

**The Use of Enforceable Undertakings
as a Strategic Labour Law Compliance Strategy**

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1 Introduction

Statutory minimum employment standards¹ are meaningful only insofar as they are respected and upheld. A critical question for inquiry is how to best ensure that sustained and widespread compliance is achieved. Many countries have established and maintained a state-sponsored labour inspectorate or enforcement agency which bears chief responsibility for monitoring and securing compliance through investigation and prosecution of relevant contraventions. In both industrialised and developing economies, such institutions face a number of challenges in seeking to ensure the effective enforcement of minimum employment standards, ranging from a lack of resourcing to addressing underlying changes in the organisation of work. Traditional approaches to law enforcement have been shown to be somewhat inadequate in the face of these challenges. A number of regulation and compliance scholars have proposed that deterrence measures, such as prosecution, should be coupled with more creative and strategic approaches to enforcement.² In particular, it has been argued that, wherever possible, regulators should adopt measures to encourage and assist employers to comply voluntarily.³

The focus of this paper will be on the use of enforceable undertakings by the Australian federal labour inspectorate, known as the Office of the Fair Work Ombudsman (FWO). An enforceable undertaking is a relatively new approach to the remedy and sanctioning of alleged breaches of the law that was first developed in Australia. It is essentially a statutory agreement between a regulator and the alleged offender, whether an individual and/or a firm. The agreement sets out a number of promises or commitments by the alleged offender that are intended to rectify past contraventions and encourage future compliance. Failure to meet these commitments can lead the undertaking to be enforced in court.⁴

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¹ For the purposes of this paper, ‘minimum employment standards’ and ‘minimum labour standards’ will be used interchangeably to refer to minimum wages, maximum working hours and leave entitlements as prescribed by the *Fair Work Act 2009* (Cth) (FW Act), the *Fair Work Regulations 2009* (Cth) and statutory instruments made under that Act. We do not include occupational health and safety standards in our definition, as in Australia these are set and enforced through a separate regulatory system.

² See, eg., Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); Bridget Hutter, *Compliance: Regulation and Environment* (1997).

³ Indeed, there have been various studies across several jurisdictions and policy arenas which have found that ‘negotiated compliance’ is a common feature of many regulators. See, eg, Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986) and Keith Hawkins, *Law as Last Resort* (2002).

⁴ It should be noted, however, that contravention of an enforceable undertaking does not itself attract a civil penalty.

While enforceable undertakings are somewhat novel in the context of minimum employment standards regulation, they have been used extensively in other spheres of business regulation in Australia, including occupational health and safety, consumer, competition, financial and media regulation.⁵ More recently, enforceable undertakings have been introduced into the United Kingdom as a result of the recommendations made in the Macrory Report.⁶ In many cases, they are used in to formalise the use of administrative sanctions in lieu of enforcement litigation.

The FWO has been empowered to accept enforceable undertakings since the commencement of the *Fair Work Act 2009* (Cth) on 1 July 2009. The FWO is itself somewhat of an innovation in the enforcement of employment standards in the Australian context. Prior to 2006, the federal inspectorate responsible for enforcing minimum wages and other working conditions was under-resourced, rarely brought litigation and was often characterised as less than aggressive in its compliance strategy.⁷ By comparison, the FWO is a well-resourced and high profile enforcement agency that has been active in bringing litigation against employers responsible for breaching the FW Act. The FWO has also actively sought to make use of the expanded repertoire of sanctions it has had at its disposal following the commencement of the FW Act, in particular enforceable undertakings. Since that time, the FWO has accepted approximately 22 enforceable undertakings,⁸ most of which deal with contraventions of minimum employment standards.

All of these enforceable undertakings have included an admission of contravention of workplace laws such as minimum wages and a promise to make good these contraventions. However, it has been the further commitments made by individuals and firms in undertakings that has attracted most interest. In particular, many enforceable undertakings have included clauses whereby employers have agreed: to take steps to ensure future workplace compliance such as ‘by developing systems and processes to ensure ongoing compliance with Commonwealth workplace laws’; to organize and

⁵ See, eg, Marina Nehme, ‘Enforceable Undertakings in Australia and Beyond’ (2005) 18 *Australian Journal of Corporate Law* 68; Christine Parker, ‘Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission’s Use of Enforceable Undertakings’ (2004) 67(2) *Modern Law Review* 209; Richard Johnstone and Michelle King, ‘A Responsive Sanction to Promote Systematic Compliance? Enforceable Undertakings in Occupational Health and Safety Regulation’ (2008) 21 *Australian Journal of Labour Law* 280; Richard Johnstone and Christine Parker, *Enforceable Undertakings In Action – Report of a Roundtable Discussion with Australian Regulators* (Working Paper No 71, National Research Centre for Occupational Health and Safety, February 2010).

⁶ Richard Macrory, *Regulatory Justice: Making Sanctions Effective* (Final Report, Better Regulation Executive, November 2006).

⁷ Miles Goodwin and Glenda Maconachie, ‘Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategies and Outcomes 1952-95’ (2007) 49 *Journal of Industrial Relations* 523; Miles Goodwin, ‘The Great Wage Robbery: Enforcement of Minimum Labour Standards in Australia’, PhD Thesis, School of Industrial Relations and Organisational Behaviour, University of New South Wales, March 2003; Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and the Law* (Law Book Co, Sydney, 1994).

⁸ Technically-speaking, the FWO has entered into 25 enforceable undertakings, however, this includes four enforceable undertakings with the same individual – Mr Sadamatsu Katsuyoshi - in his capacity as director of four separate companies all of which were in liquidation at the time the enforceable undertaking was made.

ensure that firm managers attend training on rights and responsibilities of employers; and to pay sums of money to external organizations such as not-for-profit community legal centres as a way of promoting future compliance with workplace laws.⁹

Proponents would argue that these commitments demonstrate the value of enforceable undertakings as a responsive alternative to traditional, punitive enforcement action such as prosecution. We will explore the debate about the value of enforceable undertakings later in the paper, but in brief terms, it is argued that enforceable undertakings improve compliance by addressing organizational commitment to, and institutionalization of, compliance in a cooperative manner.¹⁰ It also allows the regulator to explore new and innovative sanctions such as the payment of funds to an NGO – a remedy that has not previously been granted by a court. On the other hand, in other jurisdictional contexts, enforceable undertakings have been criticised. For example, some have argued that the broad discretion held by regulators and a lack of public accountability means they are unfair to alleged offenders.¹¹ At the same time, others have contended that enforceable undertakings are ‘a “soft option” that gives business offenders another chance to comply voluntarily when it would be more appropriate and effective to punish them’¹² in a manner more proportionate to the harm their conduct has caused.

