

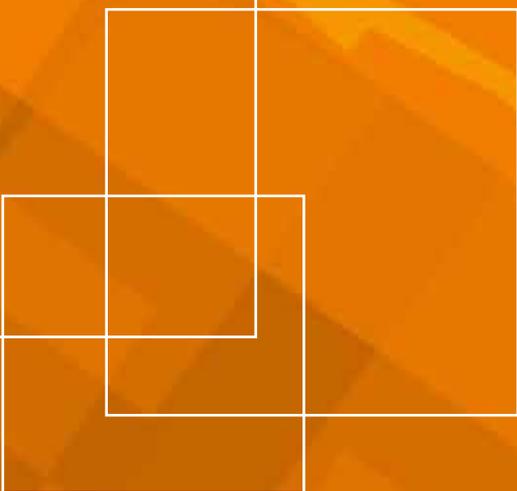


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Study on Labour Inspection Sanctions and Remedies: The case of Australia

John Howe
Nicole Yazbek
Sean Cooney



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**Labour Administration and Inspection Programme
LAB/ADMIN**

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and Remedies: The case of Australia**

John Howe

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International Labour Organization – Geneva

March 2011

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List of acronyms used in this report

ACT	Australian Capital Territory
AFPCS	Australian Fair Pay and Conditions Standard
ASCC	Australian Safety and Compensation Council
AVR	Assisted Voluntary Resolution
FWA	Fair Work Australia
FW Act	Fair Work Act 2009 (Cth)
FWO	Fair Work Ombudsman
HSC	Health and Safety Committee
HSR	Health and Safety Representative
IGA	Intergovernmental Agreement
NES	National Employment Standards
NSW	New South Wales
OHS	Occupational Health and Safety
WRMC	Workplace Relations Ministers' Council

1. Introduction

This report describes the main features of the Australian legal system for enforcement of labour standards, with a focus on the key strategies and sanctions available to government agencies responsible for oversight and enforcement of minimum employment standards and occupational health and safety.

Since 2005, government enforcement of minimum employment standards and occupational health and safety in Australia has been undergoing a significant transformation. Historically, minimum employment standards such as minimum wages, maximum working hours and leave entitlements were set through industrial relations processes and industry or sectoral instruments or agreements, and were largely enforced by trade unions. The federal government maintained only a small, under-resourced labour inspectorate.¹ As the coverage of trade unions declined in the 1980s and 1990s, employer non-compliance with many employment standards became a significant problem toward the end of the twentieth century.

As a result of recent changes to the Australian system of labour regulation, minimum standards are now set through a combination of legislation, industry awards and enterprise level agreements pursuant to a new statute, the *Fair Work Act 2009* (Cth) (the FW Act). Over the last five years, the federal agency responsible for enforcement, now called the Office of the Fair Work Ombudsman (FWO), has been given substantially increased resources along with new powers for labour inspectors, coupled with an earlier, significant increase in the penalties that courts are able to impose for breach of these standards. Notwithstanding these changes, trade unions and individual employees may still take enforcement action such as court proceedings for recovery of wage underpayments, so that FWO is not the sole enforcement mechanism under the Act.

Another change in the setting and enforcement of minimum employment standards in Australia is that responsibility for setting and enforcing minimum employment standards such as wages and working hours, previously shared with multiple State (provincial) governments in respect of those employed by private sector employers, is now largely the domain of the Australian Commonwealth (federal) Government.

Occupational, health and safety (OHS) regulation, historically a State responsibility, is also set to move to a more national system in the coming years. OHS regulation in Australia has not experienced the major transformation that has occurred to minimum employment standards regulation over recent years. However, in many ways government enforcement of OHS regulation, although decentralised due to its falling with regional government jurisdiction, has been more sophisticated than the system pertaining to minimum employment standards. The OHS regulatory environment has experienced many enforcement innovations since the 1970s, some of which are beginning to be replicated in the minimum employment standards jurisdiction.

These changes make Australia an interesting and topical example of the incidence and implementation of labour inspection sanctions and remedies.

This report sets out the context and background to these changes, before giving detailed consideration to the regulatory framework for enforcement of minimum employment standards and OHS regulation in Australia. The report provides detailed

¹ The States also maintained small labour inspectorates, see A Stewart, *Stewart's Guide to Employment Law* (2nd ed), Federation Press, 2009, 169.

information on the inspection practices of regulatory agencies in each area, and the incidence of both administrative sanctions and prosecutions in cases of alleged breach of the relevant legal standards and conditions.

2. Legal sources for the application of labour inspection sanctions: overview of the Australian system of employment and industrial relations regulation

2.1. From a federal system to a national system

Australia has a federal system of government, with jurisdictional division of law making powers between the Commonwealth and the six Australian States under the terms of the Australian Constitution. Historically, this has had a significant impact on both labour standard setting and Australia's system of labour inspection and sanctions for the enforcement of minimum employment and safety standards.

Until recently, issues involving workers within one State were thought to be outside Commonwealth jurisdiction, and it was also assumed that the Commonwealth could not legislate directly on central aspects of employment such as wages, minimum conditions and occupational health and safety.² As a result of this Constitutional division of powers, the six State Governments in Australia each maintained a separate industrial relations system governed by its own legislation (although Victoria voluntarily referred its powers to legislate over industrial relations to the Commonwealth voluntarily in 1996 as permitted by the Australian Constitution). Many employees had their rights and entitlements set through State instruments, overseen by State tribunals and inspectorates. The States also established separate systems for regulation of labour matters clearly not within federal jurisdiction, such as OHS and child labour.

However, since 2006, the federal government has assumed many State powers over labour regulation by utilising different powers in the Australian Constitution. In that year, the conservative Howard Coalition Government introduced major changes to the determination of minimum wages and conditions covering all corporate employers (the 'Work Choices' legislation). In 2009, a federal Labor Government enacted new federal labour relations legislation, the FW Act, and subsequently all States except Western Australia agreed to refer their jurisdiction over private sector employers to the Commonwealth. As of 1 January 2010, for the first time in Australia's history, minimum employment standards for nearly all private sector employers and their employees are regulated by the national 'Fair Work system'. Notwithstanding the federal assumption of responsibility for laws on basic employment conditions, State governments continue to regulate OHS and a number of other labour matters because they are specifically excluded from the FW Act by political agreement between the Commonwealth and the States.³ In addition to OHS, worker's compensation, anti-discrimination, workplace surveillance, trading hours, payment for work on public holidays, long service leave and child labour are

² Parliament of the Commonwealth of Australia *The Constitution and Industrial Relations: Is a Unitary System Achievable?* Paper no. 8 (2005-06) Parliament of Australia Research Brief 2. See also R Owens, 'Unfinished Constitutional Business: Building a National System to Regulate Work' (2009) 22 *Australian Journal of Labour Law* 258.

³ See s 27, *Fair Work Act 2009* (Cth). In the absence of an agreement between the Commonwealth and the States, it would be possible for the Commonwealth to expand its jurisdiction over these areas under the Constitution.

also excluded, although an Intergovernmental Agreement for Regulatory and Operational Reform in OHS has been signed with the purpose of harmonising OHS laws by 2012.⁴ There are also a number of exclusions and limitations from the Fair Work System, applying to categories of workers, namely certain employees essential to the operation of State governments, employees in Western Australia and workers who are not

‘employees’, such as independent contractors. One exception to this last exclusion are outworkers in the textile, clothing and footwear industry, the only industry where modern awards can apply beyond the employment relationship by operation of the FW Act (s 12).

Given that there are multiple systems of regulation and enforcement of OHS, child labour, and the other employment conditions still within State jurisdiction, with some variation between them, we have not been able to consider all of these jurisdictions in detail in our report. The report instead focuses on the present federal system of labour regulation of minimum employment standards under the FW Act, while providing some general information about labour administration and sanctions in relation to OHS enforcement. Due to space constraints, we have not considered other labour regulation within State jurisdiction such as the regulation pertaining to child labour.⁵

A brief overview of the most significant recent reforms to the Australian industrial relations enforcement regime is set out below in our discussion of the main sources of minimum employment standards in Australia.

2.2. Source and scope of the current system of minimum employment standards

The employment rights and working conditions of the majority of Australian employees are regulated by the FW Act and the *Fair Work Regulations 2009* (FW Regulations). As will be explained below, some of these rights and entitlements are derived directly from the statute, while others arise under instruments made under the Act: Modern Awards or Enterprise Agreements. Independent contractors are governed by the *Independent Contractors Act 2006* (Cth), the *Trade Practices Act 1974* (Cth) and state laws that are not excluded by virtue of section 8 of the Independent Contractors Act. (Section 8 of the Act lists several ‘workplace relations matters’ that are excluded from State jurisdiction including leave, remuneration and industrial action).⁶

The legal institutions underpinning the national regulatory system are Fair Work Australia and the Office of the Fair Work Ombudsman. These are discussed in more detail below.

⁴ See discussion later in this report, and the overview in R Johnstone ‘Harmonising Occupational Health and Safety Regulation in Australia: The First Report of the National OHS Review’ (2008) *Journal of Applied Law and Policy* 35.

⁵ For detailed consideration of the extent of child labour regulation in Australia, see A Stewart, *Making the Working World Better for Kids: A Report for the NSW Commission for Children and Young People*, NSW Commission for Children and Young People, December 2008 <http://kids.nsw.gov.au/uploads/documents/Making%20the%20working%20world%20work%20better%20for%20kids.pdf>. (accessed 17 July 2010).

⁶ J Riley ‘A Fair Deal for the Entrepreneurial Worker? Self-Employment and Independent Contracting post Work Choices’ (2006) 19 *Australian Journal of Labour Law* 246, 250.

From the early twentieth century, most minimum employment standards in Australia were set by industry or sectoral level instruments known as ‘awards’ which normally included a wide range of employment conditions, rights and entitlements. Awards were the product of negotiation between unions, employers and employer associations, and where agreement over the content of awards could not be reached; a tribunal was empowered to arbitrate over the specific terms and conditions to be included in the award. Since the 1980s, this system has been supplemented by enterprise level collective bargaining, with collective bargaining agreements normally setting terms and conditions above a ‘safety net’ of conditions in awards. Most States maintained similar systems of standard setting.

Since the mid-1990s, the Australian labour relations system has experienced significant change. In particular, the Work Choices legislation severely curtailed the role of awards in favour of enterprise bargaining underpinned by a legislated safety net of five minimum conditions, including a minimum wage, known collectively as the Australian Fair Pay and Conditions Standard (AFPCS).⁷

Although these reforms were for the most part intended to advance employer interests over employee rights,⁸ one of the positives for employees to come out of this change was the move to enhance the resources and power of the federal labour inspectorate. In 2007, the Government transformed the inspectorate into a statutory agency called the Office of the Workplace Ombudsman.⁹ Annual funding for labour inspection more than doubled between 2005 and 2007, from AUD\$21 million to around \$50 million. These changes, when combined with significant increases in the penalties applicable to breaches of federal labour legislation in 2004, meant that for the first time in the history of Australian labour regulation there was a well-resourced labour inspectorate at federal level backed by serious penalties for non-compliance.¹⁰

The Howard Government subsequently lost power to the Rudd Labor Government at the 2007 federal election, in large part due to the unpopularity of its industrial relations reforms. The Labor Government moved quickly to draft new legislation, the FW Act, part of which came into force in July 2009, and the remainder on 1 January 2010. However, it retained many aspects of the previous system, including the Howard Government’s commitment to an improved labour inspectorate.

⁷ For consideration of a number of different aspects of the Work Choices changes, see A Forsyth and A Stewart (eds) *Fair Work: The New Workplace Laws and the Work Choices Legacy*, Federation Press, 2009.

⁸ It remains contested whether Work Choices was pro-employer; with some authors contending that the framework ‘does not *require* employers to reduce employee conditions, or to move to individual arrangements which exclude unions, or to engage in practices which pressure employees to accept the employer’s preferred terms’; see C Sutherland, *Agreement-making under Work Choices: The Impact of the Legal Framework on Bargaining Practices and Outcomes*, Report to the Office of the Workplace Rights Advocate, October 2007, <http://www.buseco.monash.edu.au/blt/wclrg/4880-agreement-making-web.pdf> (accessed 18 February 2011). See generally R Mitchell, D Taft, A Forsyth, P Gahan and C Sutherland, ‘Assessing the Impact of the Coalition Government’s Labour Law Program 1996-2007’ (2010) 23(4) *Australian Journal of Labour Law* 274.

