Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia

*Tess Hardy and John Howe**

Historically, Australian trade unions played a significant role in the monitoring and enforcement of minimum employment standards, an important aspect of unions' regulatory function under the conciliation and arbitration system. In contrast, federal government enforcement was historically under-resourced, a situation that was sometimes justified on the ground that unions and the government inspectorate were 'partners in enforcement'. Under the Howard Coalition Government, legal support for trade unions' enforcement functions was significantly undermined, while Work Choices heralded an unprecedented emphasis on federal government enforcement. The Fair Work Act 2009 (Cth) maintains this emphasis on government enforcement, to be undertaken by the Fair Work Ombudsman, and restores some of the protections for trade unions lost during the Howard years. However, the new emphasis on good faith enterprise bargaining and the continuation of restrictions on right of entry suggest that unions may become the junior partner in the new enforcement regime, making a more tripartite and collaborative approach to enforcement less viable.

1 Introduction

More than eight and a half million Australians have their entitlements to pay, leave and working hours set by federally mandated labour standards.[1] Enforcement of these regulations is not only crucial to any system of legal rights and entitlements, but has profound implications for the working conditions enjoyed by employees and the living standards of the Australian community. Under a traditional, state-oriented 'command and control' model of regulation, inspection of compliance and enforcement action is carried out by state agencies.[2] This is the approach that has been taken to the setting and enforcement of minimum labour standards by many countries around the world.[3] In contrast, in Australia, trade unions have played a significant role in inspecting and enforcing federal labour rights and standards under legislation

* Centre for Employment and Labour Relations Law, University of Melbourne. We would like to thank Stephen Sempill for suggesting this article, Catherine Dow for research assistance, and the anonymous referee for their comments and suggestions.

1 Australian Bureau of Statistics (ABS), 'Employee Earnings, Benefits and Trade Union Membership Australia, August 2007', Cat No 6310.0, p 3.

2 For discussion of command and control regulation in the labour relations context, see J Howe, '"Deregulation" of Labour Relations in Australia: Towards a More "Centred" Command and Control Model' in C Arup et al, *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour*, The Federation Press, Sydney, 2006, p 147.

3 Government enforcement often operates in conjunction with a legal right for individual employees to bring enforcement proceedings, such as in the United States. For an overview

and industrial instruments, such as awards.[4] This regulatory function of trade unions was supported by the legal framework of the federal conciliation and arbitration system. It is one of the reasons why unions have historically been recognised as 'joint regulators' along with government agencies, the federal tribunal and employers under the conciliation and arbitration system.[5]

A key aspect of the regulatory function of unions was their role in monitoring and ensuring compliance with awards. In performing this role, unions were enforcing award standards for the benefit of both union members and non-members working across the relevant industry or occupation.[6] It seems that this trend may have led to a lack of resources being dedicated to federal government monitoring and enforcement — a position which was often justified on the grounds that trade unions and regulatory agencies were 'partners in enforcement'.[7] If unions and government were partners in this respect, it was an unequal partnership. Most commentators argue that unions conducted much of the enforcement of award standards up until the 1990s, and there is little evidence of formal collaboration between the two institutions.[8]

Under the Howard Government, legal support for trade unions and the federal tribunal was significantly undermined, especially after the Work Choices amendments to the Workplace Relations Act 1996 (Cth) (WR Act) came into force in 2006. At the same time, Work Choices heralded an unprecedented emphasis on government enforcement of federal labour law. Having increased the penalties for breach of the WR Act in 2004, under Work Choices there was a substantial boost in resources for the federal inspectorate,

---

of international systems of labour inspection and enforcement, see International Labour Organisation (ILO), Committee of Experts on the Application of Conventions and Recommendations, *General Surveys: Labour Inspection*, Geneva, 2006.