In this paper, we will report on the use of enforceable undertakings by the FWO as an alternative to litigation against employers for non-compliance with minimum employment standards. This will include an analysis of the terms of various enforceable undertakings entered into by the FWO, based on our review of the content of all 22 undertakings accepted by the FWO before the end of 2011. The paper will also draw on qualitative interviews with approximately 44 inspectors, managers and lawyers of the FWO to explore some of the practicalities with using this particular tool of enforcement, including the sorts of decision-making processes they follow. On the basis of this preliminary inquiry, we will provide an assessment of enforceable undertakings as an approach to compliance with minimum working conditions, and discuss the potential transferability of this enforcement approach to other jurisdictions.

2 Theoretical Context

In theoretical terms, enforceable undertakings are generally perceived to represent an innovative and strategic approach to regulatory enforcement. The agreement specifies actions that the person or business will take (such as the adoption of new compliance processes) or refrain from taking (such as further non-compliance). It is an alternative to more formal and punitive administrative, civil or criminal sanctions and is designed to provide a quick and effective remedy for contravention of regulatory provisions. At the same time, enforceable undertakings also have the potential to secure employer

⁹ See, eg. the Enforceable Undertaking between Super A-Mart Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 17 October 2011.

¹⁰ Johnstone and King, above n 5.

¹¹ See Karen Yeung, *Securing Compliance: A Principled Approach* (Hart Publishing, Oxford, 2004), 205-206.

¹² Parker, ‘Restorative Justice’ above n 5, 211.

commitment to, and capacity for, ongoing and sustained compliance. The fact that enforceable undertakings are the product of negotiation and ultimately agreement, rather than being imposed unilaterally like infringement notices or letters of caution, means that enforceable undertakings are also likely to encourage a more widespread and systematic approach to non-compliance. They are also seen as helping institutionalise positive compliance behaviour. The process of negotiating and ultimately giving an enforceable undertaking allows a business to ‘take ownership of the regulatory solution presented.’¹³ Indeed, enforceable undertakings can be particularly effective in instances where a financial penalty is likely to be absorbed by a company without necessitating or initiating more widespread cultural change. This element is important given that research into compliance:

shows that organizational culture is at the heart of sustained compliance with regulatory requirements, and encouraging, promoting and facilitating organizational change to increase sustained and ongoing compliance is a central concern of all regulators.¹⁴

In some respects, enforceable undertakings provide an alternative way to shift the burden of compliance to the firms themselves by sparking self-regulatory modes of behavior. This approach arguably allows the regulator to take a less interventionist role in terms of monitoring and ensuring ongoing compliance.

Enforceable undertakings are also seen to represent a tailored enforcement response to the contours of each specific case and can be varied to take into account individual circumstances of the contravention and the compliance motivations of the firm, industry structures and company size and resources. In this sense, enforceable undertakings can be understood as an important part of ‘responsive regulation’.¹⁵ The theory of responsive regulation posits that for regulators to react effectively to the diverse motivations and behaviour of firms, they must be armed with a mix of regulatory tools ranging from persuasive measures to deterrent sanctions and deploy these sensitively and pointedly. While there is a level of disagreement about the proper place and use of enforceable undertakings,¹⁶ they are commonly seen as an essential intermediary step in the hierarchy of sanctions frequently represented by the ‘enforcement pyramid’. They usually sit somewhere between informal warnings and infringement notices and more formal sanctions, such as prosecution. Responsive regulation can only be effective, however, where the less formal interventions can draw power from the threat of credible, more formal sanctions at the peak of the pyramid – a fact recognised by the FWO himself who recently commented that: ‘prosecution and the EUs are the lever by which you get voluntary compliance for most matters. The only way you can do that is because there is an explicit threat as to what will occur if you don’t comply.’¹⁷ Johnstone and King similarly commented that:

¹³ Macrory Report, above n 6, 65.

¹⁴ Johnstone and King, above n 5, 283. See also Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002).

¹⁵ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); John Braithwaite, *Restorative Justice and Responsive Regulation* (2002).

¹⁶ See Johnstone and Parker, above n 5, Part 3.

¹⁷ Quote extracted from Johnstone and Parker, above n 5, 66.

Part of the responsive nature of enforceable undertakings lies in their potential for dynamic deterrence, because enforceable undertakings internalize the costs of contraventions at two stages: the costs of the measures undertaken by the firm, and the cost of the sanctions that will be imposed upon the firm if the undertaking itself is broken.¹⁸

Enforceable undertakings are also seen to reflect the goals of rehabilitation and restorative justice. Restorative justice is founded on a collaborative model where the regulator, victims and alleged wrongdoers of a particular offence or contravention work collectively to resolve the matter. In so doing, restorative justice aims to rectify harms done, restore relationships and reduce recidivism.¹⁹ To achieve restorative justice, senior management within the organization must be motivated by, and committed to, the relevant regulatory goals. Given that enforceable undertakings are generally negotiated at the upper levels of an organization and empower the parties to come together to make innovative, flexible and comprehensive agreements they have been described as demonstrating, at the very least, a partial realisation of restorative justice.²⁰

In many respects, the flexibility and innovation offered by enforceable undertakings has potentially driven regulatory reform and strengthened the call for courts to be empowered to award non-monetary penalties, such as adverse publicity orders or an order requiring the defendant to take remedial measures or training. This push is potentially manifest in the broad remedial provisions that appear in the FW Act.²¹ To date, however, there has been little use made of these new powers. In any event, enforceable undertakings offer a number of distinct advantages over prosecution, namely undertakings are generally quicker, less costly and more certain. Further, these benefits do not necessarily come at the expense of deterrent, rehabilitative or restorative outcomes.

As noted in the introduction to this paper, enforceable undertakings are not without their critics. In particular, some have questioned whether enforceable undertakings effectively let non-complying employers 'off the hook', and suggest that they are of dubious value in achieving either specific or general deterrence when compared to prosecution and imposition of sanctions by the courts. Others have suggested that undertakings privilege alleged offenders who are sufficiently sophisticated and well-resourced to engage in negotiation of undertakings on an equal footing with the regulator, and to be in a position to pay fines or compensation to professional associations or charitable organizations.²² Further concerns have been raised about the lack of public accountability in relation to undertakings. For example, negotiation of undertakings occurs in private, and the undertakings themselves are often excluded from judicial review.²³ In these circumstances 'the use of undertakings may tend to thwart, rather than nurture, the

¹⁸ Johnstone and King, above n 5, 285.

¹⁹ Braithwaite, above n 15.

²⁰ Parker, 'Restorative Justice', above n 5, 220.

²¹ See, eg, FW Act, s 545.

²² Neil Andrews, 'If the Dog Catches the Mice: The Civil Settlement of Criminal Conduct under the Corporations Act and the Australian Securities and Investments Act' (2003) 15 *Australian Journal of Corporate Law* 1 at 19.

