Relations* 256.

[6] Janice Fine, Daniel Galvin, Jenn Round and Hana Shepherd, 'Maintaining Effective US Labour Standards Enforcement through the Coronavirus Recession' (Report, Washington Centre for Equitable Growth, September 2020), at 29.

punitive sanctions in response to corporate wrongdoing illegitimate or inappropriate?[7] Which actors are most likely to positively respond to deterrent-based interventions, or are best placed to amplify the deterrent effects? And how should a deterrence-based strategy be designed and delivered to maximise the ripple effects, but minimise any counterproductive impacts?[8]

Deterrence sits at the intersection of criminology and regulation and governance, as such, this paper begins by locating the concept of deterrence by first describing orthodox deterrence theory, before considering the extent to which deterrence principles are reflected in some of the most well-known models of employment standards enforcement, including responsive regulation and strategic enforcement. It then examines empirical research which seeks to test the regulatory power and potential of various deterrence-based mechanisms, including criminal prosecution, civil litigation, investigations and administrative sanctions.

This paper argues that to better address the problem of compliance defiance, one must move away from the assumption that increasing the severity of the sanction will 'supercharge'[9] deterrence in and of itself. Drawing on the preceding analysis, Part IV of this paper considers recent developments, and proposed reforms, in Australia to explore paths to possible expansion of the concept of deterrence, and innovative ways in which to shift the relevant compliance calculus.

## II Conceptualisations of Deterrence in Employment Standards Enforcement

In an article of this size it is not possible to survey all relevant enforcement strategies.[10] Instead, this section begins with a summary of orthodox deterrence theory. It then canvasses two enforcement models that have held particular sway in relation to employment standards enforcement in Australia, namely: Ayres and Braithwaite's model of responsive regulation (and its variants); and Weil's model of strategic enforcement. Although these theories are designed to address a wide breadth of compliance and enforcement challenges, the following analysis focuses on the extent to which these models embrace or eschew deterrence.

### a) Orthodox Deterrence Theory

Under classical deterrence theory, it is assumed that regulated actors, including corporations, are rational, amoral and act only in their self-interest.[11] The primary purpose of punitive sanctions is to provide a countervailing force which undermines any financial gain to be made

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[7] Pearce and Tombs have argued that allowing for 'softer sanctions' to be used in the context of white collar crime is unjustifiable as it treats these infractions as morally and qualitatively different from more traditional crimes. See, eg, Pearce and Tombs, above n. 3. A counterargument is that many 'traditional crimes' are now attract only civil penalties. See Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184.

[8] Robert Kagan, *Adversarial Legalism: The American Way of Law* (2001).

[9] Caron Beaton-Wells and Christine Parker, 'Justifying Criminal Sanctions for Cartel Conduct: A Hard Case' (2013) 1(1) *Journal of Antitrust Enforcement* 198, at 215.

[10] Such strategies that fall outside the scope of this chapter include root-based regulation; co-enforcement; risk-based regulation, meta-regulation, regulatory intermediary theory and nudge theory, amongst many others. For a recent overview of some of these theories, see Michael Piore and Andrew Schrank, *Root-Cause Regulation: Protecting Work and Workers in the 21st Century* (Harvard University Press, 2018); Matthew Amengual and Janice Fine, 'Co-Enforcing Labour Standards: The Unique Contributions of State and Worker Organisations in Argentina and the United States' (2016) 11(2) *Regulation & Governance* 129; Florentin Blanc, *From Chasing Violations to Managing Risks: Origins, Challenges and Evolutions in Regulatory Inspections* (Edward Elgar, 2018).

[11] S Tombs and D Whyte, *Safety Crimes* (Willan Publishing, 2007); S Tombs and D Whyte, 'The Corporate Criminal: Why Corporations Must Be Abolished' (Routledge, 2015); Robert Kagan and John Scholz, 'The "Criminology of the Corporation" and Regulatory Enforcement Strategies' in Keith Hawkins and Peter Manning (eds), *Enforcing Regulation* (Kluwer, 1984) 51.

through rule-breaking behaviour.[12] Actors make decisions to change (or not change) their behaviour based on the perceived costs of legal punishment,[13] which is shaped by three deterrence variables, namely the certainty, severity and celerity of sanction.[14] To achieve both specific and general deterrence, the probability of violation detection,[15] and the expected size and swiftness of the penalty, must be such that it is not economically rational to defy the law.[16] This idea is routinely reflected in many sentencing decisions relating to corporate wrongdoing. For example, in a recent underpayment case in Australia, the judge observed:

> Of paramount concern is the need to ensure that the quantum of penalties is such as to act as both a deterrence to those now before the Court and as a deterrence to others. The quantum of the penalties to be imposed has to be such that they are not seen as simply the "*cost of doing business*"...[17]

A deterrence strategy, at least in its pure form,[18] is openly accusatory and adversarial.[19] It is often perceived as being focused on punishment, rather than prevention.[20] In this regard, it envisages and entrenches a clear separation between regulated actors and inspectors. Regulatory conversations which may enhance or sustain compliance – such as specific advice on how compliance should be achieved now and into the future – are not generally condoned. Rather, cooperation, negotiation and flexibility are broadly perceived as counterproductive. They not only risk regulatory capture, but they have the potential to undermine future investigations and litigation and may weaken the deterrence signal to the broader community of duty-holders.[21] Administrative sanctions and the use of alternatives to prosecution are similarly viewed with a level of cynicism as they may undermine the credibility of the regulator.[22]

While these accounts of deterrence continue to hold political salience and public appeal, they have been subject to sustained critique. For example, an accurate cost/benefit analysis will

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[12] Fiona Haines and Alan, 'The Law and Order Debate in Occupational Health and Safety' (2004) 20 *Journal of Occupational Health and Safety: Australia and New Zealand* 263.

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

[14] Where punishment is delayed or uncertain, actors may engage in a process of 'time discounting – a tendency to 'discount' the likelihood or detriment associated with future events. Ibid, at 822.

[15] The probability of violation detection is a function of the probability of inspection combined with the probability that the inspection will uncover violations. See David Weil, 'Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage' (2005) 58(2) *Industrial and Labour Relations Review* 238, at 240.

[16] G Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 *Journal of Political Economy* 169; GJ Stigler, 'The Theory of Economic Regulation' (1971) *Bell Journal of Economics and Management Science* 3; Orley Ashenfelter & Robert Smith, 'Compliance with the Minimum Wage Law' (1979) 87 *Journal of Political Economy* 333; Yang-Ming Chang & Isaac Ehrlich, 'On the Economics of Compliance with the Minimum Wage Law' (1985) 94 *Journal of Political Economy* 83; Gideon Yaniv, 'Minimum Wage Noncompliance and the Employment Decision' (2001) 19 *Journal of Labour Economics* 596.

[17] *Fair Work Ombudsman v HSCC Pty Ltd* [2020] FCA 655 (18 May 2020) (Flick J). Specific and general deterrence are not expressly stipulated as a relevant consideration for sentencing under the FW Act, but are generally identified as a key sentencing objective in penalty decisions.

[18] A purely deterrence-based strategy is unlikely to be found in its pure form in practice. Neil Gunningham, 'Strategising Compliance and Enforcement: Responsive Regulation and Beyond' in Christine Parker and Vibeke Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011) 199, 201.

[19] Neil Gunningham, 'Compliance, Deterrence and Beyond' in Lee Paddock (ed), *Compliance and Enforcement in Environmental Law* (Edward Elgar, 2015), at 3.

[20] Keith Hawkins, *Environment and Enforcement* (OUP, 1984), at 4.

[21] Cameron Holley and Darren Sinclair, 'Enforcement Strategies: Inspection, Targeting and Escalation' in Lee Paddock (ed), *Compliance and Enforcement in Environmental Law* (Edward Elgar, 2015), at 104-5.

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

rarely be feasible in practice as firms often pay little attention to penalty information and individuals frequently underestimate their chances of getting caught.[23] Moreover, compliance decisions are far from informed or rational.[24] Another flaw with a deterrent-based strategy is that of conflicting norms. Short explains that:

> Since its inception, deterrence theory has assumed a clear dichotomy between right and wrong, compliance and transgression, cooperation and defection. On one side of the deterrence equation is conformance with collectively articulated norms; on the other is the pursuit of naked self-interest.[25]

However, as Short points out, this dichomotous view of regulatory behaviour fails to account for normative multiplicity. Indeed, human actors within corporations – who are ultimately responsible for making compliance decisions – may have individual interests which conflict with those of the corporation.[26] Conflicting norms muddies the motivational waters in that it makes it challenging to identify the 'right' course of action. It also reduces the saliency of sanctions given that: 'the most exquisitely designed and implemented deterrence regime cannot reach behaviour that eschews cost-benefit calculation.'[27] Instead, there is a need to consider the individuals within the corporation to ensure that they are deterred, as well as adequately supervised. There is also an imperative to address internal incentives directed towards norm change.

The threat, or actual imposition of sanctions, may trigger unhelpful behaviours, such as obfuscation and cover-ups.[28] There is no guarantee that the imposition of penalties will change compliance behaviour, particularly where duty-holders are able to pass on the costs of the non-compliance to consumers or shareholders or otherwise render themselves judgment-proof.[29] Moreover, the imposition of harsh sanctions, such as criminalisation, may fail to ultimately address 'the root of power dynamics which may lead to exploitation.'[30]

In practice, deterrence-based strategies are very resource-intensive. When inspectorate funding is limited, it is very difficult to routinely detect contraventions and rigorously enforce regulation.[31] Indeed, in those jurisdictions where underpayment contraventions already constitute a criminal offence,[32] the data suggests that prosecutions of non-compliant

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[23] Christine Jolls, Cass Sunstein and Richard Thaler, 'A Behavioral Approach to Law and Economics' (1988) 50 *Stanford Law Review* 1471, at 1476–77; Jennifer Lee and Annie Smith, 'Regulating Wage Theft' (2019) 94 *Washington Law Review* 759, at 797.

[24] Paul Robinson and John Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 *Oxford Journal of Legal Studies* 173, at 179-97.

[25] Jodi Short, 'Competing Normative Frameworks and the Limits of Deterrence Theory' (2013) 38 *Law & Social Inquiry* 493, at 501; Paternoster, above n. 13.

[26] See, eg, John C Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 *Michigan Law Review* 386, 393–4. See also generally Christopher Hodges and Ruth Steinholtz, *Ethical Business Practice and Regulation: A Behavioural and Values-Based Approach to Compliance and Enforcement* (Hart Publishing, 2017).

[27] Short, above n. 25, at 505.

[28] Christine Parker and Vibeke Nielsen, 'Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation' (2011) 56(2) *The Antitrust Bulletin* 377, at 383.

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

[30] Jennifer Collins, 'Exploitation of Persons and the Limits of the Criminal Law' (2017) 3 *Criminal Law Review* 169. See also Mirko Bagaric and Theo Alexander, '(Marginal) General Deterrence Doesn't Work – and What It Means for Sentencing' (2011) 35 *Criminal Law Journal* 269.

[31] Holley and Sinclair (2018), above n. 21, 104-5.

