

**BUSINESS RESPONSES TO FAIR WORK OMBUDSMAN
COMPLIANCE ACTIVITIES
Research Report**

Professor John Howe

Dr Tess Hardy

Centre for Employment and Labour Relations Law
Melbourne Law School

January 2017

ACKNOWLEDGEMENTS

The authors would like to thank the following individuals and organisations for their assistance in the conduct of this research and the preparation of this report:

- The Office of the Fair Work Ombudsman, in particular Naomi Bleaser, Anthony Fogarty, and Steve Ronson;
- The University of Melbourne Statistical Consulting Centre, in particular Sue Finch;
- Wallis Market and Social Research, which conducted the survey of businesses presented in this report, in particular Josh Flack and Nancy Howard;
- The Statistical Clearing House at the Australian Bureau of Statistics;
- Cathryn Lee, Administrator of the Centre for Employment and Labour Relations Law, who helped with the final formatting and publication of the report.

Table of Contents

Executive Summary	V
1. Introduction.....	1
2. Deterrence Theory and Measuring Business Responses to Employment Standards Compliance.....	3
3. Methodology of Study.....	6
Quotas and Completed Surveys	8
Weighting	8
4. Findings.....	9
Knowledge of Regulator	9
Knowledge of Regulatory Enforcement Action	10
Knowledge of Targeted Campaigns.....	12
Knowledge of Litigation and Signal Cases	13
Business Perceptions of Risk.....	17
Responses to FWO Enforcement Activities.....	18
Challenges in ensuring compliance	20
5. Discussion.....	21
6. Conclusion.....	23

Executive Summary

A key goal of the FWO in carrying out its enforcement activities, particularly when it brings civil remedy litigation against employers for contravention of employment standards regulation, is general deterrence. That is, as well as specifically punishing the employer found to be in breach of the law, it is anticipated that enforcement activities will influence the compliance behaviour of other employers who have not been the subject of any direct formal sanction. General deterrence is one of the four levers used by the FWO under its 'strategic enforcement' approach.

There is a very limited amount of research in Australia assessing business awareness of, and responses to, the FWO's activities, including the deterrence effects of the FWO's enforcement of minimum employment standards. This report addresses that gap by presenting findings from a survey of business awareness of, and responses to, the FWO and enforcement activities it has undertaken in relation to employment standards regulation under the FW Act.

Overall, our study found that business awareness of the existence of a government body ensuring compliance with employment standards regulation was very high. With respect to the FWO's activities, respondents were more likely to be aware of targeted campaigns and litigation than other regulatory enforcement measures such as enforceable undertakings.

We found 'explicit general deterrence' - in this case, a relationship between knowledge of specific regulatory activities, including specific litigation, and compliance-related behaviour - in a significant number of businesses that were aware of FWO activities. Only a small percentage - mostly small businesses - changed their workplace practices as a result. However, for other businesses, general deterrence had 'reminder' and 'reassurance' effects, prompting them to check whether they were in compliance.

We found that industry context, geographic proximity to violations, and size of business were relevant factors in assessing the impact of FWO enforcement activity.

The FWO should also be reassured by the findings concerning overall business awareness of the agency and its activities, their perceptions of the high risk of detection and punishment of noncompliance, and by the implicit general deterrence effect - that a majority of businesses feel that compliance is influenced by the FWO's activities in general. The FWO's use of the media to publicise its activities also appears to have enhanced both explicit and general deterrence of noncompliance.

Nevertheless, this study and its findings suggest that further research is needed to understand business calculations and motivations regarding employment standards compliance, and to explore further the factors which maximise explicit general deterrence in the employment standards regulation context.

Business Responses to Fair Work Ombudsman Compliance Activities

1. Introduction

Over the last decade, there has been a significant increase in the level and sophistication of enforcement action taken by the federal agency responsible for compliance with minimum employment standards in Australia, the Fair Work Ombudsman (FWO). Previous research carried out by the authors has provided an account of how the FWO has carried out its role of monitoring and enforcing compliance with the *Fair Work Act 2009* (Cth) (FW Act) and industrial instruments made under that Act, including the patterns of federal investigation and enforcement practices of the agency.¹ However, one important question that remains to be investigated is the response of external actors, and in particular business organisations, to the activities of the FWO.

A key goal of the FWO in carrying out its enforcement activities, particularly when it brings civil remedy litigation against employers for contravention of employment standards regulation, is general deterrence.² That is, as well as specifically punishing the employer found to be in breach of the law, it is anticipated that enforcement activities will have broader ‘ripple effects’ – that is, it will influence the compliance behaviour of other employers who have not been the subject of any direct formal sanction.³ General deterrence is one of the four levers used by the FWO under its ‘strategic enforcement’ approach.⁴

¹ J Howe, T Hardy and S Cooney *The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO’s Activities from 2006-2012*, Centre for Employment and Labour Relations Law, 2014.

² See, for example, Clause 12.7, FWO Litigation Policy. By ‘employment standards regulation’, we mean minimum wages, maximum working hours, leave entitlements and other standards set by the FW Act and enforceable by the FWO, and not other workplace standards such as those set by occupational health and safety regulation.

³ D Weil, *Improving Working Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division*, May 2010, p 57. For discussion of the concept of general deterrence, see, for example, D Thornton, N Gunningham and R Kagan, ‘General Deterrence and Corporate Environmental Behavior’ (2005) *Law & Policy* 262 (Thornton, Gunningham and Kagan 2005); C Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics*, Hart Publishing, Oxford, 2015, pp 47-67; K Purse and J Dorrian ‘Deterrence and Enforcement of Occupational Health & Safety Law’ (2011) 27 *International Journal of Comparative Labour Law & Industrial Relations* 23.

⁴ The four levers are: focusing at the top of industry structures; enhancing deterrence at the industry and geographic level; transforming complaint investigations from reactive to strategic resources; and enhancing the sustainability of initiatives through monitoring and related procedures. The strategic enforcement model was developed by economist David Weil in relation to the US labour inspectorate: Weil 2010, above n 3.

There is a very limited amount of research in Australia evaluating the impact of labour regulation, and almost no research assessing the deterrence effects of the enforcement of minimum employment standards.⁵

This report addresses that gap by presenting findings from a survey of business awareness of, and responses to, the FWO and enforcement activities it has undertaken in relation to employment standards regulation under the FW Act.

The purpose of the study was threefold:

- 1) to understand the extent to which employer businesses are aware of the activities of the FWO, including specific regulatory enforcement actions such as targeted campaigns, enforceable undertakings and litigation;
- 2) to assess employer perceptions of risk of detection and punishment of noncompliance; and
- 3) to explore how businesses have responded to the FWO's enforcement activities in terms of their compliance behaviour.

This study was mostly interested in general deterrence effects and therefore particularly focused on employers who have not been the subject of a direct FWO intervention (such as an inspection). Although we tested awareness of a range of FWO interventions, we were especially keen to learn more about the general deterrence value of a significant FWO litigation outcome (a signal case) against an employer in relation to other employers within the same industry and the same region. However, we also tested the general deterrence value of signal cases in a different industry and a distinct geographical area. As we explain below, we did this because the 'strategic enforcement' model suggests that signal interventions have greater deterrence effects in the industry and region in which the violations occurred, and we wanted to see whether this pattern was replicated in the Australian context.⁶ The report does not specifically consider the effects of litigation on individuals within employer firms, albeit this is an important consideration in evaluating deterrence, and an important topic for future research.