²³ Ibid; see also Kristy Richardson, 'Judicial Review of Enforceable Undertakings under the Workplace Health and Safety Act 1995' (2007) 27 *Qld Lawyer* 250; Yeung, *Securing Compliance*, above n ^.

constitutional values of transparency, accountability, participation and substantive fairness'.²⁴ Moreover, the private nature of the negotiation process leads to the exclusion of third parties, such as affected employees or unions, in a decision that may have a significant impact on them.

We will not address all of the potential shortcomings of enforceable undertakings in this paper. However, we will evaluate how enforceable undertakings are used by the FWO, including their content, in order to reach some preliminary conclusions about the extent to which FWO is using enforceable undertakings in a manner consistent with the literature considered above.

3 Use of Enforceable Undertakings by the FWO

Administrative settlements or sanctions, either as a result or in lieu of litigation, have been a constant feature of the work of regulators. However, with the emergence of a better funded and more sophisticated labour inspectorate in Australia after 2006, came a revision of traditional compliance strategies and enforcement mechanisms.²⁵ In particular, in 2008/2009, the FWO entered into three 'enforceable undertakings' under the common law.²⁶ Use of such a tool is permissible given that contraventions under the federal workplace relations legislation are largely civil rather than criminal offences and therefore the general rules of contract and civil procedure apply.

In many ways, the introduction of section 715 of the FW Act – which provides for the making of statutory enforceable undertakings – essentially recognised and reflected the reality of what was already occurring in practice.²⁷ The Explanatory Memorandum to the legislation stated that the inclusion of this power 'provides the FWO with another option to deal with non-compliance (by encouraging co-operative compliance) instead of pursuing court proceedings.'²⁸ While enforceable undertakings now form part of the legislative landscape, there are few restrictions in the FW Act on when they can be made and what they can contain. The remainder of this section therefore explains the findings of our research concerning these two issues – the decision-making process followed by the FWO in relation to enforceable undertakings and the content of the undertakings accepted by the FWO so far.

²⁴ Yeung, *Securing Compliance*, above n 11, p 242.

²⁵ See Tess Hardy, 'A changing of the guard: Enforcement of workplace relations laws since Work Choices and beyond' in A Forsyth and A Stewart (eds) *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) and Tess Hardy and John Howe, 'Partners in enforcement? The new balance between government and trade union enforcement of employment standards in Australia' (2009) 23(3) *Australian Journal of Labour Law* 306.

²⁶ These enforceable undertakings were framed as common law deeds enforceable in court in the event of contravention.

²⁷ Since the introduction of a statutory mechanism, no further common law enforceable undertakings have been concluded.

²⁸ Commonwealth of Australia, Explanatory Memorandum to the *Fair Work Bill 2008* (Cth.), 400.

A Decision-Making Process

The decision-making process for enforceable undertakings is not necessarily straightforward. In particular, in negotiating and concluding enforceable undertakings, the FWO is ‘faced with the tension between the need to act in a consistent and predictable way and the opportunity to use the enforceable undertakings power to negotiate tailored, individual, forward-looking solutions to idiosyncratic problems.’²⁹ Given that enforceable undertakings are intended to represent a genuine negotiated resolution to a regulatory failure, the scope, length and process of negotiation are all critical factors in determining whether this objective has been or will be achieved.

Under section 715 of the FW Act, the FWO may accept an enforceable undertaking if he reasonably believes that a person has contravened a civil remedy provision, which can include statutory minimum employment standards set directly by the FW Act (for example, the National Employment Standards), or working conditions arising from instruments made under the FW Act, such as industry-level ‘modern awards’ or a registered enterprise agreement (collective bargaining agreement). Beyond this provision, there is limited legislative guidance as to when and in what circumstances enforceable undertakings should be accepted.

Given this, the FWO’s Enforceable Undertakings Policy, which is made publicly available on its website,³⁰ is the core policy document which sets out the objectives and governs the use of enforceable undertakings under the FW Act. This Policy states that:

Enforceable undertakings are accepted as an alternative to other enforcement measures including FWO litigation. Their purpose is to focus the wrongdoer on the tasks to be carried out to remedy the alleged contravention, and/or prevent a similar contravention in the future.³¹

In particular, an enforceable undertaking will be considered where, in addition to the FWO’s reasonable belief that there has been a relevant contravention, he also considers that it is in the public interest³² and appropriate in all the circumstances to resolve the matter through a formal enforcement mechanism; the contravention is admitted; and the alleged wrongdoer is prepared to cooperate with the FWO. In addition, the Enforceable Undertakings Policy states that:

An Enforceable Undertaking will not be accepted by the Fair Work Ombudsman where it does not offer a more effective regulatory outcome. An Enforceable Undertaking may be considered to be a more effective regulatory outcome where it produces an efficient result that compensates those persons who have suffered loss or damage as a result of the contravention or where it offers

²⁹ Johnstone and Parker, above n 5, 19.

³⁰ See Fair Work Ombudsman, *Guidance Note 4 – Enforceable Undertakings Policy* (20 July 2011) <<http://www.fairwork.gov.au/fwoguidancenotes/GN-4-FWO-Enforceable-Undertakings-Policy.pdf>>.

³¹ *Ibid* 4.

³² The factors which are relevant to determining whether a particular matter is considered to be in the ‘public interest’ is set out in some detail in a separate guidance note. See Fair Work Ombudsman, *Guidance Note 1 – Litigation Policy* (20 July 2011) <<http://www.fairwork.gov.au/fwoguidancenotes/GN-1-FWO-Litigation-Policy.pdf>>. There are no factors which are specifically used to determine whether an EU is in the ‘public interest’.

opportunities to ensure continuing compliance that may not be available via an order from a court. An Enforceable Undertaking may provide the most effective and flexible enforcement mechanism as a range of compliance outcomes can be achieved. Enforceable Undertakings are not considered an appropriate enforcement mechanism to deal with trivial matters.³³

Conversely, an enforceable undertaking will not be accepted by the FWO if it either fails to admit the contravention or seeks to deny the contravention.³⁴ The position of the FWO with respect to admissions in enforceable undertakings is considered in further detail as an issue pertaining to the content of undertakings in the following section of the paper.

Under these policy guidelines, enforceable undertakings have been used as the relevant mechanism in relation to a range of different contraventions in various industries including the failure of a national retail franchise to pay for training³⁵ to a small chain of Japanese restaurants failing to pay employees their basic hourly rate of pay and keep employment records.³⁶ The variation in industry and type of alleged contravention is set out in Table 1 below.

³³ Enforceable Undertakings Policy, above n 30, 4.

³⁴ Enforceable Undertakings Policy, above n 30, 5.

