

**SUBMISSION
TO THE
FAIR WORK ACT REVIEW**



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1. Introduction

- 1.1. This submission is made to the Panel conducting the Fair Work Act Review by the Centre for Employment and Labour Relations Law ('CELRL') at the University of Melbourne. The CELRL is a specialist unit within Melbourne Law School devoted to teaching and research in labour and employment law.
- 1.2. The Government has provided a very short timeframe for making submissions, especially given the requirement in the Terms of Reference for the Review that submissions are supported by evidence.
- 1.3. Our submission will therefore be confined to commentary and analysis on discrete aspects of the operation of the *Fair Work Act 2009* (Cth) (FW Act) which relate to research expertise of Centre members who have contributed to this submission. It will not provide a comprehensive discussion of the FW Act.
- 1.4. In particular, the submission will address the following aspects of the legislation:
 - the FW Act's compliance with Australia's international obligations;
 - the right to request mechanism in the NES;
 - the general protections provisions;
 - institutions, compliance and enforcement.
- 1.5. The members of the Centre who have contributed to this submission are available to meet with the Committee to elaborate on this submission, and would welcome the opportunity to do so.

2. General Observations

- 2.1. In our view the FW Act has largely been successful in achieving the objectives it was set. We note that much of the debate over the impact of the FW Act, in particular business criticism of the effect of the legislation on productivity, has been heavy on hyperbole and based on anecdotal rather than empirical evidence.¹ When the FW Act is considered within its broader historical context, it is apparent that the Act has not swung the pendulum of labour regulation overly far in favour of workers and their unions. It has simply restored some

¹ Contrast a number of studies which suggest that there has in fact been very little correlation between changes in labour law and productivity trends in Australia. See, for example, Keith Hancock, 'Enterprise Bargaining and Productivity', paper delivered to the *Enterprise Bargaining in Australia 1991-2011* Workshop, University of Melbourne, 4-5 November 2011.

balance to a system that had become heavily skewed in favour of employers.² It must be remembered that the current legislation retained many elements of the *Workplace Relations Act 1996* (Cth) ('WR Act') and the subsequent amendments to this Act, including the Work Choices amendments.³

- 2.2. Nevertheless, there are a number of areas of the FW Act where our expertise in labour and employment law and the findings of our research indicate that the legislation is not achieving its objectives, or is otherwise flawed in some way. We address these in the remainder of the submission, and where possible indicate possible avenues for reform.

3 Compliance with International Obligations

- 3.1 The overall objective of the FW Act is to 'provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians'.⁴ One of the ways that the Act aims to achieve this overall object is by 'providing workplace relations laws that ... take into account Australia's international labour obligations'.⁵
- 3.2 In general, the FW Act has improved compliance with Australia's obligations under the ILO Conventions to which it is a signatory when compared to the previous federal labour relations legislation, the WR Act as amended by Work Choices. An example is the inclusion of the good faith bargaining provisions, which provide a legal right to collective bargaining in specific circumstances in contrast to previous legislation which permitted collective bargaining on a largely voluntary basis.
- 3.3 However, under the FW Act there continues to be a number of areas where compliance with ILO obligations is questionable. In particular, the Act's regulation of industrial action is more restrictive than permitted by ILO Conventions No 87 and No 98, as well as the International Covenant on Cultural and Political Rights to which Australia is a signatory. Evidence supporting this statement and suggesting ways in which protection of the right to strike could be better protected in Australia is set out in detail in Chapter 10 of Shae McCrystal's book *The Right to Strike in Australia* (Federation Press, Sydney, 2010).

² See Andrew Stewart, 'A Question of Balance: Labor's New Vision for Workplace Regulation' (2009) 22 *Australian Journal of Labour Law* 1.

³ The Work Choices amendments were contained in the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

⁴ FW Act s 3.

⁵ FW Act s 3(a).

- 3.4 Further, the widened mandate of the federal labour inspectorate, the Fair Work Ombudsman (FWO), and the convergence of compliance and enforcement functions places the FWO in a potentially precarious position in respect of its international obligations under article 3(1) of the Labour Inspection Convention 1947 (No 81) which states that one of the primary functions of the system of labour inspection is to ‘secure the enforcement of the legal provisions relating to the conditions of work and the protection of workers.’ Article 3(2) clarifies that while other functions may be assigned to the inspectorate, ‘they must not interfere with the discharge of its primary duties or prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with employers and workers.’⁶
- 3.5 The fact that the FWO now has responsibility to enforce the industrial action provisions against unions may serve to compromise its ability to monitor and enforce minimum employment standards – a role which is often shared with or supported by unions. This problem has been partly avoided in the past as the enforcement of industrial relations provisions, such as rights of entry and freedom of association, either were not enforced or were the responsibility of a separate agency.⁷ Merging these two functions within the one agency is potentially problematic in light of historical experience which shows that ‘[a]ttempts to impose principles and practices which place the agency at odds with those it attempts to regulate can be counterproductive.’⁸

4 Right to Request Mechanism

- 4.1 Many workers in Australia experience high levels of conflict between waged work and care responsibilities to, for example, children and elderly or frail parents. The experience of such conflict is highly gendered, with collisions between work and care representing a principal source of women’s inequality in the labour market.
- 4.2 The FW Act attempts to provide assistance to employees to better manage the intersections between employment and responsibilities to care for others. Importantly, the objects of the Act contained in section 3 identify an objective of ‘assisting employees to balance their work and family responsibilities by

⁶ A similar provision appears in Labour Inspection (Agriculture) Convention 1969 (No 129). This convention has not yet been ratified by Australia, however, we note that the Department of Education, Employment and Workplace Relations has indicated that ratification will be considered in the near future. See Communique from Australian, State, Territory and New Zealand Workplace Relations Ministers’ Council, 10 August 2011.