[32] For example, the Employment Standards Act (2000), which prescribes minimum wages and hours regulation in Ontario, Canada, makes it offence to contravene the act or its regulations, or to fail to comply with an order or direction issues by an inspector. Individuals are liable to be fined up to CAD 50,000 or imprisoned up to 12 months. Corporations are liable to be

employers are 'extremely rare'.[33] In addition, in many jurisdictions, employers who are caught underpaying their employees, are often only required to rectify the underpayment. Hallett points out: 'With millions of noncomplying employers in the country, the odds of getting convicted for committing wage theft are similar to the odds of getting hit by lightning—in other words, not high enough to change anyone's behaviour.'[34]

To compensate for the low risk of discovery and enforcement, deterrence theorists argue that the quantum of fines must be many times the amount to be gained from the wrongdoing.[35] However, it has been observed that very large, 'optimally' deterrent fines may lead to a 'deterrence trap' – where the size of the penalty is too onerous for an organisation to bear, and regulators and courts are reluctant to pursue or impose financial penalties that may lead to innocent employees and investors losing their jobs and savings.[36] These concerns are likely to be heightened in the current economic climate when businesses are already buckling under the financial strain associated with COVID-19.

### b) Responsive Regulation (and its Variants)

Responsive regulation was developed, at least in part, to address the fact that regulators 'rarely have the resources to detect, prove, and punish cheating with sufficient consistency for it to be economically rational not to cheat.'[37] The enforcement pyramid – the most renowned, and maligned, element of responsive regulation – is premised on the idea that there is a spectrum of compliance motivations. Given this, 'regulators should not rush to law enforcement solutions to problems before considering a range of approaches that support capacity-building'.[38] Instead, it advocates for a regulatory mix of tools to be applied in a ordered manner according to their coercive backing, relative formality and underlying expense.[39]

While the concept of pyramidal enforcement has been influential, there have also been many critics. One recurring theme is that a graduated or accommodative response may not be suitable or effective in all situations, particularly where inspections are less frequent or intense.[40] Vosko, Grundy and Thomas have pointed out that an over-reliance on 'soft law'

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fined up to CAD 100,000 for a first offence, CAD 250,000 for a second offence and CAD 500,000 for a third or subsequent offence. Offences under the ESA are prosecuted under Part III of the *Provincial Offences Act*. In addition, under the federal *Criminal Code of Canada* (1985), it is a criminal offence to intentionally falsify an employment record by any means. See Eric Tucker, 'When Wage Theft Was a Crime in Canada, 1935-1955: The Challenge of Using the Master's Tools Against the Master' (2017) 54 *Osgoode Hall Law Journal* 933. Similarly, the Fair Labor Standards Act of 1938 29 U.S.C. § 203 provides for criminal prosecution for willful violations of federal wage and hour laws. A conviction can result in a fine of not more than $10,000, imprisonment of up to six months, or both (albeit imprisonment is only available upon the second conviction).

[33] Tucker et al, above n. 5, at 26. In the United Kingdom, there have only been 14 prosecutions since the introduction of the *National Minimum Wage Act 1998* (see David Metcalf, Director of Labour Market Enforcement, 'United Kingdom Labour Market Enforcement Annual Report 2017/18' (March 2019) 19). Similarly, in the US, a previous study found that in a two year period only eleven wage theft prosecutions occurred in the entire country (see *Winning Wage Justice: A Summary of Criminal Prosecutions of Wage Theft in the United States* (Report, National Employment Law Project, 2013).

[34] Nicole Hallett, 'The Problem of Wage Theft' (2018) 37 *Yale Law and Policy Review* 108. See also Nat'l Emp. Law Project, Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft 17 (2011).

[35] Ashenfelter and Smith, above n. 52, at 336.

[36] Beaton-Wells and Parker, above n. 9, at 204; Christine Parker, 'The ''Compliance Trap'': The Moral Message in Responsive Regulatory Enforcement' (2006) 40 *Law & Society Review* 591. See also Stephen Lee, 'Policing Wage Theft in the Day Labor Market' (2014) 4 *University of California Irvine Law Review* 655, at 657–58 (2014)

[37] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP, 1992), at 96.

[38] John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 *UBC Law Review* 475, at 480.

[39] Karen Yeung, 'Better Regulation, Administrative Sanctions and Constitutional Values' (2013) 33 *Legal Studies* 312, at 324-5.

[40] See generally John Braithwaite, 'Relational Republican Regulation' (2013) 7 *Regulation & Governance* 124, 124; Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: System and Sanctions* (OUP, 1999) 123–9.

mechanisms may run the risk of exacerbating rather than mitigating the enforcement crisis.[41] Davidov has similarly noted: 'when dealing with minimum wage violations…where the law is usually clear and the harm is severe, persuasion or warnings are hardly sufficient.'[42] More generally, Baldwin and Black have observed that 'tit-for-tat strategies may not be effective where the compliance behaviour is shaped less by the regulator's interventions, and more by corporate cultures or economic pressures.'[43]

Braithwaite himself has acknowledged that moving up and down the pyramid may not be straightforward in practice. Notwithstanding these difficulties, Braithwaite still believes that ordering strategies in a hierarchical way is important in that the initial deployment of 'softer' forms of social control later legitimises the regulator's use of more coercive sanctions. This has positive compliance effects in that regulation which is perceived as more procedurally fair has the tendency to strengthen commitments to comply.[44] It also minimises the risk of regulatory resistance on the part of firms that have sought to comply in good faith.[45] In this respect, Kingsford-Smith observes that:

> Responsive regulation champions internalisation because long-term internalisation is the more important matter in almost any domain of social control because it is usually impossible for society to organise its resources so that rewards and punishments await every act of compliance or non-compliance.[46]

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

### c) Strategic Enforcement

The model of strategic enforcement broadly aims 'to use the limited enforcement resources available to a regulatory agency to protect workers as proscribed by laws by changing

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[41] Leah Vosko, John Grundy and Mark Thomas, 'Challenging New Governance: Evaluating New Approaches to Employment Standards Enforcement in Common Law Jurisdictions' (2016) 37(2) *Economic and Industrial Democracy* 373, at 375.

[42] Davidov (2016), above n. 2, at 243-4.

[43] Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 72 *Modern Law Review* 59, 62-3. This weakness has also been recognised by Weil and the strategic enforcement model is consciously designed to respond to this issue.

[44] Kristina Murphy, 'Turning Defiance into Compliance with Procedural Justice: Understanding Reactions to Regulatory Encounters Through Motivational Posturing' (2014) 10 *Regulation & Governance* 93; Tom Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283; Valerie Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy* (Edward Elgar, 2009).

[45] John Braithwaite, 'Restorative Justice and Responsive Regulation: The Question of Evidence' (RegNet Research Papers No 51, Regulatory Institutions Network, 2016). See also S Shapiro and R Rabinowitz, 'Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA' (1997) 14 *Administrative Law Review* 713.

[46] Kingsford-Smith, Dimity, 'A Harder Nut to Crack? Responsive Regulation in the Financial Services Sector' (2011) 44 *University of British Columbia Law Review* 695, at 702.

[47] Ayres and Braithwaite, above n. 37, at 96.

[48] Ibid.

employer behaviour in a sustainable way.'[49] While there are some parallels between responsive regulation and strategic enforcement, there are also very sharp differences.[50]

The first important distinction is that strategic enforcement focuses on the institutional setting and systemic pressures that drive employer non-compliance and places much less emphasis on the compliance posture of isolated firms or individual executives.[51] More specifically, Weil argues that:

> Enforcement and other strategies must seek to change compliance at the bottom of fissured industry structures, among lower- tiered employers, by focusing attention at the point where the incentives driving that behavior originate rather than where compliance problems are observed.[52]

In some ways, this proposition also reflects tenets of root-cause regulation,[53] in that this theory also pushes regulators to look beyond the immediate instance of non-compliance and focus instead on identifying and eliminating the compliance drivers 'that hide at the end of meandering and idiosyncratic causal chains.'[54] Rather than focusing on the compliance posture of the individual employer at the time of inspection, strategic enforcement is deliberately designed to act upon webs or networks of firms and shape market dynamics by shifting the regulatory gaze to the top of the business network.[55] This is essential to ensuring that enforcement has systemic rather than local effects.[56]

Second, strategic enforcement expressly contemplates how to enhance detection processes: a neglected aspect of the responsive regulation model. In Weil's view, following the trail of complaints is not only resource-intensive, it may misdirect resources away from the most vulnerable employees and the most egregious violations.[57] Instead of a reactive approach, labour inspectorates should triage incoming complaints and undertake sophisticated data analysis so as to proactively funnel investigation resources towards priority industries or localities.[58]

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[49] David Weil, 'Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change' (2018) 60(3) *Journal of Industrial Relations* 437, 437.

[50] David Weil, *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division* (May 2010).

[51] Tucker et al, above n. 5, at 5.

[52] 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), at 220.

[53] This is a somewhat contentious point given that root-cause regulation broadly eschews a deterrence-based approach. Nonetheless, it can be argued that, at least in this regard, strategic enforcement and root-cause regulation both share the desire to understand and address the full spectrum of compliance motivations and address symptoms rather than causes. Piore and Schrank, above n. 10, at 10.

[54] See Salo Coslovsky, 'Relational regulation in the Brazilian Ministério Publico: The Organizational Basis of Regulatory Responsiveness' (2011) 5 *Regulation and Governance* 70 at 71 (citing J MacDuffie, 'The Road to Root Cause: Problem-Solving at Three Auto-Assembly Plants' (1997) 43 *Management Science* 479).

[55] David Weil, 'Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters' (2007) 28 *Comparative Labour Law and Policy Journal* 125, at 139.

[56] David Weil, 'A Strategic Approach to Labour Inspection' (2008) 147 *International Labour Review* 349, at 356. See also David Weil, 'Enforcing Labour Standards in Fissured Workplaces – The US Experience' (2011) 22(2) *Economic and Labour Relations Review* 33.

[57] David Weil and Amanda Pyles, 'Why Complain? Complaints, Compliance and the Problem of Enforcement in the US Workplace' (2005) 27(1) *Comparative Labor Law and Policy Journal* 59, at 72-73.

[58] Industry prioritization generally involved an analysis of two criteria. First, an assessment of the prevalence of violations (i.e. the number of minimum wage violations per 100 workers) and the severity of those violations (i.e. the total amount of back wages owed per underpaid worker) in the relevant sector. Second, drawing on internal administrative data collected by WHD, the agency estimated the likelihood that the worker would (or would not) exercise their basic rights. Combining these two data sets enabled the WHD to prioritize those sectors where violations were significant and workers were unlikely to institute individual claims.