³⁵ See Enforceable Undertaking between Cotton On Services Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 3 June 2010.

³⁶ See various enforceable undertakings between Mr Sadamatsu Katsuyoshi and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 5 September 2011.

Table 1: The FWO’s Use of Enforceable Undertakings by Industry and Type of Alleged Contravention: 2009-2011³⁷

Industry	2011	2010	2009	Total
Retail	3	1	1	5
Hospitality	3	1	0	4
Transport	1	2	0	3
Medical	1	0	0	1
Agriculture	1	0	0	1
Food processing	1	0	0	1
Manufacturing	0	0	1	1
Mining	0	0	1	1
Community Service Organisation	0	1	0	1
Cleaning	0	1	0	1
Studio Photography	1	0	0	1
Service Station	1	0	0	1
Processing/Recycling	1	0	0	1
<i>Total by Industry</i>	<i>13</i>	<i>6</i>	<i>3</i>	<i>22</i>
<hr/>				
Type of Alleged Contravention³⁸				
Wages and Conditions ³⁹	12	4	1	17
Agreement-Making	1	1	1	3
Redundancy Pay	0	0	1	1
Industrial Action	0	1	0	1
<i>Total by Contravention</i>	<i>13</i>	<i>6</i>	<i>3</i>	<i>22</i>

The relevant legislative provisions imply that the process for entering into enforceable undertakings is driven by the alleged wrongdoer, given that the FWO can only accept but not offer enforceable undertakings. In practice, however, enforceable undertakings are often identified by the inspector as a relevant enforcement option in the course of an investigation. At other times, the employer and/or its representative may proactively approach the FWO with a request for such a mechanism to be considered in a bid to avoid the uncertainty and costs associated with litigation.⁴⁰ Ultimately, however, enforceable undertakings can only be entered into ‘voluntarily’, although the parties’ consent is often obtained in circumstances where the possibility of litigation by the FWO looms in the background.

Further research is required to determine on what basis specific matters are chosen as being appropriate for enforceable undertakings under the FWO’s policy. It is apparent from the interviews we have conducted with FWO staff that the relatively inexpensive

³⁷ This data is based on the FWO’s public register of enforceable undertakings which have been entered into since 1 January 2009, including common law undertakings. We note that the Workplace Ombudsman (the predecessor to the FWO) did not enter into any enforceable undertakings prior to 1 January 2009.

³⁸ Some enforceable undertakings are described by the FWO as addressing more than one type of alleged contravention. For the purposes of this table, each enforceable undertaking has only been counted once.

³⁹ Data relating to this type of contravention also includes contraventions relating to record-keeping requirements.

⁴⁰ Based on various FWO Interviews. See, eg, FWLF, FWLE.

and time efficient nature of enforceable undertakings when compared to litigation is an important factor in making undertakings an attractive enforcement option.⁴¹ However, many FWO staff have emphasized the potential impact of enforceable undertakings as an important consideration, noting that they were still capable of delivering deterrence. In this respect, one FWO lawyer commented that:

Enforceable undertakings have been very significant. There is a perception or misconception that enforceable undertakings are not as powerful as court-ordered outcomes. In fact, they are often more powerful. In a recent enforceable undertaking entered into by Super A-Mart, the company committed to a six figure donation to a community organisation. This not only meant that the company remedied past contraventions, but also committed to future compliance as well. We have found that enforceable undertakings are getting picked up in the media and delivering a general deterrent impact.⁴²

Others underlined the important role that publicity and media played in the context of enforceable undertakings. Enforceable undertakings made in this context always appear on a public register available on the FWO's website. In many respects, the fact that enforceable undertakings are always published makes them far more compelling than mere administrative settlements. The FWO himself said that making enforceable undertakings transparent and available is important given that: '[o]ur objective is to be able to use EUs as a demonstration of compliance.'⁴³ In a similar vein, a FWO manager observed:

I can tell you that when our lawyers are negotiating enforceable undertakings with major employers, while they're in mediation with major employers, it's not the penalty that concerns them. Do you think Toys R Us or Hungry Jack's or BP is concerned about a \$300,000 fine? They're concerned about the publicity ... the big end of town has cottoned on to the fact that the negative publicity about their behaviour is far more costly than the \$300,000 penalty that they're going to achieve in the Courts. To me that's, again, a positive impact for us.⁴⁴

This comment raises the question, however, of whether the outcome is disproportionate to the actual contravention, particularly in circumstances where there is no adjudication as to liability.⁴⁵

Others pointed to the fact that the publicity generated by an enforceable undertaking is not only important in terms of deterrence and education, but is also critical to alert former employees that they may have been underpaid and have money owed to them.⁴⁶ Interestingly, one lawyer also commented on fact that the media associated with enforceable undertakings is quite helpful in terms of promoting the FWO's public image.⁴⁷ While litigation pursued by the FWO could sometimes be perceived as being

⁴¹ FWO Interview: FWML.

⁴² FWO Interview: FWLF. See also FWO Interview: FWLE.

⁴³ Quote extracted from Johnstone and Parker, above n ?, 42.

⁴⁴ FWO Interview: FWMG.

⁴⁵ See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (13 March 2003), 593.

⁴⁶ Based on comments made in FWO Interview: FWLD.

⁴⁷ FWO Interview: FWLF.

unfair or harsh, enforceable undertakings can be seen as a ‘softer’ option which still allows the FWO to ‘come up with deals that we wouldn’t be able to get in the courts.’⁴⁸

It is not just the practical benefits of enforceable undertakings which have proved popular with the FWO staff, but also the ways in which such undertakings can effectively shape future compliance behaviour. This option is expressly posited as being distinct from, and less formal than, the FWO enforcing the relevant regulation through compliance notices or court proceedings. One inspector noted:

We only go down...[the enforceable undertaking] road as an alternative to litigation when we have everything we need for litigation but we decide that for whatever reason that the enforceable undertaking is a more appropriate way to go. Basically if we put it in the simplest possible terms that’s where we’re really more interested in future behaviour than past behaviour. It’s not to say what happens in the past doesn’t have to be fixed but we’re really trying to lock them into the future behaviour.⁴⁹

This view was echoed by a FWO lawyer who noted that:

One of the benefits of enforceable undertakings is that, as you know, you can get a whole range of measures that you wouldn’t necessarily get from a Court, and once again you might focus on companies, particularly larger companies, doing things like regular audits and checks of their workplaces. And it may not necessarily be limited to the workplace that’s had the issue – it could potentially be much broader – and so that’s obviously an advantage there, and they’ve been quite effective.⁵⁰

It is apparent from these comments that when deciding whether or not to pursue an enforceable undertaking as a possible regulatory option in a given case, FWO staff are mindful of the potential benefits of enforceable undertakings in achieving compliance goals.