⁹ T Hardy, ‘A Changing of the Guard: Enforcement of Workplace Relations since Work Choices and Beyond’, in A Forsyth and A Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, Federation Press, 2009, 85.

¹⁰ T Hardy and J Howe ‘Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia’ (2009) 22 *Australian Journal of Labour Law* 306, Hardy (above n 9).

As of 1 January 2010, the majority of businesses in Australia became subject to the new Fair Work system. The Fair Work system has a number of features that employers and employees must comply with. These include a set of 10 minimum statutory 'National Employment Standards' (NES) (replacing the AFPCS), 'modern awards' that apply nationally for specific industries and occupations, a national minimum wage order (where it applies) and protection from unfair dismissal. Enterprise bargaining continues to operate as a mechanism by which, for the most part, unions and employers can negotiate enterprise level agreements which supplement or are better than the terms and conditions in the NES and modern awards.¹¹

There are 10 minimum workplace entitlements in the NES:

- A maximum standard working week of 38 hours for full-time employees, plus 'reasonable' additional hours.
- A right to request flexible working arrangements to care for a child under school age, or a child (under 18) with a disability.
- Parental and adoption leave of 12 months (unpaid), with a right to request an additional 12 months.
- Four weeks paid annual leave each year (pro rata).
- Ten days paid personal leave each year (pro rata), two days paid compassionate leave for each permissible occasion, and two days unpaid carer's leave for each permissible occasion.
- Community service leave for jury service or activities dealing with certain emergencies or natural disasters. This leave is unpaid except for jury service.
- Long service leave.
- Public holidays and the entitlement to be paid for ordinary hours on those days.
- Notice of termination and redundancy pay.
- The right for new employees to receive the Fair Work Information Statement.¹²

Modern awards are permitted to regulate an additional 10 employment matters. Wages and classifications are set by modern awards,¹³ and are reviewed annually by a Minimum Wage Panel of the public body responsible for administering awards, Fair Work

¹¹ See ss 55-57, *Fair Work Act 2009* (Cth).

¹² The National Employment Standards are set out in Part 2-2 of the *Fair Work Act 2009* (Cth).

¹³ Employees are classified into types for the purposes of pay and other entitlements under an industrial instrument. A classification outlines the type of work an employee does and sometimes their expected skill level or required qualifications. Different classifications apply to employees doing different work. To determine an employee's classification level, it is important to consider: the nature of the work performed by the employee, the employee's skills and qualifications and the employee's level of responsibility. Classification structures are included in all modern awards, see Australian Government – Fair Work Online, *Glossary: Classifications* available at <http://www.fairwork.gov.au/resources/glossary/pages/default.aspx> (accessed 19 February 2011).

Australia.¹⁴ Modern awards also include terms regulating types of employment arrangements; hours of work; overtime and penalty rates; annualised wage or salary arrangements; allowances; leave loadings; superannuation; and dispute settlement procedures.

In addition employees may be covered by enterprise agreements, a form of statutory collective agreement which sets out the conditions of employment for a particular employee or group of employees and their employer. Agreements differ from contracts of employment or common law agreements, in that they have been lodged with a relevant authority, Fair Work Australia. Modern awards do not apply to an employer and employee while they have an agreement in place. However the base rate of pay under an agreement must not be less than the base rate of pay under the relevant modern award. If there is no modern award that covers the employees the agreement rate must be at least equal to the national minimum wage.¹⁵

The current structure of working conditions regulation is summarized in the following table:

Level of operation	Instrument	Set by
All workplaces in the national workplace system	National Employment Standards	Commonwealth Parliament
Industry	Modern awards	Fair Work Australia
Enterprise	Enterprise agreements	Employer, employees, unions
Individuals	Contract of employment	Employer, individual employee

The new national system also protects employers, employees and unions from discrimination and victimisation (including denial of freedom of association rights).¹⁶ It is unlawful for an employer to take adverse action against an employee (including dismissal, discrimination¹⁷ and undue influence and pressure) for asserting a workplace right. Enforcement of these rights is through the assistance of a labour inspectorate, the Fair Work Ombudsman, or a tribunal, Fair Work Australia. These institutions are discussed in more detail below.

¹⁴ For discussion of the different standards, see Stewart, above n 1; J Murray and R Owens, ‘The Safety Net: Labour Standards in the New Era’, in *Fair Work: The New Workplace Laws and the Work Choices Legacy*, Federation Press, 2009.

¹⁵ Section 293, *Fair Work Act 2009* (Cth).

¹⁶ Protection against discrimination and victimisation has formed part of the industrial relations system since the early twentieth century. See C Fenwick and J Howe, ‘Union Security After Work Choices’, in A Forsyth and A Stewart, *Fair Work: the New Workplace Laws and the Work Choices Legacy*, Federation Press, 2009, 175.

¹⁷ Prohibited forms of discrimination include discrimination based on race, sex, sexual preference, age, physical or mental disability, marital status, union activity, filing a complaint, or participating in proceedings against an employer.

Unfair dismissal laws are also governed by the new system. Employees are protected from dismissal in a manner that is ‘harsh, unjust or unreasonable’.¹⁸ If this occurs, it will constitute an unfair dismissal and an employee is eligible to make an application to Fair Work Australia for assistance.

All of this extensive system of regulation operates together with the general law principles of contract, property and tort; as Australia is a common law system, these principles are largely the creation of judges. However, the statutory provisions prevail over the common law unless legislation otherwise provides.

2.3. Institutions

2.3.1. Fair Work Australia

Fair Work Australia (FWA) is the national workplace relations tribunal established under the FW Act.¹⁹ FWA is an independent body with the authority to carry out a range of functions relating to minimum wages and employment conditions, enterprise bargaining, industrial action, dispute resolution, termination of employment, and other workplace matters.²⁰

Historically, the federal tribunal had significant responsibility for setting terms and conditions of employment through its arbitration function. This is no longer the case except in some limited circumstances. As mentioned earlier, a Minimum Wage Panel of FWA is responsible for reviewing the minimum wages set by modern awards on an annual basis, and FWA must also review the content of modern awards every four years. FWA has also been given power to arbitrate the content of multi-enterprise bargaining agreements covering ‘low paid employees’, but only when negotiations break down in ‘first contract’ situations.²¹ FWA does have responsibility for vetting the content of all enterprise agreements lodged with the tribunal against the ‘better off overall test’, which requires the tribunal to ensure that agreements do not disadvantage employees subject to the agreement when compared to their position under the relevant modern award.

¹⁸ Section 387 of the *Fair Work Act 2009* (Cth) sets out the factors that the tribunal must consider when deciding whether the dismissal was harsh, unjust or unreasonable. Where the employer is a ‘small business employer’, a dismissal will only be unfair if it is inconsistent with the Small Business Fair Dismissal Code, an instrument declared by the Minister for Workplace Relations pursuant to s 388(1) of the *Fair Work Act 2009* (Cth), which narrows the availability of a remedy for unfair dismissal in relation to such employers. A small business employer is defined as an employer who employs less than 15 full-time equivalent employees, including full time, part time and regular and systematic casual employees: s 23, *Fair Work Act 2009* (Cth).

¹⁹ Fair Work Australia is established by Part 5-1 of Division 2 of the *Fair Work Act 2009* (Cth).

²⁰ The functions of the Tribunal are set out in section 576 of the *Fair Work Act 2009* (Cth).

²¹ Part 2-5, Division 2, *Fair Work Act 2009* (Cth). The term ‘low paid employees’ is not defined in the Act and is a matter within FWA’s discretion. FWA will only have jurisdiction to arbitrate for low paid employees who are attempting to reach an enterprise agreement with their employer for the first time, not for subsequent agreements. See generally A Forsyth, ‘Collective Bargaining’, in B Creighton and A Stewart, *Labour Law* (5th ed), Federation Press, 2010, pp 749-754.

One of the functions of the tribunal is to adjudicate unfair dismissals.²² The unfair dismissal system is based on a private enforcement/compensation model, whereby employees who are aggrieved by their dismissal may apply to FWA seeking compensation on the basis that their dismissal was harsh, unjust or unreasonable.

An unlawful termination dispute (dismissal on discriminatory and other grounds) may also be referred to the tribunal, and if so, a private conference is arranged between the parties. If the tribunal finds that the matter is unlikely to be resolved, a certificate of non-resolution is issued. A complainant may use the certificate to apply to court to resolve the matter. A person may also lodge a dispute with the tribunal for an alleged contravention of the general protections in the Act which falls short of dismissal. The tribunal may deal with the dispute by mediation or conciliation, or by making a recommendation or expressing an opinion. If the dispute remains unresolved, the complainant may refer the matter to a court to deal with the matter.

Fair Work Australia is further authorised to assist with workplace disputes other than those specifically dealt with by the legislation if the dispute arises under a national system award or enterprise agreement containing the 'model term for dealing with disputes', or a national system award or agreement containing a dispute resolution procedure that allows for the tribunal's assistance. For these types of disputes, the tribunal can only exercise the powers outlined in the dispute resolution procedure or agreed to by the parties. Fair Work Australia may assist with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion. The tribunal may arbitrate the dispute if the dispute resolution procedure allows it or the parties consent.

2.3.2. The Fair Work Ombudsman

The agency with responsibility for labour inspection and enforcement under the FW Act is the Office of the Fair Work Ombudsman (FWO). FWO is an independent statutory agency which performs a number of functions under the FW Act. FWO replaces the previous agency, the Workplace Ombudsman, and assumed the general advisory function of the former Workplace Authority, which was abolished by the FW Act. The agency therefore has both an education and technical assistance function as well as a responsibility to monitor and enforce compliance with the Act.²³ FWO consists of the Fair Work Ombudsman, Fair Work Inspectors appointed in accordance with the terms of the FW Act, and other staff assisting with the performance of workplace compliance and advisory functions set out in the FW Act.²⁴ As noted, FWO has a number of roles including educating employers and employees about workplace rights and obligations to ensure compliance with workplace laws, the use of proactive methods to carry out its statutory objective of promoting 'harmonious, productive and cooperative workplace relations', taking action to determine compliance with minimum employment standards, rights and obligations under the Act, and imposing sanctions and commencing proceedings against employers, employees or unions who breach the FW Act or instruments such as awards or enterprise agreements made under the Act. The FWO presently has 53 offices throughout

²² See A Chapman, 'The Decline and Restoration of Unfair Dismissal Rights', in A Forsyth and A Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, Federation Press, 2009.

²³ FWO is established by Part 5 – 2 of the *Fair Work Act 2009* (Cth); s 682 lists the functions of FWO.

²⁴ S 696, FW Act; see also Hardy, above n 9.

Australia, which are located in a number of regional centres and capital cities of all states and territories, and presently employs over 495 Fair Work Inspectors.²⁵

Fair Work Inspectors are appointed by the FWO and are empowered to investigate and enforce compliance with relevant Commonwealth workplace laws and industrial instruments, such as the NES, modern awards and enterprise agreements. Complainants have standing to lodge a complaint with the FWO if they are subject to relevant Commonwealth workplace laws (eg. the FW Act) or industrial instruments and the complaint relates to incorrect pay, unfair discrimination or contravention of workplace rights. An inspector will then be appointed to investigate the complaint.²⁶

2.3.3. Unions

Until the 1990s, trade unions were largely responsible monitoring and enforcing compliance with awards in the Australian system.²⁷ Legal support for trade union monitoring and enforcement was provided by the Australian industrial relations system through a number of mechanisms, including union rights of entry to workplaces and standing to seek enforcement of awards in tribunals and the courts. Under the FW Act, unions still have rights of entry to workplaces, although since Work Choices these rights are more restricted than they were two decades ago. Unions also continue to have standing to bring legal proceedings against employers for breach of minimum employment standards, and therefore still play a role in the enforcement of minimum employment standards.

2.3.4. Courts

The FW Act confers jurisdiction on the courts in relation to a number of matters, including enforcement of some minimum entitlements and employment rights. The most important courts in the federal system are the Fair Work Divisions of the Federal Court and the Federal Magistrates Court, which were created by Pt 4.2 of the FW Act to handle workplace relations matters. The Act also confers jurisdiction on various State and Territory courts to deal with specified matters, such as underpayment claims (Part 4-1). There is also a small claims process where remedies of less than \$20,000 are being sought, which applies in any Magistrates Court (s 548).