The third, and perhaps the most crucial difference in the context of this paper, is the way in which strategic enforcement elevates and expands the concept of deterrence. In contrast to responsive regulation, Weil does not believe that coercive mechanisms should be hidden or downplayed.[59] Instead, he argues that the deterrent impact of regulatory interventions should be factored into the planning, implementation and evaluation of all regulatory activities.[60]

While deterrence is a 'paramount'[61] element of the strategic enforcement model, it is somewhat surprising that the imposition of criminal sanctions or crushing fines is not a prominent feature. Instead, Weil promotes a notion of deterrence that goes beyond more traditional conceptions. In Weil's view, deterrent-based mechanisms draw power not just from the formal sanction which is imposed, but the adoption of more effective detection methods (e.g. directed investigations and private monitoring), as well as the business and reputational costs which flow from the relevant regulatory intervention.[62]

Upon assuming the role as head of WHD, Weil sought to implement the strategic enforcement model through a multi-pronged effort, including via deployment of proactive and forensic inspections, the use of all enforcement tools, employer and employee outreach, regulatory agreements and strategic communications.[63] In relation to the enforcement element, Weil recognised that the WHD had not fully utilised the tools that were already available under the Fair Labor Standards Act (***FLSA***). In particular, under the strategic enforcement model, the 'hot goods' provision was not just viewed as a punitive mechanism, but as a point of leverage to coerce lead firms to enter into regulatory agreements.[64] These voluntary agreements – which were often forged in the midst of enforcement litigation[65] – were designed to 'have broader and more lasting impacts than simply reaching a settlement with the parties.'[66]

While harnessing the power and resources of lead firms was important, Weil recognised that there was still a 'need to focus on bad actors in an industry.'[67] He explained that recidivist employers

> can play an outsized role in their sector by sending signals regarding the potential to flout standards to other employers that are similarly situated…More troubling, their actions may send signals even to compliant employers who may view their persistence as an indication of the lack of fairness of the regulatory system as a whole, leading to an erosion of the overall culture of compliance in an industry.[68]

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[59] Tucker et al, above n. 5.
[60] Weil (2010), above n. 50, at 16.
[61] David Weil, 'Improving Workplace Conditions through Strategic Enforcement: The US Experience' in Leah Vosko et al (eds), *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (University of Toronto Press, 2020), at 268.
[62] Roberto Pires, 'Promoting Sustainable Compliance: Styles of Labour Inspection and Compliance Outcomes in Brazil' (2008) 147 *International Labour Review* 199, 223.
[63] Weil (2018), above n. 49.
[64] This tool provides the WHD with the power to stop the movement or acceptance of the delivery of goods by contractors, manufacturers and retailers where there is evidence to suggest that the producer of the goods has committed significant wage and hour violations.
[65] In addition, there were instances where lead firms entered into voluntary compliance agreements outside of litigation – partly because the WHD may have struggled to assert that the lead firm had legal liability as a joint employer. The 2016 agreement with Subway was one notable example of this type of agreement. Weil (2020), above n. 61, at 270.
[66] As discussed below, these compliance agreements mimic many features of voluntary agreements used in Australia in that they generally required firms to put in place a range of measures, including: appointment of a dedicated compliance officer; provisions of training for key personnel; internal and confidential complaint mechanisms for employees; and third party monitoring systems to supervise compliance of firms in the broader business network. Weil (2020), above n. 61, at 270.
[67] Weil (2014), above n. 52, at 237.
[68] Ibid.

To curb non-compliance occurring at this level, Weil pushed for routine assessment and imposition of civil monetary penalties against wrongdoers, particularly those who had shown a repeated, wilful or serious failure to comply with the law.[69] Similarly, an award of liquidated damages (which is paid directly to workers rather than the state) was seen to provide a dual benefit of better compensating workers for lost wages and interest, and better motivating employers to change future behaviour via enhanced economic incentives. In relation to all enforcement tools, outcomes were promoted publicly in an attempt to put employers on notice that the costs of violating employment standards was not worth the potential gains.

### d) Points of Tension and Overlap

While there are some important differences between responsive regulation and strategic enforcement, there are also several areas of overlap. These intersections potentially point to 'some possible paths to combination and cross-fertilization',[70] which is especially relevant in Australia given that the federal inspectorate has adopted somewhat of a hybrid approach. First, both models recognize that 'context counts'[71] and that an effective regulatory response must be tailored to the particular contours and characteristics of the relevant individual, firm and/or industry.

A second parallel is that both models believe that a 'regulatory mix' of tools should be applied and that regulators must avoid a narrow, command-and-control approach. While deterrence is a prominent feature of strategic enforcement, it is conceived far more broadly than orthodox economic theory would suggest. Rather than shun administrative sanctions and negotiated agreements, the strategic enforcement model embraces them. It is arguable that under both responsive regulation and strategic enforcement the threat of harsh sanctions, such as license revocation, preventing the shipment of goods, or criminal sanctions, are used to coerce recalcitrant to enter into voluntary agreements, such as enforceable undertakings or enhanced compliance agreements. While the deterrence effects of these voluntary instruments are somewhat obscured, it is generally agreed that these tools are important in addressing past wrongdoing and creating a platform for future compliance.[72] According to Weil, the model of strategic enforcement is not just about achieving the agency's policy objectives, but it also 'represents a mindset for organisational management'.[73]

## III Deterrence in Practice: What Works?

Although the general concept of deterrence has been well-studied, much of the empirical research has been concerned with deterrence of traditional crimes, as opposed to white collar crime.[74] Even less research has sought to test the saliency of deterrence in the context of employment standards regulation. Furthermore, the scope and methodology of many of these studies are distinct and are often seeking to test different forms of deterrence[75] in relation to different violations and different targets.[76] Nonetheless, this short survey of the

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[69] Weil (2020), above n. 61, at 268

[70] Janice Fine and Tim Bartley, 'Raising the Floor: New Directions in Public and Private Enforcement of Labor Standards in the United States' (2018) 61(2) *Journal of Industrial Relations* 252, at 255.

[71] Holley and Sinclair, above n. 21, at 108.

[72] Weil (2018), above n. 49, 448–9.

[73] Ibid.

[74] Samuel Buell, 'The Blaming Function of Entity Criminal Liability' (2006) 81 *Indiana Law Journal* 473.

[75] Categories previously used by researchers include: specific and general deterrence; explicit and implicit forms of general deterrence; and absolute or marginal general deterrence.

[76] Natalie Schell-Busey et al, 'What Works: A Systematic Review of Corporate Crime Deterrence' (2016) *15 Criminology and Public* Policy 387, at 391.

empirical deterrence terrain provides some critical insights into, and tensions between, the complexities of delivering deterrence on the ground.

One of the most recent and relevant studies is Galvin's analysis of state-based wage theft legislation in the United States (***US***).[77] In his analysis, Galvin found that most wage theft laws passed in the US in the past decade had no statistical effect on the rates of wage theft, with one notable exception.[78] In states that had implemented the strongest penalties – which allowed regulators to impose treble damages directly against contravening employers – there had been a statistically significant decline in the incidence of wage theft.[79] Similarly, a study by Simpson and Koper in the context of competition regulation found that dramatic shifts in law (e.g. changing an offence from a misdemeanor to a felony) led to a decline in recidivism.[80]

Galvin's findings are undoubtedly significant, but must be treated with some caution. For a start, it is unclear to what extent changes in the law alone would have the same deterrence effects outside of the US.[81] The long history of significant adversarial enforcement in the US, combined with a strong tradition of the rule of law,[82] may mean that 'implicit general deterrence'[83] has greater salience in that jurisdiction, as compared to others. Thornton et al hypothesise that for many US firms 'simply learning about the applicable regulatory requirement evokes some perceived threat (plus a felt legal obligation), inducing it to increase its compliance-related efforts.'[84]

Overall, the weight of empirical deterrence research has found that the factors that make the most difference to a firm's assessment of legal risk is not the 'objective severity and subjectiveness fearsomeness of the sanctions imposed',[85] but the perceived likelihood of detection and punishment.[86] Galvin himself acknowledged that increased penalties alone would not necessarily result in higher levels of compliance if they were not also accompanied by adequate levels of enforcement. A study of competition law enforcement in Australia found that, even when controlling for variables such as firm size, resources and previous interactions with regulator, the perceived risk of detection and the perceived likelihood of formal enforcement action 'make a significant and positive difference to all aspects of compliance management behaviour.'[87] In comparison, the respondents' perceptions of the severity of the sanctions was found to be of less consistent importance.[88] In a 2014 systematic review of 58 studies concerned with corporate crime deterrence, Schell-Busey et al similarly

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[77] Daniel J Galvin, 'Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance' (2016) 14 *Perspectives on Politics* 324.

[78] Other wage theft laws which formed part of this study included: smaller civil or criminal penalties; the creation of new administrative processes to adjudicate small wage claims; and the augmentation of post-judgment penalties.

[79] Galvin, above n. 77, at 326.

[80] Sally Simpson and Chris Koper, 'Deterring Corporate Crime' (1992) 30 *Criminology* 347.

[81] The US is generally perceived as having a unique legal and prosecutorial system which means that 'assertions or projections about the deterrence potential of criminalisation [and other formal sanctions] should be treated with great caution.' Beaton-Wells and Parker, above n. 9, 216.

[82] See also Piore and Schrank, above n. 10; Cf Janice Fine, 'The Franco-Iberian Model from the US Perspective' (2016) 37 *Comparative Labour Law & Policy Journal* 397.

[83] Unlike 'explicit general deterrence' which assumes rational and calculative firms will only comply when they learn of competitor firms being detected and punished for their wrongdoing, the theory of 'implicit general deterrence' does not hinge on the frequency and severity of sanctions. Dorothy Thornton, Neil A Gunningham and Robert A Kagan, 'General Deterrence and Corporate Environmental Behaviour' (2005) 27 *Law & Policy* 262, at 264.

[84] Ibid.

[85] Beaton-Wells and Parker, above n. 9, at 205-6.

[86] Sally Simpson, *Corporate Crime, Law and Social Control* (Cambridge University Press, 2002).

[87] Parker and Nielsen (2011), above n. 28, at 404-5.

[88] Ibid.

concluded that formal or punitive sanctions did not have a significant effect on deterrence when implemented as standalone strategies.

In 2015, Hardy and Howe sought to test some of the key assumptions underpinning deterrence theory by undertaking an Australian study examining business awareness of, and responses to, key enforcement activities of the FWO (i.e. targeted campaigns, enforceable undertakings and civil penalty proceedings).[89] Our findings revealed that, on the whole, firms' recollection of the quantum of civil penalties imposed against other employer businesses was 'generally imprecise and inaccurate.'[90] Most employers were not aware of the cases that the FWO had previously brought in their industry and had even less knowledge of the amount, the target of the intervention, or the nature of the sanction.[91] Our study also aimed to explore the relationship between perceptions of risk and subsequent compliance behaviour through a series of hypotheticals. The results in this respect were somewhat surprising. Our survey revealed that 75% of businesses believed that the likelihood of the FWO detecting a relatively small underpayment in the same sector was 50/50 or higher. Further, almost 70% felt that it was 'highly likely' or 'likely' that the non-compliant business would be penalised by a court. Given that the actual risk of detection by the FWO was miniscule, and the objective probability of a court-ordered penalty was extremely low,[92] these findings suggest that the majority of businesses overestimate the power and potency of the regulator.[93] This lends some support to the suggestion that 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'.[94]

This partially reflects[95] findings made earlier studies of environmental enforcement,[96] as well as in the broader criminological literature, which have similarly found that individuals

[89] We conducted a telephone survey of 643 employer firms across two discrete industries (café and restaurant and hair and beauty). In these selected industries, high profile enforcement activity had taken place in the preceding 12 months. These formed the basis for our 'signal cases'. We then tested employer knowledge and awareness of these particular cases. We also sought to explore employers' deterrence perceptions about the risk of detection and punishment etc. Tess Hardy and John Howe, 'Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman' (2017) 39 *Sydney Law Review* 471.

[90] Ibid.

[91] Beaton-Wells and Parker, above n. 9, at 204.

[92] In 2014-15, the FWO reported that it had received 25,000 workplace disputes. The vast bulk of these were resolved through internal dispute resolution processes, such as early intervention and mediation. In this same time period, the FWO initiated 50 civil penalty proceedings (i.e. 0.2% of all claims received by the regulator). Hardy and Howe (2017), above n. 89, at 492.