Our overall goal is to shed light on the possible impact of FWO interventions, with a view to providing an evidence base which will help maximise their effect in the future. Section 2 of the report summarises the existing literature on deterrence theory and the measurement of businesses responses to compliance, both in the context of employment standards but also in other fields of regulation. Our specific research questions are drawn from this literature.

⁵ C Arup et al *Assessing the Impact of Employment Legislation: The Coalition Government's Labour Law Programme 1996-2007 and The Challenge Of Research*, Monash University 2009. As discussed below, there have been some studies of deterrence and occupational health and safety regulation. On the lack of research on the impact of labour law enforcement more generally, see L Dickens and M Hall, *Review of Research into the Impact of Employment Relations Legislation*, Employment Relations Research Series No. 45, Department of Trade & Industry, London, 2005; and S Deakin, 'Labor and Employment Laws', in P Cane and HM Kritzer (eds), *The Oxford Handbook of Empirical Legal Research*, OUP, Oxford, 2010 (which notes various studies examining the impact of labour laws on working conditions, but does not identify any studies of deterrence resulting from regulatory enforcement of labour laws).

⁶ Weil 2010, above n 3, and see Section 2 below.

Section 3 explains the methodology of our study. Section 4 presents our findings, while Section 5 discusses the implications of those findings in light of deterrence theory. Conclusions are drawn in Section 6.

2. Deterrence Theory and Measuring Business Responses to Employment Standards Compliance

The concept of general deterrence is based on the assumption that regulated businesses will only take action to ensure they are compliant with the law (and to meet the associated costs) when they believe that non-compliance is likely to be detected and harshly punished.⁷ Classical deterrence theory is founded on the idea of a calculation based on competing costs (i.e. the costs of compliance versus the costs associated with non-compliance). However, various socio-legal studies have shown that the question of why businesses comply with the law has generated diverse and complex answers.⁸ For some, it is only 'specific deterrence' - or a previous experience of being inspected, warned or penalised - that brings about compliance. Others are more concerned about informal or economic sanctions such as damage to their reputation resulting from negative publicity caused by non-compliance. Many businesses seek to comply with the law from a sense of social or legal duty or obligation as distinct from fear of punishment, and are therefore not motivated by fear of detection and punishment. Nevertheless, it is accepted that at least some firms are 'amoral calculators' who will respond to fear of detection and punishment.

It is likely that in practice there is a spectrum of compliance motivations, with many firms having mixed motives – e.g. a combination of both fear of sanction and a sense of duty to be compliant. It has been argued that, in addition to explicit general deterrence, then, general deterrence may operate in other ways. For example, for firms motivated by a combination of fear and duty, 'simply learning about an applicable regulatory *requirement* evokes some level of perceived threat (plus a felt legal obligation) inducing it to increase its compliance-related efforts'.⁹ In other words, general deterrence messages may bring about 'implicit general deterrence'.

General deterrence messages may also have *reminder* and *reassurance* functions for those with mixed motives.¹⁰ In the former case, firms that are motivated to comply with the law may recognize that managerial preferences may not always be translated into compliance across an organisation. Hearing about legal penalties against other companies may remind firm managers to check whether compliance policies and practices are being followed. Further, when firms that have invested heavily in compliance hear about other firms that have suffered legal penalties, these general deterrence messages offer symbolic reassurance to those firms about the value of their investment.

⁷ Thornton, Gunningham and Kagan 2005, above n 3, at 290.

⁸ See, for example, many of the contributions in C Parker and V Nielsen (eds), *Explaining Compliance: Business Responses to Regulation*, Edward Elgar, 2011.

⁹ Thornton, Gunningham and Kagan 2005, above n 3, at 265.

¹⁰ *Ibid* at 266.

Studies have emphasized the importance of empirically testing general deterrence rather than just assuming that it works, and in particular, focusing on the impact of specific regulatory interventions rather than testing general awareness of regulation (implicit general deterrence).¹¹ It has been argued that as the components of general deterrence – certainty that punishment will occur when non-compliant, severity of punishment for non-compliance and speed of punishment – are largely subjective, they only affect decision-making if they are perceived to exist, therefore: ‘deterrence can be [best] understood and measured by interviewing respondents about their perception of risks associated with violating particular rules’.¹²

Given this, it is important to bear in mind how information about regulatory interventions is communicated. For there to be any possibility that businesses will be deterred from non-compliance by regulatory enforcement, they need to know about that activity. As Parker and Nielsen observe, general deterrence is unlikely to be achieved if businesses are not aware of their obligations under legislation and the consequences of not complying with them: ‘Consistent communication of sanctions for breach, and examples of them being applied to non-compliant businesses, are important if enforcement is to have any deterrent effect’.¹³ One way businesses might receive that information is by direct communication from regulators, such as through information and education campaigns. However, businesses may also receive this information via the media, from their legal or other advisors, and so on. Administrative agencies like the FWO are becoming increasingly proactive in their use of media strategies, so consideration should be given to agencies’ instrumental use of media and the extent to which it reinforces or enhances the impact of regulatory enforcement, as well as other potential sources of information for businesses.¹⁴

To date, there has been very little academic exploration of business responses to minimum employment standards enforcement in the Australian context in respect of employment standards regulation, aside from some studies of deterrence in the relation to occupational health and safety regulation.¹⁵

¹¹ Hodges emphasises that the justification for a policy of deterrence should be tested by empirical research: C Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics*, Hart Publishing, Oxford, 2015, p 153; Parker and Nielsen emphasise the advantage of looking at specific regulatory enforcement interventions, particularly for the purpose of comparison of other factors influencing compliance: Parker and Nielsen 2011, above n 8, p 21.

¹² B Van Rooij et al, ‘Comparative Compliance: Digital Piracy, Deterrence, Social Norms, and Duty in China and the United States’ (2016) *Law & Policy* 1, p 8.

¹³ C Parker and V Nielsen ‘Is Anyone Out There Listening?’ (2009) 17 *Trade Practices Law Journal* 106 at 106 (Parker and Nielsen 2009a). See also van Rooij et al 2016, *ibid*, p 9.

¹⁴ J Van Erp, ‘Messy Business: Media Representation of Administrative Sanctions for Corporate Offenders’ (2013) 35 *Law & Policy* 109, 113-114. Van Erp’s discussion is in the context of enforcement of financial regulation.