Once an enforceable undertaking has been identified as a possibility, there is a comprehensive internal decision-making procedure in place for the making of enforceable undertakings. In the past, enforceable undertakings were often negotiated by the relevant inspector with the support of his or her team leader or director. More recently, a decision has been made that enforceable undertakings ‘are of such significance that they can only really be negotiated at the higher levels.’⁵¹ Regardless of who is responsible for the actual negotiations, these can generally only commence where the relevant approvals have been obtained. This means that while the inspector may raise an enforceable undertaking as the most appropriate option, it will only be pursued if the briefing document prepared by the inspector under the supervision of his or her team leader or manager, is approved by the Strategic Litigation Committee (i.e. a specialist sub-committee of the FWO which considers all formal sanctions, including litigation, enforceable undertakings and compliance notices). After this approval has been granted, negotiations with the alleged wrongdoer can commence. Ultimately, the decision as to

⁴⁸ FWO Interview: FWLF.

⁴⁹ FWO Interview: FWIS.

⁵⁰ FWO Interview: FWLD.

⁵¹ FWO Interview: FWLF.

whether to accept an enforceable undertaking rests with the Fair Work Ombudsman or one of a select number of authorised delegates.⁵²

This detailed approval process appears to have had the effect of reducing the number of enforceable undertakings that have been concluded. Several inspectors we interviewed expressed the view that while enforceable undertakings were valuable, they were not being used often enough because of the amount of work involved and because of the requirement that it be approved by the FWO himself.⁵³ Indeed, we were informed by one inspector that some enforceable undertakings have taken up to 18 months to finalise.⁵⁴ That said, it seems that there has been an internal push to speed up the process by shortening the window of opportunity that an employer has to accept the terms of an enforceable undertaking before the matter proceeds to litigation.⁵⁵ Restricting the negotiating process in this way may minimise the risk faced by another inspector whose experience with enforceable undertakings had been frustrating insofar that the negotiation process had stalled and ‘so it just went to custard.’⁵⁶ By the time this impasse occurred, the contraventions were stale, the employees had been repaid and the public interest in pursuing the matter through the courts had weakened.

While the decision-making process is highly centralised, the FWO has expressed his intention that FW Inspectors should and will make extensive use of enforceable undertakings to avoid lengthy and expensive litigation in cases where employers are prepared to cooperate with FWO.⁵⁷ The FWO also commented that one of the motivations for using enforceable undertakings is to ‘wrap up the matter with an acceptable outcome for both the community, workforce and the offender.’⁵⁸ That said, it is not clear to what extent affected employees, unions and/or employer associations, are consulted as part of the decision-making process.

The shift towards greater use of enforceable undertakings has been reflected in the numbers made in each financial year since they were first trialled. For example, three were made under the common law in 2009, this rose to six in the following year with the introduction of the FW Act and subsequently peaked in 2011 where 13 enforceable undertakings were concluded.⁵⁹ This increase has not necessarily come about through the setting of specific targets, but rather as a result of natural evolution. One FWO lawyer commented that:

⁵² See Delegation of Powers and Functions issued by the Fair Work Ombudsman on 24 March 2011 and FW Act, s 683.

⁵³ FWO Interview: FWIP; FWO Interview: FWIR.

⁵⁴ FWO Interview: FWIL.

⁵⁵ Based on comments made in FWO Interview: FWLD.

⁵⁶ FWO Interview: FWML.

⁵⁷ In particular, Nicholas Wilson has previously commented that: ‘We will be expecting to continue with enforceable undertakings under the legislation and to ramp them up pretty considerably. We take roughly about 80 litigations per year nationally. I can see a role for about the same number of enforceable undertakings in the future.’ Quote extracted from Johnstone and Parker, above n 5, 41.

⁵⁸ Quote extracted from Johnstone and Parker, above n 5, 41.

⁵⁹ So far in the current financial year 2011-2012, there have been five enforceable undertakings concluded.

as the years' progress I think that [enforceable undertakings] will probably be a tool used more readily. But I think we're still assessing the EU space ... in terms of the appropriate matters ... it's used for ..., because some would criticise the EU as the soft option. ... And then some people would have a go at us for taking a matter to Court, and say we're just hard task masters trying to beat people into submission. Sometimes you can't win. But I think as the classic saying goes, well if they both don't agree, you must be doing something right.⁶⁰

There is some evidence that the process of negotiation of enforceable undertakings is achieving the legislators' goal of encouraging co-operative compliance. In many instances, it seems that the negotiations surrounding enforceable undertakings are less adversarial and more constructive than where the FWO is threatening litigation. While self-auditing and future reporting may be onerous, employers may also take some comfort from the fact that the outcomes of the enforceable undertaking process are certain, '[w]hereas with litigation someone else is making the decision, you don't know what penalty you will or you won't get.'⁶¹

B Content of Enforceable Undertakings

The proper scope and content of enforceable undertakings has also been the subject of some debate amongst academics and regulators.⁶² Indeed, one of the key benefits of enforceable undertakings is arguably the ability to include innovative and flexible remedies which seek to address the root rather than just the consequences of the underlying compliance problem. Undertakings also allow regulators to reach beyond what could be obtained in a court setting. On the other hand, some have argued that the content of enforceable undertakings should not exceed the legislative mandate and should be directly related and proportionate to the breach.

The FW Act does not provide any guidance as to what must be included in, or excluded from, an enforceable undertaking. While one lawyer observed that in considering the terms of an enforceable undertaking, 'it's all up for negotiation',⁶³ the FWO Enforceable Undertakings Policy suggests that some terms are mandatory. This is consistent with the observations of a FWO lawyer who commented that:

As a regulator we see ourselves as having a very different role from [a commercial litigant], because we have to have that education, that deterrence, that corrective workplace behaviour, and so if we sort of settled our litigations, or just came up with compromises left, right, centre, then there's issues about the strength of our role, the independence of our role, and our functioning as a regulator.⁶⁴

The Policy states that, at a minimum, the alleged wrongdoer must admit the contravention(s) which should be set out in the body of the EU and agree to remedy the contraventions in the manner and timeframe specified by the EU (unless it has already

⁶⁰ FWO Interview: FWLC.

⁶¹ FWO Interview: FWLD.

⁶² See, eg, Johnstone and Parker, above n 5.

⁶³ FWO Interview: FWLF.