4 M Lee, 'Regulating Enforcement of Workers' Entitlements in Australia: the New Dimension of Individualisation in Australia' (2006) 17 *Labour and Industry* 41; M Goodwin and G Maconachie, 'Recouping Wage Underpayment: Increasingly Less Likely?' (2006) 41 *Aust Jnl of Social Issues* 328; M Goodwin, 'The Great Wage Robbery: Enforcement of Minimum Labour Standards in Australia', PhD Thesis, School of Industrial Relations and Organisational Behaviour, University of New South Wales, March 2003; L Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law*, Law Book Co, Sydney, 1994.

5 R Mitchell, 'Juridification and Labour Law: A Legal Response to the Flexibility Debate in Australia' (1998) 14 *IJCLLIR* 113; R McCallum, 'Trade Union Recognition and Australia's Neo-Liberal Voluntary Bargaining Laws' (2002) 57 *Relations Industrielles* 225. By 'federal tribunal', we mean the various manifestations of this tribunal over the course of the twentieth century, including the Court of Conciliation and Arbitration, the Conciliation and Arbitration Commission, and the Australian Industrial Relations Commission.

6 As a result of the High Court of Australia decisions in *Burwood Cinema Ltd v Australian Theatrical & Amusement Employees' Association* (1925) 35 CLR 528; 31 ALR 282; BC2500029 (*Burwood Cinema* case) and *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387; [1936] ALR 74; (1935) 9 ALJR 346; BC3600003, awards made in settlement of an industrial dispute notified by a trade union could regulate the employment conditions of non-unionists. Although prior to 1990 there were some obstacles to legal enforcement of award breaches affecting non-unionists, unions and the government inspectorate found ways to recover wage underpayments on their behalf. This is discussed in section 3 of this article.

7 Goodwin, above n 4, p 234, citing the Australian Government's *Report to the International Labour Organisation under Article 22 of the ILO Constitution*,1989–90.

8 See sections 3–6 of this article.

and eventually the creation of a new statutory agency, the Workplace Ombudsman (WO).[9] The Work Choices changes precipitated the implementation of a more conventional command and control regulatory model. While the enhancement of government enforcement was largely welcomed by commentators, concern was expressed that a shift to a more hierarchical, top-down model of regulation might come at the expense of the more pluralist regulatory approach represented by the conciliation and arbitration system.[10] Regulatory studies suggest that more effective and accountable systems of enforcement involve a combination of state and non-state actors and regulatory techniques, an argument which is discussed in more detail later in this article.[11]

With the passage of the Fair Work Act 2009 (Cth) (FW Act), the Rudd Government has committed to maintaining the resources of the state regulatory agency re-named the Fair Work Ombudsman (FWO); revived the role of a central state agency, now called Fair Work Australia (FWA); and restored some legal support for trade unions. The retention of federal government enforcement powers and resourcing, and the softening of the Work Choices restrictions on unions, presents an opportunity for unprecedented collaboration between government and unions in enforcement activities. For the first time in the history of federal regulation of labour relations, there is the potential for a true partnership between government and unions in enforcement of minimum employment standards. However, the FW Act does not reinstate many aspects of the conciliation and arbitration system that were conducive to the role of unions as joint regulators. For example, union right of entry to workplaces — a crucial legal support for union enforcement activity — remains relatively restricted. Furthermore, with the cooperation of the Australian Council of Trade Unions (ACTU), the FW Act has established a 'good faith' enterprise bargaining system with an emphasis on the role of unions as bargaining representatives for workers at enterprise level. While unions will continue to perform some regulatory functions under the new system, these may be more 'front-end' rather than 'back-end' with an increased focus on representation and negotiation and a reduced emphasis on monitoring and oversight beyond the enterprise bargaining system. This potential shift in the focus of enforcement from unions to the federal government, when combined with changes to standard setting and dispute resolution, may hasten the decline in the broader regulatory function of unions.

---

9 This new focus on federal enforcement also came at the expense of state government enforcement responsibilities. Although state government agencies had played a significant role in enforcement of both state awards and labour legislation over the previous 100 years, this article is primarily concerned with federal government responsibility for enforcement.