¹⁵ There have been some historical studies of employment standards compliance levels that have not tested explicit links between compliance and regulatory enforcement activities: See, for example, M Goodwin and G Maconachie, ‘Recouping Wage Underpayment: Increasingly Less Likely?’ (2006) 41 *Australian Journal of Social Issues* 328. For examples of studies in the OHS context, see, for example, R McCallum, T Schofield and B Reeve ‘Reflections on General

There have, however, been studies of the impact of enforcement of wages and hours employment standards in other jurisdictions, such as the United States. For example, US economist David Weil investigated deterrence of non-compliance with minimum wages in the fast-food industry as a result of investigations by the Wage and Hour Division (WHD) of the US Department of Labour.¹⁶ His research used WHD investigation data to evaluate compliance findings for fast food outlets, including both those that had previously been investigated by the WHD as well as those that were investigated for the first time. Weil found evidence of general deterrence, but at a very localised level. In other words, previous WHD investigation of fast food outlets generated compliance behaviour by other businesses in the same industry and within the same zip code as the investigated outlets. He further concluded that not only did industry and geographical context matter, but also the extent to which awareness of these investigations was raised by the regulator and/or through employer and worker networks.¹⁷

In deciding on the aims and methodology for our study, we also considered empirical research into the deterrence effects of enforcement activities in other policy fields, such as environmental regulation and competition and consumer regulation.¹⁸

Drawing on these previous studies, we developed some general research questions that we felt would assist us in examining general deterrence resulting from the regulatory activities of the FWO:

- What general level of awareness of the existence of the FWO and its enforcement activities was there?
- To what extent were businesses aware of specific regulatory enforcement action against violators in the same industry, compared to action in a

Deterrence and OHS Prosecutions' (National Centre for OHS Regulation, Working Paper 75), March 2010; T Schofield, B Reeve and R McCallum, 'Deterrence and OHS Prosecutions' (2009) 25(4) *Journal of OHS –Australia and NZ* 263; and N Gunningham 'Prosecution for OHS Offences: Deterrent or Disincentive?' (2007) 29 *Sydney Law Review* 359. For a discussion of studies of OHS enforcement deterrence effects in other jurisdictions, see Purse and Dorrian 2011, above n 3.

¹⁶ Weil 2010, above n 3. Weil's report also examined enforcement of employment standards in the garment industry and hotel industry.

¹⁷ Weil 2010, above n 3, pp 56-57.

¹⁸ In relation to environmental regulation, see Thornton, Gunningham and Kagan 2005, above n 3; and N Gunningham, D Thornton and R Kagan, 'Motivating Management: Corporate Compliance in Environmental Protection' (2005) 27(2) *Law & Policy* 199. For a separate study of deterrence in relation to environmental regulation, see S Simpson et al 'An Empirical Assessment of Corporate Environmental Crime-Control Strategies' (2013) 103 *Journal of Criminal Law and Criminology* 231. In the competition and consumer regulation sphere, see, for example, C Parker and N Stepanenko, *Compliance and Enforcement Project: Preliminary Research Report*, Centre for Competition and Consumer Policy, ANU, 2003; V Nielsen and C Parker, *The ACCC Enforcement and Compliance Survey: Report of Preliminary Findings*, 2005. For further discussion of empirical research concerning deterrence in competition and consumer law enforcement, see Hodges 2015, above n 11.

different industry? Were there differences in awareness based on factors such as geographic proximity of the violator and/or size of the business?

- What was the source of respondents' information about regulatory enforcement action? e.g. from direct contact with the regulator, from the media, or other sources?
- Did knowledge of the regulator/regulatory enforcement action cause a higher level of risk perception (of detection and sanction)?
- Were respondents who had knowledge of regulatory enforcement actions against other firms more likely, on average, to have taken action to ensure their compliance with workplace regulation? What challenges did businesses face in ensuring compliance?

3. Methodology of Study

To collect data to help us answer these questions, we used a telephone survey of businesses in two industries of particular interest: 'cafés and restaurants' and 'hair and beauty services'. These industries were chosen because there was evidence to suggest that they were characterised by a high level of non-compliance with workplace laws, based on FWO complaint and targeted campaign data. Another consideration was that there had been a high profile litigation case decided in these industries within the 12 months prior to the survey taking place, which would facilitate our testing business knowledge of a signal case.

We sought to distinguish between different types of FWO enforcement action, to determine whether there were particular activities that were more significant in raising business awareness of enforcement action and achieving general deterrence.

The primary form of FWO enforcement action we were interested in was successful litigation against an employer resulting in penalties. Two 'signal cases' – one each from the two industries - were selected from litigation successfully brought by the FWO against non-compliant employers involving underpayment of wages, resulting in the imposition of significant penalties. The first involved two 'La Porchetta' franchises in outer metropolitan and regional Victoria.¹⁹ We chose the La Porchetta case on the basis that it was a high profile intervention in the café and restaurant sector involving a national franchise network, operating in an industry identified by the FWO as having a high level of non-compliance. La Porchetta has a significant number of stores in regional areas, and are large

¹⁹ The FWO brought litigation against both franchises: *Fair Work Ombudsman v Zillion Zenith International Pty Ltd & Anor* [2014] FCCA 433; and *Fair Work Ombudsman v Bound for Glory* [2014] FCCA 432. Both cases involved underpayment of a large number of employees (59 and 52 respectively), including the employer giving employees pizza and soft drinks in lieu of their correct pay. Each franchise was fined \$139,507.50 in relation to the contraventions. The FWO also entered into a Proactive Compliance Deed with the La Porchetta franchisor.

employers of young workers, trainees and apprentices. Further, the conclusion of the litigation was relatively recent in the context of the timing of the survey, and a high penalty was awarded by the court.

The second signal case involved a series of hair salons on the Central and South Coasts of NSW trading under the name 'House of Colour' and owned by the same operator.²⁰ FWO took legal action against the employer for underpayments of mostly young workers (including underpayment and non-payment for time worked). The court ordered the employees be paid and imposed significant penalties. The court also issued an order restraining one of the employers from underpaying any hairdressing employees he employed in the future. The case received recent, extensive media coverage online and in regional press, and was NSW based (to allow comparison with Victoria).

We also sought to find out whether respondents were aware of other forms of FWO enforcement activity, such as 'targeted campaigns' designed to detect non-compliance, and 'enforceable undertakings' i.e. statutory agreements made between the FWO and employers. Under these agreements, the employer generally undertakes to fix any past wrongdoing and to change their workplace practices to make sure they comply with workplace laws in the future. If they fail to honour these commitments, the FWO can enforce the agreement in court.

The survey was conducted via telephone in June-July 2015 by Wallis Strategic Market & Social Research (Wallis) on behalf of the research team at the Melbourne Law School and the FWO. We should note that this was shortly after the ABC 4-Corners program revealed that certain sectors of the Australian labour market, such as the horticulture and food processing industries, may be 'riddled with exploitation',²¹ but before media allegations of serious and systemic underpayment of international student workers by the 7-Eleven franchise were aired.²²

The questionnaire for the survey included a series of questions to test the general questions outlined above. A pilot test of 42 interviews in the café and restaurant industry was conducted in February 2015, to identify any issues with question wording, flow, and timing. Following the pilot, some minor revisions were made to the questionnaire, and the second signal case was added. As a result, these 42 interviews were retained and included in the final analysis where possible.

²⁰ *Fair Work Ombudsman v Hair Industrie Erina Pty Ltd & Anor, House of Colour @ Hurstville Pty Ltd and The House of Colour @ Shellharbour*, Federal Circuit Court, Driver J, 15 April 2015. The proceedings concerned underpayments and failure to comply with Compliance Notice. Driver J ordered penalties of \$80 000.00 against Hair Industrie Erina Pty Ltd, \$20 000.00 against Nelvin Lal, \$40 000.00 against House of Colour @ Hurstville Pty Ltd and \$22 000.00 against The House of Colour @ Shellharbour. Judge Driver did not issue written reasons in the matters: <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation/2014-2015-litigation-outcomes>

²¹ Caro Meldrum-Hanna and Ali Russell, 'Slaving Away', *Four Corners*, 4 May 2015.