⁶⁴ FWO Interview: FWLD.

been rectified). As a general rule, the EU should also specify any other actions that the alleged wrongdoer has agreed to undertake, however, the substance of these obligations is not prescribed. The Policy further states that the FWO will not accept an enforceable undertaking that is required to be kept confidential from any person.⁶⁵ Consistent with this, all of the EUs that have been finalised so far have been posted on the FWO's website and are normally accompanied by a tailored media release.⁶⁶

The enforceable undertakings that we reviewed typically fell within two standard formats depending on when they were made.⁶⁷ Generally, those made before July 2010 followed the earlier format which set out the background,⁶⁸ admissions and relevant commitments in the main body of the document. In contrast, the more recent format which has been generally used after July 2010 is more formal, lengthy and legalistic. The background and relevant commitments are set out in separate appendices, while the main body of the document consists of standard form clauses dealing with, amongst other matters, the admissions of contravention, acknowledgements, termination by the FWO, continuing obligations, entire agreement, construction, costs and governing law. The drafting of some of these clauses appear to mimic commercial deeds of settlement and appear not to reflect the unique statutory context in which they have been made. There is also a concern that they are not drafted in a way that supports the underlying regulatory objectives. For example, both the earlier and new formats of the enforceable undertakings refer to 'consideration' – an element which is essential to the enforceability of common law contracts. Given that enforceable undertakings are made under and authorised by statute, such provisions appear redundant. More generally, if enforceable undertakings are being made to support the broader regulatory goals of deterrence and education, it seems that a simpler framework and plain language would be more helpful than a complex structure and use of detailed legal terminology.⁶⁹

As noted in the previous section, all enforceable undertakings entered into by the FWO must include an admission of the contravention and cannot include a denial of the contravention.⁷⁰ The position of the FWO in respect of admissions in enforceable undertakings appears to stand in some contrast to the approach taken by the ACCC in trade practices matters and ASIC in financial regulation.⁷¹ The relevant guidelines of both

⁶⁵ Enforceable Undertakings Policy, above n 30, 8. The Policy states, however, that the person giving an enforceable undertaking may request that certain information, such as information which is commercial in confidence or contains personal details of an individual, is not made publicly available.

⁶⁶ We were informed that, in some exceptional cases, an EU would not be accompanied by a press release. For instance, if the contraventions were perceived to be old or the size of the relevant underpayment was exacerbated by delays of government agencies. FWO Interview: FWMG.

⁶⁷ Based on comments made in FWO Interview: FWLB.

⁶⁸ Background information normally provides a brief overview of the company size, the industry and the nature of the contraventions.

⁶⁹ By way of contrast, it seems that undertakings made under 87B of the Trade Practices Act 1974 (Cth) and the Competition and Consumer Act 2010 (Cth) are far simpler than those made under the FW Act. See, eg, Undertaking by Australian Workplace Services Pty Ltd dated 10 January 2012.

⁷⁰ Enforceable Undertakings Policy, above n 30, 5.

⁷¹ The issue of admissions in enforceable undertakings being subsequently used in court proceedings has been raised in respect of the ACCC, which has, on occasion, combined enforceable undertakings with court action via a consent order or contested proceedings. For example, in *Australian Competition and Consumer*

regulators expressly state that they will not insist on admissions in enforceable undertakings, but will require, in some cases, that the regulator acknowledge the regulator's concerns.⁷² In this respect, Karen Yeung argues that: '[r]egulators should, as a matter of procedural fairness and ethical duty, formally inform suspects that they are not obliged to provide admissions in giving enforceable undertakings.'⁷³ This issue is not insignificant when one considers the fact that while the FWO is prevented from pursuing civil penalty litigation where an enforceable undertaking is in place,⁷⁴ this 'in no way impedes the ability of another party with standing to bring proceedings in relation to the contravention'.⁷⁵ This means that employees, or even unions, who feel that the enforceable undertaking does not adequately redress the harm, may pursue the matter through the courts.

Beyond the standard clauses, however, we were informed in our interviews that enforceable undertakings were tailored to the circumstances of each case. As one lawyer put it, there is no 'one size fits all EU and what works for big business is not the same as small business – it's recognising that there's different circumstances'.⁷⁶ Indeed, our review of previous enforceable undertakings reveal a kaleidoscope of different commitments including to: make good any underpayments,⁷⁷ conduct FWO-approved workplace relations compliance training,⁷⁸ provide a paid meeting of affected employees,⁷⁹ report to the FWO regarding future compliance,⁸⁰ develop workplace

Commission v Colgate-Palmolive Ltd [2002] FCA 619 (15 May 2002), Colgate was subject to a court-ordered pecuniary penalty of \$250,000, notwithstanding that it had previously given the ACCC an undertaking under section 87B of the *Trade Practices Act 1974* (Cth) that it would maintain a compliance program for three years. For further discussion, see Marina Nehme, 'Enforceable Undertaking and its Impact on Private Lawsuit' (2008) 22 *Australian Journal of Corporate Law* 275.

⁷² See ALRC – Principled Regulation, above n 45, 603.

⁷³ Karen Yeung as cited in ALRC – Principled Regulation, above n 45, 605.

⁷⁴ Cf with the ACCC which is entitled to bring legal proceedings in relation to the same or a related matter which is the subject of an enforceable undertaking. See Australian Competition and Consumer Commission, *Section 87B of the Trade Practices Act – Guidelines on the Use of Enforceable Undertakings by the Australian Competition and Consumer Commission*, September 2009, 6.

⁷⁵ See Enforceable Undertakings Policy, above n 30, 5. A note to section 715(4) of the FW Act also states that: 'A person other than an inspector who is otherwise entitled to apply for an order in relation to the contravention may do so.' The Explanatory Memorandum to the Fair Work Bill 2008 (Cth) notes that, in circumstances where a person has brought enforcement proceedings against a firm or individual who has previously entered into an enforceable undertaking in relation to the same contravention(s), '[i]t is envisaged that a court would take an enforceable undertaking into account when making orders to remedy a contravention, including when it is considering whether to impose a pecuniary penalty.' See Explanatory Memorandum, Fair Work Bill 2008 (Cth), [2670].

⁷⁶ FWO Interview: FWLD. Another lawyer also commented that in relation to enforceable undertakings: 'there's a template that just has the bare minimum, it's just formatted in the way that we want them formatted, but in terms of the content it's always dependent on each individual case.' FWO Interview: FWLB.

⁷⁷ See, eg, Enforceable Undertaking between Irvine's Transport (Pt. Pirie) Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 13 December 2010.

⁷⁸ See, eg, Enforceable Undertaking between eJack Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 21 January 2011.

⁷⁹ See, eg, Enforceable Undertaking between Ascot Haulage (NT) Pty Ltd & Anor and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 15 February 2011.

