The State Strikes Back: Supervision and Sanctioning of Unlawful Industrial Activity by Federal Government Agencies in Australia

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Introduction

Historically, the state was seen to have adopted 'a fairly passive role in relation to the enforcement of the collective norms'[1] of the federal industrial relations system. Less than 20 years on, and the state is no longer seen as a mere observer, but as an active participant in the supervision and sanctioning of unlawful industrial activity. Indeed, there are few government agencies around the world that have been as contentious as the federal labour regulators in Australia, now known as the Office of the Fair Work Ombudsman (FWO) and the Australian Building and Construction Commission (ABCC) respectively. The political heat generated by these agencies is underlined by the fact that the Coalition Government's attempt to reinstate the construction watchdog was so avidly resisted it ultimately led to the 2016 double dissolution election.[2] Indeed, conflict over the role various institutions, including labour inspectorates, has been described as 'endemic to Australian labour law'.[3]

While there is a burgeoning body of scholarship concerned with the ways in which regulators seek to detect and recover underpayments on behalf of aggrieved workers,[4] there has been considerably less academic consideration of how these same agencies enforce anti-strike provisions against trade unions.[5] However, the rise of these regulatory agencies, and their reliance on coercive court-based sanctions, raises important questions about the proper role of the state in supervising collective

[1] B Creighton, 'One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?' (2000) 24(3) *Melbourne University Law Review* 839 at 858.

[2] The Building and Construction Industry (Improving Productivity) Bill 2016 (Cth), together with the Fair Work (Registered Organisations) Amendment Bill 2016 (Cth), triggered the most recent double dissolution election.

[3] L Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law*, Law Book Company, Sydney, 1994, 4.

[4] T Hardy, 'Who Should Be Held Liable for Workplace Contraventions and on What Basis?' (2016) 29(1) *Australian Journal of Labour Law* 78; L Berg and B Farbenblum, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman' (2017) 23(3) *Australia Journal of Human Rights* 310; S Clibborn and C Wright, 'Employer Theft of Temporary Migrant Workers' Wages in Australia: Why Has the State Failed ot Act?' (2018) 29(2) *Economic and Labour Relations Review* 207.

[5] E Goodwin, 'Building on Shifting Sands: From the Fair Work (Building Industry) Act 2012 (Cth) to the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth)' (2014) 27(1) *Australian Journal of Labour Law* 97; E Goodwin, 'Beyond Wilcox: Laying the Foundation for Fair Work in the Australian Building and Construction Industry' (2010) 23(4) *Australian Journal of Labour Law* 302; A Forsyth, V Gostencnik, I Ross and T Sharard, *Workplace Relations in the Building and Construction Industry,* LexisNexis Butterworths, Sydney, 2007; J Webster, 'More Underpayments and Civil Penalties – Taking a Strategic Approach to Regulatory Workplace Relations Litigation' (2017) 59(3) *Journal of Industrial Relations* 354.

bargaining, the interaction between public and private enforcement and the meaning ascribed to concepts such as the 'public interest' in this context.[6]

This chapter begins by briefly charting the history of labour inspection in Australia, and the somewhat turbulent emergence of the FWO and the ABCC. Next, the chapter considers the respective statutory mandate of each agency, as well as the scope of their regulatory discretion, before exploring some of the more conspicuous concerns, including the assignment of mixed functions to regulatory agencies and the efficacy (or otherwise) of the current civil remedy regime.

The Rise of Regulatory Agencies in the Federal Industrial Relations Sphere: A Short History

From the turn of last century, the workplace relations framework in Australia was founded on a distinctive system of compulsory conciliation and arbitration.[7] In this early period, the industrial relations tribunal lay at the core of the federal framework and the state inspectorate was seen to be largely irrelevant to maintaining industrial peace or achieving industrial equity.[8] Indeed, it was not until 1952, that the small group of appointed inspectors were moved into a dedicated Arbitration Inspectorate.[9] However, this inspectorate was largely instituted to ease the enforcement burden of unions, rather than employers. The prevailing logic was that employees were structurally disadvantaged in the employment relationship and needed governmental assistance to protect their working conditions. It was assumed that employers could largely take care of their own interests.[10]

However, the Fraser Coalition Government – elected in 1975 – challenged this view of the inspectorate as an agency that 'applied o e section of industrial law against employers only'.[11] In 1978, the Fraser Government initiated a paradigmatic shift by replacing the Arbitration Inspectorate with a statutory corporation, the Industrial Relations Bureau (IRB). The IRB was urged to discharge its enforcement functions 'in a completely even-handed manner and without distinction between employers and employees ... or their organisations'.[12] This approach was justified on the basis that employers, particularly smaller businesses, were not in a position to initiate proceedings against unions due to a lack of resources and for fear of victimisation.

While enforcing the law against unions was the most contested feature of the IRB, securing employer compliance with awards remained the principal activity during this period.[13] However, assigning mixed

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[6] A Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) 45(3) *Industrial Law Journal* 299; A Forsyth, '"Restoring the Rule of Law" through Commercial (Dis)incentives: The Code for the Tendering and Performance of Building Work 2016' (2018) 40(1) *Sydney Law Review* 93.

[7] S Macintyre and R Mitchell, *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration, 1890-1914*, Oxford University Press, Oxford, 1989.

[8] L Bennett, 'Legislative Policy and Design: Federal Deregistration and the "Destruction" of the Builders' Labourers' Federation' (1991) 4(1) *Australian Journal of Labour Law* 18.

[9] See M Goodwin and G Maconachie, 'Political Influence and Enforcement of Minimum Labour Standards in the Australian Federal Industrial Relations Jurisdiction' (Paper presented at the 22nd Conference of the Association of Industrial Relations Academics of Australia and New Zealand, Melbourne, 6 February 2008) 3.

[10] Creighton, above n 1, 857.

[11] A Street, 'Conciliation and Arbitration Amendment Bill 1977, First Reading Speech', *Parliamentary Debates,* House of Representatives, Parliament of Australia, 31 March 1977, 835.

[12] A Street, 'Conciliation and Arbitration Amendment Bill 1977, Second Reading Speech', *Parliamentary Debates,* House of Representatives, Parliament of Australia, 27 May 1977, 2039, 2042.

[13] C Wood, 'The Establishment and Operations of the Industrial Relations Bureau' in Monash University Faculty of Law (eds), *Australian Conciliation and Arbitration after 75 Years: The Federal Arbitration Process, Present Problems and Future Trends,* Faculty of Law, Monash University, Clayton, 1979, 37.

functions to this agency was not benign. In particular, Bennett has argued that being charged with responsibility for pursuing unions for unlawful industrial action hampered 'the Bureau's ability to discharge its award enforcement duties since it brought it into conflict with groups upon which it was dependent'.[14] Although the IRB was controversial and highly unpopular, it ultimately 'proved to be something of a damp squib in practice ... which confounded both the fears of its opponents and the hopes of its proponents'.[15]

The subsequent Hawke Labor Government returned 'to a more orthodox view of the role of the enforcement agency'.[16] With the support of the Coalition (by then in opposition), the IRB was abolished in 1983 and the traditional Arbitration Inspectorate recreated and housed as a unit within the relevant department. For the next decade or so, the enforcement agency enjoyed a relative hiatus from heavy-handed political interference.