2.4. State coverage and exclusions

All private sector employers in the New South Wales (NSW), South Australian, Tasmanian and Queensland systems have been covered by the national workplace relations system since 1 January 2010. State public sector and some local government employees are not covered by the national workplace relations system and will remain under the NSW,²⁸

²⁵ Fair Work Ombudsman, *Annual Report 2009-10*, p 23. The powers of Fair Work Inspectors are set out in Division 3 of Part 5 – 2 of the *Fair Work Act 2009* (Cth).

²⁶ The Australian Government *Factsheet: About the Fair Work Ombudsman* available at <http://www.fairwork.gov.au/Fact-sheets-tools/Pages/Fact-sheets.aspx?role=employees> (accessed 1 June 2010).

²⁷ See Hardy and Howe, above n 10.

²⁸ See the *Industrial Relations (Commonwealth Powers) Act 2009*. More information is available on the NSW Industrial Relations Website at <http://www.industrialrelations.nsw.gov.au/Home.html>.

South Australia,²⁹ Tasmania,³⁰ and Queensland³¹ State jurisdiction. All employees and employers in the Australian Capital Territory (ACT), Northern Territory and the State of Victoria were already subject to the national workplace relations system.

Western Australia is the only State not to have joined the national workplace relations system. Western Australian employers that are incorporated entities and their employees are covered by the national workplace relations system as in this State the Commonwealth relies upon its power to regulate corporations to have jurisdiction over labour relations matters. Sole traders, partnerships, other unincorporated entities and non-trading corporations and their employees will continue to operate under the Western Australian state system.³²

In addition, independent contractors are not covered by the new national industrial relations system. Australian law is premised on the distinction between a *contract of employment*, and a *contract for services*, determined according to the common law.³³ A contract of employment primarily concerns an employment relationship where the employee agrees to work for the employer entity in a subordinate capacity whereas a contract for services is concerned with workers who have their own business and are effectively performing work for clients or customers of that business. Those engaged under a contract of employment are employees and receive protections contained in the FW Act. Those engaged by a contract for services are often independent contractors and receive more restricted rights and protections under the *Independent Contractors Act*.³⁴

The FW Act further restricts access to some entitlements under the Act, in some cases by specifying that only certain employees are covered by the entitlements, or in other cases by excluding some types of employment from particular rights or standards. So, for example, the right to request flexible working arrangements is only available to an ‘employee who is a parent, or has responsibility for the care, of a child’.³⁵ ‘Casual’ employees (that is, employees in non-permanent employment relationships) are excluded from leave entitlements under the NES, although these employees are normally paid a casual loading to compensate them for this exclusion.³⁶

The broadest exclusions in the FW Act are maintained in relation to the entitlement to redundancy pay and protection against unfair dismissal, where in both cases the length of

²⁹ More information is available at <http://www.safework.sa.gov.au/>.

³⁰ More information is available at <http://www.wst.tas.gov.au/>.

³¹ More information is available at the Queensland Government Justice site at <http://www.justice.qld.gov.au/>.

³² More information is available at <http://www.commerce.wa.gov.au/LabourRelations/>.

³³ See, for example, A Stewart, ‘Redefining Employment: Meeting the Challenge of Contract and Agency Labour’ (2002) 15 *Australian Journal of Labour Law* 235.

³⁴ For more detailed analysis of the *Independent Contractors Act* see Riley above n 6; A Forsyth ‘The 2006 Independent Contractors Legislation: An Opportunity Missed’ (2007) 35 *Federal Law Review* 329.

³⁵ S 65(1), *Fair Work Act 2009* (Cth).

³⁶ For more information on the nature of casual employment status, see A O’Donnell ‘“Non-Standard” Workers in Australia: Counts and Controversies’ (2004) 14 *Australian Journal of Labour Law* 89.

an employee's continuous service with an employer and the size of that employer are factors in whether or not an employee can claim these protections. For example, to refer an unfair dismissal dispute to FWA, a complainant must be: covered by the national workplace system (accordingly independent contractors are not eligible); must have completed a minimum employment period of at least 6 months (or 12 months if the employer is a small business employer who employs fewer than 15 full-time equivalent employees); and at the time of dismissal, was covered by a modern award (or pre-modern award instrument), covered by an enterprise agreement (or an agreement based transitional instrument), or earning less than \$108,300 a year.³⁷

2.5. Source and scope of the current system of OHS regulation

Occupational health and safety in Australia is currently regulated by one Commonwealth, six State and two Territory general OHS statutes, together with a number of specific statutes covering public safety and OHS in industries such as mining, the maritime industry, transport, electricity and dangerous goods.³⁸ The OHS legislation in all these jurisdictions is based on the Robens model of OHS regulation.³⁹

'The Robens model includes two principal elements: a single umbrella statute containing broad "general duties" based on the common law duty of care; and the incorporation of "self-regulation" by empowering duty holders, in consultation with employees, to determine how they will comply with the general duties. Prescriptive requirements were replaced with a three tiered approach involving regulations and codes of practice designed to support the general duties in the Act. Robens also recommended the use of improvement and prohibition notices in compliance activities as new administrative sanctions to enable regulators to contribute to the self-regulator culture.'

OHS legislation in all State jurisdictions address the core aspects of OHS, namely: the duty of care on employers to ensure health and safety of workers; the responsibility for employers to consult with workers on issues and work practices which may affect their health and safety (including the formation of health and safety committees (HSCs) and the election of health and safety representatives (HSRs) to facilitate consultation); the obligation on employers to provide OHS training to employees; the identification and

³⁷ This amount is annually indexed, or in other words linked to rises in the Australian Consumer Price Index, so that the threshold is not devalued by inflation. See ss 23, 383 *Fair Work Act 2009* (Cth). Only employees with at least 12 months continuous service who are not employed by a small business employer are entitled to redundancy payments under the NES: s 121 *Fair Work Act 2009* (Cth).

³⁸ The specific legislation is discussed later in our Report. For more detailed academic consideration of the Australian system of occupational health and safety regulation, see R Gunningham and R Johnstone, *Regulating Workplace Safety: Systems and Sanctions*, Oxford University Press, 1999; R Johnstone, *Occupational Health and Safety Law and Policy* (2nd ed), Thomson, 2004; and E Bluff, N Gunningham and R Johnstone (eds.), *OHS Regulation for a Changing World of Work*, Federation Press, Sydney, 2004.

³⁹ The Robens model is the name given to an overall regulatory approach to OHS regulation in the UK recommended in Lord Robens, *Report of the Committee on Safety and Health at Work*, Cmnd 5034 (1972) (the Robens Report). This summary of the Robens model is from Australian Government, *National Review into Model Occupational Health and Safety Laws: First Report* (October 2008) 2. Recent consideration of the Australian legislative frameworks can also be found in Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety* (March 2010) 13.

management of general and specific risks or hazards; reporting obligations; and provision for enforcement and sanctions.

Consistent with the Robens model, OHS obligations are placed on a wider range of parties materially influencing OHS rather than just employers (including self-employed persons, persons in control of workplaces, employees, designers, manufacturers and suppliers of plant, substances and structures). The legislation is supplemented by regulations, codes of practice and standards. Compliance is monitored and enforced by inspectorates with broad powers of inspection and a wide range of enforcement measures including informal measures (advice and persuasion), administrative sanctions (improvement, prohibition and infringement notices), accepting enforceable undertakings and formal prosecution.⁴⁰

While all of the OHS statutes conform to this basic model, there are some significant differences between the OHS statutes and the regulations and codes of practice made under those statutes. These differences mean that workers in different jurisdictions who face similar risks have different levels of legal protection. Moreover organisations conducting business in more than one State or Territory are faced with varying standards and enforcement approaches.⁴¹

Since the 1990s there have been a number of attempts to harmonise Australian OHS standards in Australia. Most recently, in July 2008, the Commonwealth, State and Territory governments concluded the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (the IGA), which formalised a protocol and timetable for the harmonisation of OHS laws. The parties agreed to:

- the development of legislation for a new body to replace the *Australian Safety and Compensation Council* (ASCC);
- the development, monitoring and maintenance of model OHS legislation; and
- the adoption and implementation of the model OHS legislation by each jurisdiction.⁴²

After receiving the findings of a National Review into Model Occupational Health and Safety Laws commissioned under the terms of the IGA, the Commonwealth and State/Territory Governments (except Western Australia) agreed on model OHS legislation, the *Model Work Health and Safety Bill 2009* (Cth) (the Model National OHS Act). It is intended that each State and Territory will enact legislation which is identical to the model legislation (subject to some limited jurisdictional differences) and will adopt those laws by December 2011, with the new system to commence operating on 1 January 2012. The following is largely a discussion of the current OHS regulatory framework, while also taking into account some of the implications of the planned implementation of the Model National OHS Act.

⁴⁰ Australian Government, *National Review into Model Occupational Health and Safety Laws: Second Report* (January 2009) Pt 10. See also Productivity Commission, *ibid*.

⁴¹ Johnstone, 'Harmonising OHS Regulation', above n 4, 35.

⁴² Johnstone, 'Harmonising OHS Regulation', above n 4, 40.

2.5.1. Legal sources for OHS

As noted earlier, each jurisdiction has adopted a ‘three-tiered OHS regulatory system’⁴³ comprising Acts, regulations, and codes of practice. The Acts set out the key principles, duties and rights of employers and employees. The regulations made under those Acts are more detailed and specify procedures and administrative matters.

There are nine principal OHS Acts - one for the Commonwealth and one for each State and Territory.⁴⁴ In addition to the primary OHS Acts, there are a number of topic specific Acts and regulations, which relate to certain hazards, industries or occupations.⁴⁵ All OHS Acts have key elements in common, namely: duty of care; the obligation to consult and union rights of entry (although the last of these is not provided for by the Commonwealth legislation). These elements are discussed in more detail below.

In addition to legislation, subordinate legislation (that is, regulations made pursuant to the governing OHS statute) is used to address administrative matters and to prescribe specific requirements or standards applicable at the workplace, such as technical requirements, exposure limits, and procedural requirements. The regulations made in each jurisdiction vary considerably in coverage and detail, as do the number and subject matter of codes of practice in each jurisdiction.

There are a number of national standards, codes of practice and guidelines which are a product of earlier attempts at national harmonization. States and territories are encouraged to incorporate the national standards in their own legislation. Codes of practice and guidelines, while not legally binding, provide interpretation of the laws as well as practical guidance on how to comply with them.

2.5.2. Duty of care and consultation

All of the Australian statutes impose a general duty to take reasonable care for the health and safety of employees which is used to confer responsibilities for OHS on all persons and entities that can influence OHS outcomes. Accordingly, the duty extends beyond employers.

Consultation provisions may involve direct consultations with employees or consultation with employee representatives such as HSCs or elected HSRs.⁴⁶ All

⁴³ Productivity Commission, above note 39, 13.

⁴⁴ They are Occupational Health and Safety Act 1991 (Cth), Occupational Health and Safety Act 2000 (NSW), Occupational Health and Safety Act 2004 (Vic), Workplace Health and Safety Act 1995 (Qld), Occupational Health, Safety and Welfare Act 1986 (SA), Occupational Safety and Health Act 1984 (WA), Workplace Health and Safety Act 1995 (Tas), Workplace Health and Safety Act 2007 (NT) Occupational Health and Safety Act 1989 (ACT). Set out in table 2.1 of the Productivity Commission, above note 39, 14. See also Johnstone, Occupational Health and Safety Law and Policy, above n 38, Chapter 3.

⁴⁵ These include the Workplace Injury and Disease Recording Standard, the National Standard for Licensing Persons Performing High Risk Work, the National Standard for Manual Tasks, Adopted National Exposure Standards for Atmospheric Contaminants in the Occupational Environment, National Standard for Synthetic Mineral Fibres, National Model Regulation for the Control of Workplace Hazardous Substances, National Occupational Health and Safety Certification Standard for Users and Operators of Industrial Equipment and the National Standard for Occupational Noise.

⁴⁶ Australian Government, *National Review: Second Report*, above n 40, Pt 7.

jurisdictions provide for the formation of HSCs as part of their OHS framework although HSCs are not automatically mandatory in any jurisdiction. The primary role of HSCs is to consult and agree on OHS initiatives. HSRs also feature in all OHS frameworks. HSRs are employees elected by their peers to represent them in OHS matters. Once elected, HSRs continue to fulfill their regular employment duties and are not paid for taking on the HSR role.