⁷ Margaret Lee, ‘Regulating Enforcement of Workers’ Entitlements in Australia: the New Dimension of Individualisation’ (2006) 17 *Labour & Industry* 41, 54; Breen Creighton, ‘Enforcement in the Federal Industrial Relations System: An Australian Paradox’ (1991) *Australian Journal of Labour Law* 197.

⁸ Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and the Law* (Law Book Co, Sydney, 1994), 164.

providing for flexible working arrangements'.⁹ The section 3 objects also refer to 'promot[ing] social inclusion', 'fairness', and protection against 'unfair treatment and discrimination'.¹⁰

- 4.3 Part 2-2 Division 4 contains a potentially important mechanism to assist in addressing conflict between work and care responsibilities. A number of characteristics of the right to request mechanism limit its potential in this regard though, and ought to be amended. The recommended amendments outlined below would further the objects of the FW Act, and especially those noted in the previous paragraph.
- 4.4 The right to request mechanism in Part 2-2 Division 4 is limited to the care of pre-school aged children and children with a disability under the age of 18.¹¹ This limitation is unduly restrictive. The right to request should relate more broadly to 'family or carer's responsibilities', terminology that is used in Part 3-1 General Protections.¹²
- 4.5 There are three main reasons justifying this broadening out of the right to request beyond young children and children with a disability. First, empirical evidence indicates that many Australian employers are already offering broader right to request schemes, and have been doing so since prior to the commencement of the FW Act provisions.¹³ In this way the amendment recommended in this submission would simply represent the FW Act catching up with existing employer practice regarding flexibility mechanisms.
- 4.6 Secondly, although care of infants and young children is a prominent source of work and care conflict, conflicts relating to care responsibilities towards others are also significant. Those others might be partners, relatives, people in Indigenous kinship networks, friends, and people who share a house with the employee. The Productivity Commission has found, for example, that 'the responsibilities [of parents] often increase when children with disability leave school, as school provides a de facto form of respite. Accordingly, the rationale for flexible working hours is stronger where a person is caring for a [adult] child with disability.'¹⁴

⁹ FW Act s 3(d).

¹⁰ FW Act s 3.

¹¹ FW Act s 65(1)(a), (b).

¹² FW Act s 351.

¹³ Barbara Pocock, Natalie Skinner and Reina Ichii, *Work, Life and Workplace Flexibility: The Australian Work and Life Index 2009*, Centre for Work + Life, University of South Australia, 2009, 54-62; Natalie Skinner and Barbara Pocock, 'Flexibility and Work-Life Interference in Australia' (2011) 53 *Journal of Industrial Relations* 65. See also CCH, 'Results of Flexible Work 2010 – A Pulse Survey' (June 2010) 184 *Equal Opportunity Alert* 1, 3.

¹⁴ Productivity Commission, *Disability Care and Support: Inquiry Report*, Vol 2, No 54, 31 July 2011, 728-9.

- 4.7 The Commission has recommended that the FW Act right to request mechanism be extended to apply in relation to children with a disability over the age of 18 years and who require a high level of care.¹⁵ There is no good reason to ignore this source of care pressure on workers, in addition to the potential need to care for a wide range of other people. This is especially so in the context of an overriding test that would be structured around whether the employer can establish that its refusal of a request was justified (see further below).
- 4.8 Notably a similar right to request scheme enacted in the United Kingdom in 2002 has been incrementally extended over the years and now applies in relation to parents and carers of children up to the age of 16, and workers in relation to a wide range of adults in need of care, including relatives, spouses, civil partners and people who live at the same address as the employee.¹⁶ Developments in the UK have been influential in Australian debates, and were referred to explicitly in the 2005 *Parental Leave Test Case* (discussed further below).¹⁷
- 4.9 Thirdly, broadening the ability to request a change in working arrangements may take effect to reduce resentment by co-workers towards mothers of infants and young children who seek flexibility through the statutory right to request mechanism. This may take effect to reduce discrimination against women workers.
- 4.10 The right to request mechanism in Part 2-2 Division 4 is limited to ‘national system employees’ who have completed 12 months ‘continuous service’ with their employer prior to making the request, or are a ‘long term casual employee’.¹⁸ These criteria are also unduly restrictive. They are highly gendered in that they disproportionately exclude employment arrangements that are dominated by women of child-bearing age.¹⁹ The right to request

¹⁵ Ibid, recommendation 15.5.

¹⁶ *Employment Rights Act 1996* (UK) s 80G(1)(b), inserted by the *Employment Act 2002* (UK). See also *Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002* (SI 2002 No. 3236) and the *Flexible Working (Procedural Requirements) Regulations 2002* (SI 2002 No. 3207). The provisions were subsequently extended by the *Work and Families Act 2006* (UK) and *Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006* (SI 2006 No. 3314). See Gwyneth Pitt, *Employment Law* (Sweet & Maxwell, 8th edn, 2011) 187-8.