However, this changed with the election of the Howard Coalition Government in 1996. As has been well documented, the *Workplace Relations Act 1996* (Cth) (WR Act) encouraged individual agreement-making and curtailed the arbitral powers of the federal tribunal.[17] This statute also introduced a range of additional remedies and sanctions in relation to industrial action and union activity.[18] Rather than rely on the tribunal to determine what activities and outcomes were in the 'public interest', the Parliament sought increasingly to codify and prescribe 'what is acceptable, and what is unacceptable, industrial conduct'.[19] The relevant institutional framework also underwent considerable reconstruction in this period. In place of the Arbitration Inspectorate, three new enforcement agencies were established: the Office of Workplace Services (OWS),[20] the Office of the Employment Advocate (OEA) and the Interim Building Industry Taskforce (which was subsequently replaced by the original form of the ABCC). The latter two bodies were focused almost entirely on union rather than employer breaches of workplace laws.[21]

However, with the introduction of the Work Choices legislation in early 2006,[22] the federal government's enforcement policy moved in an entirely different, and somewhat unexpected, direction. In response to the wave of concern that the new laws would lead to mass exploitation of employees,[23] the federal government emphasised the role of the federal labour inspectorate in protecting employees from underpayment and other forms of employer wrongdoing. It also provided the agency with a significant resource injection and expanded its statutory mandate.[24] Along with its

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[14] Bennett, above n 3, 154.
[15] Creighton, above n 1.
[16] Bennett, above n 3, 149.
[17] M Lee, 'Regulating Enforcement of Workers' Entitlements in Australia: The New Dimension of Individualisation' (2006) 17(1) *Labour and Industry* 41.
[18] K Wheelwright, 'Enforcement under Work Choices: Recent Developments' (2005) 13(66) *Employment Law* Bulletin 58, 58..
[19] *FSU v Commonwealth Bank of Australia* (2005) 147 IR 462 at [75].
[20] From 1996 to 2006, this agency was chiefly responsible for employer compliance with awards and collective agreements.
[21] M Lee, Whatever Happened to the Arbitration Inspectorate? The Reconstruction of Industrial Enforcement in Australia' in Marian Baird, Rae Cooper & Mark Westcott (eds), *Reworking Work AIRAANZ 05: Proceedings of the 19th Conference of the Association of Industrial Relations Academics of Australia and New* Zealand, *Vol* 1, University of Sydney, Sydney, 2005, 341.
[22] *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).
[23] See eg A Forsyth and C Sutherland, Collective Labour Relations under Siege: The Work Choices Legislation and Collective Bargaining' (2006) 19(2) *Australian Journal of Labour Law* 183.
[24] T Hardy, 'A Changing of the Guard: Enforcement of Workplace Relations Laws Since Work Choices and Beyond' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices*

traditional function of enforcing awards and collective agreements, the OWS became responsible for enforcing provisions principally aimed at union wrongdoing.[25]

Following statutory amendments in mid-2007,[26] the federal enforcement agency underwent further transformation: it moved from an executive to a statutory agency and was renamed the Workplace Ombudsman (WO).[27] These legislative amendments gave the agency a more independent footing, and expressly set out its key functions.[28] These changes to the institutional framework, and the mandate of the labour inspectorate, largely survived the election of a Labor government in 2007 and the introduction of the FW Act.

The Office of the Fair Work Ombudsman

The FWO – established in 2009 by the FW Act – is broadly required to promote 'harmonious, productive and cooperative workplace relations'.[29] The Act envisages that the FWO (just like its immediate predecessor) would be a 'full-service regulator':[30] one that promotes compliance in relation to, and on behalf of, employers, employees and their organisations through a range of different activities. While the FWO is most well-known for its work in seeking redress on behalf of underpaid employees, the federal regulator also has authority to investigate and bring enforcement proceedings against trade unions (and/or other involved persons) in relation to a range of civil remedy provisions, including for unlawful industrial action,[31] adverse action[32] and coercion,[33] as well as non-compliance with certain orders of the FWC.[34] As the then head of the FWO put it: 'It's my job to enforce *all* the laws'.[35]

While this may be true, the FWO retains substantial discretion in determining which contraventions should take priority and what regulatory response is appropriate in the circumstances.[36] Previously, the FWO had published a guidance note which directly addressed exercise of its functions in relation to industrial action.[37] This guidance note has been replaced with a more general Compliance and Enforcement Policy, which contains very little information about the FWO's approach to strike activity.[38]

Legacy, Federation Press, Sydney 2009; T Hardy and J Howe, 'Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 23(3) *Australian Journal of Labour Law* 306.

[25] For example, the OWS (and not the OEA) became responsible for the investigation of possible breaches during the bargaining process, rights of entry and freedom of association etc.

[26] *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth).

[27] Simultaneously, the OEA was renamed the Workplace Authority.

[28] WR Act s 166B.

[29] FW Act s 682(1).

[30] N Wilson, 'Fairness of the First Year' (Speech delivered to the Industrial Relations Society of Victoria Annual Convention, Melbourne, 8 October 2010), 8.

[31] FW Act s 417.

[32] FW Act s 346(b).

[33] FW Act ss 348, 349.

[34] FW Act ss 280, 421. Failure to comply with FWC orders suspending or terminating protected industrial action issued under ss 423, 424, 425 or 426 are not civil remedy provisions and therefore outside the FWO's remit.

[35] Workplace Express, 'FWO Confirms Probe Extends to Glencore's Conduct', 8 February 2018 (emphasis added).

[36] But see FW Act s 684.

[37] See Fair Work Ombudsman, *Guidance Note 5 – FWO Industrial Action Policy,* 3rd ed, Commonwealth of Australia, 2012 (repealed).

[38] Fair Work Ombudsman, *Compliance and Enforcement Policy*, Commonwealth of Australia, 2017, 17.