²² Adele Ferguson and Klaus Toft, '7-Eleven: The Price of Convenience', *Four Corners*, 31 August 2015.

The sample was sourced from Dun & Bradstreet, made up of 3,598 businesses from the café/restaurant industry and the hairdressing industry, across both metro and regional areas of ACT, NSW and VIC. The respondents came from a mix of small (1-19 employees), medium (20-199 employees) and large (200+ employees) businesses. The sample provided contained 73 businesses that were part of the pilot survey, 34 of which had either already completed or refused to participate in the pilot survey and were removed from the sample. The 39 sample members who were included in the pilot but did not complete or refused the pilot survey were included for the main interviewing, making the final sample size 3,564.

Quotas and Completed Surveys

Maximum quotas by state and industry were set and achieved, so as to provide an adequate representation of the variables and allow for meaningful comparisons between them. The final number of interviews (including the pilot interviews) by state, industry, and size is shown below in *Figure 1*:

Figure 1. Interviews achieved, by State, Industry and Size²³

Industry and Size	NSW/ACT		VIC		Total
	Metro	Regional	Metro	Regional	
<i>Hairdressing and beauty services (ANZSIC 9511)</i>	97	50	128	26	301
Small	93	50	123	24	290
Medium/Large	4	0	5	2	11
<i>Cafés and Restaurants (ANZSIC 4511)</i>	104	66	101	71	342
Small	65	42	61	55	223
Medium/Large	39	24	40	16	119
<i>Total</i>	201	116	229	97	643

Of the 317 NSW/ACT interviews, 43 were sourced from the ACT. This small sample means that ACT/NSW figures have generally been combined in the report, although reference is made to a small number of statistically significant findings regarding the ACT. We included ACT in the sample because of concerted efforts by the FWO over the past decade in the café and restaurant industry.

Weighting

Data was weighted to reflect the actual distribution of the population of the two industries, by size, region and state as advised by a customised data request from the Australian Bureau of Statistics (ABS). The following table shows the population to which the survey data was weighted. Due to a low responding

²³ All tables and graphs included in this report were prepared by Wallis Strategic Market and Social Research, and are reproduced with permission of Wallis.

sample for medium/large hairdressers in regional NSW/ACT, this cell was combined with the equivalent metro cell for weighting calculations.

Figure 2. Population targets

Industry and Size	NSW/ACT		VIC	
	Metro	Regional	Metro	Regional
<i>Hairdressing and beauty services (ANZSIC 9511)</i>				
Small	3556	1569	2784	817
Medium/Large	(91)		53	8
<i>Cafés and Restaurants (ANZSIC 4511)</i>				
Small	7321	2592	6159	1392
Medium/Large	509	175	458	85

When contacting employers, we sought to identify an individual respondent who was the most senior manager responsible for the recruitment, payment and management of staff. This is consistent with the approach taken in previous surveys of employing units in seeking to identify individuals whose responses can be ascribed to the workplace or broader organisation.²⁴

In designing the survey we were conscious of the possibility of ‘social desirability bias’ – that respondents to surveys raising issues concerning compliance with the law ‘are generally likely (either deliberately or self-consciously) to interpret, remember, and report events in such a way as to exaggerate their compliance with the law and underplay or excuse noncompliance or to over-report trivial offenses or under-report serious offenses’.²⁵ We sought to avoid triggering this bias by ensuring that the survey was conducted anonymously by an independent, University-based research team and not by the regulator, by framing questions about the regulator, compliance and non-compliance in neutral terms requiring factual responses, and by giving respondents a range of ways to admit non-compliance and discuss responses to non-compliance in apparently socially acceptable ways.²⁶

4. Findings

Knowledge of Regulator

Survey respondents were asked about their awareness of a government body responsible for ensuring compliance with minimum wages and entitlements in

²⁴ N Millward, P Marginson and R Callus ‘Large-Scale National Surveys for Mapping, Monitoring, and Theory Development’, in K Whitfield and G Strauss (eds) *Researching the World of Work: Strategies and Methods in Studying Industrial Relations*, Cornell University Press, Ithaca, 1998.

²⁵ C Parker and V Nielsen ‘The Challenge of Empirical Research on Business Compliance in Regulatory Capitalism’ (2009) 5 *Annual Review of Law & Social Science* 45, p 61 (references omitted) (Parker and Nielsen 2009b).

²⁶ *Ibid* at 63.

Australia, and if they recalled the name of that body. They were then asked whether they had had any previous direct contact with the FWO, and if so, were asked questions about the nature of that contact.

Almost all (91%) of the respondents were aware there that there is a government body responsible for ensuring compliance with employment standards. However, only 6% of these businesses were able to name the FWO without prompting. Upon prompting, most of the respondents (83%) said that they had heard of the FWO.

Awareness of the FWO and its activities is likely to differ depending on location (regional or larger metropolitan area), size of business, industry and whether or not they had any contact with the FWO in the past.

We found that respondents in regional areas were more likely to name the FWO (10%) than respondents in metropolitan areas (5%), and overall regional respondents were more likely to be aware of the FWO (90%) than those in metropolitan areas (81%). Further, respondents in medium/large sized businesses (94%) were more likely to be aware of the FWO compared to respondents in small businesses (83%). It is possible that better recognition and recall of the FWO in regional areas reflects the impact of media coverage – the FWO’s activities are often picked up by regional media whereas the metro media seems more ambivalent about reporting on routine activities of the FWO (e.g. campaigns etc), which may reflect there being more competition for news space in metropolitan areas.

Almost one third of respondents (29%) reported that they had experienced direct contact with the FWO at some time in the past, with hairdressers (42%) much more likely to do so than cafés/restaurants (23%). The most common reasons for contact were to make an enquiry about wages or entitlements (51%), in relation to a complaint by an employee (26%) and as part of an audit by the FWO (18%).²⁷ Larger businesses were much more likely to identify contact following an employee complaint (51%) compared with smaller businesses (25%). This may reflect the likelihood that larger businesses have access to internal/external Human Resources expertise and are therefore less likely to rely on a government agency for information/advice purposes. Hairdressers (61%) were much more likely to enquire about wages or entitlements than cafés/restaurants (42%).

Knowledge of Regulatory Enforcement Action

Respondents were also asked about three key compliance and enforcement activities of the FWO. First, the respondents were asked about their awareness of **targeted campaigns** run by the FWO to educate and audit businesses in particular localities and industries, and to describe the first campaign which

²⁷ It should be noted that the survey was conducted shortly after the transitional period of the FW Act had expired, which may have influenced the proportion of respondents making enquiries to the FWO.