¹⁷ *Parental Leave Test Case 2005* (2005) 143 IR 245 [395]. On the broader significance of the UK developments, see Sara Charlesworth and Iain Campbell, ‘Right to Request Regulation: Two New Australian Models’ (2008) 21 *Australian Journal of Labour Law* 116, 117; Jill Murray, ‘Work and Care: New Legal Mechanisms for Adaptation’ (2005) 15 *Labour & Industry* 67.

¹⁸ FW Act s 60, s 65. See s 12 for the definition of ‘long term casual’ and s 22 for the definition of ‘continuous service’.

¹⁹ See eg, Sara Charlesworth and Iain Campbell, ‘Right to Request Regulation: Two New Australian Models’ (2008) 21 *Australian Journal of Labour Law* 116, 122, who write that ‘[i]n 2006 ..., 21% of working women of child bearing age (25-44 years) had less than 12 months service with their current employer’, citing Australian Bureau of Statistics, *Labour Mobility Australia*, 2006, Cat No 6209.0. See also Australian Bureau of Statistics, *Australian Labour Market Statistics*, July 2009, Cat No 6105, ABS, Canberra,

scheme should simply extend to ‘employee[s]’ within the ordinary meaning, or at least to all ‘national system employee[s]’.²⁰

- 4.11 The length and characteristics of an employee’s engagement, instead of presenting a bar to reliance on the scheme, is better positioned as a relevant consideration in assessing whether it was justified for the employer to reject the request for changed working arrangements (discussed below).
- 4.12 As presently drafted the FW Act requires that the person requesting a change in working arrangements must actually be currently engaged in employment. In other words, the request mechanism cannot be used by a job applicant to seek accommodation in relation to a potential position.²¹ This ought to be amended so that a person seeking employment may request flexible work arrangements. Again, the particular circumstances of the request would be a relevant factor in determining whether the potential employer was justified in rejecting the request.
- 4.13 At present the FW Act provides that an employer may refuse a request on ‘reasonable business grounds’. That phrase is not defined or further articulated in the Act, and the 2005 *Parental Leave Test Case* does not assist to clarify its meaning.²² It is not a phrase used elsewhere in the FW Act, apart from the parental leave provisions, which have not been interpreted in case decisions.²³
- 4.14 The phrase ‘reasonable business grounds’ is largely unknown in industrial law. Moreover, it is an ambiguous phrase and for this reason it should be replaced with a requirement that the employer establish that it was ‘justified’ in rejecting the employee’s request for accommodation. As the reasons why the employer rejected a request are within the employer’s knowledge alone, it is appropriate to place the onus on the employer to establish as a factual matter that it was ‘justified’ in rejecting the request of the employee. This would operate as a reverse onus of proof.
- 4.15 Notably, a reverse onus of proof is in keeping with the adverse action protections in Part 3-1 (FW Act s 361) and the remaining unlawful termination provisions in Part 6-4 Div 2 (FW Act s 783).²⁴ The concept of ‘justified’ would

2009; Australian Human Rights Commission, *Australian Human Rights Commission Submission to the Senate Education, Employment and Workplace Relations Committee* (2009) [8].

²⁰ FW Act Part 1-2 Div 3.

²¹ This point is made in Beth Gaze, ‘Quality Part-time Work: Can Law Provide a Framework?’ (2005) 15 *Labour & Industry* 89 at 106.

²² *Parental Leave Test Case 2005* (2005) 143 IR 245. See further, Anna Chapman, ‘Requests for Flexible Work under the Fair Work Act’ (2012, unpublished manuscript).

²³ FW Act s 76.

²⁴ The Explanatory Memorandum to the Fair Work Bill acknowledges that in the absence of a reverse onus in relation to the adverse action, ‘it would often be extremely difficult, if not impossible, for a

then be explained by a non-exhaustive list of factors to take into account. That list should emphasise the public interest in furthering the objects of the Act, including to assist employees to balance their family and care responsibilities by providing for flexible working arrangements, to promote social inclusion, fairness, and non-discrimination. It should be made clear that the disadvantage to the employee in not being accommodated is an important consideration.

- 4.16 At present the legal rule that the only basis for an employer to refuse a request is 'reasonable business grounds' is not enforceable as a contravention of Part 2-2 Division 4.²⁵ It cannot be litigated directly, as no cause of action arises where an employer refuses a request on trivial or unreasonable grounds. This characteristic of the scheme rightly attracted much criticism in submissions to the Senate Inquiry into the Fair Work Bill.²⁶
- 4.17 It is time to address this main shortcoming of Part 2-2 Division 4. It is confusing and unhelpful to both employees and employers that the Act provides a legal right to employees with a concomitant legal obligation on the employer, at the same time as denying an enforcement mechanism to ensure compliance. In addition, the lack of an avenue of enforcement may bring the law into disrepute in the eyes of lay people.
- 4.18 The objects of the FW Act and the objects of Part 2-2 Div 4 should include the pursuit of substantive equality, and not merely formal equality. This would include a recognition that the attainment of substantive equality may require accommodation by an employer of an employee's carer responsibilities. In addition, the current wording of the section 3 object of 'family responsibilities' should be reworded to the more contemporary phrase of 'family or carer's responsibilities', as used in Part 3-1 General Protections.²⁷

5 Adverse Action

- 5.1 The adverse action provisions, contained as part of the General Protections in Part 3-1 of the FW Act, enable certain employees to seek an order in relation to various forms of adverse treatment experienced at work. To be unlawful, the 'adverse action' must be due to one or more grounds, such as having or

complainant to establish that a person acted for an unlawful reason' under Part 3-1: Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1461].