The powers and functions of an HSR vary under the OHS Acts in each jurisdiction. HSRs have the ability to issue Provisional Improvement Notices (PINs) in all jurisdictions apart from NSW. A PIN is a written direction to an employer requiring them to fix a workplace health and safety problem, and is intended to bring about a timely response without the need for attendance by a government inspector. HSRs in jurisdictions aside from NSW, Queensland and the Northern Territory also have the capacity to issue stop work directions (where work is unsafe). In 2008-09, businesses in Tasmania, the Northern Territory and the ACT with less than 10 employees were exempt from the HSR requirements.⁴⁷

2.5.3. Union right of entry and prosecution

The OHS Acts in NSW, Victoria, Queensland, Tasmania the Northern Territory and the ACT all provide authorised representatives of unions the right to enter workplaces. In Western Australia, the right of entry is provided to unions under the *Industrial Relations Act 1979* (WA). The FW Act sets out requirements for exercising rights of entry which exist under State or Territory OHS laws.⁴⁸

The entry powers vary across jurisdictions. In all cases representatives may investigate breaches and inspect systems of work, plant and equipment, and materials and substances. Only Victoria denies union officials the right to examine, copy or take extracts of documents. New South Wales and the ACT are the only State or Territory jurisdictions which give unions standing to prosecute breaches of their respective OHS Acts. The ACT also provides standing to third parties including secretaries of unions and chief executives of employer organisations under the *Work Safety Act 2008* (ACT).

The issue of non-state or private prosecution remains a matter of contention. The *National Review into Model Occupational Health and Safety Laws* noted that private prosecution has not been available universally or unqualified,⁴⁹ and identified four approaches to prosecution standing across OHS jurisdictions:⁵⁰

⁴⁷ Productivity Commission, above n 39. In most jurisdictions, if the person to whom the PIN is issued does not agree with the notice, the person may request an inspector to attend the workplace to review the circumstances and either affirm (with or without modifications) or can cancel the notice. Australian Government, *National Review: Second Report*, above n 40, 135.

⁴⁸ The federal right of entry requirements under the FW Act operate in addition to any requirements that form part of State or Territory laws, see s 494 *Fair Work Act 2009* (Cth).

⁴⁹ Australian Government, *National Review: Second Report*, above n 10, 418.

⁵⁰ *Ibid.*, 431.

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- Confer a right of private prosecution in addition to the regulator's right to initiate a prosecution;⁵¹
 - Allow a private prosecution where no official action has been taken and is not intended to be taken;⁵²
 - Give the responsible Minister or an official the power to authorise a "person" to bring a prosecution;⁵³ or
 - Reserve the right to prosecution to the Crown.⁵⁴

Whilst third parties will not have the right to prosecute under the Model National OHS Act, the legislation allows certain third parties to request that the regulator bring a prosecution for serious offences.⁵⁵

2.5.4. National standards

As noted earlier, consistent with the Robens model (which recognized the desirability of non-statutory standards and codes of practice to supplement legislation), there are a number of non-legislative regulatory measures governing OHS in Australia. National standards encapsulate agreed principles, approaches and requirements and provide the mechanisms for jurisdictions to readily set and update various technical requirements of the National OHS Framework. The national standards are public and accessible via the internet. Generally, a national standard is not mandatory unless it is adopted into a jurisdiction's legislation. The standards have been a mechanism by which priorities for harmonization of OHS laws have been identified. There has been some controversy over the provenance and authority of national standards, culminating in the implementation of a National Standards Continuous Improvement Program in 2002.⁵⁶ The current process is that Safe Work Australia determines and declares OHS standards for hazards common to many industries and workplaces across Australia, and for priority, high-risk industries. Once declared, standards and codes are endorsed by the Workplace Relations Ministers' Council (WRMC), a non-statutory body comprising Commonwealth, State and Territory ministers for workplace relations and occupational health and safety. It is important to note that national standards are in the process of being phased out and replaced by model regulations, which will be developed by Safe Work Australia.⁵⁷

⁵¹ S 106 Occupational Health and Safety Act 2000 (NSW); s 218(2) Occupational Health and Safety Act 1989 (ACT).

⁵² S 58(7) Occupational Health, Safety and Welfare Act 1986 (SA).

⁵³ S 164(5) Workplace Health and Safety Act 1995 (Qld); s 52(1) Occupational Safety and Health Act 1984 (WA).

⁵⁴ The Victorian, Tasmanian and Commonwealth OHS Acts only permit officials to prosecute, see Australian Government, *National Review: Second Report*, above n 40, 419.

⁵⁵ Productivity Commission, above note 39, 25, and Johnstone, 'Harmonising OHS Regulation', above n 4.

⁵⁶ For a discussion of this controversy, see Johnstone, *Occupational Health and Safety Law and Policy*, above n 38, 336-342.

⁵⁷ Productivity Commission, above note 39, 32.

2.5.5. Codes of practice and guidance notes

National codes of practice have also been adopted as part of efforts to achieve harmonization of OHS regulation. Declared national codes must be endorsed by the WRMC. The national codes of practice provide focused and practical guidance to help employers and employees meet obligations under the requirements of a national standard. The codes are not mandatory and employers may adopt an alternative approach that better suits their needs. An approved code of practice is admissible as evidence in legal proceedings and a court may determine that a failure to comply with an approved code of practice constitutes proof of a breach of the duty of care. In addition, guidance notes provide practical advice to employers, employees and others on how to prevent risks to health and safety from hazards identified in the workplace.

Most of the Australian OHS jurisdictions enable the relevant Minister to approve codes of practice providing employers and others with guidance on implementation of OHS legislation. For example, Comcare (the Commonwealth regulator), introduced the Commonwealth Occupational Health and Safety Code of Practice in June 2008, which replaced 27 individual codes of practice. The new Code is a single document replacing 50 separate documents. The Code of Practice covers 25 separate areas including 20 different hazards, as well as risk management, first aid, construction induction training, cash in transit and falls in construction.⁵⁸ Generally, it is not an offence to breach a code of practice or guidance note, nor will a breach of a code of practice give rise to a civil action on the part of a person injured by a breach.⁵⁹

2.5.6. Regulators

Each jurisdiction has a specific regulator with primary responsibility for implementing OHS rules and regulations.⁶⁰ Some core regulators and a number of other regulators have responsibility for OHS matters contained in industry specific Acts and Acts relating to specific hazards. In some jurisdictions, regulators have combined the administration and enforcement of OHS and workers' compensation regulations. Regulators for the Commonwealth, NSW, Victoria, Tasmania, the Northern Territory and the ACT have responsibility for both OHS and workers' compensation. In contrast, Queensland, South Australia, and Western Australia have separate regulators for OHS and workers' compensation, but in some instances these regulators also have other responsibilities.⁶¹

⁵⁸ <http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200836938?Open-Document> (accessed 7 September 2010). An overview of the number and type of codes of practice (sometimes called 'compliance codes') in the various Australian jurisdictions can be found in Productivity Commission, above n 39, 34-38

⁵⁹ Johnstone, *Occupational Health and Safety Law and Policy*, above n 38, 323.

⁶⁰ The core regulators are Comcare for the Commonwealth, WorkCover NSW, WorkSafe Victoria, Workplace Health and Safety Queensland, SafeWork SA, WorkSafe WA, Workplace Standards Tasmania, NT WorkSafe, and the ACT WorkCover.

⁶¹ Productivity Commission, above note 39.

3. Enforcement and prosecutions

3.1. Nature and scope of enforcement mechanisms for minimum employment conditions

Given that a major object of the FW Act is to ensure ‘a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions’ (s 3(b)), enforcement is an essential component of the Act. 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 awards and the NES are breached.

The FW Act has increased the variety of enforcement approaches available to the FWO. 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 enforceable undertakings)’.⁶² However, the FWO is also able to bring court proceedings seeking penalties for breach of terms and conditions of employment under the FW Act.

3.1.1. Powers of Fair Work Inspectors

Subdivision D of Division 3 of Part 5-2 of the FW Act sets out the functions and powers of Fair Work Inspectors, including their rights of entry and inspection (ss 708 and 709, FW Act). A Fair Work Inspector may enter certain premises if they reasonably believe a relevant Commonwealth law applies to the workplace and records or documents relevant to compliance are on the premises.

Before entering a premise, a Fair Work Inspector must show their identity card to the occupier of the premises or their representative but does not need permission to enter the premises. An inspector must not enter a part of a premise that is used for residential purposes unless they reasonably believe that work is being performed on that part of the premise.

A Fair Work Inspector may exercise a number of powers whilst on the premise including inspect any work, process or object; interview anyone (with their consent); require a person to tell them who has, or who can access, a record or document; require the person with access to a record or document to hand it over while the inspector is on the premises or within a specific timeframe; inspect and make copies of any record or document kept on the premises (hardcopy or electronic); and take samples of any goods or substances after informing the owner or other relevant person in charge of the goods or substances. To assist an investigation, a suitably qualified and experienced person may accompany a Fair Work Inspector onto the premises if the Inspector deems it necessary and reasonable. Assistants could include information technology specialists, forensic accountants or interpreters.⁶³

⁶² Explanatory Memorandum, *Fair Work Bill 2008* (Cth), 386. See also Hardy and Howe, above n 10, 328.

⁶³ The retention of a relatively independent and well-resourced government enforcement agency by the FW Act ensures that Australia acts consistently with many other labour law jurisdictions, and with the ILO Convention No 81 on Labour Inspection, see Hardy and Howe, above n 10, 328.

If a Fair Work Inspector reasonably believes that a person has contravened a relevant Commonwealth Act, and the contravention may attract a monetary penalty, the Fair Work Inspector can require that person to tell them their name and address and provide proof of such. Refusal to comply with this request could attract a penalty of up to AUD\$3,300 if prosecuted. Furthermore, in the course of an investigation, a Fair Work Inspector can issue a written Notice to Produce Records or Documents, requiring a person to provide records or documents at a particular location, within a specified time period (at least fourteen days). A person cannot refuse to comply with this on the grounds that providing the documents may incriminate them. Failure to comply with a Notice to Produce Documents could attract a penalty of up to \$6,600 (for an individual) or \$33,000 (for a corporation) if prosecuted.

Fair Work Inspectors are authorised to inspect a range of matters including underpayments of wages and entitlements, time and wages record-keeping obligations, freedom of association, right of entry by trade unions, undue influence or pressure in relation to individual flexibility arrangements, guarantees of annual earnings, transfer of business arrangements, sham contracting arrangements, unprotected industrial action and unlawful discrimination. The FWO is not empowered to investigate unfair dismissal complaints. If a person seeks to hinder or obstruct a Fair Work Inspector in the course of their duties, they may face criminal charges.⁶⁴

One of the many enforcement tools which Fair Work Inspectors have at their disposal is an Assisted Voluntary Resolution (AVR), which is used at the informal early stage of the FWO investigation process. Matters that typically undergo AVR include complaints lodged with the FWO for underpayment or non-payment of wages and entitlements. Fair Work Inspectors use AVR to assist alleged wrongdoers and complainants find a fair and mutually acceptable resolution to a workplace complaint, without having to resort to formal investigation. Fair Work Inspectors do not dictate a particular outcome or method of resolution in AVR. Rather the complaint is explained to the parties and the inspector will support and guide the parties in reaching a mutually acceptable and appropriate solution. During the AVR stage, Fair Work Inspectors do not make a determination about what entitlements are outstanding. They will, however, form a preliminary view as to whether the complaint has merit, and work with both parties to form a proposed resolution to the complaint. AVR is one of the ways in which the FWO aims to promote preventative compliance.

The AVR process can last up to thirty days from the date a complaint is lodged with the FWO. If AVR is not achieved within that time period, then the complaint may be referred for a full investigation and the law will be enforced. Matters suitable for AVR are generally restricted to complaints about underpayment or non-payment of wages and entitlements, where there are no complicating factors. However, not all complaints proceed through the AVR process. The FWO may decide that AVR is neither possible nor appropriate in some circumstances in which case the complaint will proceed directly to full investigation.

A full investigation involves a Fair Work Inspector obtaining evidence and making a final determination. This has a range of possible outcomes and enforcement options, which include, but are not limited to: no contraventions identified; directed voluntary compliance

⁶⁴ See Guidance Note 8: Investigative Process of the Fair Work Ombudsman, 31 May 2010.

with formal contraventions recorded; referral for alternative dispute resolution (such as mediation or small claims action); or FWO-initiated litigation.⁶⁵

Since 2006, the FWO has adopted a more strategic approach to its inspection activities when compared to the complaints-oriented ‘persuasive compliance’ approach of the federal inspectorate in the latter part of the 20th century.⁶⁶ While the agency continues to instigate investigations in response to complaints, the FW Act empowers the agency to carry out investigations of its own motion. In particular, the FWO has increased its use of ‘targeted campaigns’ or audits directed to industries and regions in which it believes non-compliance with minimum standards is prevalent. These targeted campaigns are designed both to educate employers and employees concerning relevant minimum employment standards, and involve strategic inspections to detect breaches of the FW Act and industrial instruments. One of these campaigns is the National Horticulture Industry Shared Compliance Campaign, which is discussed in further detail later in this report as an innovative approach to enforcement.