[93] However, in relation to the probable penalty size, the majority of respondents underestimated the quantum of penalties that had previously been handed down by the courts. The majority of respondents (41%) believed that the fine for a $5000 underpayment would be between $1000 and $9999, 31% of respondents estimated that it would be between $10,000 and $100,000 and 1% believed that it would be more than $100,000. This was much lower than the penalties that had been awarded by the courts in the period preceding the survey. For example, the House of Colour litigation – which was one of the 'signal' cases in the hair and beauty industry – resulted in penalties totalling $142 000, which is especially severe in light of the fact that the total underpayments were just over $6000. Hardy and Howe (2017), above n. 89, at 492.

[94] Neil Gunningham, 'Prosecution for OHS Offences: Deterrent or Disincentive' (2007) 29 *Sydney Law Review* 389, at 389 (emphasis added). See also Purse and Dorrian, above n. 3, at 24.

[95] In fact, our study showed that employers' knowledge of the FWO's enforcement activity was much lower than in comparable studies. For example, in the Thornton, Gunningham and Kagan study, 89% of respondents remembered at least one instance of a fine against some other company. In comparison, only 32% of all respondents in the Hardy and Howe study confirmed that they were aware of the FWO's enforcement activities, including targeted campaigns, enforceable undertakings and civil remedy litigation.

[96] In their study of US environmental regulation and enforcement, Thornton, Gunningham and Kagan similarly found that while most respondents were able to recall at least one example of a person or firm being penalised for an environmental offence, their knowledge of the size of the sanctions was much poorer. Broadly-speaking, respondents were only able to clearly remember those cases where an unusually high financial penalty had been imposed or a person had been imprisoned as a result of the enforcement proceeding. Thornton, Gunningham and Kagan, above n. 83, 272.

generally have poor levels of knowledge about the likelihood of being detected, and the possible consequences that may flow as a result of detection.[97] The lack of attentiveness to penalties may be a product of several factors. One hypothesis is that 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.'[98] Another possible explanation put forward in the Hardy and Howe study was that, at the time the survey took place, the FW Act lacked sufficiently harsh sanctions, such as high civil penalties or imprisonment. This is potentially significant given that earlier studies suggest that more severe sanctions may 'penetrate the corporate consciousness in a way that other penalties do not'.[99] However, Bagaric has recently argued that rather than criminalise wage theft, a more effective way to promote employer compliance with workplace regulation is

> to put in place mechanisms to detect breaches of the law and increase the perception in the minds of people that if they breach the law they will be caught…The nature and size of the possible penalty is, at best, a peripheral consideration. [100]

In relation to the detection element of the deterrence equation, Weil's detailed analysis of WHD investigations[101] found that the 'shadow cast by directed investigations is longer and more influential than that of complaint investigations.'[102] The latter type of investigation was also found to have stronger ripple effects far beyond the worksite being investigated.[103] Weil puts forward a number of propositions as to why this might be the case. For example, he suggests that because directed investigations are so rare, employers are more sensitive to such investigations as 'they represent a "bolt from the blue" to an employer.'[104] This is supported by Weil's finding that an initial directed investigation had the largest deterrent impact on business behaviour, with weaker effects associated with subsequent or additional directed investigations in the local area. It is important to note that this study specifically focused on the deterrence value of the various investigation modes, rather than the investigation outcome. This is significant given that other studies suggest that regulatory inspections which do not involve the imposition of any penalty have little deterrent effect.[105]

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[97] Mirko Bagaric, Theo Alexander and Athula Pathinayake, 'The Fallacy of General Deterrence and the Futility of Imprisoning Offenders for Tax Fraud' (2011) 26 *Australian Tax Forum* 511, at 529 (citing Gary Kleck et al., 'The Missing Link in General Deterrence Research' (2005) 43 *Criminology* 623; Paul Robinson and John Darley, 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best (2003) 91 *Georgetown Law Journal* 949.)

[98] 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, 40.

[99] Robert A Kagan, Neil Gunningham and Dorothy Thornton, 'Explaining Corporate Environmental Performance: How Does Regulation Matter?' (2003) 37(1) *Law & Society Review* 51, at 40.

[100] Mirko Bagaric, 'Jailing Bosses for Wage "Theft" No Payback for Dudded Workers', *The Australian*, 2 August 2019. A previous study of tax avoidance in cash-only businesses found that the business owners and preparers generally cheated on their taxes because of norms and opportunity – that is, people they know and trust who are in the same position cheat on their taxes. In addition, there was a very low likelihood that they will get caught. See Susan Cleary Morse, Stewart Karlinsky, and Joseph Bankman , 'Closing the Tax Gap: Cash Businesses and Tax Evasion' (2009) 20 *Stanford Law & Policy Review* 37.

[101] Weil's 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. Weil (2010), above n. 50, at 81.

[102] Ibid, at 71.

[103] Ibid, at 81.

[104] Ibid, at 56.

[105] Liz Bluff and Richard Johnstone, 'Infringement Notices: Stimulus for Prevention or Trivialising Offences? (2003) 19 *Journal of Occupational Health and Safety* 337, at 340. See also Shapiro and Rabinowitz, above n. 45.

In particular, a separate thread of research has shown that administrative penalties can lead to a 're-shuffling of managerial priorities',[106] even where the quantum of such penalties do not necessarily justify action in pure cost-benefit terms.[107] Other studies have shown that where relatively small sanctions were imposed during inspections, there were still a range of positive outcomes.[108] In one Australian study of OHS infringement notices, Gunningham, Sinclair and Burritt found that receiving a notice was perceived as a 'blot on the record', which had the effect of triggering preventative activities and spurring on the safety performance of individual site or line managers.[109] While the penalty associated with an infringement notice was quite modest, it still acted as a financial deterrent, especially by individuals and smaller firms. However, the deterrent effects of an infringement notice were found to fade rapidly over time, especially if there was a lack of continuing inspections and enforcement. Bluff and Johnstone observed that:

> The reasons given by inspectors and policy-makers for the perceived success of infringement notices included: one firm's concern that public knowledge of the fine would have an impact on its reputation; the effect of drawing attention to inspectors' powers and presence, leading to improved behaviour; an immediate impact on the offender due to the swift method for warning and fining offenders; and the combination of advice of an offence and imposition of a fine.[110]

These findings have been reinforced by a recent and important study of employment standards enforcement in Ontario, Canada. This analysis revealed that inspections in and of themselves had a specific deterrent effect on employers, but inspections which were accompanied by a 'ticket' (i.e. which is similar to an on-the-spot fine) enhanced the deterrence effects.[111]

While there have been some empirical studies of the deterrence effects of administrative notices, there have been far fewer investigations of how voluntary agreements, such as enforceable undertakings or enhanced compliance agreements, affect calculative motivations. In the Hardy and Howe study referred to earlier, we found that firms were much less familiar with enforcement tools below the apex of the pyramid, such as enforceable undertakings and proactive compliance deeds, even though these had been routinely used by the FWO during the relevant period. Given that awareness of sanctions and enforcement is

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[106] J Baggs J, B Silverstein and M Foley, 'Workplace Health and Safety Regulations: Impact of Enforcement and Consultation on Workers' Compensation Claims Rates in Washington State' (2003) 43 *American Journal of Industrial Medicine* 483.

[107] WB Gray and JT Scholz, 'Does Regulatory Enforcement Work—A Panel Analysis of OSHA Enforcement Examining Regulatory Impact' (1993) 27 *Law and Society Review* 177.

[108] Ibid. See also Purse and Dorrian, above n. 3, at 36.

[109] N Gunningham, D Sinclair and P Burritt, *On-the-Spot Fines and the Prevention of Injury and Disease – The Experience of Australian Workplaces* (National Occupational Health and Safety Commission, 1998), at 30. Positive compliance outcomes were also identified in a later study of citations made during OHS inspections carried out in the US (that is, where the inspector identifies the regulations and standards alleged to have been violated and the proposed length of time for their abatement). David Weil, 'If OSHA is So Bad, Why is Compliance So Good! (1996) 27(3) *RAND journal of Economics* 618; David Weil, 'Assessing OSHA Performance: New Evidence from the Construction Industry' (2001) 20(4) *Journal of Policy Analysis and Management* 651.

[110] Bluff and Johnstone, above n. 105, at 339.

[111] In particular, of the 573 employers inspected more than once, 477 (83%) had ticketable violations on their first inspection, but only 41% of these employers had ticketable offences on their second. Furthermore, in relation to those employers who had ticketable violations but were not ticketed on their first inspection, 42% were found to have re-offended on re-inspection. In comparison, in relation to those employers who were ticketed on their first violation, only 33% were found to have reoffended on a re-inspection. Rebecca Casey et al, 'Using Tickets in Employment Standards Inspections: Deterrence as Effective Enforcement in Ontario, Canada' (2018) 29 *Economic and Labour Relations Review* 245.

an essential precondition of deterrence, this finding suggests that the general deterrence effects of voluntary instruments were weak – at least at the time the survey took place.[112]

More recently, a small qualitative study of the general deterrence effects of EUs made in the financial services sector found that EUs can motivate behavioural change, not only by tapping into a firm's 'fear' of being caught, but by strengthening the firm's 'duty' to comply.[113] In relation to calculative motivations, respondents broadly confirmed that were keen to: avoid the perceived punishment and the intrusion of outsiders meted out as part of an EU; avoid the costs of the commitments made under the EU (including the costs of engaging lawyers and other independent consultants to assist with negotiation and implementation of the EU); and avoid the reputational damage associated with EUs, including flow on loss of customers, revenue and standing amongst peers in the industry.[114] Another risk associated with EUs was the potential for steps taken by the firm under the terms of an EU – such as remediation schemes, admissions of liability or acknowledgment of regulatory concerns – to be subsequently used as a '"roadmap" for class action lawyers to build their case.'[115] However, this study also found the deterrent value of EUs may be undone through a lack of celerity, with many EUs taking years to finalise and be made public.[116] This is concerning in light of other studies which suggest that one of the reasons for the failure of general deterrence 'is the big delay between detection and the imposition of punishment.'[117]

Weil's study of voluntary monitoring agreements in the US garment sector found that, while these instruments may take time to nut out, they had the potential to lead to significant compliance improvement, especially where the monitoring involved payroll review and unannounced inspections.[118] Detailed data analysis revealed that stringent contractor monitoring by manufacturers, under the auspices of voluntary agreements made with WHD, raised the costs of non-compliance costs faced by contractors, including established firms and new entrants.[119] In the words of Weil:

> The use of supply chain pressure to create monitoring systems leads to changes in contractors' behaviour by altering the basic regulatory calculus facing them. In particular, it introduces substantial *private* penalties that easily swamp in magnitude the civil penalties available to the government as well as appreciably increase the implicit probability of inspection.[120]

A number of studies drew attention to the importance of the regulatory target – that is, an intervention which is directed at lead firms, direct competitors, prominent businesses or

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[112] The survey was undertaken in July 2015, just before key media investigations into 7-Eleven and other well-known firms resulted in a wave of public concern, a stream of government inquiries and major law reform.

[113] Marina Nehme et al, 'General Deterrence Effects of Enforceable Undertakings on Financial Services and Credit Providers' (Report to ASIC, 2018) https://download.asic.gov.au/media/4916053/18-325mr-deterrence-effects-of-enforceable-undertakings-on-financial-services-and-credit-providers.pdf, at 24.

[114] Ibid.

[115] Nehme et al (2018), above n. 113, at 20.

[116] In addition to the absence of celerity, other barriers identified in the study included: overconfidence in peer providers, peer influence and provider rationalisation; limited evidence of capability or motivation to address compliance issues; and low volume and inconsistency in using EUs. Ibid, at 27.