²⁵ FW Act s 65(5), s 44(2). See also s 739(2), s 740(2).

²⁶ The Senate, Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, *Fair Work Bill 2008 [Provisions]* (2009) [2.30].

²⁷ FW Act s 351.

proposing to exercise a 'workplace right', engaging in 'industrial activities', or a ground of race, sex, family or carer's responsibilities, disability etc.²⁸

- 5.2 These adverse action protections are complex and uncertain in scope.²⁹ This submission comments upon one aspect only of the adverse action provisions - the causal nexus. The key inquiry posed by Part 3-1 is whether the 'adverse action' was taken by the employer 'because' of one or more of the prescribed grounds. The correct interpretation of the casual nexus is currently the subject of an appeal before the High Court of Australia in the case of *Barclay v Board of Bendigo Regional Institute of TAFE*.³⁰
- 5.3 It is the view put in this submission that should the appellant TAFE succeed before the court in the argument made in its pleadings, the FW Act ought to be amended to make it clear that the test of 'because' is primarily an objective test, rather than a subjective test of the intention or consciousness of the employer.
- 5.4 In other words, the approach taken by the majority in the Full Court of the Federal Court (Gray and Bromberg JJ) ought to represent the correct position on the causal nexus. This is because literature on the role of unconscious motivation in anti-discrimination law suggests that people may act for reasons that they are unaware of or refuse to admit to themselves, such as unconscious prejudice.³¹ It is possible that unconscious or unadmitted motivations could also influence management in relation to 'industrial activities' and 'workplace right[s]'. This undermines the legitimacy of a test of subjective reason.
- 5.5 In considering interpretation of the 'because' test, the history of interpretation of the freedom of association provisions under predecessor laws is important, but so also is the location and operation of the casual nexus within the General Protections provisions. The casual nexus of 'because' applies to all adverse action claims, not just those based on 'industrial activities'. In making findings on reasons in the context of adverse action, which can include decisions based

²⁸ The full list is: the 'person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin': FW Act s 351.

²⁹ See Anna Chapman, 'Reasonable Accommodation, Adverse Action and the Case of Deborah Schou' (2012) *Adelaide Law Review* (forthcoming).

³⁰ *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 (9 February 2011); *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2011] HCATrans 243 (2 September 2011).

³¹ C Lawrence, 'The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism' (1987) 39 *Stanford Law Review* 317; LH Krieger, 'The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity' (1995) 47 *Stanford Law Review* 1161; C Lawrence, 'Unconscious Racism Revisited: Reflections on the Impact and Origins of "the Id, the Ego, and Equal Protection"' (Symposium: Unconscious Discrimination Twenty Years Later: Application and Evolution) (2008) 40 *Connecticut Law Review* 931.

on race or sex etc, a modern court should consider the possibility of subconscious motives.³²

6 Institutional Framework – Compliance and Enforcement³³

- 6.1 Statutory minimum employment standards are meaningful only insofar as they are respected and upheld. It is an object of the FW Act to ensure ‘a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and minimum wage orders’.³⁴ The provisions in Chapter 4 of the FW Act providing for civil remedies, and the powers provided to the Fair Work Ombudsman in Part 5-2 of the Act, are the key mechanisms by which the Act is to be enforced.
- 6.2 The mechanisms available in the FW Act include provisions empowering the FWO to determine compliance with minimum standards, penalty provisions for failure to observe modern awards, the NES and other instruments, as well as mechanisms by which the FWO, unions or employees can recover entitlements when the relevant provisions are breached.
- 6.3 The FWO has been active and innovative in performing its function of promoting compliance with the FW Act. In particular, we note that the FWO has developed a number of tools and programs to further its responsibility for providing education, advice and assistance to employees, employers and others. For example, our research suggests that the establishment of the National Employer Branch and the increased emphasis on education through targeted compliance and audit campaigns have enhanced the FWO’s compliance activities.
- 6.4 The FW Act increased the variety of enforcement approaches available to the FWO when compared to its predecessor, the Workplace Ombudsman. In particular, the FWO now has a number of administrative sanctions available to it, a reflection of the Act’s emphasis on ‘preventative compliance (eg. through education and advice) and cooperative and voluntary compliance (eg. through

³² See further, Anna Chapman and Beth Gaze, ‘The Fair Work Act and Adverse Action: The Reverse Onus of Proof Comes Into Focus’, paper delivered to the 2012 Conference of the Association of Industrial Relations Academics Australia & New Zealand (AIRAANZ), 8-10 February 2012, Surfers Paradise.