In 2009-2010, FWO carried out a total of 3,413 finalized targeted audits as part of local, regional and national campaigns.⁶⁷ In the same year, the FWO received 23,698 complaints of breaches of minimum employment standards in federal agreements and awards. The agency finalized 21,070 cases of breaches of the Act or of instruments made under the Act arising from complaints and targeted inspections in 2009-2010.⁶⁸ On average, the FWO has been able to resolve more than 75% of the complaints received it has received over the last three years. Further statistics are set out below in Section 4.

3.1.2. Administrative sanctions

If a Fair Work Inspector identifies a contravention of a civil remedy provision under the FW Act, in addition to AVR there are a range of compliance tools available. In particular, the following can be considered:

- a letter of caution;
- an infringement notice;
- a compliance notice;
- an enforceable undertaking; or

⁶⁵ Australian Government - Fair Work Online, *Factsheet: About Assisted Voluntary Resolution* available at <http://www.fairwork.gov.au/Fact-sheets-tools/Pages/Fact-sheets.aspx?role=employees> (accessed 1 June 2010).

⁶⁶ G Maconachie and M Goodwin, ‘Recouping Wage Underpayment: Increasingly Less Likely?’ (2006) 41 *Australian Journal of Social Issues* 327; M Goodwin and G Machonachie, ‘Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategy and Outcomes 1952-1995’ (2007) 49 *Journal of Industrial Relations* 523. These articles suggest that the combination of a weak inspectorate and the declining influence of trade unions in the latter part of the twentieth century were indicative of an increase in undetected non-compliance with minimum employment standards among employers.

⁶⁷ Fair Work Ombudsman, *Annual Report 2009-10*, above n 25, 27.

For further detail concerning FWO’s current investigation strategy, see Office of the Fair Work Ombudsman, *Guidance Note 8: Investigative Process of the Fair Work Ombudsman*, 31 May 2010.

⁶⁸ Fair Work Ombudsman, *Annual Report 2009-10*, above n 25, 22.

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- litigation to seek an injunction or penalties and compensation

As noted earlier, the FW Act has enhanced the mix of enforcement approaches available to the FWO, especially the administrative sanctions available to Fair Work Inspectors. These provisions are intended to provide ‘the FWO with another option to deal with non-compliance (by encouraging co-operative compliance) instead of pursuing court proceedings.’⁶⁹

One key administrative enforcement tool at the disposal of Fair Work Inspectors is an infringement notice, which is similar to an on-the-spot fine. Inspectors may issue infringement notices where they reasonably believe an employer has contravened the record-keeping and pay slip obligations contained in the FW Act and FW Regulations with a maximum fine of \$330 per contravention for an individual and \$1,650 per contravention for a body corporate. An infringement notice must be given within 12 months after the day on which the contravention(s) is alleged to have occurred.

Infringement notices may be issued if an employer does not make and keep employee records for seven years, include the information required for employee records, issue pay slips to employees within one working day of paying an amount, or include the information required for pay slips. These record-keeping and pay slip obligations ensure that accurate records are kept so Fair Work Inspectors and employees can check that the correct pay, leave and conditions are being received.

The Fair Work Inspector may decide not to issue an infringement notice if it is the first time the employer has contravened record-keeping and pay slip obligations, or if the issue is minor in nature. Instead, they may seek to resolve the matter with the employer or give the employer a contravention letter (a formal warning). However, if the Fair Work Inspector finds the contravention is willful, repetitive, or a way of avoiding paying employees what they are owed, an infringement notice may be issued or they may recommend the matter be taken to court. This is regardless of whether it is a first time contravention. If an inspector issues an employer with an infringement notice, the employer must pay the specified penalty amount within 28 days of being served the notice (a maximum extension of 28 days may be granted on request).⁷⁰

Other key administrative sanctions are available to Fair Work Inspectors in relation to breaches of substantive employment rights and standards set by or made under the Act. Aside from the FWO’s new promotional role, one of the most important changes introduced by the FW Act in relation to inspectors’ powers and the role of the FWO is that enforceable undertakings and compliance notices are now expressly recognised as legitimate enforcement mechanisms in the legislation.

For example, Fair Work Inspectors may issue a compliance notice in circumstances where the Inspector reasonably believes that there has been a breach of a provision of the NES or a term of a modern award, enterprise agreement, minimum wage order, or equal remuneration order.⁷¹ A compliance notice may follow a contravention letter, and is a more formal notification of non-compliance compliance notice as a failure to comply with the

⁶⁹ Explanatory Memorandum, FW Act 2008 (Cth), 400.

⁷⁰ See s 558(1) of the *Fair Work Act 2009* (Cth) and Regs. 4.01-4.10, *Fair Work Regulations 2009* (Cth).

⁷¹ *Fair Work Act 2009* (Cth), s 716(1). See also Fair Work Ombudsman, *Guidance Note 3: FWO Compliance Notice Policy*, 17 December 2009.

notice is a breach of s 716(5) of the FW Act and is a civil remedy provision.⁷² Compliance notices will normally provide that a person must take specified action to remedy the contravention, and require the person to produce reasonable evidence of the carrying out of that action. If the person complies with the notice, then no court proceedings can be brought against them by the Inspector.

A written enforceable undertaking may be accepted from a person where the inspector reasonably believes that the person has contravened a civil remedy provision.⁷³ It thus applies to any breaches of the Act which attract civil penalties. A recommendation for enforceable undertaking may be made where a Fair Work Inspector views that it is in the public interest⁷⁴ for the FWO to offer or accept an enforceable undertaking in lieu of litigation. The enforceable undertaking is an Australian invention that has been widely used in a number of other regulatory regimes in this country, including State OHS systems,⁷⁵ and has since been introduced in the United Kingdom as a result of the recommendations of the *Regulatory Justice: Making Sanctions Effective* report (the Macrory Report).⁷⁶ The enforceable undertaking is essentially an agreement enforceable in court between an individual or firm that is alleged to have contravened the Act and (in this context) the FWO. The agreement specifies actions that the person or business will take –such as the adoption of new compliance processes– or refrain from taking, and if contravened, is enforceable in court. It is an alternative to more formal and punitive administrative, civil or criminal sanctions and is ‘designed to secure quick and effective remedies for contravention of regulatory provisions ... and have enormous potential to provide non-adversarial and constructive solutions to regulatory compliance issues’.⁷⁷

⁷² For an explanation of the relevant provisions which are civil remedy provisions, see *Fair Work Act 2009* (Cth), s 539. An explanation of the nature of civil remedy provisions is provided in the section headed ‘Prosecution and Penalties’ below.

⁷³ Fair Work Act 2009 (Cth), s 715.

⁷⁴ Relevant considerations in determining the public interest will be whether or not the objectives of other compliance tools (rectification of the contravention, general and specific deterrence) can be achieved through the acceptance of an enforceable undertaking, without, for example, the expense and delay associated with litigation; see Fair Work Ombudsman, *Guidance Note 4: FWO Enforceable Undertakings Policy*, 17 December 2009, Cl. 5.3. See also Fair Work Ombudsman, *Guidance Note 1: Litigation Policy of the Office of the Fair Work Ombudsman*, 15 July 2009.

⁷⁵ For a discussion of the nature of enforceable undertakings and their use by a range of agencies in Australia, including State OHS regulators, see R. Johnstone and C Parker, *Enforceable Undertakings In Action – Report of a Roundtable Discussion with Australian Regulators*, Working Paper, Melbourne Law School, 2010. For discussion of the operation of enforceable undertakings in the OHS context, see R. Johnstone and M. King, ‘A Responsive Sanction to Promote Systematic Compliance? Enforceable Undertakings in Occupational Health and Safety Regulation’ (2008) 21 *Australian Journal of Labour Law* 280.

⁷⁶ See R.B. Macrory, *Regulatory Justice: Making Sanctions Effective – Final Report* (2006), especially pp 63–69. See also the *Regulatory Enforcement and Sanctions Act 2008* (UK), giving UK regulatory agencies the option of adopting ‘enforcement undertakings’.

⁷⁷ Johnstone and Parker, above n 75, 2 (footnote omitted).

In the context of the FW Act, the acceptance of an enforceable undertaking is an alternative to FWO commencing proceedings or, where applicable, issuing a compliance notice.⁷⁸ It may also be a method of formalising an arrangement where a wrongdoer has voluntarily rectified their non-compliance with the law after an investigation by a Fair Work Inspector. FWO will consider an enforceable undertaking as an alternative to litigation in circumstances where the contravention is of a character that would ordinarily be considered suitable for litigation under FWO's Litigation Policy, the contravention is admitted and the alleged wrongdoer is willing to cooperate with FWO, and it is in the public interest to accept the enforceable undertaking.⁷⁹

According to FWO's *Enforceable Undertakings Policy*, an undertaking:

'may contain a broad range of commitments on the part of the wrongdoer, including, for example, participation in an FWO education program, the provision of training for managers and staff, completion of regular audits and compliance plans, management plans for work systems and/or keeping the FWO informed of ongoing steps taken to ensure compliance with Commonwealth workplace laws. The Enforceable Undertaking may also require the wrongdoer to publish a public notice about the contraventions and the remedial action they have undertaken to carry out'.⁸⁰

This is in keeping with the theoretical rationale for enforceable undertakings as mechanisms which are 'more than a simple remedy of the regulatory contravention', and which instead 'harness managerial commitment to the goal of sustained organisational change'.⁸¹

Although use of enforceable undertakings in the OHS jurisdiction has been patchy (see Table 3), it has been used effectively in Queensland, and in other jurisdictions, such as by the Australian Competition and Consumer Commission (ACCC), the agency responsible for enforcing competition and consumer protection regulation.⁸² The Fair Work Ombudsman has expressed his intention that Fair Work Inspectors will make extensive use of enforceable undertakings to avoid lengthy and expensive litigation in cases where employers are prepared to cooperate with FWO.⁸³ As of July 2010, FWO has accepted 13 enforceable undertakings. In one recent instance, a clothing retailer which admitted that it had not paid over 3,000 employees for attending staff meetings and training sessions conducted outside of normal working hours agreed to an enforceable undertaking after FWO's investigation into the matter. In addition to providing back-pay to its employees, the retailer undertook to display a statement admitting to the underpayments and an apology on its Facebook page and in a notice posted at each of its stores; to require

⁷⁸ Fair Work Ombudsman, Guidance Note 4: FWO Enforceable Undertakings Policy, 17 December 2009, Cl. 4.4.

⁷⁹ Fair Work Ombudsman, Guidance Note 4: FWO Enforceable Undertakings Policy, 17 December 2009, Cl. 5.1-5.3. See also Fair Work Ombudsman, Guidance Note 1: Litigation Policy of the Office of the Fair Work Ombudsman, 15 July 2009.

⁸⁰ Fair Work Ombudsman, Guidance Note 4: FWO Enforceable Undertakings Policy, 17 December 2009, Cl. 6.3.

⁸¹ Johnstone and King, above n 75, 287.

⁸² See, for example, C Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67(2) *Modern Law Review* 209; Johnstone and King, above n 75, 288-290.

⁸³ Johnstone and Parker, above n 75, 38-39.

its HR managers to undertake a quality workplace relations compliance program; and to report to FWO each year for the next three years on the wage rates and entitlements paid to each employee, their classification and employment status and details of any proactive compliance measures it has implemented.⁸⁴

3.1.3. Prosecution and penalties

In addition to the administrative sanctions available under the FW Act, the legislation provides that employees, unions and FWO may bring court proceedings in relation to a breach of provisions in the NES, the minimum wage and modern awards (employers and their associations may also sue for breach of modern awards). FWO (and other plaintiffs) can ask a court to make orders for an injunction to prevent a breach from continuing, for the imposition of penalties and/or for the payment of compensation (outstanding wages or other monetary entitlements) to a worker in relation to contraventions of a relevant Commonwealth workplace law, provisions of enterprise agreements or modern awards.