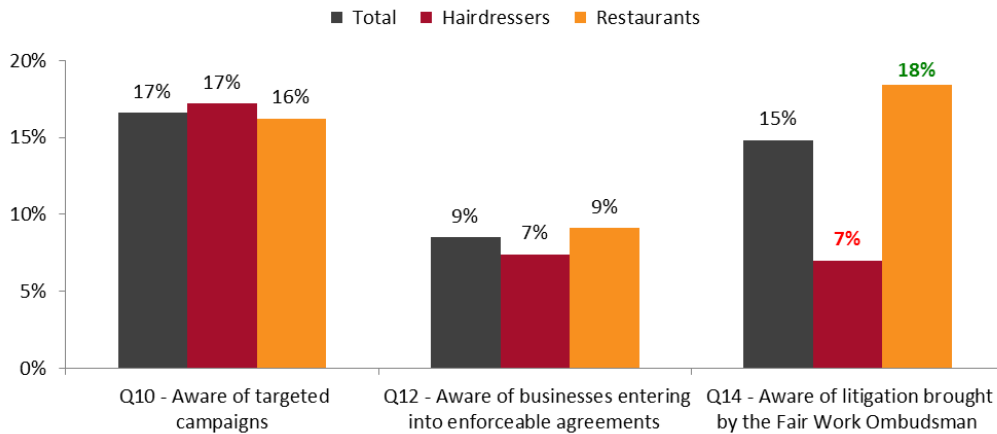
came to mind, if any. Second, respondents were asked about **enforceable undertakings** (the nature of these agreements were explained to the respondent). Respondents who were aware of enforceable undertakings were then asked questions about the first undertaking that came to mind, and the nature of what the business did wrong. Third, respondents were asked whether they were aware of **litigation** against businesses in relation to breaches of laws regulating minimum wages and other employment entitlements, and if so, to describe the first case which came to mind. Respondents who recalled a case were then asked further questions about what the business did wrong (with a number of prompts, if required), their recollection of the size of the business, the industry context, and what orders were made (that is, compensation, back-pay or monetary penalties) and against whom.

In addition to general questions about awareness of litigation brought by the FWO against businesses, respondents were asked about their awareness of the **signal cases** – La Porchetta and House of Colour - and the nature of any details they recalled.

The overall results suggested that targeted campaigns and litigation featured most strongly in terms of the relative awareness of respondents' of these different actions. Targeted campaigns were the most widely recalled (17%), slightly ahead of litigation against businesses (15%). Enforceable undertakings were less well recalled (9%). The fact that targeted campaigns were more widely recalled than litigation possibly reflects the way in which targeted campaigns are promoted and publicized by the FWO as compared to litigation i.e. in the former instance, the FWO sends individual letters to businesses advising them of the campaign, and actively reaches out to industry stakeholders such as employer and industry associations. By comparison, in relation to litigation, the FWO will generally issue a press release at the commencement and conclusion of the litigation – businesses will generally only be alerted to the litigation if it has been reported in the general/industry press.

There were some variations in awareness of enforcement actions according to geographic location and industry context. In terms of geographic location, businesses in the ACT (36%) were much more likely to be aware of targeted campaigns than those in NSW (16%) or Victoria (13%). The ACT result may reflect the higher concentration of campaigns in the ACT region – particularly in the café/restaurant sector. While awareness of targeted campaigns and enforceable undertakings was broadly similar across industries, there was a substantial difference in recollection of litigation, with respondents in cafés/restaurants (18%) much more likely to be aware of litigation brought by the FWO than hairdressers (7%) (see *Figure 3*).

Figure 3. Awareness of FWO activities by Industry



Q10 Are you aware of any examples of targeted campaigns which have taken place in the last two years?

Q12 Are you aware of any examples of where businesses have entered into these types of enforceable agreements in the last two years?

Q14 Are you aware of any examples of where the Fair Work Ombudsman has brought litigation against businesses in the last two years?

Base: All respondents, n=643

Knowledge of Targeted Campaigns

In relation to targeted campaigns, we found a strong association between respondent recall of campaigns and industry context. *Figure 4* shows the proportion of respondents describing particular types of campaigns as the ‘first one that comes to mind’. Respondents were much more likely to be aware of audit or compliance campaigns targeted to their own industry, and were not aware of campaigns that were specifically targeting a different industry. Aside from industry-specific campaigns, just over one in ten respondents (11%) who were aware of campaigns identified FWO audits of businesses employing foreign workers as the first campaign that came to mind.

Figure 4. FWO Campaigns Identified, by Industry

Campaign description	Total	Hairdressers	Restaurants
Restaurant industry audit/compliance	27%	0	41%
Audit or compliance information (no specific industry)	19%	13%	23%
Hairdressing and beauty industry audit/compliance	14%	42%	0
Audits of businesses using foreign workers	11%	6%	14%
Hairdressing and beauty industry campaign	6%	18%	0

Q11 - Can you please describe the first campaign that comes to mind?

Base: All aware of targeted campaigns, n=117

Knowledge of Litigation and Signal Cases

As noted earlier, around 15% of respondents were aware of litigation being taken by the FWO against another business. Almost all (96%) of litigation awareness was in relation to underpayment of employees. As we hypothesized, recall of litigation appears to vary by industry. Awareness of hairdressing cases is almost entirely confined to hairdressers. However, cases relating to restaurants are recalled more evenly across both industries. For example, respondents from the hairdressing industry were just as likely to describe the La Porchetta litigation as the first case of litigation that came to mind (11%) as respondents from restaurants/café (9%).

Figure 5. FWO Litigation Identified, by Industry

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

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

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

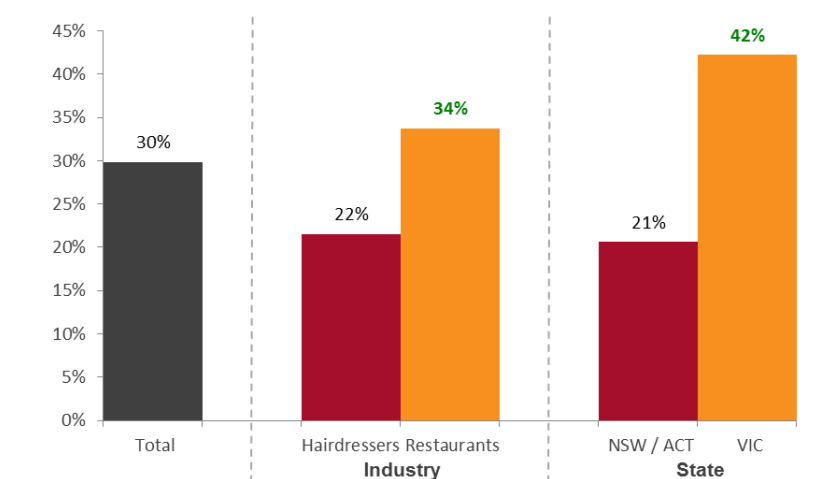
La Porchetta

Respondents were more likely to have knowledge of the La Porchetta signal case than other litigation, with around 30% of respondents aware of the case (19% recalled the case without prompting by the interviewer, while 11% confirmed awareness after being prompted with further information about the case).

Both geographic locality and industry context were clearly important. Overall, there was significantly higher awareness of La Porchetta amongst Victorian businesses (42%), where the breaches occurred, than in NSW (21%). Industry context was also important, with 34% of respondents in cafés/restaurants having knowledge, compared to 22% of hairdressers.