³³ This part of the submission is based on data and analysis of a broader research project funded by the Australian Research Council that is concerned with the activities and impact of the FWO. This research is being conducted by Associate Professor John Howe, Associate Professor Sean Cooney and Ms Tess Hardy. It draws on reviews of internal documents of the agency, such as the Operations Manual, which is used to guide and manage the work of the Fair Work Inspectors (FW Inspectors), as well as publicly available documents, such as annual reports, guidance notes, media releases and court cases. We have also undertaken approximately 40 in-depth, semi-structured interviews with FW Inspectors, managers and lawyers who are variously responsible for inspection, education, media, policy and legal activities.

³⁴ FW Act s 3(b).

enforceable undertakings)'.³⁵ These compliance tools, either by themselves, or in conjunction with other sanctions, are valuable strategies in that they can 'deliver superior remedies than courts to compensate victims, prevent future misconduct and fix systemic problems that led to misconduct.'³⁶

- 6.5 In addition to retaining powers previously held by the Workplace Ombudsman, such as the power to issue a notice to produce documents and issue penalty infringement notices the FW Act makes provision for the FWO to accept enforceable undertakings,³⁷ an innovative compliance approach adapted from other jurisdictions,³⁸ and compliance notices, which require the employer to take certain remedial steps within a specified timeframe.³⁹
- 6.6 Based on research carried out in relation to the role and operations of the Fair Work Ombudsman, we submit that the enhanced powers of the FWO have assisted the agency in achieving its key function of promoting compliance with the FW Act and fair work instruments.⁴⁰
- 6.7 However, we believe there is still room for these powers to be enhanced in order to render them more effective. Our suggestions in this respect are set out below.

Enforceable Undertakings

- 6.8 The FWO has made extensive use of enforceable undertakings since receiving statutory authorisation to accept them under the FW Act. Since that time, the FWO has accepted approximately 22 enforceable undertakings,⁴¹ most of which deal with contraventions of minimum employment standards.

³⁵ Explanatory Memorandum, *Fair Work Bill 2008* (Cth), 386. See also 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, 328.

³⁶ Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67 *Modern Law Review* 209, 212.

³⁷ FW Act 715.

³⁸ 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.

³⁹ FW Act s 716.

⁴⁰ FW Act s 682(1). The definition of 'fair work instrument' is set out in FW Act s 12.

⁴¹ 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.

- 6.9 All of these enforceable undertakings have included an admission of contravention of workplace laws and many contain 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 management and human resources systems and processes to ensure ongoing compliance with workplace laws; to organize and 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.⁴²
- 6.10 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 pyramid’ of responsive regulation.⁴³ 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, our review indicates 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.
- 6.11 We understand that so far the FWO has not had to take enforcement action in respect of any contraventions that have been the subject of enforceable undertakings.⁴⁴ Further, it appears that there have been no instances where a party has sought to vary or withdraw from an undertaking.⁴⁵ The FWO have found most employers to be quite proactive in reporting on what they had

⁴² 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.

⁴³ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

⁴⁴ Various FWO interviews: FWLF, FWLE and FWLD.

⁴⁵ 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 FWO Enforceable Undertakings Policy, 6.

done,⁴⁶ and one FWO lawyer we interviewed believed that the lack of any enforcement action was a sign that ‘they’re obviously working’.⁴⁷ 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.’⁴⁸

- 6.12 Holding such parties to account is not necessarily straightforward. Under the FW Act, 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.⁴⁹ We recommend that for ease and clarification, the FW Act should be amended so as to give the FWO an express right to withdraw from an enforceable undertaking in appropriate circumstances, such as where a party to the enforceable undertaking has not complied with its terms.

Compliance Notices

- 6.13 Compliance notices can only be issued in relation to contraventions occurring on or after 1 July 2009. Partly for this reason, very few have been issued so far. It is therefore difficult to make comment on their operation in practice. However, given that a similar mechanism has been used to great effect in the occupational health and safety context,⁵⁰ we hope that this tool will be used more readily as time passes and the relevant activation date becomes less of a barrier to its use.

Notice to Produce and Penalty Infringement Notice

- 6.14 First, we make the following observations in relation to the power to issue a notice to produce documents and records in s712 of the FW Act.

⁴⁶ Based on comments made in FWO Interview: FWLD.

⁴⁷ FWO Interview: FWME.

⁴⁸ 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, 313. See also Marina Nehme, ‘Monitoring Compliance with Enforceable Undertakings’ (2009) 24 *Australian Journal of Corporate Law* 76; and Christine Parker, ‘Regulator-Required Corporate Compliance Audits’ (2003) 25(3) *Law & Policy* 221.

⁴⁹ FW Act, s 715(3).

⁵⁰ For example, compliance notices in many respects operate in a similar way to improvement notices which are available under the *Occupational Health and Safety Act 2004* (Vic).