The FW Act establishes a civil penalty regime for breaches of the legislation and instruments made under the legislation. Civil penalties are a middle ground between criminal offences and civil remedies in that they are intended to be significant enough to punish wrongful behaviour and deter breaches of the law, but are subject to lower evidentiary and proof requirements than normally expected under the criminal law and do not lead to criminal convictions. The FW Act provides the courts with the discretion to impose a pecuniary penalty for each breach of a 'civil remedy provision', which includes breaches of the NES, awards and enterprise agreements. The Act imposes a maximum penalty of either \$3,300 or \$6,600 for individuals (depending on the nature of the breach), or \$16,500 or \$33,000 in the case of a corporation. Where there are two or more breaches that arise out of the same 'course of conduct', the court may treat these as a single offence. The vast majority of all penalties imposed by the courts are paid into consolidated revenue fund of the Commonwealth of Australia. The funds from such penalties are used at the discretion of the Commonwealth.

These penalties are significantly greater than the penalties imposed for breaching minimum employment standards prior to 2004, which were previously \$2,000 and \$10,000 respectively. However, these penalties are not as significant as penalties in commercial regulatory regimes, such as under the *Corporations Act 2001* (Cth), the statute which regulates corporate governance in Australia. Under that legislation, penalties for breaching civil penalty provisions range between a maximum of \$200,000 for an individual or \$1 million for a corporation.⁸⁵

Some breaches of the FW Act are designated as a criminal offence, such as where a person breaches an order of Fair Work Australia, in which case criminal proceedings may be brought against those alleged to have breached the legislation. However, the legislation excludes FWA orders concerning minimum employment standards such as minimum wages or equal remuneration. In the event that an FWA order concerning a non-excluded employment standard was breached, such matters must be referred to the Commonwealth Office of Public Prosecutions. Few criminal proceedings have been pursued for breach of minimum employment standards in recent years.

⁸⁴ *Undertaking by Cotton On Group Services Pty Ltd*, 3 June 2010, available at <http://www.fwo.gov.au/Legal-info-and-action/Pages/Undertakings.aspx> (accessed 16 July 2010).

⁸⁵ Section 1317G, *Corporations Act 2001* (Cth).

In cases where a firm is alleged to have committed a breach of the Act, the legislation also provides for ‘accessorial liability’. In other words, proceedings may be brought against individuals ‘involved in a contravention’ with the firm, such as company directors. For example, in the case of *Hortle v Aprint (Aust) Pty Ltd* [2007] FMCA 1547, penalties were imposed on a director of a company (later declared insolvent) that had underpaid workers brought to Australia on migrant working visas.

The Australian courts have developed a number of principles which are intended to guide the determination of the just and appropriate penalty in the circumstances of a given case. These include factors such as the extent of loss or damage resulting from breaches, whether the offending person or firm has expressed contrition and/or taken action to remedy the breach, and the ‘need for specific and general deterrence’.⁸⁶

As the statistics provided later in this report confirm, there has been a significant increase in prosecutions by the FWO and its predecessors when compared to the extent of litigation in prior years, although less than 1% of matters investigated by the FWO result in litigation.⁸⁷ While this increase in litigation activity is in part related to changes made to the enforcement and compliance framework and a concurrent increase in resourcing of the federal inspectorate, there has also been a significant shift in the enforcement approach adopted by the federal agency in the carrying out of its responsibilities.⁸⁸ The FWO and its predecessors sought to increase its prosecution of breaches of minimum employment standards as a key element of an ‘insistence compliance’ approach to its functions. In determining whether or not to prosecute, the FWO applies a publicly available Litigation Policy.⁸⁹ This policy sets out a two stage decision making process. First, the FWO must determine whether there is sufficient evidence on which to prosecute, and second, the litigation must be in the public interest. According to the Litigation Policy, the public interest is to be assessed against a number of criteria, including the nature and circumstances of the contravention and the presence of any aggravating or mitigating circumstances.

While staff of the FWO, including FW Inspectors, are involved in the preparation of litigation and provision of evidence in cases brought before the courts concerning breaches of minimum employment standards, until recently the FWO engaged external lawyers in the preparation and carriage of court cases once the decision was made to commence litigation. Since August 2008, the FWO’s ‘in-house’ lawyers have conducted many of FWO’s wage underpayment cases.⁹⁰

Cases brought by FWO and its predecessors under the former *Workplace Relations Act 1996* and now the FW Act have attracted significant attention as the courts have shown themselves willing to impose quite substantial penalties for non-compliance with the legislation.⁹¹ Fines of over \$200,000 (in addition to wage payment orders) have been

⁸⁶ See *Kelly v Fitzpatrick* (2007) 166 IR 4.

⁸⁷ Workplace Ombudsman, *Annual Report 2008-09*, Commonwealth of Australia, 2009, 27.

⁸⁸ Hardy, above n 10, 85.

⁸⁹ Fair Work Ombudsman, Guidance Note 1: Litigation Policy of the Office of the Fair Work Ombudsman, 15 July 2009.

⁹⁰ Workplace Ombudsman, *Annual Report 2008-09*, above n 87, 28.

⁹¹ A comprehensive discussion of these legislative and case law developments can be found in K Wheelwright, ‘Enforcement Under Work Choices: Recent Developments’ (2007) 13(6) *Employment Law Bulletin* 58; Hardy, above n 9; Stewart, above n 1, 159-167.

imposed against employers in cases where breaches have been substantial and sustained over an extended period of time.⁹²

While the majority of court proceedings brought by the FWO relating to breaches of minimum employment standards have concerned wage underpayments, the agency recently commenced its first prosecution of an employer for pregnancy discrimination.⁹³

3.2. Nature and scope of enforcement mechanisms for OHS

As noted earlier in our report, each jurisdiction in Australia has its own core regulator of OHS.⁹⁴ In the Commonwealth, New South Wales, Victoria, Tasmania, Northern Territory and the ACT, the regulator for OHS is also responsible for the workers' compensation systems. In contrast Queensland, South Australia and Western Australia have a separation of responsibilities. Shared responsibilities for some regulators mean that a significant proportion of their expenditure and staff is not allocated to OHS.

Some jurisdictions divide OHS related functions between different agencies or arms of government. The Commonwealth has separated the OHS policy making function (performed by the Department of Education, Employment and Workplace Relations) from the regulator, Comcare, whereas in the ACT, OHS related functions are jointly performed by the Office of Industrial Relations (ACT Chief Minister's Department), the Office of Regulatory Services (Work Cover) and the ACT Work Safety Commissioner. There are also regulators for specific industries in many of the jurisdictions. Core regulators conduct investigations and workplace visits and have a range of remedial and punitive actions, which will be looked at in more detail below.⁹⁵

Given the number of separate jurisdictions, and the variation in OHS systems across those jurisdictions, the following is a broad overview of some of the key features of the labour inspection systems and sanctions across these jurisdictions. Our discussion draws on a recent study of OHS regulation in Australia conducted by the Productivity Commission, an Australian Government agency responsible for conducting research and providing advice to the Commonwealth on a range of economic, social and environmental issues.⁹⁶

⁹² See *Workplace Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38; *Klousia v TKM Investments* [2009] FMCA 208. In *Workplace Ombudsman v Saya Cleaning Pty Ltd*, the maximum penalty that could be awarded per breach of the Workplace Relations Act 1996 (Cth) was \$6,600 by an individual and \$33,000 for a body corporate; the case in question involved 12 separate breaches, however the corporate respondent was only required to pay \$215,000 out of a possible maximum total penalty of \$396,000 and the individual respondent was only required to pay \$45,000 out of a possible maximum of \$79,200; *Workplace Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38 [49]-[53].

⁹³ 'Sydney Company Faces Court Over Pregnancy Discrimination', FWO Media Release, 7 July 2010 <http://www.fwo.gov.au/Media-centre/2010/Pages/20100707-Wongtas-prosecution.aspx> (accessed 21 July 2010).

⁹⁴ See Johnstone, OHS Law and Policy, above n 38, Chapter 3; Productivity Commission, above n 39.

⁹⁵ Productivity Commission, above n 39, 102.

⁹⁶ Productivity Commission, above n 39.

3.2.1. Inspections and investigations

Each jurisdiction provides its OHS inspectorate with the power to conduct inspection of workplaces to assess and monitor the safety environment of workers, and to investigate possible breaches of OHS regulation. There is significant variation in the scope of the powers and duties of Inspectors across the various jurisdictions.⁹⁷ While all regulators use both inspections of workplaces and investigations to assess compliance, definitions of both activities are not uniform across the jurisdictions and the causes or triggers of inspection differ across the jurisdictions. According to the Productivity Commission's recent study, the Queensland core and mining regulators, the Western Australian and NSW mining regulators and the Tasmanian, Victorian and South Australian regulators, inspections are largely 'proactive' (conducted without the receipt of prior information of a breach) and investigations are 'reactive' (in response to information about a breach). The Commonwealth conducts investigations, audits and site visits which may be either proactive or reactive in nature, while the ACT regulator predominantly uses information provided to them as the basis for conducting inspections.⁹⁸

3.2.2. Workplace visits

Apart from inspections and investigations, regulators may also visit worksites for other reasons. The Productivity Commission found that the Commonwealth, Victorian, Queensland, South Australian and Western Australian core regulators all use workplace visits to provide training and education. Other purposes of workplace visits include stakeholder engagement sessions (the Commonwealth) and workplace consultation on systems performance (Queensland). In Queensland and Western Australia, workplace visits are also used to provide training and education, as well as the mentoring of mine and quarry sites (Queensland) and to give safety presentations (Western Australia). During workplace visits, the NSW mining regulator conducts presentations and workshops about legislative systems and various safety issues.⁹⁹

3.2.3. Remedial and punitive actions

Regulators across the jurisdictions have a large range of enforcement instruments at their disposal. Many of these are similar to the instruments available to FW Inspectors discussed above. First there is enforcement through a written or verbal directive. Inspectors generally use these directives for less serious breaches. If compliance is achieved, no further enforcement action need be taken.

Each of the Australian OHS statutes empowers inspectors to issue prohibition and improvement notices. An improvement notice is an administrative sanction used when non-compliance is detected but does not necessarily impose an immediate risk to health and safety. The improvement notice directs the recipient to remedy an identified fault within a specified time.

⁹⁷ A useful table comparing the powers and duties of inspectors under the various Commonwealth and State OHS statutes can be found in Johnstone, *OHS Law and Policy*, above n 38, 383-391.

⁹⁸ Productivity Commission, above n 39, 113.

⁹⁹ *Ibid.*

Inspectors can use prohibition notices when an immediate risk to health and safety is detected in a workplace and the activity needs to be terminated. The notice may include directions on how a duty holder is to remedy the risk and may provide that an activity can resume once that action has occurred. Infringement notices can be utilised by inspectors for non-indictable offenses as an alternative to prosecution. They have immediate punitive effect without the need for court proceedings and vary in the amount of penalty rate across the jurisdictions.

Another alternative to prosecuting an offender is the power to accept an enforceable undertaking, discussed earlier in relation to the jurisdiction of the Fair Work Ombudsman. This particular sanction is not available in all of the State OHS jurisdictions, and only Queensland has been active in making use of this power.¹⁰⁰ However, a study of the implementation of enforceable undertakings in Queensland found that enforceable undertakings were important enforcement mechanisms in the OHS enforcement framework, with the potential to have a significant impact on organizational compliance with OHS law.¹⁰¹ Finally, Inspectors have the option of prosecuting an offender when a serious breach has occurred. The outcome of these court proceedings could be monetary fines, imprisonment or health and safety undertakings.¹⁰²

According to the Productivity Commission, enforcement activity (including less punitive administrative approaches and sanctions such as improvement notices as well as more serious and punitive formal enforcement action such as litigation) accounts for the greatest proportion of expenditure by Queensland mining (78 per cent), followed by the Northern Territory regulator (76 per cent) and the Queensland core OHS regulator (69 per cent).¹⁰³ The Commonwealth and the New South Wales core OHS regulator spent the smallest percentages of total expenditure on enforcement compared to other regulators (7 per cent and 12 per cent respectively).

3.2.4. Penalties

Financial penalties for businesses and imprisonment terms for individuals within those businesses act as an added deterrent. The maximum penalty amounts for corporations range from \$180,000 in Tasmania to \$1.65 million in NSW. For those jurisdictions with maximum imprisonment terms, they vary from 2 years in Western Australia to 7 years in the ACT. All jurisdictions, except for the Commonwealth, have adopted some level of personal liability provisions. In addition, businesses and workplaces can be shut down for a given period by regulators when their operations are considered to pose imminent and high OHS risks to workers and/or the general public. Core regulators would typically use a prohibition order to direct a business to shut down its operations. Businesses may also need

¹⁰⁰ See Johnstone and King, above n 75.