[117] Bagaric, Alexander and Pathinayake, above n. 97, at 529.

[118] David Weil and Carlos Mallo, 'Regulating Labour Standards via Supply Chains: Combining Public/Private Interventions to Improve Workplace Compliance' (2007) 45 *British Journal of Industrial Relations* 791, at 810.

[119] In particular, this monitoring arrangement was found to have led to an estimated reduction in the incidence of minimum wage violations by participating contractors of 20 violations per 100 workers (random samples in the same industry/area revealed a violation rate of 27 violations per 100 workers). There was also a decline in the size of the underpayment by an average of $6.00 per worker per week amongst monitored contractors (as compared to an average underpayment of $6.50 for contractors that were not subject to proactive monitoring). Weil (2005), above n. 15, at 250.

[120] Ibid, at 255.

individual decision-makers, may have outsized deterrence effects. Weil's research regarding the deterrence effects of WHD investigations in the hotel sector found that the ripple effects of an investigation were often restricted to 'subsets of the industry that tend to "watch" one another.'[121] So, for example, investigations of the top five branded hotels had the greatest effect on other branded hotels, whereas the compliance behaviour of independent hotels was most influenced by investigations of other independent outlets.[122] 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.[123]

Similarly, Parker and Nielsen identified that the extent to which firms fear sanctions which trigger informal social and economic losses was likely to depend on their market position and their vulnerability to market competition. Firms with a larger brand presence, more consumer-facing services and more substitutable products were generally found to have a greater sensitivity to risk and to adverse publicity associated with regulatory interventions. In comparison, firms that found themselves in a more vulnerable market position with slim profit margins might believe that their business viability hinges on committing violations and 'might value the gains of noncompliance more greatly.'[124] Studies which have focused on how individuals, such as representatives and managers, respond to various regulatory strategies have found that a credible legal threat, combined with informal modes of shame and peer pressure, lower the risk of corporate wrongdoing.[125] While Gunningham accepts that deterrence often works better in relation to individuals, he cautions that much depends upon context. In his view, sanctioning the 'wrong' individuals, such as middle managers – who may be easy targets, but lack decision-making power – has a tendency to create 'a considerable sense of injustice and damages the legitimacy of the entire regulatory regime.'[126]

Even where perceptions of relevant risk variables are high, there is no guarantee that this will ultimately motivate or sustain compliance.[127] Instead, many studies confirm that motivations to comply may be shaped by a range of cognitive biases, individual personality traits and the strength of people's sense of moral or ethical obligation to obey the law. Gunningham, Thornton and Kagan's study of the mining industry in the US found that deterrence has an important regulatory role to play, but is not necessarily a *direct* motivator of compliance.[128] Rather, hearing about sanctions imposed against the worst offenders, was found to have a 'reminder' and 'reassurance' function for those organisations already in compliance. First, it refocused employer attention on regulatory problems that may have been ignored or overlooked. Second, it reassured firms that their efforts to invest in compliance were worth

[121] Weil (2010), above n. 50, at 56.
[122] Ibid, at 74.
[123] Michael Wright et al, *Evaluation of EPS and Enforcement Action: Main Report*, Health and Safety Executive Research Report RR519 (HSE Books, 2006); Gunningham, Sinclair and Bunitt, above n. 119.
[124] Parker and Nielsen (2011), above n. 28, at 388. Cf Fiona Haines, *Corporate Regulation: Beyond Punish and Persuade* (1997); Robyn Fairman & Charlotte Yapp, 'Enforced Self-Regulation, Prescription and Conceptions of Compliance within Small Businesses' (2005) 27 *Law and Policy* 4.
[125] Sally Simpson et al, 'An Empirical Assessment of Corporate Environmental Crime Control Strategies' (2013) 103 *Journal of Criminal Law and Criminology* 231, at 267.
[126] Gunningham (2007), above n. 94, at 370.
[127] John Braithwaite and Toni Makkai, 'Testing an Expected Utility Model of Corporate Deterrence' (1991) 25 *Law &Society Review* 7.
[128] Gunningham (2015), above n. 19, 4-5.

it, as competitor firms who had sought to evade the system were unlikely to get away with it.[129]

The Hardy and Howe study also generated some puzzling findings that ran counter to the theoretical predictions of deterrence theory. We assumed that those firms with the greatest awareness of the FWO's enforcement activities would have an increased perception of risk of detection and sanction. Instead, we found the opposite to be true. Those who were most familiar with the FWO's enforcement efforts, appeared to fear them the least.[130] Another somewhat confounding finding was that we expected to find a link between increased risk perception and an enhanced compliance response, but observed only a weak association in this respect. These somewhat perplexing results may reinforce the point made earlier – context counts and the relationship between deterrence and compliance is not straightforward. This may be one of the reasons why – after surveying the deterrence literature – Schell-Busey et al concluded that a mix of agency interventions and multiple treatments, at the individual and company levels, 'is apt to have the biggest impact on corporate crime.'[131]

To summarise, while there is some limited evidence that higher sanctions will lead to higher levels of compliance in the context of wage theft, many studies concerned with corporate regulation, and crime more generally, have cast doubt on the efficacy of penalties alone to change behaviour. The finding that formal sanctions have no bearing on compliance outcomes has led some to declare that economic theories of deterrence are a 'stark failure.'[132] Other researchers are less pessimistic, but broadly agree that, when it comes to deterrence, the perceived risk of detection is more significant than the nature or size of the possible penalty. Instead, it seems that consistent public and private monitoring, accessible systems of administrative sanctioning and targeted disclosure and publicity may 'possess greater power, capacity, and deterrent impact than prosecutorial agencies.'[133] The more likely the detection and the swifter the sanction, the better. It is possible that while actors may be sufficiently rational to be deterred by the threat of sanctions, if there is delay between the contravention and the imposition of punishment, the formal legal system is not well-placed to 'exploit that rationality'.[134] While it is the perception, and not necessarily the actuality of risk, which is critical to delivering general deterrence, it is also important to acknowledge that compliance motivations may stray well outside the assumed cost-benefit calculus.

## IV A Snapshot of Recent Developments in Australia

Many of the reforms that have been implemented, or are being contemplated, in Australia reflect trends observable in other jurisdictions.[135] For example, in 2017, the federal

[129] Neil Gunningham, Dorothy Thornton and Robert Kagan, 'Motivating Management: Corporate Compliance in Environmental Protection' (2005) 27(2) *Law and Policy* 289.
[130] Hardy and Howe (2017), above n. 89, at 494.
[131] Schell-Busey et al, above n. 76, at 4. However, the authors acknowledge that on the basis of the literature review alone they could not discern whether the deterrence effects associated with a 'regulatory mix' is a result of 'the unique contribution of regulatory actions (nonpunitive interventions), which is mixed in with other treatments, or whether deterrence is achieved via the layered multiprong approach of the enforcement pyramid. See also (Simpson et al., 2013).
[132] Braithwaite and Makkai, above n. 127, at 29.
[133] Almond and Van Erp, above n. 22, at 176-7.
[134] Paternoster (2010), above n. 13, at 819.
[135] While federal reform has stalled, many states and localities in the US have been active in enhancing deterrence by, for example, increasing civil penalty amounts for minimum wage violations, introducing criminal penalties for companies and individuals, improving debt recovery processes for unpaid judgments through a wage lien device, and actively revoking

enforcement framework in Australia underwent a major overhaul as a result of the Protecting Vulnerable Worker reforms. A central aim of these statutory amendments was 'to effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business.'[136] Amongst other changes, the amending legislation raised maximum civil penalties for 'serious contraventions' of prescribed workplace laws to over half a million dollars,[137] extended liability to franchisors and holding companies for employment violations committed by subsidiary firms in their respective networks,[138] and shifted the onus of proof to employers where an employee was making an underpayment claim and there had been a failure to keep or maintain employment records.[139]

While these amendments are still relatively fresh,[140] and many provisions remain untested, the enforcement framework continues to attract much scrutiny and criticism. Last year, Sandra Parker – the incumbent head of the FWO – observed that, despite the momentous change to the regulatory framework, her agency remains under pressure to 'send a strong message of deterrence to would-be lawbreakers'.[141] This pressure stems, at least in part, from a never-ending stream of government inquiries and media investigations revealing the severity of the wage theft problem in Australia.[142] In the past 12 months alone, a string of public sector organisations and listed companies, including supermarket retailers, Australia's national broadcaster and major universities, have been found to have underpaid their direct workforce staggering sums of money.[143] At the time of writing, compliance and enforcement

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business licenses for non-complying employers. For an overview of US developments, see Hallett, above n. 34; and Lee and Smith, above n. 23.

[136] A subsidiary, and related objective, was to 'ensure the Fair Work Ombudsman has adequate powers to investigate and deal with serious cases involving the exploitation of vulnerable workers and the deliberate obstruction of its investigations.' Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth) – Explanatory Memorandum, Commonwealth Parliament, ii.

[137] Each 'serious contravention' of a relevant civil penalty provision currently attracts a maximum penalty of AUD666,000 for a corporation and AUD132,230 for an individual. However, the amounts that are actually levied by the court are often much less than these maximum amounts due to current sentencing principles and grouping mechanisms. For a recent discussion of this issue, see *Fair Work Ombudsman v HSCC Pty Ltd* [2020] FCA 655 (18 May 2020) (Flick J).

[138] For further discussion of the provisions relating to franchise networks, see Tess Hardy, 'Shifting Risk and Shirking Responsibility? The Challenge of Upholding Employment Standards Regulation within Franchise Networks' (2019) 32 *Australian Journal of Labour Law* 62; and Tess Hardy, 'Working for the Brand: The Regulation of Employment in Franchise Systems in Australia' (2020) 48 *Australian Business Law Review* 234.

[139] In addition, there were further amendments which had the effect of: elevating penalties in respect of record-keeping and payslip contraventions; providing the FWO with compulsive investigative powers; expressly prohibiting unlawful cash-back or deduction practices. *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).

[140] As at August 2020, the FWO had initiated at least fourteen cases under the provisions introduced by the PVW Act. Only a handful of these cases have reached final determination (see, eg, *Fair Work Ombudsman v A & K Property Services Pty Ltd & Ors* [2019] FCA 2259 (16 August 2019); *Fair Work Ombudsman v Desire Food Pty Ltd & Anor* [2019] FCCA 2979 (15 November 2019); and *Fair Work Ombudsman v Pulis Plumbing Pty Ltd & Anor* [2019] FCCA 3192 (15 November 2019)).

[141] Parker, FWO June 2019 Speech, above n 4, at 3.

[142] Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, Parliament of Australia (2016); Anthony Forsyth, *Victorian Inquiry into Labour Hire and Insecure Work – Final Report* (2016); Senate Economics References Committee, *Superbad – Wage Theft and Noncompliance of the Superannuation Guarantee,* Parliament of Australia (2017); Senate Education and Employment References Committee, *Corporate Avoidance of the Fair Work Act 2009*, September 2017; Australian Government, *Black Economy Taskforce*, Final Report, October 2017; Queensland Parliamentary Committee, Education, Employment and Small Business Committee, 'A Fair Day's Pay for a Fair Day's Work? Exposing the True Cost of Wage Theft in Queensland' (Report No 9, November 2018); Senate Education and Employment References Committee, Parliament of Australia, *Wage Theft? What Wage Theft?! The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies*' (2018); Allan Fels and David Cousins, *Report of the Migrant Workers' Taskforce*, Australian Government (March 2019) ('Migrant Workers' Taskforce Report'); Tony Beech, 'Inquiry into Wage Theft in Western Australia – Final Report (June 2019).