- 6.15 Under s819(2) of the WR Act a person subject to a Notice to Produce (NTP) may claim they do not possess the relevant document and therefore have a 'reasonable excuse' for not complying with the Notice. Clause 712(4) of the FW Act mirrors this provision. The Act does not provide inspectors with additional powers to pursue the matter in cases where the inspector believes the excuse is false.
- 6.16 This stands in contrast to similar provisions of the *Australian Securities and Investments Commission Act 2001* (Cth). Under section 35 of that Act, ASIC staff may apply to a magistrate for a warrant to seize books not produced in accordance with a NTP. Other agencies, including the ACCC and state OH&S agencies have the power to apply for a search warrant.
- 6.17 Accordingly, we would recommend the introduction of provisions allowing an inspector to apply for a search warrant in terms similar to those found in the *Australian Securities and Investments Commission Act 2001* (Cth).
- 6.18 We also note that, under the FW Act, a failure to provide a person's name or address or produce documents or records at the request of an inspector is no longer deemed to be a criminal offence. Rather, such a failure is treated as a contravention of civil remedy provision and enforced under Part 4-1. This change allows the FWO to retain control over the litigation process and removes the need to rely on the Commonwealth Department of Public Prosecutions to bring criminal proceedings in respect of such contraventions.
- 6.19 While the FWO has brought several cases under these provisions, it is disappointing that at least one of the decisions which has considered this issue appears not to appreciate the importance of this mechanism in ensuring that the trust and credibility of the regulator is not undermined.⁵¹
- 6.20 Indeed, without proper time and wage records, it is difficult for the Fair Work Ombudsman to obtain sufficient evidence to support a prosecution.⁵² The resulting effect of these provisions is that the less the employer does in terms of complying with the provisions of the FW Act and regulations, the less likely there will be a prosecution, which arguably has the effect of destabilising the entire enforcement regime.
- 6.21 Penalty infringement notices or PINs can still only be issued in respect of a limited number of provisions, which generally relate to record-keeping and pay slip requirements. We suggest that it would be useful, however, to expand the

⁵¹ See *Fair Work Ombudsman v Ballina Island Resort Pty Ltd & Anor* [2011] FMCA 500 (1 July 2011).

⁵² See Fair Work Ombudsman, Guidance Note 1 – Litigation Policy.

use of PINs. For example, to empower FW Inspectors to issue PINs in relation to non-compliance with a notice to produce. In order to strengthen this sanction, it would also be useful if the FW Act clearly specified the consequences of a failure to comply with a PIN.

Other Sanctions and Remedies

6.22 The suite of remedies available to applicants has been significantly broadened under the FW Act.⁵³ While the FWO has used some of these powers,⁵⁴ it has not explored the full range of remedies that are now on hand. Indeed, the apparent ease with which more expansive sanctions have been included in enforceable undertakings, including concrete preventative measures and firm commitments regarding future compliance, raises the question of whether similar remedies should be more actively pursued or granted by the courts.

6.23 One remedy which is not available where company directors or officers are found to be 'involved in' contraventions under section 550 of the FW Act is the capacity to seek an order disqualifying them from managing corporations for a period the court considers appropriate.⁵⁵ This is a particularly significant omission given that one of the fundamental barriers to effective enforcement is the problem of 'phoenixing'.⁵⁶ Numerous inspectors, managers and lawyers we have interviewed expressed disappointment at the fact that all too often companies liquidated their assets on the eve of litigation or shortly after it had commenced. In effect, this practice weakens the compliance and enforcement framework and largely nullifies the deterrence effects normally associated with civil penalty litigation. Even if penalties are ordered against the company and/or directors, they are often extremely difficult to recover.

The Fair Work Principles

6.24 The Australian Government's Fair Work Principles ('FWP') require certain government contractors to demonstrate that their employment practices and

⁵³ FW Act s 545.

⁵⁴ In *Fair Work Ombudsman v Stuart Ramsay & Ors* (Unreported, Federal Court of Australia) the FWO sought an injunction in order requiring the employer group to pay approximately \$1 million to the court and to restrain the employer from directing employees to resign from their employment, which would effectively deprive the employees of their redundancy pay entitlements. See Workplace Express, 'FWO seek urgent \$1m payment to court by Ramsay companies', 1 November 2011.

⁵⁵ This is an order which may be made where a person has breached a civil penalty provision under the *Corporations Act 2001* (Cth), see s 206C.

⁵⁶ This is a term generally used to describe those circumstances where a company fails and is unable to pay its debts and/or acts in a manner which is intended to deprive unsecured creditors equal access to the available assets. Within a relatively short period of closing one business, the same directors or officers commence a new business using some or all of the assets of the former, failed business. For a recent discussion of phoenix activities in the employment context, see Helen Anderson, 'Phoenix activity and the recovery of unpaid employee entitlements - 10 years on' (2011) 24 *Australian Journal of Labour Law* 141.

those of their supply chains are compliant with the FW Act and consistent with the legislation's objective of providing 'a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians'.⁵⁷

- 6.25 The *FWP* play an important role in promoting compliance with the FW Act in that they use government purchasing power to leverage compliance with the Act and are an example of regulation which takes account of industry and work structures and organisation such as supply chains in the implementation of minimum employment standards.
- 6.26 Supply chains typically have more than three levels and allow each contractor or sub-contractor to provide goods or services at a profit to the client firm higher up in the chain. The firm at the top of the chain, known as the 'lead client' or 'principal contractor', provides the goods or services to the consumer.
- 6.27 The workers producing the goods and services are therefore not employed by the lead client firm but rather by (less visible) contractors, sub-contractors or labour hire firms further down the chain. These firms are often operating in very competitive markets that create incentives for non-compliance with minimum employment standards.⁵⁸
- 6.28 Although there is great potential for the *FWP* to promote compliance by a large number of Australian businesses and their subcontractors, it is unclear to what extent the Government is ensuring that the *FWP* are properly enforced.
- 6.29 All Commonwealth entities conducting procurement to which the *FWP* apply are required to implement and comply with the *FWP* and monitor compliance with the *FWP* by their suppliers. In addition, the Government established two new entities under the *FWP*, the Procurement Coordinator ('PC') and the Procurement Consultation Committee ('PCC'). The Department of Education, Employment and Workplace Relations ('DEEWR') has overall responsibility for the *FWP*, while the Department of Finance and Deregulation has overall responsibility for procurement, and provides administrative support to the PC and the PCC.