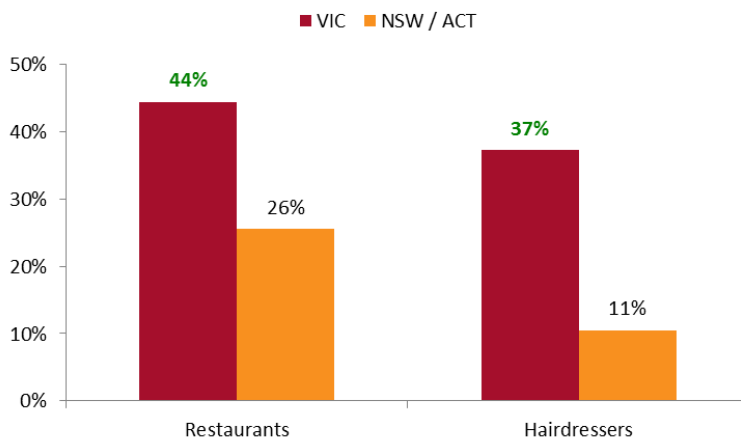
Reinforcing the importance of geographic location, within the cafés/restaurants industry, recall of the case was much higher in Victoria (44%) than in NSW (26%). Recall among hairdressers, whilst lower than their café/restaurant counterparts, is also higher in Victoria (37%) than in NSW (11%).

Figure 6. Overall Awareness of 'La Porchetta' Signal Case



Q16 Have you heard of (the 'La Porchetta') case?
 Q18 Do you recognise this case now?
 Base: All respondents, n=643

Figure 7. Awareness of 'La Porchetta' Case, by State and Industry



Q16 Have you heard of (the 'La Porchetta') case?
 Q18 Do you recognise this case now?
 Base: All respondents, n=643

Three-quarters (75%) of the respondents who recognized this signal case by name were able to correctly identify the nature of the infraction as underpayment of wages. However, much fewer of these respondents recalled the sanctions imposed against 'La Porchetta'. More than half of these respondents (57%) did not know what penalties were imposed on the 'La Porchetta' franchise. 27% of respondents who recognised the signal case identified that

there was some sort of financial penalty imposed on the franchise in addition to backpay, but only a small percentage identified that a penalty was imposed against both the company and an individual behind the company (5%). Even fewer were aware of what sanctions were imposed against the head franchisor of 'La Porchetta', with 92% of respondents not aware. This is consistent with other studies of general deterrence, where it has been found that recollection of sanctions against other firms tends to be general: 'respondents remember the *infractions* more than the precise penalty'.²⁸ The finding is also significant in that it seems to run counter to the idea that businesses are rational and calculative – if they can't recall the amount of the penalty (i.e. the potential costs), then they cannot weigh this up against the costs associated with compliance.

House of Colour

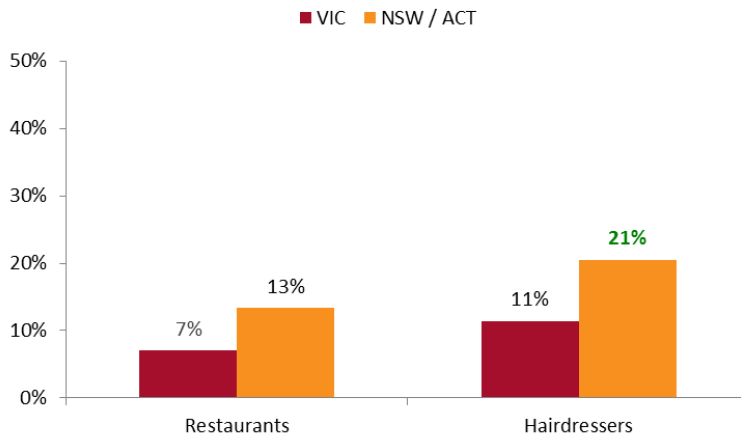
We expected that there would be lower levels of awareness of the House of Colour signal case overall, given the higher profile of the La Porchetta restaurant franchise. This was confirmed by the survey results, with around 13% of respondents aware of the case (10% unprompted, 3% prompted). We also expected that awareness would be higher in NSW, where the case was located, and again this was confirmed by the survey results, with 17% of NSW respondents aware of it compared to 9% in Victoria.

Also as expected, there was also a strong industry effect, with recall of the 'House of Colour' case highest among hairdresser respondents, and again, particularly in NSW. So like the 'La Porchetta' case, the 'House of Colour' results indicate that there are industry-specific and geographic-specific effects on awareness, which is consistent with the Weil study of the deterrence effects of WHD investigations of US fast food outlets described earlier.²⁹

²⁸ Thornton, Gunningham and Kagan 2005, above n 3, at 273.

²⁹ See Weil 2010, above n 3, pp 54-57.

Figure 8. Awareness of 'House of Colour' Case, by State and Industry



Q16 Have you heard of (the 'House of Colour') case?

Q18 Do you recognise this case now?

Base: All main survey respondents (question not asked during the pilot), n=601

Around two-thirds (67%) of those respondents aware of this case by name correctly identified underpayment as the focus of the litigation, but like the La Porchetta case, businesses were again much less certain of the sanctions imposed on 'House of Colour'. Less than 20% of respondents were aware penalties had been imposed in addition to backpay, with 13% unable to elaborate on the details of penalties, while almost three-quarters (72%) didn't know what action was taken. In relation to both La Porchetta and House of Colour there was very little recognition that individuals behind the corporation may have been penalized, and therefore limited indication of the general deterrence effects of litigation against individual accessories to corporate breaches.

Sources of Knowledge of FWO Activities

Based on the deterrence studies outlined earlier in this report, we assumed that communication of enforcement activities and sanctions would be an important determinant of whether respondents had knowledge of FWO actions. Respondents who were aware of FWO enforcement activities were asked how they found out about these actions.

Almost three-quarters (71%) of respondents said that they had heard about FWO activities through the media or news stories, including internet news. Interestingly there was some variation in results across the two different industries. While respondents from cafés/restaurants heard about the FWO almost entirely through the media, hairdressers appear to have a wider network of information sources. They are much more likely to have heard about the FWO through employer associations (13%) or even their clients (7%), relative to cafés/restaurants (4% and 0%, respectively).

Figure 9. Finding out about Fair Work Ombudsman actions

Source of hearing about FWO activities	Total (%)	Hairdressers (%)	Restaurants (%)
The media, or news stories, including internet news sources	71	55	79
Colleagues	7	10	6
Employer associations	7	13	4
Friend / family member	5	6	5
Client	2	7	-

Q20 – Thinking about the [campaigns] [enforceable undertakings] [litigation] that we've been speaking about, How did you find out about the action undertaken by the Fair Work Ombudsman? Selected response categories

Base: All aware of targeted campaigns, enforceable undertakings or litigation n=360

The findings regarding the importance of media coverage are consistent with studies of information sources about enforcement in other regulatory contexts. For example, Parker and Nielsen found that media stories were the largest influence on overall business awareness of competition and consumer regulation in Australia.³⁰ In addition, the rate of respondents noting employer associations as their source of information underlines the argument made by Weil that employer associations, and other networks, are critical to magnifying the ripple effects of litigation and augmenting the limited resources of government.³¹

Business Perceptions of Risk

According to deterrence theories, business awareness of sanctions imposed for noncompliance will not necessarily alter their behaviour if they do not think the risk of detection and punishment is high.³² To test business perceptions of the risk of detection and punishment of noncompliance by the FWO, respondents were presented with a number of hypothetical situations regarding compliance with Australian labour laws. By using hypotheticals, we aimed to distance the issue of noncompliance from the respondents' own businesses. First, respondents were asked to assume there was a small business in the same industry that deliberately underpaid its workers by \$5000 in the past 12 months. Respondents were then asked what they thought the chances were that the FWO would find out, with a range of possible responses suggested: highly unlikely, unlikely, 50/50, likely, or highly likely. If the respondent answered 'don't know', that response was recorded by the interviewer.