What is clear from the current policy is that the FWO is not required to wait for a complaint to be made – but can act on its own volition in initiating an inquiry or investigation. The policy further indicates that such an investigation is more likely where non-compliance is 'serious', namely there is evidence to suggest that there is:

a) exploitation of vulnerable workers;
b) significant public interest or concern;
c) blatant disregard for the law, or a court or FWC order;
d) deliberate distortion of a level playing field to gain a commercial advantage; or
e) an opportunity to provide an educative or deterrent effect.[39]

Further, in determining whether to commence, or intervene in, litigation, the FWO's separate Litigation Policy prescribes a two-stage test: first, there must be sufficient evidence in relation to the litigation; and second, it must be evident from the facts of the case, and all the surrounding circumstances, that initiation of the proceedings is 'in the public interest'.[40] In deciding whether civil remedy proceedings are 'in the public interest', the FWO will consider a range of factors, including the nature and seriousness of the alleged contravention and the characteristics and compliance history of the alleged wrongdoer. Somewhat tellingly, the FWO Litigation Policy explicitly states that 'contraventions relating to agreement making, bargaining orders, industrial action or right of entry' are not 'trivial' and therefore fall within the category of serious contraventions which are generally worth pursuing.[41]

These internal guidelines suggest that the FWO continues to characterise unlawful industrial action as 'serious', even where there is no statutory requirement or prescription to do so. Indeed, the classification of what constitutes a 'serious contravention' under the FWO's Litigation Policy is markedly distinct from a new statutory definition of 'serious contravention' recently introduced as part of far-reaching reforms designed to better protect 'vulnerable workers'.[42] These new provisions – which allow for significantly increased penalties to be imposed by the courts – are aimed at deterring deliberate non-compliance by employers, not curbing illegal union activity. Instead, maximum penalties for unlawful industrial action remain capped at the lower levels under the FW Act.[43]

Although the FWO's policies tell one story, the agency's litigation record tells another. More specifically, the proportion of matters initiated by the FWO against unions (and officials) for contravention of the FW Act is relatively small compared to the number of cases brought against employers (and other involved persons) for breach of minimum employment standards. There is evidence to suggest that less than 4 per cent of the litigation matters brought by the FWO involve a union.[44] This, in and of itself, provides a valuable insight into the FWO's conception of the 'public interest', and how it implicitly prioritises matters within its remit. This stands in sharp contrast to the approach of the building regulator, which has long been accused of being brazenly anti-union.[45]

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[39] Ibid 13.
[40] Fair Work Ombudsman, *Guidance Note 1 – Litigation Policy,* 4th ed, Commonwealth of Australia, 2013, 8.
[41] Ibid 1.
[42] See *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* Cth).
[43] But note that there have been recommendations that penalties for unlawful industrial action be tripled. See Productivity Commission 2015, Recommendation 27.8 at 68.
[44] Previously, there were suggestions that around 1 per cent of all matters initiated by the FWO involved a union (see Webster, above n 5, 72). More recently, the FWO has confirmed that around 4 per cent of current litigation matters involve union respondents, see Workplace Express, above n 35.
[45] See Workplace Express, 'FWBC Had Collateral Purpose for Prosecuting National Secretary: CFMEU', 26 May 2016.

The Australian Building and Construction Commission

From 2005, there have been sector-specific laws in the building and construction industry operating alongside the generally applicable workplace relations laws overseen by the federal labour inspectorate in its various guises (the OWS, the WO and now the FWO). While industry-focussed laws have been in place for more than a decade, they remain in a state of flux and the subject of controversy. This part charts the establishment and evolution of the specialist regulatory agency in the building sector.[46]

The Howard Government first established the Interim Building Industry Taskforce in 2002 in response to the 2001 Royal Commission into the Building and Construction Industry.[47] The taskforce was later superseded by the original ABCC which was established as a separate statutory agency in 2005. Under the *Building and Construction Industry Improvement Act 2005* (Cth) (BCII Act), the ABCC was tasked with enforcing applicable laws in the building sector, embedding a culture of compliance and building respect for the rule of law.[48] The formation of a sector-specific regulatory agency – with a strong political mandate to pursue unions, access to hefty penalties for unlawful industrial action and formidable investigative powers – was fiercely resisted by the trade union movement.[49]

Under the Rudd/Gillard Labor Government, there was a rolling back, but not a wholesale reversal, of some of the most contentious aspects of the building regulatory framework.[50] In particular, the Labor Government decided to replace the ABCC with a rebadged body, the Fair Work Building Industry Inspectorate, which adopted the moniker 'Fair Work building and Construction' (FWBC).[51] The main object of this new agency was to provide a 'balanced framework for cooperative, productive and harmonious workplace relations'.[52] This was very similar to the FWO's statutory objectives and stood in some contrast to the original ABCC's stated objective, to focus on ensuring the fair, efficient and productive carrying out of building work.[53] Indeed, it was intended that the FWBII Director's role was 'broadly similar' to that of the FWO, albeit limited to the building industry.[54] In this vein, the FWBI Act imposed additional safeguards on the FWBC's exercise of compulsory examination powers,[55] realigned the penalties for unlawful industrial action with the civil penalty amounts applicable under the FW Act

[46] T McIlroy and A Remeikis,'Breaking the Law an Australian Worker Tradition: ACTU Boss Sally McManus', *Sydney Morning Herald*, 17 March 2017.
[47] T Cole, 'Final Report of the Royal Commission in to the Building and Construction Industry', Commonwealth of Australia, Canberra, 2003.
[48] Ibid vol 11. See generally A Forsyth, 'Law, Politics and Ideology: The Regulatory Response to Trade Union Corruption in Australia' (2017) 40(4) *UNSW Law Journal* 1336.
[49] In relation to the examination powers, see G Williams and N McGarrity, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21(3) *Australian Journal of Labour Law* 244.
[50] K Rudd and J Gillard, *Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces* (Australian Labor Party, 2007) 24.
[51] *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* (Cth); *Fair Work Building Industry Act 2012* (Cth) (FWBI Act).
[52] FWBI Act s 3 (repealed).
[53] BCII Act s 3 (repealed).
[54] Parliament of Australia, *Revised Explanatory Memorandum, Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012 (Cth)* (Parliament of Australia, Canberra) 6.
[55] Some of these measures had already been introduced – albeit on an informal and voluntary basis – following the appointment of a new Commissioner in 2011 – Workplace Express, 'ABCC to Adopt Checks on Coercive Powers', 22 February 2011.

and expanded the range of matters which could be handled by the construction regulator, including cracking down on unscrupulous employers in the building sector.[56]

In late 2013, following a change in government, a new FWBC Director was appointed. Under this new leadership, the FWBC changed direction to once again focus on enforcement action against unions.[57] This more vigorous enforcement approach was further buttressed by key findings of the 2015 Royal Commission into Trade Union Governance and Corruption.[58] In the wake of this Commission, the Coalition Government pushed forward with its plan to re-establish the ABCC.[59] Notwithstanding intense opposition, the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (BCIIP Act)[60] was ultimately passed in late 2016, albeit with some key amendments in order to secure cross-bench support in the Senate.