⁵⁷ s 3, FW Act. For further discussion see John Howe, 'Government as Industrial Relations Role Model: The Promotion of Collective Bargaining and Workplace Cooperation by Non-Legislative Mechanisms' in WB Creighton and A Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, New York, forthcoming in 2012).

⁵⁸ See David Weil, 'Enforcing Labour Standards in Fissured Workplaces: the US Experience' (2011) 22(2) *Economic and Labour Relations Review* 33.

- 6.30 It is unclear what resources are being devoted to monitoring and enforcement of the *FWP* in both the assessment and award of tenders, and the observance of relevant contractual conditions. Tenderers are expected to volunteer information as part of the tender process, verifying the information they have provided by signing a statutory declaration.
- 6.31 It is also unclear whether the tenderers have to provide any evidence of their compliance with relevant laws, or evidence of their cooperative and productive workplace relations practices and respect for freedom of association and right to representation, beyond these undertakings.
- 6.32 Other procurement schemes which seek to link the award of government contracts with labour standards and practices have a mechanism for independent verification of employment conditions. For example, the Victorian Government Schools Cleaning Program requires contractors to submit documentary evidence such as employee pay slips to approved accountants for verification.⁵⁹
- 6.33 Similarly, the Construction Code and Guidelines have required submission of extensive workplace relations documentation for assessment of Code compliance by DEEWR.
- 6.34 The *FWP* are an important mechanism by which the Australian Government requires compliance with the FW Act throughout its own supply chain. However, the current arrangements for monitoring and enforcement of compliance with the *FWP* appear to be inadequate. We therefore recommend that the FW Act should be amended to specifically empower the FWO to monitor and enforce the *FWP*.

7 Access to Justice

- 7.1 Under the FW Act, any employee affected by a breach of a civil penalty provision has the right to initiate legal proceedings to seek rectification of the breach, amongst other remedies. However, this has not resulted in many

⁵⁹ John Howe and Ingrid Landau, 'Using Public Procurement to Promote Better Labour Standards in Australia: A Case Study of Responsive Regulatory Design' (2009) 54(4) *Journal of Industrial Relations* 575-589, 580.

individual employee legal claims against employers outside of the unfair dismissal jurisdiction.⁶⁰

- 7.2 Vulnerable employees, particularly those in low-wage industries and engaged under precarious or unlawful arrangements, may be reluctant to raise a complaint about their working conditions or pursue their rights when they are contravened.⁶¹ Where employees are willing to complain and to seek legal redress, the cost of access to justice in relation to court enforcement of employment rights is often prohibitive.⁶² Others may simply be ignorant of their rights, entitlements and enforcement options or lack sufficient means.⁶³ These barriers are magnified in respect of some employees, such as young or foreign workers, or in some settings, such as in rural or remote areas.
- 7.3 While the capacity for employees to bring small claims has expanded under the FW Act,⁶⁴ and arguably provides greater access for employees to pursue their claims, significant barriers remain. For example, to successfully make such claims, indeed to even fill in the application form, employees must 'produce legal information and make legal judgments.'⁶⁵ In this respect, the small claims jurisdiction is arguably of limited value in relation to vulnerable workers who fear reprisal, lack job security or are ignorant of their rights under the law.
- 7.4 This also means that the role of unions and the FWO become all the more important in ensuring adequate enforcement of minimum employment standards on behalf of vulnerable workers.
- 7.5 We note and acknowledge the important compliance and enforcement role played by unions, particularly in the period before 2006. Since that time, and for a variety of reasons, the regulatory role of unions has been somewhat overshadowed by the elevation, in terms of funding, stature and profile, of the

⁶⁰ For in-depth consideration of a number of factors inhibiting individual prosecution of employment law breaches in the Australian context, see Chris Arup and Carolyn Sutherland, 'The Recovery of Wages: Legal Services and Access to Justice' (2009) 35 *Monash University Law Review* 96.

⁶¹ Glenda Maconachie and Miles Goodwin 'Victimisation, Inspection and Workers' Entitlements: Lessons Not Learnt?' (Paper presented at the *Proceedings Asia-Pacific Economic and Business History Conference 2008*, 13-15 February 2008, Melbourne, Australia).

⁶² Chris Arup and Carolyn Sutherland, 'The Recovery of Wages: Legal Services and Access to Justice' (2009) 35 *Monash University Law Review* 96.

⁶³ 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.

⁶⁴ For example, the maximum claim that can be heard in a court exercising small claims jurisdiction increased from \$10,000 to \$20,000. See FW Act, s 548.

⁶⁵ Chris Arup and Carolyn Sutherland, 'The Recovery of Wages: Legal Services and Access to Justice' (2009) 35 *Monash University Law Review* 96.