⁸⁰ See, eg, Enforceable Undertaking between CFC Retail Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 4 March 2011.

relations compliance plans⁸¹ and post a public apology on Facebook⁸² or website.⁸³ An example is the undertaking agreed by the FWO with Super A-Mart Pty Ltd in late 2011, whereby the operator of a chain of furniture retail stores admitted to wage underpayments in relation to more than 800 of its employees over a seven year period. In that particular undertaking, the company made a number of additional commitments, including promises: to ensure future workplace compliance ‘by developing systems and processes to ensure ongoing compliance with Commonwealth workplace laws’; agreeing to organize and ensure that all its store managers attend a training course on rights and responsibilities of employers; and agreeing to pay the sum of \$120,000 to a not-for-profit community legal centre, the Working Women’s Centre Queensland, ‘to assist with the promotion of compliance with ... workplace laws’.⁸⁴

Table 2 below sets out a list of some of the types of commitments and the frequency with which they have been included in enforceable undertakings accepted by the FWO up until the end of 2011.

Table 2: The Content of FWO Enforceable Undertakings: 2009-2011

Type of Commitment ⁸⁵	Number of Undertakings Containing Commitment
Make good underpayment	11
General commitment to ensure future workplace relations compliance	21
Apology/notice to employees	16
Paid meeting of affected employees	7
Workplace notice	5
Public notice/social media notice	12
Payment to not-for-profit organisation or educational institution	4
Workplace relations compliance manual	5
Workplace relations compliance program or training	20
Future reporting to the FWO	8
Engage independent person to undertake future audit activity	9
Attempt to locate former employees	4

One manager of the FWO stated that the earlier enforceable undertakings were ‘fairly rigid in their kind of thinking’,⁸⁶ however, recent undertakings have been more experimental and wide-ranging. For example, an early enforceable undertaking made

⁸¹ See, eg, See Enforceable Undertaking between Signature Portrait Studios Pty Ltd and Lyn Brabban and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 28 March 2011.

⁸² See, eg, Enforceable Undertaking between Cotton On Services Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 3 June 2010.

⁸³ See, eg, Enforceable Undertaking between CMA Corporation Ltd & Ors and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 15 June 2011.

⁸⁴ Enforceable Undertaking between Super A-Mart Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 17 October 2011.

⁸⁵ This table represents the commitments that are commonly included in enforceable undertakings, however, there were a number of limited instances where commitments fell outside this range.

⁸⁶ FWO Interview: FWMH.

under the common law included, amongst other things, a general commitment to ensure compliance with the relevant regulations in the future and conduct a self-audit within 28 days of the execution of the undertaking.⁸⁷

In comparison, the commitments in relation to future compliance set out in more recent enforceable undertakings, such as the one negotiated with Super A-Mart, had a much greater level of prescription. The undertaking included not only a general statement as to future compliance, but also required the company to prepare a workplace relations compliance manual, undertake workplace relations compliance training with the approval of the FWO and engage an accounting professional or audit specialist to conduct an annual workplace relations compliance audit for a period of three years.⁸⁸

Many of the FWO staff we spoke to believed that expansive remedies were innovative and appropriate. One of the oft-cited examples of innovation in FWO enforceable undertakings is where businesses agree to pay sums of money to external bodies such as community legal centres, as in the Super A-Mart undertaking. Another example is the enforceable undertaking entered into by the toy retail chain Toys R Us, which included a commitment by the company to pay \$300,000 to various charities, organisations, groups or entities as selected in consultation with the FWO and having regard for the needs of young and vulnerable workers in those states and territories where the contraventions occurred.⁸⁹

However, one manager expressed concern that some commitments in enforceable undertakings went beyond the intentions of the Act, a comment which appears particularly relevant to the Super A-Mart and Toys R Us commitments described above.⁹⁰ This reflects a number of Yeung's 'constitutional value' concerns in relation to enforceable undertakings. In particular, Yeung argues that enforceable undertakings although wide, are not unlimited and should not go beyond the scope of the legislative grant. Further, under Australian constitutional law principles, administrative power cannot lawfully be applied for penal purposes. In other words, enforceable undertakings should only go so far as is necessary to correct the relevant contraventions, which should not amount to punishing the alleged wrongdoer through the imposition of onerous or disproportionate commitments.

This view stands in contrast to the majority opinion of the FWO staff which is reflected by the following comments of a FWO lawyer regarding enforceable undertakings:

by their very nature they're very innovative, and they do go well beyond what a Court has jurisdiction to order, but I think that's the beauty of them as well...we're trying to develop other

⁸⁷ See Enforceable Undertaking between Pilbara Iron Company (Services) Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Workplace Ombudsman) dated 26 March 2009.

⁸⁸ See Enforceable Undertaking between Super A-Mart Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 17 October 2011.

⁸⁹ See, eg, Enforceable Undertaking between Toys R Us (Australia) Pty Ltd (**Toys R Us**) and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 21 January 2011.

⁹⁰ FWO Interview: FWMP.

ways by which we can achieve our primary functions of promoting harmonious workplaces and education, and if we can get educative value out of our EUs, why wouldn't we be doing it if people are taking out advertisements, paying for seminars, putting money into legal centres to help educate people...⁹¹

While there was a common perception shared amongst managers and lawyers that the commitments set out in enforceable undertakings were far more expansive than what could be sought in a court, it is not clear that this position has necessarily been tested, particularly under the FW Act which, as noted earlier, grants the courts very broad remedial powers in relation to civil penalty provisions.⁹² Indeed, the apparent ease with which these expansive remedies have been included in enforceable undertakings raises the question of whether similar remedial measures should be more actively pursued or granted by the courts.

It is common for enforceable undertakings to include commitments which facilitate monitoring of future compliance by the business with minimum working conditions. As we noted in our discussion of the theory of responsive regulation, although FWO's use of enforceable undertakings are intended as an alternative to litigation which encourages co-operative compliance, there must nevertheless be a deterrent element to these agreements. That is, the fact that the regulator has the statutory right to enforce the agreement in court is intended to motivate the business to comply with the undertaking, including any commitments to future compliance with minimum working conditions.⁹³ It is therefore important that compliance with the terms of enforceable undertaking is monitored so that the signatory knows it is likely that any breaches to the terms of the undertaking can be detected.⁹⁴

A number of enforceable undertakings have included a commitment by the employer to undertake self-audits of ongoing compliance and to report the results of these findings as well as 'details of proactive compliance measures' to FWO. Others have included a commitment to have compliance audited by a third party - in many of the new format enforceable undertakings, these audits are to be performed by 'an accounting professional' or an 'audit specialist'.⁹⁵ Reporting and audits are generally required to be carried out annually over a period of three years.

Inspectors are also informed, at the time the enforceable undertaking is finalised, of any relevant monitoring that must be undertaken. At other times, for instance where there is a significant group of former employees who are owed money, the company and the

⁹¹ FWO Interview: FWLC.