¹⁰¹ Ibid.

¹⁰² Productivity Commission, above note 39, 113. On the impact of prosecutions on employer behaviour, see T Schofield, B Reeve and R McCallum, 'Deterrence and OHS Prosecutions: Prosecuted Employers' Responses' (2009) 25 *Journal of Occupational Health and Safety – Australia and New Zealand* 263-276.

¹⁰³ Productivity Commission, above n 39, 125. The Productivity Commission sought to isolate expenditure on enforcement activity from expenditure on administration and formal education activity conducted by the regulator.

to shut down in order to take remedial actions under improvement notices or enforceable undertakings. Shut down periods are however not frequent.¹⁰⁴

3.2.5. Appeals

All jurisdictions, except South Australia, have internal appeal processes available for businesses. The timeframe to appeal against decisions ranges between 7 days in NSW to 14 days in Victoria, Queensland, Tasmania and the Northern Territory. The process to appeal against prosecutions differs across the jurisdictions. While all jurisdictions have provisions for appeals, and generally make use of the court system and its appeal provisions, in some states these differ. Lastly all jurisdictions provide the opportunity to appeal against licensing decisions made by OHS regulators.¹⁰⁵ In NSW, Victoria, Queensland and Tasmania, both internal and external licence appeals are available whereas in South Australia, the appeal process is either internal (for certificates of competency) or external (Dangerous Substance Driver, Explosives, Fireworks and Ammonium Nitrate licensing decisions). In Western Australia, only internal appeal provisions are available and in the Northern Territory, only external appeal provisions are available.¹⁰⁶

4. Statistical information on labour sanctions

4.1. Statistical data on enforcement of minimum employment conditions

Each year FWO and its predecessor the Workplace Ombudsman publishes an annual report, which documents the activities and performance of the agency.¹⁰⁷ Table 1 summarises the available data on the number of complaints received by the FWO and its predecessor agencies as distinct from the number of targeted investigations completed by the agency, the number of breaches of legislation or instruments made under the legislation, and the amount of underpayments recovered. The table also shows the proportion of underpayments received as a result of targeted investigations. Since 2006, the number of breaches of minimum employment standards detected by the Workplace Ombudsman as a result of complaints and its targeted investigations has steadily increased, although figures were not available for the most recent financial year.

¹⁰⁴ Productivity Commission, above note 39, 125–126. The issue of criminal responsibility for OHS offences remains controversial. Despite this, the National Review concluded that the nature of offences relating to breaches of duties of care should be criminal, not civil, as this reflects the seriousness with which such conduct is regarded, and reinforces deterrence. Australian Government, *National Review: First Report*, above n 39, Chp 10. Further, in the context of corporate criminal liability, the National review recommended that the Model Act should provide for ‘the imputation to a corporation of the conduct and state of mind of officers, employees and agents of the corporation acting within the scope of their actual or apparent authority, and a defence for a corporation if it is proved that the corporation took all reasonable and practicable measures to prevent the offence occurring’. Australian Government, *National Review: Second Report*, above n 40, 455.

¹⁰⁵ The Commonwealth does not have licences of its own and instead recognizes those issued by the states and territories.

¹⁰⁶ Productivity Commission, above note 39, 146.

¹⁰⁷ WO, *Annual Report 2008-09*, above n 89.

Table 1¹⁰⁸

	Complaints received	Targeted Investigations	Breaches detected	Total underpayments recovered	Underpayments recovered from targeted campaigns
1 July 2005 – 30 June 2006	N/A	N/A	4,804	\$4.9 million	N/A
1 July 2006 – 30 June 2007	15,238	4,600	10,404	\$13,466,737 for 6,754 workers	>\$1,850,000
1 July 2007 – 30 June 2008	23,728	4,866	17,186	\$36,612,481 for 27,794 workers	\$11,104,739
1 July 2008 – 30 June 2009	22,670	7,080	19,567	\$32,489,904 for 28,648 employees	\$5,863,059
1 July 2009 – 30 June 2010	23,698	3,413	N/A	\$26,195,656 on behalf of 16,088 employees	\$4,267,828

In Table 2¹⁰⁹ below, the number of court actions the Workplace Ombudsman (and its predecessors) has commenced and completed since 2006 is shown, along with the penalties it has secured during this period. The table demonstrates the substantial increase in the federal labour inspectorate's use of judicial proceedings since 2006, and the increase in penalties secured. However, it must be noted that in 2008-2009 and 2009-2010 the agency finalized around 99% of complaints received without the need for litigation.¹¹⁰

Table 2

Date	Number of matters commenced	Number of Matters completed	Penalties secured
27 March 2006 – 30 June 2006	4	0	0
1 July 2006 – 30 June 2007	53	20	\$409 055 reduced to \$387 055 ¹¹¹
1 July 2007 – 30 June 2008	67	53	\$ 1 563 000
1 July 2008 – 30 June 2009	77	33	\$1 621 206
1 July 2009 – 30 June 2010	53 (plus 13 enforceable undertakings approved)	N/A	\$ 2 019 755

4.2. Statistical data on enforcement of OHS standards

In 2010 the Productivity Commission of Australia, which is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians published a report on

¹⁰⁸ These statistics are taken from WO, *Annual Report 2006-2007*, Commonwealth of Australia, 2007; WO, *Annual Report 2007-08*, Commonwealth of Australia, 2008; WO, *Annual Report 2008-09*, above n 87; FWO, *Annual Report 2009-10*, above n 25. As a key accountability document, the FWO's Annual Report complies with the Requirements for Annual Reports prepared by the Department of the Prime Minister and Cabinet and approved by the Joint Committee of Public Accounts and Audit.

¹⁰⁹ This table is a reproduction of table 10 of the *Annual Report 2008-09*, above n 89, 28.

¹¹⁰ See WO *Annual Report 2008-09*, above n 89; FWO *Annual Report 2009-10*, above n 25.

¹¹¹ The penalties were reduced following an appeal in one decision reducing the penalty to initially awarded.

benchmarking Australian business regulation pertaining to OHS regulation. The following statistics are taken from the report, which was released in March 2010.

Table 3¹¹² below shows the total number of inspections and investigations conducted in 2008-09. The number of inspections and investigations provides an indicator of how often businesses are likely to interact with their OHS regulator either in response to an incident or otherwise.

Table 3

	<i>Cwth</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
Total inspections	580	13 452	42 169	16 852	19 934	11 339 ^a	6 280 ^b	4 007 ^c	2 304
Total investigations	298	nr	1 289	1 225	1 754	10 085	358 ^d	nr	nr
Proactive visits	36	4 478	25 903	20 097	6 375	6 499	4 518	3 342	nr
Return visits	17	502	nr	na	na	na	na	121	nr
Reactive visits:	772	8 160	17 832	22 748	13 156	4 840	1 762	544	nr
Complaint	51	6 955	nr	1 012	3 603	nr	nr	nr	nr
OHS incident with injury	162	990	nr	1 598	2 106	nr	nr	nr	nr
Near-miss	264	215	nr	41	1 793	nr	nr	nr	nr
OHS compliance breach	52	0	nr	20 097	4 604	nr	nr	nr	nr
Worksites to inspections and investigations	6.9 ^e	49	1.5	21.6	6.6	18.1 ^f	na	na	na
Worksites to proactive visits	111	148	3	19	22	32	na	na	na
Total value of fines imposed on businesses \$'000	nr	5 710	6 796	3 644	1 356	na	136	0	nr

na not applicable. nr non response. ^a Figure is the total number of workplace visits conducted during 2008-09 and thus includes visits which were a part of an investigation. ^b Workplace interventions which are not a consequence of an accident or dangerous incident being notified to the regulator (termed 'Type 1 investigations'), but does include repeat visits once a breach has been found either as a result of a complaint or proactive visit (termed Type 2 investigations). ^c Figure indicates total workplace interventions which may be proactive or reactive in nature. ^d Type 1 investigations only. ^e Ratio counts total inspections only as figure may be double counting inspections conducted within investigations. ^f Ratio counts total inspections only as figure may be double counting the inspections conducted within investigations.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

The use of the enforcement tools by core regulators is shown in Table 4¹¹³. Generally, improvement notices were most regularly used and the use of more serious enforcement actions such as prosecutions and enforceable undertakings was relatively rare compared to all enforcement activities conducted in 2008-09.

¹¹² This table is a reproduction of table 5.9 of Productivity Commission, above note 39, 115.

¹¹³ This table is a reproduction of table 5.14 of Productivity Commission, above note 39, 122.

Table 4

	<i>Cwlth</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
Educate/advise	2 368	2 453	nr	nr	nr	nr		4 000	nr
Verbal warning	na	nr	nr	nr	nr	2 986	1 986 ^a	na	nr
Written directive	0	122	nr	na	na	na		12	na
Improvement notice	13	10 830	18 363	7 584	2 396	9 842	129	193	99
Prohibition notice	16	767	1 078	1 991	630	721	98	70	101
Licence suspension	nr	1	nr	nr	nr	0	nr	0	nr
Licence cancellation	nr	1	nr	nr	nr	0	nr	0	nr
Adverse publicity	13	na	0	na	60	na	0	0	nr
Infringement/penalty notice	na	686	nr	471	10	na	17	0	nr
Prosecution	2	108	118	141	62	37	30	5	4
Enforceable undertaking	1	na	1	20	na	nr	nr	0	nr
Other:			6 313 ^b	115 ^c					

na not applicable. nr non response. ^a Statistic includes educate/advise, verbal warning and written directives. ^b Voluntary compliance (6163), Letters of warning (81), Non disturbance notice (54), Letters of caution (15). ^c Electrical safety protection notice (94), Seizures (21).

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

Lastly Table 5¹¹⁴ shows the large variability of penalties imposed on businesses across the various Jurisdictions.

Table 5

		<i>Cwlth</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
Maximum penalty ^a	\$'000	495	1 650	1 021	750	1 200	625	180	na	1 000
Imprisonment term	years	^b	5	5	3	5	2	na	na	7

na not applicable. ^a Maximum penalties for corporations. ^b The Commonwealth has no personal liability provisions — see chapter 7.

Source: Access Economics (2009).

5. Social partners in enforcement

5.1. Social Partners for the enforcement of basic employment conditions

In Australia, trade unions traditionally played a central role in monitoring and enforcement of basic conditions of employment set by awards under the conciliation and arbitration system. For much of the twentieth century, unions not only had the capacity to initiate the award-making process, it was relatively easy for them to bring disputes before the federal tribunal, and they were given standing to bring legal proceedings to enforce award conditions in the courts. Unions also enjoyed broad rights of entry to workplaces for the purpose of determining employer compliance with award standards. The extent of both

¹¹⁴ This table is a reproduction of table 5.17 of Productivity Commission, above note 39, 126.

informal and formal union enforcement allowed governments to be less active and provide fewer resources to labour inspection and enforcement activity, except in the most vulnerable, non-unionised sectors of the economy.¹¹⁵ There is little evidence of collaboration between the two agencies during this era.

The capacity and willingness of unions to enforce minimum employment standards for many workers has been undermined since the 1980s as a result of a decline in union membership combined with the introduction of decentralised enterprise bargaining, increased individualism in employment relations, reduced union right of entry powers, increasingly precarious types of employment, and a growing small business sector.¹¹⁶ The decline of the enforcement role of unions left an extensive gap in enforcement, given the under-resourcing of federal and State labour inspectorates.

As noted earlier, the Australian government sought to increase the role of government in enforcement of minimum employment standards through the creation of the Workplace Ombudsman (the predecessor to the FWO) and by increasing the resources available to the agency. The creation of the FWO and its ‘insistence compliance’ strategy has on the face of it been an improvement in minimum labour standards’ enforcement in Australia.

What of the unions’ continuing role in enforcement? Under the FW Act, unions continue to have the right to bring court proceedings in relation to a contravention of a relevant provision, if the employee is affected by the contravention and the union is entitled to represent the industrial interests of the employee. Further, if the contravention relates to a workplace agreement or workplace determination binding on the union, the union can make an application in its own right, on behalf of an employee or both.¹¹⁷

However, while unions can still enforce minimum standards through court proceedings, unions do not have the ability to employ the alternative enforcement mechanisms at the FWO’s disposal, such as enforceable undertakings, infringement or compliance notices.