[143] For example, in the past 12 months or so, Super Retail Group has reported that it had underpaid workers $32 million, Michael Hill Jewellers conceded that it underpaid its workforce $25 million, Australian Broadcasting Commission believes it

issues remain very much on the political agenda, notwithstanding the pandemic.[144] The federal Attorney-General's Department is looking specifically at compliance and enforcement as part of its wide-ranging consultation on the industrial relations framework.[145] At the same time, there is a federal senate inquiry underway that is considering wage and superannuation theft.[146]

Again, reflecting patterns in other jurisdictions, the 'rhetorical push toward criminalisation'[147] has dominated much of the recent debate on employment standards enforcement in Australia.[148] Notwithstanding the pandemic, at least two states have recently passed legislation creating a criminal offence of wage theft.[149] The federal government is seriously considering following suit by introducing federal criminal sanctions 'for the most serious forms of exploitative conduct'.[150] However, the empirical studies surveyed above suggest that it is somewhat unlikely that more severe sanctions, in and of themselves, will lead to enhanced employer compliance.[151] Instead, this research suggests that a number of seemingly less popular techniques may be better at tapping into calculative motivations.[152] In particular, targeted inspections, particularly where these are accompanied by an administrative sanction and combined with strategic use of media, may be more powerful in fuelling a firm's perception of risk and foster a greater willingness to commit to compliance in the longer term.

In light of these findings, this section will assess the deterrence dimensions of a number of administrative sanctions used by the FWO, namely: enforceable undertakings;[153] and compliance notices. It goes without saying that there are many other mechanisms that may prevent and control employer wrongdoing and there are a range of other regulatory extensions currently on the table.[154] Nonetheless, this focused discussion is intended to redirect the conversation away from enforcement strategies which attract the most

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has underpaid employees a total of $23 million, Wesfarmers has revealed that it has underpaid staff by $15 million, Thales has admitted to a total underpayment of $7.4 million and Sunglass Hut has identified underpayments worth $2.3 million. See generally Anna Patty, 'Worker underpayment at Woolworths sparks calls for company payroll audits', *The Sydney Morning Herald,* 31 October 2019 < https://www.smh.com.au/business/workplace/worker-underpayment-at-woolworths-sparks-calls-for-company-payroll-audits-20191030-p535nu.html. A number of leading universities in Australia have now joined this ignominious list. See Jordan Baker, 'Sydney Uni reveals tens of millions in staff underpayments', *The Sydney Morning Herald*, 13 August 2020.

[144] Tess Hardy, 'What Now for Wage Theft? Enforcement of Employment Rights and Entitlements in a Time of Crisis', *Labour Law Downunder*, 22 April 2020 <https://labourlawdownunder.com.au/?p=829>).

[145] Attorney-General's Department, 'Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance'; and Attorney-General's Department, 'Improving protections of employees' wages and entitlements: Further strengthening the civil compliance and enforcement framework'.

[146] Senate Standing Committees on Economics, Inquiry into the Unlawful Underpayment of Employees' Remuneration, Commonwealth Parliament, 2020.

[147] Collins, above n. 30.

[148] Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020)

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

[150] Migrant Workers' Taskforce – Final Report, above n. 142, Recommendation 6.

[151] Parker and Nielsen, above n. 28.

[152] See, eg, Bronwyn Morgan and Karen Yeung, *An Introduction To Law And Regulation: Text And Materials* (Cambridge University Press, 2007), 176–220.

[153] Proactive compliance deeds are another tool which bear some similarity to enforceable undertakings. However, they have not been used readily by the FWO in the past two years.

[154] These include, amongst other options: extending secondary liability to supply chain heads and host companies; mandating the payment of wages into bank accounts to improve transparency; providing courts with specific powers to make adverse publicity orders, disqualification orders and banning orders; reviewing forums for redress either by enhancing the small claims process or directing claims to the Fair Work Commission; providing a greater capacity to 'name and shame' contravening employers; and establishing a national labour hire registration scheme in high risk industries.

controversy and consider those tools which may have the most potential to 'change the behaviours that result in rule violations in the first place.'[155] A critical review of these administrative sanctions is even more timely given that state funding for enforcement is likely to be constrained as a result of the COVID-19 pandemic[156] and intermediate sanctions 'can provide credible deterrence at a very modest administrative and legal cost'.[157]

### a) Enforceable Undertakings

Under the FW Act, a FW Inspector can enter into an enforceable undertaking with a 'person' if they hold a reasonable belief that a contravention of a civil remedy provision has been committed. If the signatory fails to abide by the terms of the EU, the instrument can be enforced in court. These written agreements frequently contain admissions, promises and commitments to remedy the harm caused by the contravention[158] and address the root cause of the contravention.[159] In recent years, signatories have also been required to make a 'contrition payment', which is ostensibly designed to reflect the 'seriousness of their contravening conduct'[160] and 'reflect the community expectation that a company should do more than simply rectify their contraventions.'[161] Whereas previously these payments were frequently made to community organisations or charities, they are now paid to the federal government's consolidated revenue. While the negotiations relating to the terms of the EU are generally sensitive and highly confidential, once signed, copies of the final agreement are typically published on the agency's website and accompanied by a press release.[162] For the term of the EU, it is also routine for the FWO to release reports on the firm's progress against the relevant commitments. Although the use of EUs has dropped off in the last three years or so, there appears to be a resurgence in their use. This may be partly driven by the wave of corporate self-disclosures received by the agency in the past few years. Currently, the FWO's 'default position' is that every business that self-reports has to enter into an EU.[163]

In many respects, EUs reflect enhanced compliance agreements which have been used in the US to ease the monitoring burden of the regulator and entrench a sustained commitment to compliance on the part of the signatory firm. Both instruments arguably form a 'bridge between the strategies of persuasion and enforcement.'[164] A key tension is whether these

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[155] Weil (2018), above n. 49, at 230.

[156] See Fine et al (2020), above n. 6.

[157] Gunningham (2007), above n. 94, at 141.

[158] Generally, there is a requirement that the signatory firm provide for full rectification of the underpayments, including superannuation, and with interest. This is not insignificant given that the bulk of requests for assistance are 'resolved' for confidential amounts (which may or may not reflect the actual amount owing). Formal apologies are also commonly required to be posted on employee noticeboards and social media etc.

[159] Relevant commitments include: providing workplace training to key personnel, improving compliance and payroll systems and appointing an independent accountant, auditor or lawyer to assist with, verify and report on the firm's underpayment calculations.

[160] In some of the most recent EUs, the contrition payment is calculated on a sliding scale of between 5.5% and 7% of the underpayment amount. For example, the multinational technology company, IBM, self-reported to the FWO that they had underpaid over 1000 employees as a result of failing to apply the relevant awards to casual staff working at the company's contact centre. The total underpayment amount is most recently estimated to be $12.3 million, which equates to a contrition payment of at least AUD676,000 (i.e. 5.5% of total underpayment amount). See Enforceable Undertaking between the FWO, IBM Australia Ltd and IBM Global Financing Australia Ltd dated 8 September 2020.

[161] AG Discussion Paper, above n. 145.

[162] Use of EUs by the FWO has waxed and waned over the past decade, but in the past few years, their use has dropped off fairly sharply. In 2018-19, the FWO entered into 17 EUs down from a high of 43 in 2015-16. See Hardy (2020), above. ?.

[163] Sandra Parker, 'Address by the Fair Work Ombudsman', speech delivered at the 2019 Annual National Policy Influence Reform Conference, Canberra, 3 June 2019, at 4-5.

[164] Nehme (2020), above n. 113, at 33.

tools represent an innovative and flexible solution or whether they let employers 'off the hook' by providing businesses with another chance to voluntarily comply, and avoid the imposition of a more punitive sanction.[165] Owens has argued that the use of EUs against small or medium sized businesses, which are operating in high risk sectors and have a history of underpaying temporary labour migrants, is 'inappropriate',[166] and 'has no real impact on those who profit greatly from the exploitation of these workers.'[167] Another source of unease surrounding voluntary agreements, such as EUs, is the risk that the commitments made in the instrument will only lead to cosmetic improvements in compliance.[168] The Senate Inquiry into Contract Cleaning was especially derisive towards proactive compliance deeds (***PCDs***) – an instrument that mimics many features of EUs (but is not enforceable in court). The Committee observed that PCDs

> do not constitute a significant enough deterrent to businesses that may contemplate exploiting their workers, or lead firms who ignore the non-compliant behaviour of their contractors in order to reap financial benefits… If this is the 'punishment' meted out to exploitative businesses and lead firms, then non-compliance with the *Fair Work Act 2009* becomes a calculated and rational business decision.[169]

In the recent Royal Commission into Banking Misconduct, Commissioner Hayne acknowledged that the flexibility of EUs holds 'undoubted appeal', but also pointed out that if an entity 'considers the promises made in the EU as no more than the cost of doing business or the cost of placating the regulator',[170] than it is likely to constitute a more effective regulatory outcome than legal proceedings. Concerns over the lack of deterrence associated with EUs reached fever pitch following the FWO's EU with MADE Establishment Pty Ltd (the group which runs restaurants owned by celebrity chef, George Calombaris) in 2019. In this instance, the parent company had been found to have underpaid over $7 million to more than 500 current and former employees. The FWO subsequently entered into an EU which required MADE to take a range of measures, including: implementing systems and processes to monitor compliance with all relevant legal obligations; providing compliance training to all HR, recruitment, payroll and managerial staff; submitting annual audits of the pay and conditions of a sample of the workforce to an external auditor or employment law specialist for independent vetting; publish written apologies on MADE's social media and websites, and in both mainstream and industry media publications; and 'demonstrate its commitment to promoting general deterrence in the restaurant industry and education of industry leaders' by requiring Calombaris to personally participate in a minimum of seven speaking engagements directed at industry.[171]

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[165] In a recent Senate Inquiry into Contract Cleaning, the Committee noted that Woolworths 'has gotten away with its inept managing of its cleaning supply chain with little accountability and no serious repercussions.' Senate Inquiry into Contract Cleaning, above n. 142, [3.69].

[166] Rosemary Owens, 'Temporary Labour Migration and Workplace Rights in Australia: Is Effective Enforcement Possible?' in Johanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart, 2016), at 406.

[167] Ibid, at 412.

[168] This concern partly stems from the fact that a number of franchisors that had entered into proactive compliance deeds with the FWO, such as Domino's Pizza, were subsequently found to be overseeing networks that were riddled with employment violations. See, eg, Patrick Hatch, 'Domino's told stores to pay workers incorrectly, class action alleges', *The Sydney Morning Herald*, 25 June 2019.

[169] Senate Inquiry into Contract Cleaning, above n. 142, at [3.51] – [3.54].

[170] Commissioner Kenneth Hayne, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry – Final Report* (1 February 2019) 442.

[171] Enforceable Undertaking between FWO and MADE Establishment Pty Ltd dated 17 July 2019.