⁹² In particular, section 545(1) of the FW Act states that the federal courts may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision. It should be noted that there are some limitations on orders made in relation to costs (FW Act, s 570) and orders made in relation to contraventions of those civil penalty provisions which deals with reasonable business grounds and protected action ballot orders (FW Act, ss 44(2), 463(3) and 745(2)).

⁹³ See Marina Nehme, 'Monitoring Compliance with Enforceable Undertakings' (2009) 24 *Australian Journal of Corporate Law* 76 at 77-78.

⁹⁴ *Ibid.*

⁹⁵ See, eg, Enforceable Undertaking between CFC Retail Pty Ltd and the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) dated 4 March 2011.

inspectorate may work together to monitor compliance with the enforceable undertaking.⁹⁶ So far, we were informed that the FWO has not had to take enforcement action in respect of any contraventions that have been the subject of enforceable undertakings.⁹⁷ Further, it appears that there have been no instances where a party has sought to vary or withdraw from an undertaking.⁹⁸ We were informed that most employers were usually quite proactive in reporting on what they had done,⁹⁹ and one lawyer believed that the lack of any enforcement action was a sign that ‘they’re obviously working’.¹⁰⁰ While there has been little problem with enforceable undertakings being complied with so far, experience from other jurisdictions shows that holding parties accountable to an enforceable undertaking is ‘central to the credibility of undertakings as an enforcement option’¹⁰¹ and is not necessarily straightforward.

As noted earlier, the FWO is expressly prohibited from bringing civil penalty litigation if an enforceable undertaking is in place. In addition, there is no express right under the legislation to vary, withdraw from or terminate an enforceable undertaking at the FWO’s own initiative. Rather, the right to vary or withdraw from an undertaking rests with the person giving the undertaking, albeit such a right may only be exercised with the FWO’s consent.¹⁰² However, the FWO has sought to circumvent this problem by including two clauses in their enforceable undertakings: one which purports to give the FWO a right to bring court proceedings against a person who withdraws from an undertaking; and another clause which provides that the FWO may terminate the enforceable undertaking at any time with seven days’ written notice if the person who gave the undertaking commits, in the opinion of the FWO, a serious or persistent breach or non-observance of the terms of the undertaking. Both these termination provisions have not yet been tested.

4 Conclusion – EUs and Strategic Compliance

Our research has revealed that the FWO has made extensive use of enforceable undertaking since receiving statutory authorisation to accept them. There is no doubt that through deployment of enforceable undertakings, the FWO has demonstrated that it has a mix of regulatory approaches available to it that is consistent with the ‘enforcement

⁹⁶ One lawyer commented that, one example, ‘where there might be some work for FWO to do, is say there’s a whole range of underpayments, they’re a whole heap of former employees, we’ve got money sitting there in public funds, we’re trying to get the employer to make some efforts to try and email, phone, locate some of these employees, and we might say, “We want you to report to us on all the efforts that you’ve made; we’ll give you an up to date list and all the ones that have claimed the monies, and those who are still outstanding,”...’ FWO Interview: FWLD.

⁹⁷ Various FWO interviews: FWLF, FWLE and FWLD.

⁹⁸ Once agreed, a party to an EU can only vary or withdraw from the agreement with the consent of the FWO. The FWO’s Enforceable Undertakings Policy provides that consent will only be given where the alleged wrongdoer can demonstrate that: a) compliance with the EU is impractical or ineffective; or there has been a relevant material change which renders variation or withdrawal appropriate. See FW Act, s 715(3); and Enforceable Undertakings Policy, above n 30, 6.

⁹⁹ Based on comments made in FWO Interview: FWLD.

¹⁰⁰ FWO Interview: FWME.

¹⁰¹ Johnstone and King, above n 5, 313. See also Nehme, ‘Monitoring Compliance’, above n 93, 76; and Christine Parker, ‘Regulator-Required Corporate Compliance Audits’ (2003) 25(3) *Law & Policy* 221.

¹⁰² FW Act, s 715(3).

pyramid' of responsive regulation. We have also observed that the enforceable undertakings entered into by the agency have become more sophisticated and ambitious in their content from 2011 onwards. For example, we noted that commitments to future compliance in enforceable undertakings had become more detailed in their prescription of steps to be taken by firms to meet this goal, whether through training and/or compliance audits. This evidence suggests that the FWO is endeavouring to be strategic and innovative in its use of enforceable undertakings to achieve compliance. Certainly, in requiring firms to take specific steps, the newer enforceable undertakings require firms to do more to institutionalise compliance than the general statements in the earlier documents.

However, the enforceable undertakings entered into by FWO do not necessarily address the criticisms that have been made in the context of other policy jurisdictions. While the FWO is taking steps to ensure that the process for negotiating enforceable undertakings is quicker, they have not always been an efficient alternative to litigation. Although all enforceable undertakings and their contents have been made public by the FWO, they are nevertheless negotiated in private through a process that potentially excludes interested third parties, thus raising questions about their accountability. The power to enter into enforceable undertakings is yet to be properly tested either through the passage of time or before the courts.

Finally, there is as yet little evidence of how effective enforceable undertakings have been in bringing about greater organisational commitment to compliance on the part of business signatories. Although the presence of clauses requiring compliance programs and training and third party auditing is a positive development, such clauses still require FWO to be vigilant and to monitor compliance with the terms of enforceable undertakings. This may be difficult in circumstances where the agency has finite resources which must be spread across a number of responsibilities. Parker has observed that regulators must have both capacity and commitment to rigorous monitoring in order for undertakings to operate successfully and credibly.¹⁰³ In future research, we hope to garner the responses of employers who have entered into an enforceable undertaking, as well as those in the industry who may have been aware of the enforceable undertaking, to shed some light on how effective undertakings have been in achieving both specific and general deterrence.¹⁰⁴

Nevertheless, enforceable undertakings have been an important development in the enforcement of minimum employment standards in Australia. This may be an approach which is potentially transferable to labour law systems in other countries. Enforceable undertakings are now more common in the UK as a result of the recommendations of the Macrory Report and subsequent statutory amendments. In the US, David Weil has noted the success of a similar regulatory tool, known as a 'compliance agreement', in the Department of Labor's efforts to improve employment conditions in that country's

¹⁰³ Parker, 'Compliance Audits', above n 101; see also Johnstone and King, above n 5, 312-314.

¹⁰⁴ What we propose would be similar to the study of business responses to enforceable undertakings in Australian occupational health and safety regulation conducted by Johnstone and King: see Johnstone and King, above n 5.

garment industry.¹⁰⁵ That said, enforceable undertakings will not be appropriate to all jurisdictions, and many may wish to wait for more evidence of their effectiveness before replicating them.

¹⁰⁵ David Weil, *Improving Workplace Conditions Through Strategic Enforcement*, A Report to the Wage and Hour Division (US Department of Labour), May 2010.