In addition to re-establishing the ABCC, the latest round of legislative reforms had the effect of:

a) broadening the scope of application of the BCIIP Act;
b) reinstating industry-specific prohibitions against 'unlawful industrial action'[61] and introducing new restrictions on 'unlawful picketing';[62]
c) increasing maximum penalties for prescribed contraventions, including unlawful industrial action;[63] and
d) facilitating the issuance of the *Code for the Tendering and Performance of Building Work 2016* (2016 Code).[64]

While the ABCC now has more regulatory firepower, the agency's discretion continues to be constrained in various ways. Administrative oversight of its compulsory examination powers has continued. Further, it has been directed to be more even-handed in its approach to enforcement. This is manifest in the revised objects of the BCIIP Act which provides that the ABCC's role is to promote an improved workplace relations framework to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants, without distinction, and for the benefit of the Australian economy as a whole.[65] More specifically, there is now a requirement that in performing his or her functions, the ABC Commissioner must ensure that:

> the policies and procedures adopted and resources allocated for protecting and enforcing rights and obligations … are to the greatest extent practicable having regard to industry conditions based on complaints received by the ABC Commissioner, *applied in a reasonable and proportionate manner* to each of the categories of building industry participants.[66]

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[56] Workplace Express, 'Trendified ABCC Has Lost Its Mojo: Lloyd', 3 April 2011.
[57] Workplace Express, 'FWBC Returns to "Core Business", Drops Wages and Sham Contracting Focus', 22 November 2013.
[58] JD Heydon, 'Royal Commission in to Trade Union Governance and Corruption: Final Report, Commonwealth of Australia, Canberra, 2015, 401.
[59] Earlier versions of this Bill had been introduced and defeated in federal parliament, see Building and Construction Industry (Improving Productivity) Bill 2013 (No 2) (Cth).
[60] See also *building and Construction Industry (Consequential and Transitional Provisions) Act 2016* (Cth).
[61] BCIIP Act s 46.
[62] BCIIP Act s 47.
[63] Maximum penalties have increased from $54,000 to $210,000 (body corporate including a union) and from $10,800 to $42,000 (individuals including union delegates and organisers).
[64] This furthered developments under the FWBI Act, which converted an administrative policy to a legislative instrument, namely the *Building Code 2013* (Cth). See Forsyth, above n 6.
[65] BCIIP Act s 3(1).
[66] BCIIP Act s 16(2) (emphasis added). See also BCIIP Act s 28(1)(c).

There is also a requirement that the ABCC enforce employer obligations in relation to wages and entitlements and not simply refer these matters to the FWO.[67]

Similar to the FWO, the ABCC's general approach to litigation is based on the same two-step test set out in the preceding section. Moreover, despite the very different policy settings, and the dominant litigation targets (unscrupulous employers as opposed to defiant unions), the factors considered by the ABCC in determining whether enforcement litigation is in the 'public interest' are strikingly similar to those identified in the FWO's Litigation Policy.

Notwithstanding the fact that both agencies are responsible for enforcing provisions across the full spectrum of the workplace relations framework, and despite apparent parallels between the formal enforcement policies of the FWO and the ABCC respectively, litigation outcomes are evidently different. In the financial year 2016-17, the ABCC finalised 28 matters before the courts – all of them against unions and an overwhelming proportion against the CFMEU.[68] While the ABCC has formally indicated that it intends to pursue wages and entitlements on behalf of building workers, it is not clear to what extent it has dedicated resources to detecting underpayments (beyond responding to direct complaints). In some ways, this underlines the way in which enforcement practices are influenced by much more than legislative frameworks and policy documents. Indeed, as Bennett has observed:

> The interrelationships between the creators, enforcers and subjects of law are far more complex and dynamic than orthodox legal scholarship assumes and the making of labour law involves far more than just the Parliament, courts, tribunals and pressure groups.[69]

Analysis

This section discusses how the wide statutory mandate of the FWO and the ABCC may help to boost perceptions of political neutrality, but compromise regulatory effectiveness. Second, the section considers how the 'public interest' in enforcement is conceived in the context of industrial disputes by the International Labour Organization (ILO), by Australian labour inspectorates and by courts. Finally, the efficacy of civil remedy litigation and regulatory alternatives to pecuniary penalty orders is explored.

Assignment of Mixed Functions to Labour Inspectorates

Article 3 of the ILO Labour Inspection Convention 1947 (No 81) provides that one of the functions of any labour inspection system is to 'secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours [and] wages'. While the agency may be entrusted with additional functions, these must not 'interfere with the effective discharge of their primary duties' or 'prejudice in any way the authority or impartiality which are necessary to inspectors in their relations with employers and workers'.

These issues are particularly complex for regulatory agencies – such as the FWO and ABCC – which have a broad legislative mandate, limited resources and mixed, potentially contradictory, functions.

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[67] BCIIP Act s 16(3).

[68] In 2016-2017, penalties against the CFMEU and its representatives accounted for 86 per cent of all penalties imposed in ABCC cases, ABCC, *Annual Report 2016-2017* (ABCC, Melbourne, 2017) vi.

[69] Bennett, above n 3, 247.

Indeed, there appears to be no other publicly-funded labour inspectorate, either in Australia or beyond, that has the same level of regulatory plurality.[70] On the one hand, being charged with responsibility to enforce the law on behalf of all relevant labour market participants has the benefit of minimising perceptions of partisanship. This is essential to building trust in the regulator and strengthening compliance motivations.[71] In this respect, it is arguable that adopting a universal standard to non-compliance with the FW Act is one way that the FWO has sought to strengthen their formal position of political neutrality. On the other hand, being assigned potentially conflicting functions, and applying an apparently uniform approach, creates some thorny regulatory dilemmas. Indeed, the former deputy director of the controversial IRB, reflect on some of these challenges in the late 1970s, where he observed:

> It is one thing to regulate and secure [minimum] conditions of employment. It is quite another thing, and it requires attention to different considerations and the exercise of judgments of a different kind, to induce parties in the industrial relations area to follow, against their apparent predilections, the ordained procedures for the conduct of those relationships and to abstain from engagement in conduct that defies those procedures. This is not to doubt or express any reservation whatsoever about the necessity for and the propriety of the regulation of industrial relations. It is to recognise that a ham-fisted, indiscriminate application of legal sanctions for the resolution of industrial conflict will almost certainly bring the industrial law, as well as the sanctions attaching to it, into even more bitter disrepute, and at the same time exacerbate the very conflict that they seek to deal with.[72]