³⁰ Parker and Nielsen 2009a, above n 13, p 108.

³¹ Weil 2010, above n 3, pp 56-57. Parker and Nielsen also found that industry associations were a significant influence on business awareness of competition and consumer regulation: Parker and Nielsen 2009a, *ibid*, pp 109-110.

³² C Parker and V Nielsen, 'How Much Does it Hurt? How Australian Businesses Think About the Costs and Gains of Compliance and Noncompliance with the *Trade Practices Act*? (2008) 32 *Melbourne University Law Review* 554 at 576.

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

This finding - that 75% of respondents felt that the risk of detection by the FWO was 50/50 or higher - is very significant when considering that the number of audits undertaken by the FWO represents a very small slice of all businesses operating in these industries. Also relevant is the vulnerability of the employees working in the respective industries (which lowers likelihood of complaints).

A higher proportion of respondents felt that if detected, a noncompliant business would be fined by a court. Almost 70% said that this was 'highly likely' (39%) or 'likely' (29%).

Responses to FWO Enforcement Activities

As noted earlier, we were also interested in the effect of knowledge of FWO activities and/or specific regulatory enforcement actions on business' compliance-related behaviour. Respondents who were aware of FWO activities were asked if they had responded in any of a range of ways that were read out by the interviewer:

- By reviewing your systems to make sure that they comply with Australian work law?
- By changing your procedures to ensure that you comply with the laws relating to minimum wages and entitlements, such as leave and termination entitlements)?
- By seeking external advice (e.g. from a legal or HR professional)?
- By increasing the resources devoted to HR?
- In some other way (specify)

If respondents answered that they had taken no action or didn't know, that was recorded.

Of the respondents that had heard about FWO activities, more than half (62%) have taken no action as a direct result. Medium to large businesses were more likely to have given this answer (68%) than small businesses (61%). The great majority of these businesses (88%) are confident that their business is already compliant with Australian workplace law. This finding seems to confirm the 'reassurance function' of general deterrence messages - that their significance is not necessarily the threat they signal, but the reassurance they provide to employers that have incurred costs to ensure compliance. In other words, 'penalizing the "bad apples" helps keep the "contingently good apples" good'.³³

³³ Thornton, Gunningham and Kagan 2005, above n 3, at 266, citing E Bardach and R Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Revised Ed.), Transaction Publishers, Philadelphia, 2002.

Where respondents had taken action in response to FWO activities, the most common actions were to review their systems to ensure compliance (25%) and to seek external advice such as from a legal or HR professional (18%). Around one in ten of businesses (11%) had changed their procedures to ensure that they comply, after hearing about the FWO's activities. The following table (*Fig. 10*) shows the proportion of businesses undertaking various actions subsequent to hearing about FWO activities.

Figure 10. Action taken following awareness of FWO activities

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

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

These results suggest that FWO activities serve a significant reminder function for many businesses, causing them to check on their compliance processes. The fact that 27% of these businesses either sought external advice or increased HR resources suggests that their response to awareness was strong enough for them to incur costs in ensuring compliance. Of the respondents that reported taking action to change their workplace procedures to ensure compliance, the survey results suggest that almost all were small businesses: 12% of small businesses that were aware of FWO activities reported taking this action, compared to one per cent of medium or large businesses. This is consistent with previous research which suggests that smaller businesses are far more sensitive to regulatory interventions than larger businesses.³⁴ For the other actions, however, results were broadly similar for different sized businesses.

Implicit General Deterrence

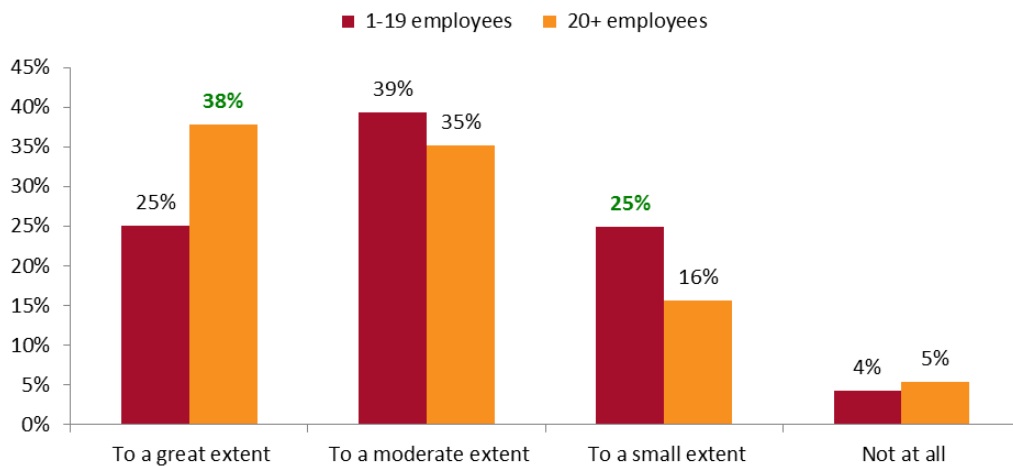
The survey results also indicated an 'implicit general deterrence' effect, as predicted by the Thornton, Gunningham and Kagan study. Although few respondents reported that their business had changed behaviours specifically as a result of the FWO, most felt that they are influenced either very much (35%), or

³⁴ See discussion of the relevance of business size earlier in the report.

to some extent (23%) by the FWO’s activities. There were no significant differences in opinion by industry, business size, state or location, indicating that this level of influence is felt in a similar fashion across industries and geographic locations.

Reassurance also seemed to be a factor in firms’ reactions to awareness of FWO activities. In addition to the results presented above which suggest that most respondents felt that they were already compliant with employment standards, a majority of respondents were of the view that other firms in their industry comply with workplace laws, due to FWO activities, to either a great (26%) or moderate extent (39%). Respondents from larger firms (38%) were more likely to feel it is to a great extent, while those from smaller firms (25%) were more likely to think it is only to a small extent (16% for larger businesses). Only 6% said that firms comply ‘not at all’ due to the FWO’s oversight.

Figure 11. Extent firms in industry take steps to ensure compliance because of oversight from FWO



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

Challenges in ensuring compliance

Respondents were also asked about what they saw as the biggest challenges their organisations faced in ensuring compliance with workplace law. There was some variation between the two industries in relation to this question.

Respondents from hairdresser employers were more likely to identify issues such as access to correct and accurate information (19%) and keeping up to date with the law (25%) relative to cafés/restaurants (10% and 16%, respectively). Respondents from cafés/restaurants were more likely to be concerned about minimum wages and penalty rates being set too high (10%) than hairdressers (5%). Although previous studies of compliance have suggested that smaller businesses are more likely to suffer from lack of knowledge of legal requirements, we found that small businesses were only slightly more likely to identify access to information (13% of small businesses compared to 10% of medium to large businesses) and keeping up to date with changes in the law

(19% of small businesses compared to 17% of medium to large businesses) as the biggest challenge in ensuring compliance.