FWO.⁶⁶ However, we note that the maintenance of standing and provision of adequate rights of entry for unions are important to their continued role in achieving compliance with employment rights and entitlements.

- 7.6 In comparison to the predecessor statutes,⁶⁷ the FW Act enhances the ability of unions to bring enforcement proceedings.⁶⁸ The express recognition of ‘the role employee organisations play in enforcement, particularly in relation to the safety net and instruments that apply to them’⁶⁹ heralds a partial return to co-regulation, at least in theory. However, preliminary analysis of enforcement proceedings suggest that unions do not necessarily have sufficient capacity and resources to fully utilise this new right, particularly as there is still no ability for a party to recover their costs in an enforcement proceeding.⁷⁰ This is a point we will return to later.
- 7.7 Another problem hindering the regulatory role of unions, particularly in respect of vulnerable employees, relates to their rights of entry. While the FW Act eased many of the restrictions introduced by Work Choices,⁷¹ section 518 still requires the entry notice to specify ‘to whom the suspected contravention or contraventions relate’. This makes it very difficult for unions to investigate confidential complaints made by employees. In such instances, it appears that unions have to refer these matters to the FWO for further investigation given that FW Inspectors can exercise inspection powers without needing to name the person to whom the inspection relates.
- 7.8 In relation to FWO, we note that the federal labour inspectorate in Australia has been well funded in the past five years – a development which resulted from an unexpected flush of political enthusiasm for improved enforcement following Work Choices.⁷² This influx of resources initially led to a boost in its

⁶⁶ 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.

⁶⁷ Under the original WR Act and Work Choices, unions, as compared to inspectors, had less standing to commence enforcement proceedings. For example, prior to Work Choices, neither a union nor the Employment Advocate could bring proceedings on an employee’s behalf for breach of an AWA (WR Act, s 170VV(3)). Comparatively, since Work Choices, unions had a right to bring enforcement proceedings in relation to an ITEA or AWA, but only if they are requested to do so in writing by the employee (WR Act, ss 718(5) and (6)).

⁶⁸ FW Act s 540.

⁶⁹ Explanatory Memorandum, Fair Work Bill 2008 (Cth), 326.

⁷⁰ However, the union may apply for payment of any penalty imposed by a court to be redirected to them. See Fair Work Bill cl 546(3).

⁷¹ See Colin Fenwick and John Howe, ‘Union Security After Work Choices’ in in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009).

⁷² *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

inspectorate workforce, a shift in its enforcement strategy and a spike in prosecutions.⁷³

- 7.9 However, there are a number of challenges and barriers to enforcement faced by the FWO and other actors and agencies seeking to curb employer non-compliance.
- 7.10 Unfortunately, notwithstanding the advances in the power and resources of the FWO and its predecessors, it seems that the widened mandate that the FWO received under the FW Act,⁷⁴ combined with the current regulatory complexity associated with the introduction of modern awards and transitional provisions, 'has resulted in reactions by some employers of confusion, ignorance and avoidance'.⁷⁵
- 7.11 In addition to the issue of complexity, the agency has faced a range of compliance and enforcement challenges on other fronts, including: the resource problems associated with a heavy complaint caseload; the difficulty of identifying and assisting vulnerable workers; and the problems with obtaining evidence and bringing prosecutions against rogue employers who steadfastly refuse to cooperate.
- 7.12 It is unreasonable to assume that the FWO can alone be responsible for enforcement of the FW Act. Moreover, there are many workers who may not have access to trade unions to seek redress for breach of their employment rights and entitlements. It is therefore important that the FW Act facilitates individual employees' access to remedies for contravention of the Act and fair work instruments.
- 7.13 One way in which the FWO has sought to facilitate access to justice while saving its own resources for more strategic litigation is by encouraging claimants to commence a small claims action – either with the direct or indirect support of the FWO.

⁷³ 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).

⁷⁴ Since Work Choices, the federal labour inspectorate has increasingly assumed responsibility for the enforcement of minimum employment standards previously undertaken by state inspectorates. At the same time, the legislative mandate has also broadened. It is now responsible for enforcing all relevant provisions of the FW Act and the FW Regulations, including: pay slip and record-keeping requirements; freedom of association and general protections; right of entry by unions; transfer of business; sham contracting arrangements; unlawful industrial action; and discrimination. From 1 January 2011, the FWO has also had a compliance role in respect of paid parental leave entitlements.

⁷⁵ Patricia Todd, 'Employer and Employer Association Matters in 2010' (2011) 53(3) *Journal of Industrial Relations* 353, 359.

- 7.14 While this new approach is showing signs of promise, it is somewhat concerning that vulnerable workers, particularly those who speak English as a second language or are unfamiliar with the Australian legal system, will face a difficult decision of whether to try to wade through the process alone or engage a lawyer at their own expense where there is little prospect of recovering costs.
- 7.15 To improve access to justice, we suggest that the no costs rule – which generally applies in respect of matters brought under the FW Act⁷⁶ – should be reversed in relation to matters involving underpayment or other contraventions of minimum employment standards, at least in relation to applications by individual natural persons. This would allow successful applicants to seek recovery of their legal costs from employers in breach of the FW Act. This would encourage greater private enforcement and ease the compliance burden of public agencies, unions and community groups.

⁷⁶ FW Act s 570.