Indeed, another critical dilemma raised by the assignment of mixed functions to regulatory agencies relates to the somewhat fragile relationship between the state and trade unions. Collaboration between regulators and unions is often essential to detecting employer non-compliance with time and wage laws.[73] However, these collaborations may be derailed by the agency bringing penalty litigation against these same unions for unlawful industrial activity.[74] Bennett has argued that 'attempts to impose principles and practices which place the agency at odds with those it attempts to regulate can be counterproductive'.[75] Indeed, the ABCC recently voiced concerns about an incident where one union, which had invited the ABC Commissioner to address their delegates about the Building Code, had been 'publicly denigrated by other unions for attempting to engage with the regulator about compliance with the law'.[76] While this behaviour may well be 'disappointing',[77] it is certainly not surprising that many unions operating in the building and construction sector have a deep mistrust of the ABCC after having been the subject of repeated and ongoing enforcement litigation. In these circumstances, a working collaboration between the regulator and unions – even if this is in the interests of underpaid workers – is highly doubtful, particularly in the building sector. The FWO has not escaped criticism in this respect. The current ACTU secretary, Sally McManus, recently observed

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[70] For discussion of the United States and United Kingdom positions, see respectively: CR Marzan and M Nikitis,'Danbury Hatters in Sweden: A US Perspective on the Available Remedies and Sanctions for Employers Who Suffer Unfair Labor Practices by Labor Unions' (2014) 30(3) *The International Journal of Comparative Labour Law and Industrial Relations* 339; S Cavalier and R Arthur, 'A Discussion of the Certification Officer Reforms' (2016) 45(3) *Industrial Law Journal* 363.

[71] T Tyler, *Why People Cooperate*, Princeton University Press, Princeton, 2011.

[72] Wood, above n 13, 39.

[73] J Fine and J Gordon, 'Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations' (2010) 38(4) *Politics and Society* 552.

[74] T Hardy, *Friend or Foe? The Regulatory Enrolment of Non-State Actors in the Enforcement of Minimum Employment Standards in Australia* (PhD Thesis, The University of Melbourne, 2014).

[75] Bennett, above n 3, 164.

[76] ABCC, above n 68, vii.

[77] Ibid.

that while the federal labour regulator's primary function was to recover wages on behalf of workers, the FWO had 'form suing unions for going about union business'.[78]

The Public Interest in Supervising and Sanctioning Unlawful Industrial Activity

As previously noted, when deciding whether to commence, or intervene in, enforcement proceedings both the FWO and the ABCC have regard to the 'public interest'. While the concept of the 'public interest' has been a foundational concept of the federal industrial relations system and a long-standing touchstone of the tribunal, it remains a slippery concept.[79] The High Court has suggested that, 'ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including public interests, and be very much a question of fact and degree'.[80] In the absence of any express legislative direction, regulatory agencies like the FWO and the ABCC must subjectively assign relative values to various interests.[81] In this regard, Benson, Griffin and Smith have argued that:

> The concept of the public interest essentially implies that the needs of community welfare transcend the partisan wishes of either or both the parties to an industrial dispute. However, whether or not there exists a clash between public and private interests depends not necessarily on the issue at stake but rather on the context in which the issue is being pursued and decided.[82]

Under the current regulatory framework, it seems that balancing conflicting values, and competing interests, is especially difficult in at least three circumstances. First, where the parties have amicably resolved the underlying dispute and reached a commercial settlement following unlawful conduct. Second, where private parties have already commenced legal action prior to, or in conjunction with, public enforcement litigation in response to union wrongdoing. Third, where the unlawful industrial action has been taken in response to contraventions committed by employing firms.

The status of the underlying dispute – and its influence on enforcement decisions – has been especially contentious in the context of the building regulator. As a result of statutory amendments pushed by the Greens in 2012, the FWBC was effectively prevented from initiating or continuing legal proceedings where the underlying industrial dispute had been resolved between the parties.[83] McCallum has previously argued, albeit in the context of the IRB, that state intervention in industrial disputes can create problems by disrupting 'the delicate employer/employee negotiations',[84] which may be taking place privately or before the federal tribunal. Indeed, the Deputy Director of the now defunct IRB noted at the time that:

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[78] Workplace Express, above n 35.

[79] R Naughton, '"Public Interest" in Australian Labour Law – Reshaping an Old Concept in the Enterprise Bargaining Era' (2014) 27(2) *Australian Journal of Labour Law* 112; Creighton, above n 1; J Isaac and RC McCallum, 'The Neutral and Public Interests in Resolving Disputes in Australia' (1992) 13(4) *Comparative Labour Law Journal* 380.

[80] *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 1 at [7].

[81] J Benson, G Griffin and G Smith, 'The Public Interest and the Industrial Relations Act 1988 (Cth(' (1992) 3(2) *Public Law Review* 113, 125.

[82] Ibid 118.

[83] FWBI Act ss 73, 73A (repealed).

[84] R McCallum, 'Secret Ballots and the Industrial Relations Bureau: Old Wine in New Bottles' in GW Ford, June Hearn and Russell Lansbury (eds), *Australian Labour Relations: Readings,* Macmillan, South Melbourne, 1980, 368.

> It is axiomatic that in pursuing its function of securing the observance of the Act, the Bureau must not only afford the Commission the maximum opportunity to exercise its dispute-settling powers, but also lend every encouragement to disputants, either to settle their own affairs or to avail themselves of their access to the Commission.[85]

How times have changed. In response to the 2012 amendments to the building regulation, the Coalition argued that regulators should not 'be stopped from taking proceedings to protect the national interest or society's interest just because the parties themselves have come to a commercial settlement'.[86] Goodwin has similarly argued that prohibiting a regulator from intervening in a dispute is 'unhelpful':

> [A]s a fundamental matter of principle, if a party to a dispute has breached the law, the mere fact that the parties to a dispute have reached an agreement to resolve the dispute should not prevent a regulator from pursuing that breach in the public interest.[87]

These restrictions have now been lifted as a result of the BCIIP Act. This means that the regulatory discretion of the ABCC, much like the FWO, is relatively unfettered in this respect. However, an absence of legislative guidance does not necessarily make the 'public interest' test any easier to apply in practice. For instance, in 2016, the FWO initiated litigation against the NUW for unlawful industrial action which took place at two Woolworths distribution centres in the preceding year. The FWO sought $800,000 in compensation on behalf of Woolworths, in addition to pecuniary penalties.[88] This litigation is somewhat remarkable for at least two reasons. First, the FWO has previously entered into a formal Memorandum of Understanding with the NUW. While this Memorandum of Understanding does not restrict the FWO's compliance powers, it does expressly state that the relationship would be:

> based on the principles of no surprises, constructive engagement, working collaboratively to create and maintain fair and productive workplaces and ensuring a level playing field for all workplace participants in the [named] sectors.[89]

The second contentious aspect of this litigation is that the underlying dispute between Woolworths and the union had already been resolved at the time the FWO commenced court proceedings. The FWO has stated that, in their view, the circumstances met the 'public interest' threshold because the industrial action occurred during the currency of an enterprise agreement, ran over a number of days, and took place in the face of a FWC order to cease the industrial action. Unsurprisingly, not everyone agrees with this assessment. The NUW national secretary, Tim Kennedy, has commented that it was concerning that the FWO was:

> using public money to intervene in an industrial case that was resolved and settled between the company and the union. Given the tight resources the Fair Work Ombudsman has to deal with widespread worker exploitation across Australia, we think their resources would be better spent defending workers from wage theft and unscrupulous bosses rather than tying workers' unions up in red tape and legal costs.[90]

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[85] Wood, above n 13, 41.