The most contentious term of the EU was the requirement that MADE make a 'contrition payment' of $200,000. This provoked a storm of public outrage about the apparent lack of deterrence and strengthened calls for a criminal offence to be introduced.[172] The new federal Industrial Relations Minister even weighed in on the debate, indicating that he believed the quantum of the contrition payment was too 'light'.[173] Shortly after the EU was signed, MADE went into administration. The collapse of this well-known restaurant empire, which resulted in the closure of 12 restaurants and the redundancy of 400 employees, was blamed on the FWO's 'name and shame' campaign against Calombaris.[174] The head of the Restaurant and Catering Association – a key employer group in the hospitality industry – argued that the demise of the business was partly due to the 'heavy-handed enforcement' by the FWO, despite the firm self-reporting the underpayment and committing to full rectification of back wages.[175]

However, an undue focus on the size of the contrition payment or a narrow conceptualisation of deterrence fails to properly account for the way in which these voluntary agreements do more than recover back wages, or penalise duty-holders.[176] In particular, it does not factor in the way in which these instruments produce 'dynamic deterrence': a concept coined by Johnstone and King which is intended to capture the way in which EUs internalise the costs of contraventions at two stages: the costs of the measures undertaken by the firm, and the costs of the sanctions that will be imposed upon the firm if there is a failure to abide by the terms of the undertaking.[177] Indeed, this second set of costs, combined with the enforceability of the instrument, is what gives EUs a deterrence edge over other voluntary agreements, such as PCDs.

The cost of many commitments set out in EUs are not negligible. Rather, enormous resources are often required to undertake backpayment calculations, or engage an independent accountant or auditor to do it on the firm's behalf. In the notorious 7-Eleven underpayment case, rectification costs alone exceeded $100 million. This, combined with the reputational damage and the costs of other measures, were described as 'extremely high'.[178] The Migrant Workers' Taskforce observed that these costs 'should be a major deterrent for any company valuing its reputation to fall into a culture of non-compliance with employment and wage laws.' However, the Taskforce also acknowledged that the substantial expense incurred by 7-Eleven may have a counterproductive effect in that some firms may see these costs 'as a reason not to emulate the 7-Eleven approach.'[179]

While voluntary agreements are not infallible, those that perceive EUs as the poor regulatory cousin of enforcement litigation may be overlooking the way in which these instruments

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[172] Anthony Forsyth, 'Stronger Stick Needed to Enforce Workplace Laws', *The Sydney Morning Herald*, 2 August 2019.
[173] Dana McCauley, 'I think that's light': Porter criticises $200k fine for wage theft', *The Sydney Morning Herald*, 24 July 2019.
[174] Patrick Durkin, David Marin-Guzman and Liz Main, 'Who killed George Calombaris' empire?', *Australian Financial Review*, 12 February 2020. The company's administrator observed that the underpayment scandal was a big factor in the collapse with patronage down by 50 per cent in the wake of the scandal.
[175] Patrick Durkin, David Marin-Guzman and Liz Main, 'Who killed George Calombaris' empire?', *Australian Financial Review*, 12 February 2020. While the commitment to full rectification was made in the EU, ultimately, it appears that at the time of administration the group still owed $1.3 million to 364 former employees. To recoup some of this loss, the employees would be required to make a claim on the federal Government's Fair Entitlements Guarantee scheme. See 'Ex-Calombaris group workers to dip into FEG scheme', *Workplace Express*, 11 March 2020.
[176] Weil (2018), above n. 49, at 438.
[177] Richard Johnstone and Michelle King, 'A Responsive Sanction to Promote Systematic Compliance? Enforceable Undertakings in Occupational Health and Safety Regulation' (2008) 21 *Australian Journal of Labour Law* 280, 285.
[178] Migrant Workers' Taskforce Report, above n. 142, at 47.
[179] Ibid.

already aid in deterrence. For a start, as Weil pointed out in his study of US compliance agreements, increasing the risk of detection through third party monitoring is of critical importance. In some cases, EUs have been deliberately designed to 'disrupt the use of wage theft as a business model.'[180] A number of agreements have led to sweeping changes in the sourcing and organisation of labour in the relevant business network. The FWO's EU with Coles Supermarkets Australia Pty Ltd (***Coles***) is especially instructive in this regard.[181] Under the terms of this EU, Coles made a number of fairly standard commitments. A unique feature of the Coles EU, however, was that the supermarket retailer expressly agreed to make 'fundamental, permanent and sustainable changes to its trolley-collection services model.'[182] In practical terms, this led to Coles abandoning its multiple contractor model by moving initially to a single national trolley services provider (which entered into a separate PCD with the FWO) and later to an in-house model (where Coles now directly engages almost all trolley-collectors working at its sites).[183]

While the EU had profound and positive effects on the supply chain practices of Coles, it did little to shift the dominant contracting model adopted by its main competitor, Woolworths Limited (***Woolworths***). u On the whole, however, there has been a view that the deed represented a 'missed opportunity to re-set the relationship between Woolworths and the cleaning workforce'.[184]

### b) Compliance Notices

Compliance notices are a unique administrative sanction that was introduced into the FW Act, along with EUs, to provide 'inspectors with another option to deal with non-compliance instead of pursuing court proceedings.'[185] A compliance notice may be issued by an inspector if they believe that 'a person'[186] has committed a contravention of a prescribed provision of the FW Act or a term of a relevant industrial instrument, determination or order.[187] The notice may require the recipient to take specified action to remedy the direct effects of the contravention; and/or produce reasonable evidence of the person's compliance with the

[180] Hallett, above n. 34, at 134.

[181] The supermarket retailer entered into an EU in relation to trolley collectors who were underpaid while working in Coles' supermarket carparks. The affected employees were engaged through a string of companies with Coles assuming the position of 'lead firm' – at the top of the supply chain. As part of the EU, Coles acknowledges that it has an 'ethical and moral responsibility to require standards of conduct from all entities and individuals directly involved in the conduct of its enterprise.'

[182] FWO, Enforceable Undertaking between FWO and Coles Supermarkets Australia Pty Ltd dated 6 October 2014, at 4.

[183] FWO, *Final Report – Enforceable Undertaking between the Fair Work Ombudsman and Coles Supermarkets Australia Pty Ltd*, 2019.

[184] Maurice Blackburn Lawyers and United Voice, answers to question on notice, 4 September 2018 (received 25 September 2018), pp. 3–4. See Senate Inquiry into Contract Cleaning, above n. 142, at [3.41] – [3.43].

[185] Explanatory Memorandum, Fair Work Bill 2008 (Cth), at [2673]. For further discussion of the changes introduced under the FW Act, see Tess Hardy, 'A Changing of the Guard: Enforcement of Workplace Relations Laws Since Work Choices and Beyond' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009).

[186] That is, the person who is reasonably believed to have contravened an entitlement provision. FW Act s 716(1).

[187] FW Act s 716(1) specifies that a compliance notice may only be used in relation to a contravention of: a provision of the National Employment Standards; a term of a modern award; a term of an enterprise agreement; a term of a workplace determination; a term of a national minimum wage order; and/or a term of an equal remuneration order.

notice.[188] Failure to meet the terms of the compliance notice without a valid excuse, may expose the recipient to civil penalties.[189]

Similar to situation in the US with respect to liquidated damages and civil monetary penalties,[190] compliance notices were not fully utilised by the FWO for a long time.[191] However, in the wake of recommendations made by the Migrant Workers' Taskforce, there has been a dramatic spike in the use of these administrative sanctions. In the first six months of 2019-20, the FWO reported that it had issued 602 compliance notices resulting in more than $3.4 million in unpaid wage recoveries. This was more than double the number of notices issued for the whole of the preceding twelve-month period.[192] This surge in compliance notices has also been accompanied by a wave of new court proceedings involving compliance notices.[193] The FWO has publicly commented that this new approach 'should leave no doubt about the FWO's expectations that such notices are to be taken seriously.'[194]

As noted above, previous studies have suggested that low-level administrative sanctions, like compliance notices, can provide a quick and cost-effective form of deterrence, particularly when they are tacked on to targeted inspections and directed at recidivists. Another clear advantage of compliance notices is they 'can be used effectively to stop illegal activity and to ensure redress is paid for the consequences of that activity'[195] and they can do so swiftly. There is no need to reach consensus with the alleged wrongdoer (which can take months) or wait for a court date (which can take years). The time between violation, rectification and sanction is not just critical for deterrence purposes, but for the employee who is out of pocket, particularly in the midst of a severe economic downturn. It is also arguable that compliance notices enhance the certainty of legal sanction by effectively reversing the onus of proof in underpayment matters.[196] This is not insignificant in light of the fact that a lack of employment records, or payslips, often presents an insurmountable barrier to pursuing the matter in court and has the effect of undermining the credibility of the regulatory framework.[197]

Unlike administrative sanctions in many other jurisdictions, there is no requirement that compliance notices be issued only against the direct employer. Technically-speaking, it appears open to the FWO to issue compliance notices against other persons 'involved in' the contravention, including third party firms or individuals who may fall within the accessorial liability provisions.[198] This feature is important in two ways. First, it means that compliance notices can be issued against an individual, even where the employer company is at risk of going into administration or liquidation. This is particularly crucial in light of the dire economic situation brought on by COVID-19. Second, in line with the empirical research outlined above,

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[188] FW Act s 716(2). Relevant evidence might include 'bank records showing the relevant amount has been transferred to the underpaid employee or employees.' Attorney-General's Department (n ?) 9.

[189] Maximum penalties for contravention of s 716 are currently AUD6,300 for an individual or AUD31,500 for a body corporate.

[190] Weil (2018), above n. 49, 442.

[191] Tess Hardy, 'Trivial to Troubling: The Evolution of Enforcement under the Fair Work Act' (2020) 33 *Australian Journal of Labour Law* 87.

[192] The FWO issued 247 compliance notices in 2018-19. See FWO Submission to Senate Inquiry into Wage Underpayment, above n. 146, at 5.

[193] So far, in the current financial year, the FWO has commenced 22 litigation proceedings which involve failures to comply with compliance notices.

[194] FWO Submission, above n. 198, at 7.

[195] Migrant Workers' Taskforce Report, above n. 142, at 89-90.

[196] *Hindu Society of Victoria (Australia) Inc v Fair Work Ombudsman* [2016] FCCA 221.

[197] *Fair Work Ombudsman v Dosanjh* [2016] FCCA 923 [46].

[198] FW Act, s 550.

it is likely that issuing the sanction against an individual decision-maker may have more pronounced deterrence effects.

However, as it currently stands, the compliance notice regime has a number of shortcomings. There remains some uncertainty about the extent to which compliance notices aid in detection. Initially, the scope and content of compliance notices were fairly confined – in that they would generally require rectification of discrete underpayments that had already been identified and quantified by a FW Inspector. In practice, this meant that the detection and calculation burden still rested with the agency and there seemed to be a view that they were not 'worth the time and effort it takes to impose them.'[199] However, in more recent years, inspectors have been using compliance notices in new and novel ways. It is now common for compliance notices to require an employer to not just rectify the underpayment in respect of the initial complainant, but to undertake a payroll review of the entire workforce and provide evidence of having done so.[200] The head of the FWO explained that where 'an employer is issued with a compliance notice, the onus will be on them to get their house in order.'[201] Expanding compliance notices in this way is important for ensuring that complaint mechanisms 'have impacts beyond the immediate workers involved',[202] which is especially critical in relation to vulnerable workers who may otherwise stay silent

Beyond rectification of the relevant underpayment, compliance notices carry no direct punishment.[203] Indeed, the issuance of a compliance notice effectively prohibits the FWO from suing for the imposition of a penalty.[204] In comparison to EUs, the preventative aspect is also weak in that there is no commitment to put in place systems to sustain compliance into the future.[205] By providing only for recovery of backwages and a low-level mechanism for compliance assurance, employers do not face an economic incentive to comply with the law either now or into the future. In the meantime, 'employers have essentially been provided a no-interest loan by its workforce.'[206] More limiting still is the fact that compliance notices are essentially private mechanisms which allow wage complaints to be 'resolved quietly and outside of the public eye.'[207] While they may provide a level of specific deterrence, they are likely to do very little in terms of general deterrence (unless and until the notice, and the underlying contraventions, are brought before a court).