10 Howe, above n 2; S Cooney, J Howe and J Murray, 'Time and Money under Work Choices: Understanding the New Workplace Relations Act as a Scheme of Regulation' (2006) 29 *UNSWLJ* 215; J Murray, 'Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law' (2006) 35(4) *ILJ* 343; A Group of 150 Australian Labour Market and Legal Academics, *Research Evidence about the Effects of the 'Work Choices' Bill*, Submission to the Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005 (Cth).

11 B Hutter, 'The Role of Non-State Actors in Regulation', Discussion Paper No 37, Centre for Analysis of Risk and Regulation, London School of Economics, 2006, p 14.

This article examines the apparent shift in the balance between trade union and state enforcement in the federal labour relations system, and considers the implications of this shift both for workers' enjoyment of rights and entitlements under the FW Act and for the future health of the trade union movement. An expanded role for the state in enforcement of employment standards is a positive development for Australian workers, especially if unions maintain their historical role in enforcement of minimum employment standards. However, the article suggests that it is also possible that the continued focus on government enforcement may lead to a decline in union enforcement activity, representing a fundamental challenge for the legitimacy and role of unions in the future.

The next section of the article addresses the nature of enforcement as an element of an effective regulatory system, and gives consideration to the literature regarding the role of the state and non-state actors in enforcement. The third section then provides a brief historical background to the practice of labour law enforcement in the Australian context. The fourth, fifth and sixth sections consider the recasting of state and union roles in the setting and enforcement of federal labour standards by the WR Act, Work Choices and the FW Act. The seventh section is a discussion of the implications of these changes for enforcement of minimum standards and the role of trade unions. The final section draws some brief conclusions.

2 Enforcement of Minimum Employment Standards and the Roles of State and Non-State Actors

In this article, we adopt a definition of 'regulation' as:

> any process or set of processes by which norms are established, the behaviour of those subject to the norms monitored or fed back into the regime, and for which there are mechanisms for holding the behaviour of regulated actors within the acceptable limits of the regime (whether by enforcement action or by some other mechanism).[12]

The focus of this article is on the monitoring and enforcement aspects of federal government regulation designed to secure minimum standards of employment (wages, limitations on working hours, leave and so on) set by or under federal legislation for Australian workers.[13]

As noted earlier, most conventional analysis of regulatory systems starts from the assumption that regulation is state-centred and follows a 'command and control' model of mandatory legal standards enforced by a state agency

12 C Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] *Public Law* 329 at 331.

13 We do not consider the role of agencies in enforcing individual rights such as freedom of association, or in the enforcement of statutory protections against coercion or duress. Nor do we consider the rights of individual workers to enforce minimum employment standards. A recent analysis of individual enforcement can be found in C Arup and C Sutherland, 'The Recovery of Wages: Legal Services and Access to Justice' (2009) 35(1) *Mon ULR* 96. We also do not consider related enforcement systems, such as occupational health and safety regulation, in relation to which there is a rich literature: see, eg, L Bluff, N Gunningham and R Johnstone, *OHS Regulation for a Changing World of Work*, The Federation Press, Sydney, 2004.

with the capacity to seek or impose penalties for non-compliance. This is the traditional model of labour regulation followed by many countries, and is reflected in ILO Convention No 81 on Labour Inspection, adopted in 1947. For example, Art 4 of that Convention prescribes that 'labour inspection shall be placed under the supervision and control of a central authority'. Nevertheless, the importance of non-state actors in the regulatory process is recognised in Art 5, which requires the competent authority to make arrangements for promoting effective cooperation between inspection services and 'private institutions engaged in similar activities', as well as 'collaboration between officials of the labour inspectorate and employers and workers or their organisations'.