[86] Parliament of Australia, *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011,* Senate Standing Committee on Education, Employment and Workplace Relations (Parliament of Australia, Canberra, 2012) 34.

[87] Goodwin, above n 5, 103.

[88] Workplace Express, 'FWO Prosecuting Union for Alleged Wildcat Action Against Labour Hire', 23 June 2016.

[89] Memorandum of Understanding between Office of the FWO and NUW (14 November 2014).

[90] Workplace Express, 'Ombudsman Pursuing NUW Over $800,000 Damages for Woolies', 3 November 2017.

The tensions between public and private enforcement may be further illustrated by reference to concurrent legal action that ensued following wildcat strikes taken by the TWU and its members in March 2009. Soon after the stopwork action took place, Qantas Airways Limited (Qantas), initiated wide-ranging legal action against the union and eight senior union officials, for the disruption and loss that was caused. The FWO commenced separate but similar proceedings alleging that the same strikes contravened s 494 of the WR Act. The trial of the FWO's proceedings was held jointly with the Qantas proceedings. In an initial decision on liability, Moore J dismissed a number of Qantas' claims, but did find that the TWU and the named officials had contravened WR Act s 494. His Honour subsequently ordered the TWU to pay over $700,000 in compensation.[91] The union, along with a number of senior officials, was also ordered to pay penalties.[92]

While Qantas was partly successful, the outcome for the FWO was not so positive. Its claim was dismissed and it was ordered to pay the union's costs. In reaching this conclusion, the Federal Court acknowledged that it was reasonable for the FWO to bring separate enforcement proceedings, notwithstanding that the Qantas proceedings were already on foot, because of an apprehension that 'the Qantas proceedings might settle with the result that those centrally involved in the industrial action would, in effect, go unpunished'.[93] However, the judge further found that while a regulator could be expected to initiate proceedings, 'it was entirely unnecessary for the Ombudsman to have thereafter actively participated in the proceedings thereby substantially duplicating ... the prosecution of the case by Qantas'.[94] At the time, the lawyer representing the TWU noted that dismissal of the FWO's claim was 'significant and sends a message that there are adverse consequences for the Fair Work Ombudsman if he prosecutes a matter where an employer has already commenced proceedings on the same issues'.[95] Notwithstanding these criticisms, the FWO appears still to be willing to investigate matters and consider enforcement proceedings despite court orders being privately pursued and/or the matter being resolved on a commercial basis.[96]

Another issue at stake – but one that raises deeper questions about regulatory interventions in this space – is whether far reaching remedies and penalties should be imposed against unions where they are seeking collectively to defend the economic and social interests of their members.[97] Sally McManus has suggested that state coercive action cannot be justified under the existing legal framework and has stated: 'I believe in the rule of law where the law is fair, where the law's right but when it's unjust, I don't think there's a problem with breaking it'.[98]

While these statements provoked the ire of the Coalition Government,[99] and were publicly condemned by the Opposition Leader Bill Shorten,[100] McManus' statements raise a number of fundamental issues, including adherence to the rule of law and Australia's questionable compliance with its international obligation. In particular, jurisprudence from the ILO suggests that the legitimacy

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[91] *Qantas Airways Ltd v TWU* (2011) 211 IR 1.
[92] *Qantas Airways Ltd v TWU (No 2)* (2011) 211 IR 119.
[93] Ibid [211].
[94] Ibid [214].
[95] Workplace Express,'TWU to Pay Qantas $700,000-Plus in Compensation for Wildcat Strikes', 22 July 2011.
[96] See Workplace Express, 'FWO Puts MUA Under Microscipe Over Webb Dock Picket', 19 December 2017.
[97] T Novitz, 'The Internationally Recognised Right to Strike: A Past, Present, and Future Basis upon Which to Evaluate Remedies for Unlawful Collective Action?' (2014) 30(3) *The International Journal of Comparative Labour Law and Industrial Relations* 353.
[98] ABC, 'New ACTU Boss Says It's OK for Workers to Break "Unjust Law"', *7:30*, 15 March 2017.
[99] D Marin-Guzman, 'Malcolm Turnbull Says He Can't Work With New ACTU Boss Sally McManus', *Australian Financial Review*, 17 March 2017.
[100] Workplace Express, 'Labour Movement Leaders Clash on Rule of Law', 16 March 2017.

of any remedies for unlawful industrial action must be assessed by reference to whether such relief 'unduly inhibits the exercise of "the right to strike"'.[101] In assessing the appropriateness of the sanctions and remedies available in relation to unlawful collective action, the ILO Governing Body's Committee on Freedom of Association (CFA) has noted that the overriding principle is that 'all penalties in respect of illegitimate action linked to strikes should be proportionate to the offence or fault committed'.[102]

The approach of the FWO and the ABCC, as well as a growing body of case law, arguably runs counter to this principle. For example, in the civil penalty litigation against TWU referred to above, Moore J observed that:

> [T]he nature of the discretion to order the payment of a sum to remedy the effects of industrial action is not, in my opinion, exercisable by reference to general considerations of fairness. It is a power conferred for a specific purpose as part of a statutory scheme which made certain conduct unlawful. Whether this proscription of conduct is, in some broad sense, fair, desirable or appropriate is not a matter for me to assess. Also whether engaging in proscribed conduct might, in any given situation, be reasonable or justifiable on broad grounds concerning fairness or 'industrial justice' is again not a matter for me to assess. Once it is accepted that the purpose of the conferral of the power to make an order to remedy the effects of industrial action is to address the consequences of unlawful industrial action then the exercise of the discretion both to make an order and to determine the terms on which it is made, is limited.[103]

More recently, the Full Federal Court increased the penalties imposed against the CFMEU, and a number of its senior officials, after they unlawfully blocked construction work at the Perth International Airport. On appeal, Dowsett and Rares JJ noted that the blockade was partly in support of a lawful request that employees be paid outstanding wages due to them. Their Honours further acknowledged that 'trade unions can play a significant role in exposing and reforming inadequate or inappropriate terms and conditions of employees in not only a particular employer's workforce but in an industry'.[104] However, the judges ultimately concluded that the CFMEU's conduct in this case 'brings the trade union movement into disrepute and cannot be tolerated'.[105] Further, in fixing the penalty, the majority explicitly rejected the approach taken by the trial judge and held that the union's 'motivation for organising and participating in the blockade could not be a mitigating factor and should have been treated as irrelevant'.[106]