Union’s rights of entry and inspection powers are also still relatively restricted when compared to the situation twenty years ago.¹¹⁸ Union officials must obtain an entry permit and give 24 hours notice before being able to enter workplaces for the purpose of either investigating suspected contraventions or hold discussions with employees. Permit holders must meet certain standards in order to retain their permit. Where union officials are seeking to inspect documentation, employers are only obliged to provide documents that are directly relevant to an alleged contravention. Furthermore unions may not have access to non-members records unless the employee consents.¹¹⁹

Although trade union membership has declined over the recent decades, unions still represent a significant proportion of the Australian workforce. However, the exact role of

¹¹⁵ Maconachie and Goodwin, above n 66; Hardy and Howe, above n 10.

¹¹⁶ G Maconachie and M Goodwin ‘Enforcing Minimum Labour Standards in Australia from 2010: Correcting or Compounding Problems’, Proceedings of the 2009 AIRAANZ Conference, *Labour Capital and Change* (2009) 2; Hardy and Howe, above n 10.

¹¹⁷ Hardy and Howe, above n 10, 330.

¹¹⁸ For a discussion of the extent to which union right of entry has become more restricted over the last two decades, see Fenwick and Howe, ‘Union Security After Work Choices’, above n 16.

¹¹⁹ Hardy and Howe, above n 10, 226.

unions in enforcement under the FW Act is not yet clear. Nor is it clear to what extent the legislation supports a collaborative, tripartite model of enforcement. The availability of a well-resourced government agency might mean that unions will refer most enforcement matters under awards to the FWO. Nevertheless, there is still some scope for union enforcement and participation. The system of modern awards will ensure the continuation of instruments setting some terms and conditions across industries and occupations. The role of unions in overseeing the maintenance and updating of modern awards is retained although this only occurs every 4 years.¹²⁰ The ILO's *Labour Inspection Convention* (Convention 81, 1947) requires the government of member nations to make arrangements for promotion of 'collaboration between the labour inspectorate and employers and workers or their organisations' (Article 5(b)). The FW Act neither encourages this or prohibits it and accordingly gives limited effect to the requirement.

Some steps have been taken toward greater collaboration between FWO, unions and employers in FWO's efforts to establish the National Horticulture Industry Shared Compliance Campaign, which is discussed in more detail below. However, a significant barrier to greater cooperation between FWO and unions is FWO's responsibility for enforcing provisions in the FW Act intended to control unlawful union activity, such as unlawful industrial action. FWO has recently commenced legal proceedings against unions in some cases, which possibly will undermine relations between FWO and unions in the future.

5.2. Social Partners for the enforcement of OHS

The inclusion of health and safety committees and the election of health and safety representatives in all OHS jurisdictions facilitate a more inclusive approach to enforcement of OHS laws. Usually the process of electing an HSR can be initiated by the employee, the employer or by a direction from a regulator. Work groups are then typically established to allow HSRs to represent workers with similar functions within a workplace. HSCs are not automatically mandatory in any jurisdiction. However, in 2008-09, all jurisdictions (except the ACT) had OHS provisions either requiring an employer to establish an HSC when requested to do so by employees or by an HSR subject to varying thresholds.

Besides HSRs, unions can also play a significant role in enforcement. In all jurisdictions except the Commonwealth and South Australia, union representatives have the right to enter workplaces to investigate possible breaches of OHS regulations and consult with workers on OHS matters. The rights of unions to enter workplaces provide an additional source of scrutiny and a separate source of information on OHS matters and a channel through which they can report instances of non-compliance. There are however a number of differences across the jurisdictions on the application of entry rights for unions.¹²¹

Of the jurisdictions that provide for the right of unions to enter a workplace, all include the right to investigate breaches. Queensland, Western Australia and the Northern Territory provide the right to enter workplaces to consult and discuss OHS issues with 24 hour notice required for Queensland and Western Australia. New South Wales, Victoria and the ACT do not allow unions the right to enter for consultation purposes. Authorised representatives need to have completed a course of training prescribed in regulations before they may hold an entry permit in Victoria, Queensland, the Northern Territory and

¹²⁰ Hardy and Howe, above n 10, 335.

¹²¹ Productivity Commission, above note 39, 242.

the ACT. Victoria is the only jurisdiction not to confer rights to authorised representatives to examine, copy or take extracts from any document produced.¹²²

While the Commonwealth OHS Act does not provide any union right of entry powers, provisions exist in the FW Act which relate to OHS matters. Under section 494 of the Act authorised union representatives need a federal permit to gain access to a workplace which is controlled by the Commonwealth, a Commonwealth authority, a constitutional corporation, a body corporate incorporated in a Territory or premises located in a Commonwealth place. The right to enter and investigate is only available where such rights of entry currently exist under either a State or Territory OHS Act. A permit holder must not exercise a State or Territory right to inspect unless they have given the occupier at least 24 hours notice.¹²³

The Model National OHS Act (as amended in December 2009) provides that an entry permit holder may enter a workplace to inquire into a suspected contravention of the Act that relates to or affects a relevant worker.¹²⁴ The entry permit holder must reasonably suspect before entering that the contravention has occurred or is occurring. The permit holder may inspect the work system, plant, substance, structure or other thing relevant to the suspected contravention, consult with the relevant workers in relation to the suspected contravention, consult with the person conducting the relevant business or undertaking about the suspected contravention, inspect and make copies of any record or document that is directly related to the suspected contravention and consult and advise workers on OHS matters. At least 24 hours but no more than 14 days' notice must be given before entering to inspect employee records, inspect information held by another person and consult and advise workers.¹²⁵

6. Proactive and innovative approaches to sanctions

6.1. Innovative approaches to enforcement for minimum employment standards

The new administrative sanctions provided to FWO under the *Fair Work Act 2009* (Cth) are important innovations in enforcement of minimum employment standards in the Australian context. However, it is too early to evaluate the success of these new initiatives. The FWO has been given a much broader role than enforcement of minimum standards through inspection and application of administrative and legal sanctions. The FW Act provides that one of the objects of the FWO is to promote 'harmonious and cooperative workplace relations' and compliance with the FW Act and fair work instruments, including by providing *education, assistance and advice*. The FWO has therefore been given an important education function (previously held by a different agency, now abolished). The education role of the FWO includes assisting employees, employers and outworkers by providing education, assistance and advice on relevant Commonwealth workplace laws, promoting and monitoring compliance with relevant Commonwealth workplace

¹²² Productivity Commission, above note 39, 244.

¹²³ Ibid.

¹²⁴ S 116, Model Work Health and Safety Bill 2009 (Cth).

¹²⁵ S 119, Model Work Health and Safety Bill 2009 (Cth).

laws, conducting targeted education campaigns in industries and regions and conducting compliance audits. In addition to promoting compliance with minimum standards, the FWO has the authority to promote particular approaches to workplace relations by producing 'best practice guides'.¹²⁶

The Fair Work Ombudsman offers employees and employers free information and advice on pay, conditions, and workplace rights and obligations under the Commonwealth workplace system. For example, the Fair Work Infoline was established to assist businesses with their rights and obligations under a relevant Commonwealth workplace law or industrial instrument, including provision of advice about pay rates, terms and conditions of employment for employees, record keeping and pay slip obligations. The Fair Work Ombudsman has also produced Best Practice Guides to assist small to medium-sized businesses to implement best practice initiatives in a number of aspects of workplace relations, including fostering a culture of workplace flexibility for family responsibilities, consultation and cooperation in the workplace, and dispute resolution.

In addition to its education role, the FWO also conducts national campaigns and audits. In March 2010 the FWO launched the national Horticulture Industry Shared Compliance Campaign. As noted earlier in our report, this is a significant initiative involving collaboration between the Fair Work Ombudsman and industry and union partners (Australian Industry Group, Australian Workers' Union, Horticulture Australia Council and National Farmers' Federation). The Department of Immigration and Citizenship was also consulted and provided valuable input into the design of the campaign. The campaign combines a two month educational phase followed by an audit campaign to check on employer compliance with relevant minimum employment standards in the industry.

The education phase involved an informational mail out to nearly 15,000 horticulture growers, the publication of a Guide to the Horticulture Award 2010, and dedicated horticulture pages on the FWO website for employees and employers. The partners and the Fair Work Ombudsman then conducted education seminars in regional areas, and Fair Work Inspectors undertook education visits to employers who were transitioning to the national system.

The campaign's compliance audit phase began in May 2010.¹²⁷ Using the latest Australian Business Register data base, FWO targeted 704 growers across the country for an audit. Of this total, FWO have since determined that 234 were unsuitable for audit because they either could not be tracked down or they were no longer working in horticulture or had no employees.

The remaining 470 employers are being individually assessed for their level of compliance with the Horticulture Award and the National Employment Standards. Fair Work Inspectors will take appropriate action to remedy any findings of non-compliance by working with the employer to ensure they understand their responsibilities and to encourage voluntary rectification.

FWO will provide a public report on the activities and findings of the *Horticulture Industry Shared Compliance Program* at the completion of the audit phase.

¹²⁶ Hardy and Howe, above n 10, 328.

¹²⁷ The information presented in this report concerning the conduct of the audit phase of the campaign was provided to the authors by the Office of the Fair Work Ombudsman. For more information on the current Audits and Campaigns currently undertaken by the FWO see <http://www.fwo.gov.au/Audits-and-campaigns/Pages/Current-and-upcoming-campaigns.aspx>.

6.2. Innovative approaches to enforcement of OHS standards

As noted earlier in our report, there have been many innovations in OHS regulation and enforcement since the 1970s. One example is the use of enforceable undertakings, discussed in the context of the sanctions now available to the Fair Work Ombudsman.

The key State OHS regulators also play an important role disseminating educational material to workplaces and conducting workshops and awareness campaigns on OHS requirements in order to better inform both employers and employees about their obligations and rights in relation to safety in the workplace. According to a survey of 1800 small and medium business enterprises (SMEs) in 2004, the regulator or state government was generally identified as the main source of OHS information (Sensis 2004).

These educational initiatives are conducted through different media such as television or print, or during face-to-face consultations. There have been a number of effective awareness campaigns in the recent past including WorkSafe Western Australia's 'come home safe' campaign in 2007. This was a six-week mass-media campaign, including television and radio coverage, posters, information brochures and other promotional items. The aim of the campaign was to increase safety awareness at work by focusing on families waiting for their loved ones to come home. The Victorian authority has also run a similar campaign. In South Australia, the core regulator SafeWork embarked on a campaign in 2007 called 'looking after your mate'. This mass media campaign included television, radio and press, billboard signage and other advertising. The aim of the campaign was to promote safety in the workplace, with a focus on blue-collar workers, young workers and priority industries.

WorkSafe in Western Australia also delivers free OHS advice through independent consultation to small businesses. WorkSafe Victoria's Small Business Safety assistance program offers employers with less than 50 employees a free three-hour consultancy at their workplace with an independent health and safety consultant and since the program commenced, around 10,140 consultancies have been delivered. These are just a few examples of the educational and proactive assistance role that core OHS regulators in Australia play in ensuring compliance with OHS standards.

Innovation in OHS enforcement can also be found in the increased range of sentencing options available for breaches of OHS duties of care. In addition to the traditional sanctions of fines and imprisonment, courts now have additional powers to make the following orders:

- Adverse publicity orders (NSW, VIC, SA, NT, ACT);
- Community service orders (NSW, VIC, SA);
- Training orders (SA, NT);
- Corporate Probation orders (NSW, VIC, NT, ACT, Cth); and
- Injunctions (VI, QLD, TAS, NT, ACT, Cth).¹²⁸

¹²⁸ Australian Government, *National Review: First Report*, above n 39, 146.

7. Conclusion

While the Australian system of enforcement of minimum employment standards and OHS regulation is by no means perfect, the last five years have seen vast improvements in government enforcement capacity, especially in relation to wages and other minimum employment conditions. While OHS enforcement has not experienced such significant change, the State systems of OHS regulation have been laboratories for experimentation with innovative enforcement approaches. It will be interesting to see whether this experimentation continues in the move to a national system of OHS regulation. While some of these innovative enforcement sanctions have been provided to FWO, in recent years it has been the increase in strategic inspection and the use of traditional sanctions such as court proceedings to seek the imposition of penalties which has been the most interesting aspect of federal enforcement of minimum employment standards. Empirical research is required to establish just how effective the agency's 'insistence compliance' strategy has been, and to inform the agency's future strategies, including its deployment of its more innovative enforcement tools.

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