5. Discussion

Overall, our study found that business awareness of the existence of a government body ensuring compliance with employment standards regulation was very high, with more than nine in ten respondents confirming knowledge. However, there was relatively low awareness of that body by name – the ‘Fair Work Ombudsman’ – and some confusion with other, similarly named bodies such as the Fair Work Commission. We also found that respondents in medium to large sized businesses in regional areas were more likely to be aware of the FWO than respondents in small businesses and/or metropolitan areas.

With respect to the FWO’s activities, respondents were more likely to be aware of targeted campaigns and litigation than other regulatory enforcement measures such as enforceable undertakings. Respondents were much more likely to be aware of targeted campaigns within their own industry. However, in relation to litigation, cases relevant to restaurants were recalled relatively evenly across both industries, whereas café/restaurants had little knowledge of hairdressing cases. Further questions about knowledge of FWO ‘signal case’ litigation campaigns suggested they were recalled by a small, but considerable proportion of businesses (30% for ‘La Porchetta’ and 13% for ‘House of Colour’).

We found that levels of awareness concerning litigation appears related to both geography and industry. The FWO should carefully consider both these factors when choosing which signal cases to pursue. Further, awareness of the La Porchetta litigation among both groups was relatively high compared to the ‘House of Colour’ case. As noted earlier, some element of the ‘La Porchetta’ case meant that it was more able to bridge the gap across industries, compared with the ‘House of Colour’ case, which had low awareness outside of hairdressers. It may be that the nature of a business/industry is a significant factor in general awareness, as suggested earlier, or it may be that the prominence in public awareness of the ‘La Porchetta’ franchise *brand* was a significant factor in respondent knowledge of this litigation. A question for further research is whether these findings support or contradict Weil’s research that suggests that other branded restaurants are going to be more sensitive to litigation against branded restaurants and independent cafés/restaurants are going to be more sensitive to litigation against other independent cafés/restaurants.³⁵

Another significant finding was that there was only general awareness of the penalties imposed in the two signal cases, with a high proportion of respondents who knew about the cases unable to identify the exact nature of the penalties imposed. As we have observed, this may suggest that many businesses are not ‘amoral calculators’ that make a rational calculation of the costs of compliance and measure that against the costs of noncompliance. This is particularly so

³⁵ Weil 2010, above n 3, pp 52-53.

when considered in conjunction with our finding that a majority of businesses who were aware of FWO activities either took no action, or reviewed their own systems to ensure compliance. In other words, it appears that there were many firms motivated to comply with the law that experienced knowledge of FWO activities as either reassurance that they were compliant (and therefore did not need to check their compliance) or took the knowledge as a reminder to review their internal systems to ensure that they were compliant. This suggests that even when FWO enforcement activities are not having a deterrent effect on deliberately noncompliant firms, they are nevertheless having a compliance impact.

These findings reinforce the FWO's approach to general deterrence as just one element of a strategic enforcement operating model. That is, the FWO does seek to activate general and specific deterrence into their campaigns, litigation and media strategies. However, the inspectorate is cognisant of the limitations of general deterrence, hence is only one of the four levers deployed by the FWO under the agency's strategic enforcement model.

Where awareness of FWO activity does prompt actual changes to work practices, this seemed to occur mostly among small businesses. Medium and larger businesses, however, appear to be more influenced by the implicit deterrence aspect of FWO's activities. FWO may wish to consider this in its future activities: campaigns designed at changing non-compliant behaviour are more likely to gain traction among smaller businesses, and are arguably more necessary there. For larger businesses, the 'implicit deterrence' messages that are created by FWO activity are more likely to ensure compliant behaviour.

Even though most of the businesses we surveyed felt that they already comply, a majority of respondents conceded that the FWO's activities do influence compliance in their industry. This could be because it is not fear of formal legal sanctions that motivates firms to take compliance action, but rather other factors stemming from knowledge of enforcement action. For example, Thornton, Gunningham and Kagan identify fear of informal sanctions for violations, such as damage to a company's reputation.³⁶ There was also evidence to suggest that notwithstanding the FWO's extensive education activities, including targeted campaigns, small businesses find access to information about relevant employment standards an ongoing challenge in achieving compliance.

The implicit deterrence effect of FWO activities was reinforced by our findings about business perceptions of risk and detection of punishment by the FWO. That almost half of businesses felt that it would be likely or highly likely that the FWO would detect business underpayment of workers, and that almost 70% felt that it was at least likely that underpayment would be penalised, may be a reason for respondents' beliefs about the FWO's positive influence on compliance.

³⁶ Thornton, Gunningham and Kagan 2005, above n 3, at 279.

Finally, the survey results pertaining to where respondents gained their knowledge of FWO activities suggests that the FWO media strategy has been successful and should be continued. While it also appears that FWO efforts to enrol stakeholders such as employer associations in their enforcement activities have had some success,³⁷ there is scope to improve on this group as a source of business knowledge concerning the FWO. It was also surprising that more respondents did not list legal advisors or external HR consultants as a source of information. Parker and Nielsen's study of sources of information concerning competition and consumer regulation found that legal advisors were the next strongest influence on business awareness after the media.³⁸

6. Conclusion

This study of business awareness of, and responses to, the FWO and its activities in two industries investigated the extent to which regulatory enforcement actions against non-compliant employers were achieving 'ripple effects' on employers not subject to any direct formal sanction. Our findings go some way to addressing the dearth of research on general deterrence in employment standards regulation enforcement, but as we note below, there is more work to be done.

We found 'explicit general deterrence' – in this case, a relationship between knowledge of specific regulatory activities, including signal cases, and compliance-related behaviour – in a significant number of businesses that were aware of FWO activities. Only a small percentage – mostly small businesses – changed their workplace practices as a result. However, for other businesses, general deterrence had 'reminder' and 'reassurance' effects, prompting them to check whether they were in compliance. They were not firms that know they are noncompliant and are stimulated by knowledge of regulatory action to change their practices.³⁹

We found that industry context, geographic proximity to violations, and size of business were relevant factors in assessing the impact of FWO enforcement activity. There is evidence to suggest that the FWO should continue to focus its regulatory activities based on these considerations. However, it is also apparent that other factors, such as the extent to which litigation involves well known business names or 'brands', will also be relevant to maximising general deterrence.

The FWO should also be reassured by the findings concerning overall business awareness of the agency and its activities, their perceptions of the high risk of detection and punishment of noncompliance, and by the implicit general deterrence effect – that a majority of businesses feel that compliance is

³⁷ See further T Hardy, 'Enrolling Non-State Actors to Improve Compliance with Minimum Standards' (2011) 22 *Labour & Industry* 117.

³⁸ Parker and Nielsen 2009a, above n 13, at 109.

³⁹ This is consistent with the findings in the Thornton, Gunningham and Kagan study: Thornton, Gunningham and Kagan 2005, above n 3, at 282.

influenced by the FWO's activities in general. The FWO's use of the media to publicise its activities also appears to have enhanced both explicit and general deterrence of noncompliance. Nevertheless, this study and its findings suggest that further research is needed to understand business calculations and motivations regarding employment standards compliance, and to explore further the factors which maximise explicit general deterrence in the employment standards regulation context.