This finding is broadly in line with the recent High Court decision in *Esso Australia Pty Ltd v Australian Workers Union*[107] which confirmed that there is no 'right' to engage in protected industrial action – rather providing immunity from civil suit is a 'privilege' which is conditional on the union complying with the terms of the statutory scheme. This approach to collective action is not a new one. Indeed, Bennett observed that historically the Industrial Court had also refused to consider whether there was any justification for a strike and 'was only concerned with the fact of the breach'.[108] The courts' doctrinal approach to determining breach and assessing penalty has the effect of blocking out the

[101] Novitz, above n 97, 360-1.
[102] ILO CFA Digest at [668] as cited in Novitz, above n 97, 364.
[103] *Qantas Airways Ltd v TWU (No 2)* (2011) 211 IR 119 at [9].
[104] *ABCC v CFMEU* (2017) 249 FCR 458 at [98).
[105] Ibid [99].
[106] Ibid [74].
[107] [2017] HCA 54 at [53].
[108] Bennett, above n 3, 79.

broader social and economic context – which was once a key consideration for the federal tribunal in exercising its dispute resolution and arbitral functions.[109]

Efficacy of the Existing Enforcement Regime

As yet, there are no concrete empirical data as to the practical effects of enforcement proceedings initiated by government regulatory agencies against unions.[110] It is evident, however, that in the past 10 years, the CFMEU has been sanctioned by the courts on at least 150 occasions for breaches of industrial laws.[111] In this same period, total penalties imposed against the CFMEU and its representatives has reached almost $10 million. This pattern of behaviour has led the Full Federal Court to observe:

> The most significant point to emerge from the schedules of past cases is that the CFMEU is a recidivist when it comes to contravening industrial laws. No penalties that have been imposed in the past have appeared to reduce its willingness to breach the law. It continues to thumb its nose at the industrial laws, including the BCII. The Court should nevertheless not shy away from imposing stern sentences with a view to attempting to deter the CFMEU from engaging in, or encouraging others to engage in, further unlawful industrial action. Considerations of deterrence, both specific and general, undoubtedly loom large in fixing the appropriate penalties.[112]

The High Court in *Commonwealth v Fair Work Building Industry Inspectorate*[113] confirmed that a pecuniary penalty order is intended to put a price on future contraventions that is sufficiently high to deter repetition by the contravener and others who may be tempted to contravene the FW Act.[114] In the past 12 months, there has been a string of cases in which record penalties have been imposed by the court against the CFMEU.[115] At the same time, the judiciary has been increasingly vocal about the open defiance of powerful unions, such as the CFMEU and MUA, and the limitations of imposing pecuniary penalties in discouraging unlawful industrial activity. Recently, Flick J imposed the maximum penalty against the CFMEU and officials, a total fine of more than $2.4 million, on the basis that it 'was not possible to envisage worse union behaviour'.[116] However, the judge went on to observe that:

> The CFMEU's conduct exposes a cavalier disregard for the prior penalties imposed by this court and exposes the fact that such prior impositions of penalties have failed to act as a deterrent against further unlawful industrial action ... In the absence of legislative action, it may (regrettably) be expected that even penalties imposed at the maximum now permitted will not act as a deterrent.[117]

Members of the Coalition Government have argued that increased penalties for unlawful industrial action – introduced under the BCIIP Act – were necessary in order to address the union's 'blatant

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[109] Naughton, above n 79.
[110] This is complicated by the fact that measuring the effect of 'soft' regulatory tools – such as the Building Code – cannot easily be distinguished from the possible impact of court orders, B Creighton, 'Government Procurement as a Vehicle for Workplace Relations Reform: The Case of the National Code of Practice for the Construction Industry' (2012) 40(3) *Federal Law Review* 380.
[111] *ABCC v CFMEU* (2017) 249 FCR 458 at [83].
[112] *ABCC v CFMEU* [2017] FCAFC 113 at [159].
[113] (2015) 258 CLR 482.
[114] Ibid [55].
[115] Workplace Express 2017f.
[116] *ABCC v Parker (No 2)* (2017) 270 IR 165 at [32].
[117] Ibid [32]-[33].

disregard for court orders'.[118] But, as Flick J has identified, elevated penalties may not be sufficient to do the regulatory trick in addressing the recalcitrance of some unions.[119]

There are at least three separate measures aimed at strengthening the hand of regulators, and employers, in these circumstances. First, the ABCC has recently pursued a successful High Court appeal which challenged the CFMEU's common practice of indemnifying its officers with respect to pecuniary penalty orders: a practice which meant that the deterrent effect of penalties may be 'reduced, ultimately to a vanishing point'.[120] While a High Court majority[121] agreed with the Full Federal Court in concluding that a non-indemnification order was outside the parameters of the FW Act,[122] the plurality ultimately confirmed that the regulator is allowed to seek, and the courts are permitted to grant, a 'personal payment order' with respect to civil penalties imposed against individual officers or union members under FW Act s 546. Such an order would require the contravener to pay a pecuniary penalty personally. It would also effectively block any attempt to avoid, shift or reallocate the amount through indemnification or contribution by a co-contravener. In reaching this conclusion, their Honours observed:

> [I]f a penalty is devoid of sting or burden, it may not have much, if any specific or general deterrent effect, and if so it will be unlikely, or at least less likely, to achieve the specific and general effects that are the raison d'etre of its imposition.[123]

The judges did acknowledge, however, that enforcing a personal payment order may be difficult, including 'by exposing vexed questions of identifying the source of funds used for payment'.[124] The plurality further conceded that the prospect of court orders going unenforced 'is likely to detract from the prestige of the court and, ultimately, the efficacy of its processes'.[125] Ultimately, however, their Honours proceeded 'with a degree confidence that the ABCC will be jealous to protect the efficacy of any such orders and therefore astute to detect and institute contempt proceedings for their contravention'.[126] Only time will tell whether this confidence is well placed.