### c) Opportunities and Barriers to Enhancing Deterrence in Australia

[199] Leah Vosko et al (eds), *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (University of Toronto Press, 2020), at 289. 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, Report, 2014).
[200] See, eg, Fair Work Ombudsman, 'Melbourne clothing retailer faces court', Media Release, 12 March 2020.
[201] Parker, above n. 163.
[202] Weil (2010), above n. 50, at 77.
[203] Compliance notices are quite different from infringement notices in this respect. The primary purpose of infringement notices is to dole out a set penalty to alleged wrongdoers for prescribed contraventions mainly relating to record-keeping and payroll violations. FW Act, s 558.

[204] *Hindu Society of Victoria (Australia) Inc v Fair Work Ombudsman* [2016] FCCA 221 [30].
[205] This is very different to improvement notices which are routinely used in the WHS context. See Bluff and Johnstone, above n. 105, at 342.
[206] Weil (2018), above n. 49, 442.
[207] Hallett, above n. 34, at 147.

Drawing on the idealised models outlined in Section II, and the empirical findings in Section III, the following analysis seeks to identify ways in which the deterrence effects of these instruments may be enhanced (and the potential barriers to doing so).

*Introducing Financial Penalties*

A criticism levelled at both instruments is that the absence of a financial penalty severely limits their deterrence effects. This may be true. However, increasing the penalty component of administrative sanctions may face some legal obstacles and practical challenges. In particular, under Australian constitutional law principles, administrative power – such as that exercised by the FWO – cannot be lawfully applied for penal purposes.[208] While EUs commonly contain promises which go beyond what may be ordered by a court, obligations which are too onerous or are otherwise disproportionate may be struck down by the courts on constitutional grounds.[209] If the FWO was to increase the level of the 'contrition payment', or introduce terms into compliance notices that were overtly punitive, it may enhance deterrence, but it may also constitute an unlawful exercise of judicial power. Notwithstanding these constitutional constraints, it would seem legitimate to attach a fixed penalty to compliance notices, particularly where there is evidence to suggest the firm is a repeat offender.

A second obstacle to introducing a penalty component into an EU is that, at the end of the day, the FWO must reach agreement with the signatory firm. The case of Woolworths demonstrates that this may difficult, particularly if there is no relevant point of leverage (e.g. secondary liability etc).

*Targeting Lead Firms*

With the exception of the FWO's EU with Coles, the vast bulk of the undertakings have been made with the direct employer, related employers (and in some rare cases, individuals).[210] There is a general view within the FWO that EUs cannot be made with lead firms, such as franchisors. Under the current statutory provision, a FW Inspector can only enter into an EU if they hold a reasonable belief that a contravention has been committed. Indeed, it is much more challenging to meet this threshold requirement in relation to third party firms beyond the employer. This requirement should be abandoned.[211] In addition, the secondary liability provisions could be expanded so that they apply not just to franchisors and parent companies, but other types of lead firms, such as principal contractors at the head of supply chains. Arming the FWO with the ability to issue a credible threat of liability, or the capacity to withhold privileges (via incapacitation orders or licensing revocations), may assist in coercing lead firms to enter into voluntary monitoring arrangements where they would not otherwise be inclined to do so. The case of Woolworths is illustrative of the challenges that the FWO

[208] The scope of the legislative grant, and the limits of the FWO's power in this regard, is likely to come to a head in the coming year given that the FWO has recently initiated its first set of proceedings against a party for failure to comply with the terms of the agreement. See Fair Work Ombudsman, 'FWO acts to enforce compliance with EU', Media Release, 3 August 2020.

[209] Nehme (2020), above n. 113, at 21.

[210] In some instances, one company is designated as the signatory, but then agrees to 'take all reasonable steps' to ensure that its associated entities comply with workplace laws, including via monitoring and rectification of any underpayments on behalf of the associated entity.

[211] This is in line with the recommendation of the Migrant Workers' Taskforce and is in step with the *Regulatory Powers (Standard Provisions) Act 2014* (Cth), which standardises regulatory powers exercised by Commonwealth agencies, including use of enforceable undertakings (see Part 6).

faces in this regard. Many franchisors continue to be reluctant to proactively engage with the regulator. The former head of the FWO has observed:

> Reputational leverage works as a 'push' factor for franchisors to act, but has had limited effect as a general deterrence measure to encourage other franchisors to take reasonable steps to detect non-compliance and support franchisees to be compliant.[212]

In addition, the statutory restrictions that currently apply to compliance notices should be loosened so as to allow these tools to be used in relation to all civil remedy provisions of the FW Act, rather than a much more circumscribed set of so-called 'entitlement provisions'. Again, this may potentially allow these notices to be issued against a wider range of parties, including lead firms, which would provide the FWO with an opportunity to better reflect core principles of strategic enforcement.

*Amplifying Deterrence*

If perceptions are more important than reality when it comes to deterrence, then it is clear that more needs to be done to promote and publicise sanctions. As noted above, in our study of Australian employers, very few of them were even aware that enforceable undertakings were available, let alone able to make a rational and nuanced assessment about the costs and gains of non-compliance. Similarly, as noted above, compliance notices are issued behind closed doors. Again, this significantly reduces the deterrence value of these instruments.

As Weil suggests, it is necessary for the FWO to engage in more strategic communication in relation to these instruments and direct messaging to actors who are receptive and sensitive to deterrence signals, such as competitor firms in the same sector or locality, senior directors and other board members, and increasingly, institutional investors.[213] The MADE EU required Calombaris – who had a high personal profile – to give a series of industry seminars. This term attracted a level of ire at the time, but appears to be an attempt to make competitor firms in the hospitality industry 'alert' to the real possibility of sanction and shame. Enrolling civil society actors, including worker organisation and community groups, in the wage theft project can provide additional resources by 'reframing, naming and shaming'.[214] The model of co-enforcement, developed by Amengual and Fine, envisages that worker organisations have a unique capacity to 'exercise a kind of moral power when they document and publicise egregious examples and patterns of abuse.'[215] As Hallett notes, characterising underpayment contraventions as 'wage theft' is a powerful signalling device designed 'to give moral valence to the practice by associating it with a concept – theft – with clear normative implications.'[216]

In relation to compliance notices, publicly identifying individual firms may be a step too far given that these notices are issued without any independent assessment of whether a contravention has actually taken place. However, it is possible for the FWO to amplify the deterrence effects of compliance notices by summarising and announcing the findings and outcomes to employers in the relevant industry or network.[217]

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[212] Fair Work Ombudsman, Submission to the Parliamentary Inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth) (March 2017), at 14.

[213] Weil (2018), above n. 49, at 446; Pamela Hanrahan, 'Deterring White-Collar Crime: Insights from Australia's Insider Trading Penalties Regime' (2017) 11 *Law and Financial Markets Review* 61, 67-8.

[214] Hallett, above n. 34, at 143.

[215] Amengual and Fine, above n. 10.

[216] Hallett, above n. 34, at 144.

[217] Weil (2010), above n. 50, at 57.

## V Conclusion

This paper stemmed from the debate that is currently raging in Australia over the role of deterrence in labour law enforcement.[218] Many have assumed that introducing a criminal offence of wage theft will aid in deterrence, and that greater deterrence will automatically lead to greater levels of employer compliance. This paper seeks to unpack some of these assumptions by surveying leading models of employment standards enforcement and undertaking a broad sweep of the empirical literature concerned with deterrence.

In reviewing the core features of orthodox deterrence theory, responsive regulation and strategic enforcement, it was clear that deterrence was an essential element, albeit the way in which the calculative motivations and incentives have been conceived is vastly different.[219] The theoretical and empirical literature suggests that the relationship between deterrence and compliance is complex, multidimensional and cannot always be explained via a simple cost-benefit prism.[220] In the end, it is likely that a 'detailed and "messy" mix of enforcement strategies and practices'[221] may be most effective. However, there is still much that remains uncertain about how deterrence 'works' and how to make it work better in the context of wage theft.[222]

On the evidence which is available, it appears that a drastic increase in sanctions – such as the introduction of imprisonment or a huge uplift in the size of civil penalties – may make some difference by projecting a serious threat.[223] Further, characterising employment standards violations as 'wage theft', backed by criminal sanctions or heavy fines, may shift social norms[224] and provide a level of 'implicit general deterrence' by 'challenging dominant normative, political, and cultural understandings of the law as one that merely regulates private and consensual relations between workers, rather than as a law that addresses a serious public wrong.'[225] However, there is limited evidentiary support for the idea that criminalisation of wage theft will alone act as a regulatory panacea, particularly if the enforcement apparatus is not sufficiently resourced to pursue formal sanctions on a frequent, swift and sophisticated basis.[226] As Hallett observes: 'with abysmally low enforcement rates, no amount of tweaking the penalties of wage theft violators will make a dent in the wage theft crisis.'[227] Instead, the weight of empirical data suggests that 'the only way to encourage people to comply with the law is to put in place mechanisms to detect breaches of the law and increase the perception in the minds of people that if they breach the law they will be caught.'[228] Or, as Parker and Nielsen put it: 'A regulator that wants to make a difference to compliance behaviour needs to be perceived as having both fearsome sanctions and all-seeing eyes and spies – big brother with a big stick!'[229]

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[218] As Tucker et al have observed: 'deterrence gaps are the norm, not the exception, in the enforcement of protective labour and employment laws.' Tucker et al, above n. 5, at 29. See also Vosko et al (2020), above n. 205, at 174-5.
[219] Tucker et al (2019), above n. 5, at 29.
[220] Gunningham, Thornton and Kagan (2005), above n. 129, at 290. Parker and Nielsen (2011), above n. 28, at 412.
[221] Holley and Sinclair (2018), above n. 21, at 112.
[222] Ibid
[223] Galvin, above n. 77; Parker and Nielsen (2011), above n. 28, at 414.
[224] Hallett, above n. 34, at 143.
[225] Tucker et al (2019), above n. 5, at 30.
[226] Bagaric, Alexander and Pathinayake, above n. 97, 523.
[227] Hallett, above n. 34, at 98.
[228] Bagaric, above n. 100.
[229] Parker and Nielsen (2011), above n. 28, at 407.

The subsidiary objective of this paper was to redirect attention towards those elements have been neglected or overlooked in recent debates on reform. In the latter part of the paper, I sought to apply some of the findings from the theoretical and empirical deterrence literature to advance a purposive discussion on how to promote employer compliance in Australia. This analysis of two administrative sanctions – EUs and compliance notices – revealed that both have the capacity to change the compliance calculus in compelling, but less conventional, ways. For example, by shifting the oversight burden to lead firms and employers, these instruments may simultaneously enhance the risk of detection, ease the pressure on the inspectorate, create a impetus for subsequent legal action and create a platform for future compliance.[230] Indeed, in some cases, these instruments may allow for a 'more focused and penetrative enforcement than prosecution.'[231] However, this examination also highlighted some key statutory limitations, and agency practices, which may be unnecessarily inhibiting the full deterrent potential of these tools.

[230] Davidov (2016), above n. 2, at 250.
[231] Nehme et al (2018), above n. 113, at 41.