A second regulatory mechanism increasingly being used by the regulator is the 2016 Code. This Code essentially provides that, in order to be eligible to bid for Commonwealth-funded building work, Code-covered entities must comply with applicable laws, court orders and tribunal decisions, as well as a range of additional requirements prescribed by the Code itself.[127] Non-compliance with the Code may prompt a formal warning from the minister or an 'exclusion sanction' – a period during which the relevant entity cannot tender for Commonwealth-funded building work.[128] While the Code may have more regulatory bite than civil penalties in terms of promoting positive union behaviour, Creighton has argued that:

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[118] C Pyne, 'Building and Construction Industry (Improving Productivity) Bill 2013 Second Reading Speech', *Parliamentary Debates,* House of Representatives, 14 November 2013 265, 269.
[119] See also M White, 'Civil Penalties: No Deterrence in Industrial Litigation' (2017) 33(May) *Law Society Journal* 71.
[120] *CFMEU v ABCC* (2016) 247 FCR 339 at [59].
[121] *ABCC v CFMEU* (2018) 351 ALR 190 (Keane, Nettle and Gordon JJ; Kiefel CJ concurring; Gageler J dissenting).
[122] *CFMEU v ABCC* (2016) 247 FCR 339, Jessup J at [94]; Allsop CJ and North J agreeing.
[123] *ABCC v CFMEU* (2018) 351 ALR 190, Keane, Nettle and Gordon JJ at [116].
[124] Ibid, Keane, Nettle and Gordon JJ at [131]; see also Kiefel CJ at [47].
[125] Ibid, Keane, Nettle and Gordon JJ at [131].
[126] Ibid.
[127] For detailed discussion of the 2016 Code, see Forsyth, above n 6.
[128] 2016 Code s 18(1A). In 2016-2017, the ABCC issued its first exclusion sanction, see Workplace Express, 'Cash Imposes Sanction on Hutchinson, as CFMEU Refuses to Change Deal' 3 April 2017.

> [I]t is not at all clear that the 'end' of cultural and behavioural change justifies the 'means' in terms of failure adequately to respect the rule of law, and the significant levels of inconsistency with Australia's international obligations.[129]

Finally, and in addition to the range of mechanisms currently available, the Coalition Government has been seeking to introduce a range of potent sanctions under the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (Cth). Although this Bill was prompted by recommendations of the Heydon Royal Commission, it goes beyond introducing measures to prevent corruption and improve internal trade union governance. Rather, many provisions in this Bill are aimed at curbing union power and preventing union militancy. In particular, the Bill seeks to amend the statutory framework so as to allow the Registered Organisations Commissioner, as well as persons with 'sufficient interest', to apply to the Federal Court for an order cancelling (or suspending) the registration of a union on a range of grounds, including where there is repeat contraventions of workplace laws by the organisation or its members and 'the taking of obstructive unprotected industrial action by a substantial number of members'.[130] This Bill has been stalled before Parliament for some time and it seems unlikely that the amendments will pass in their current form, if at all.[131] However, controversy surrounding state supervision and sanctioning of unlawful union behaviour, and business concerns about the efficacy of the current enforcement regime, are unlikely to disappear, particularly now that the merger between the CFMEU, the MUA and the TCFUA has passed its first regulatory hurdle.[132]

Conclusion

Over 25 years ago, enforcement of federal industrial relations laws was described as a paradox.[133] Creighton argued that the applicable legislation appeared to be 'more than adequately endowed with enforcement provisions',[134] yet almost all of them were widely assumed to be 'of little or no relevance as a means of ensuring adherence to the norms of the system by trade unions'.[135] Since then, we have witnessed a dramatic change in the dominant enforcement response to unlawful industrial activity. While some employers continue to bring proceedings before the FWC, along with, or separate to, common law and statutory claims, many firms are now far more willing to also pursue civil penalties under the workplace relations regime.[136] More notable than this is the fact that federal regulatory bodies are now very active in this area.[137] Indeed, since the early 1990s, there has been a radical

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[129] Creighton, above n 110,. See further Forsyth, above n 6.

[130] Parliament of Australia, *Explanatory Memorandum, Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (Cth)* (Parliament of Australia, Canberra, 2017) i.

[131] Workplace Express, 'Super-Union to "Have a Say" in Country's Future: CFMMEU Secretary', 27 March 2018.

[132] *Application by CFMEU, MUA and the TCFUA* (FWC, Gostencnik, 6 March 2018). See also Workplace Express, 'Super-Union Challenge Likely to Head to Court if Appeal Denied', 15 March 2018..

[133] B Creighton, 'Enforcement in the Federal Industrial Relations System: An Australian Paradox' (1991) 4(3) *Australian Journal of Labour Law* 197

[134] Ibid 197.

[135] Ibid.

[136] See Workplace Express, 'Qube Bid for Damages from MUA in Court Next Year', 27 October 2017. For analysis of employer responses prior to 2000, see V Di Felice, 'Stopping or Preventing Industrial Action in Australia (2000) 24(2) *Melbourne University Law Review* 310.

[137] See eg B Creighton, 'Individualisation and the Protection of Worker Voice in Australia' in Alan Bogg and Tania Novitz, *Voices at Work: Continuity and Change in the Common Law World*, Oxford University Press, Oxford, 2014, 232.

reshuffling of state responsibilities, a sidelining of the tribunal and a reinvigoration of two government agencies, now known as the FWO and the ABCC.

Some may argue that the high profile now enjoyed by these agencies is but one manifestation of the growing public and political interest in compliance and enforcement. Others may perceive these bodies, along with the new Registered Organisations Commission, as evidence of the increasing hostility towards unions.[138] This chapter examined critical issues, many of which have been underexplored in the existing literature. For example, both the FWO and the ABCC are responsible for enforcing the full spectrum of legal rights and obligations, at least in theory. It was argued that saddling these agencies with mix of contradictory functions may enhance perceptions of political neutrality, but may also serve to compromise the agency's capacity to fulfil its 'core' function (as prescribed in international law), namely the promotion and protection of employee entitlements.

Charting the history and evolution of the government agencies also reveals a change in the way regulatory agencies are perceived by the public, policy-makers and Parliament. In the late 1970s, the IRB was much maligned for mixing regulatory functions and using coercive sanctions to crack down on unlawful union activity. Almost 40 years on, it seems that the notion of enforcing civil remedy provisions against both employers and unions in an even-handed manner is seen as an important facet of contemporary regulatory practice.

This chapter also considered how the concept of the 'public interest' has been interpreted by the respective regulatory agencies and constructed by the courts. Here, it was identified that the dominant approach in the domestic context does not necessarily accord with international jurisprudence in this respect. Finally, the chapter explored a number of leading cases, and key legislative developments, in assessing the current efficacy of the enforcement regime. While the FWO, and particularly the ABCC, have been very focused on union misdeeds for some time, it is increasingly clear that pursuit of civil penalties may not be achieving the desired policy objective in changing the dominant compliance culture. Instead, it may be having a counterproductive effect by entrenching regulatory resistance. Other regulatory tools may be more effective in prompting behavioural change but may raise additional regulatory dilemmas in terms of adherence to the rule of law and compliance with international legal obligations. Further research in this contested area is warranted. This preliminary analysis has revealed that, although enforcement of anti-strike laws may no longer amount to a paradox, it remains ever perplexing.

[138] See Forsyth, above n 48. In addition to the ROC, the ACCC has recently established a 'commercial construction unit', see Workplace Express, 'ACCC Construction Unit Preparing for Action', 20 February 2018.

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