The existence of ILO Convention No 81 reflects the reality that many employers will fail to comply with minimum standards regulation if the financial benefits gained by not complying with these standards — for example, paying less than the minimum wage — outweigh the potential costs (risk of detection or complaint and the amount of penalty if prosecuted).[14] Further, while individual workers in Australia do have the right to bring proceedings against employers for non-compliance with employment standards, it is not sufficient to rely on individual workers to enforce their own rights and entitlements in the absence of active enforcement by the state and trade unions or other representative bodies.[15] First, many workers will not have knowledge of their entitlements. Second, even where workers have such knowledge and are aware of their employer's lack of compliance, they will fail to bring this to the attention of relevant agencies for fear of employer retribution and victimisation.[16] Thus, ILO Convention No 81 and supporting documentation, as well as the academic literature, emphasise the importance of monitoring and inspection rights and practices by both state agencies and non-state agencies.[17]

Enforcement approach and strategy

There is a great deal of scholarly literature devoted to the analysis of state-centred regulatory models and how they can be rendered most effective. This literature identifies that there are a number of approaches and techniques that might be employed in the carrying out of enforcement activities. While the process of detection of non-compliance through monitoring and inspection will be a key element of any enforcement system, much of the literature focuses on the approach taken by regulators once non-compliance is detected and the effectiveness of these approaches in bringing about greater levels of compliance.

Traditionally, approaches to regulatory enforcement have been divided between the deterrence or punishment model, on the one hand, and the

14 See, eg, A M Polinsky and S Shavell, 'The Economic Theory of Public Enforcement of Law' (2000) 38(1) *Jnl of Economic Literature* 45.

15 Arup and Sutherland, above n 13; Lee, above n 4.

16 M Goodwin and G Maconachie, 'Victimisation, Inspection and Workers' Entitlements: Lessons Not Learnt?', paper presented at the Asia-Pacific Economic and Business History Conference, Melbourne, 13–15 February 2008.

17 See, eg, ILO, above n 3; C Estlund, 'Rebuilding the Law of the Workplace in the Era of Self-Regulation' (2005) 105 *Columbia L Rev* 319.

compliance or accommodative model, on the other. The compliance approach is, however, comprised of two additional sub-branches: persuasive compliance and insistent compliance. While both these sub-strategies have the same objective of securing compliance without resorting to retribution, they work in different ways towards this goal. The persuasive compliance model is premised on the assumption that compliance is an 'open-ended and long-term venture'[18] and therefore emphasises the use of education and persuasion. In comparison, those who adopt the insistent strategy are 'less benevolent and less flexible'[19] in their approach. Rather than using patient persuasion, there are clearly defined limits to their tolerance: if the offender does not 'play ball', increased pressure will be applied by way of more formal legal sanctions.[20] More recent studies have suggested, however, that, consistent with the concept of 'responsive regulation' developed by Ayres and Braithwaite, 'the most credible and optimal enforcement strategy is achieved by a judicious mix of deterrence and persuasive approaches being applied in a regulatory enforcement pyramid'.[21] The enforcement pyramid works on the basis that '[t]he more the regulated firm refuses to comply, the greater the sanction that should be adopted'.[22] Enforcement activity should commence and occur most frequently at the foundation of the pyramid, which provides for less interventionist techniques, including education, advice and persuasion. If compliance is not achieved, the regulator escalates up the pyramid where more formal enforcement mechanisms are available, such as the issuing of official warnings or infringement notices. At the apex of the pyramid sits the most punitive sanctions, such as penalties and prosecution.

In the Australian system of labour law, the most obvious sanction is the ability of the enforcement agency (and others) to commence court proceedings for recovery of underpayments and penalties against non-compliant employers. However, there are a range of enforcement approaches and sanctions which can be employed within labour relations systems. Indeed, while the availability of penal sanctions is critical in ensuring the effectiveness of the less intrusive techniques, a key feature of the enforcement pyramid is that regulators should only use the minimal sanction necessary to secure compliance. Precisely what sanctions are contained in the enforcement pyramid varies with the area being regulated and the stakeholder(s) involved. However, the key requirement for enforcers is that there is a 'range of credible sanctions that enable them to match the sanction to the form of non-compliance'.[23]

---

18 B Hutter, 'Variations in Regulatory Enforcement Styles' (1989) 11(2) *Law & Policy* 153 at 155–6.

19 Ibid.

20 Ibid.

21 E Bluff and R Johnstone, 'Infringement Notices: Stimulus for Prevention or Trivialising Offences?' (2003) 19(4) *Jnl of Occup Health Safety* 337 at 338. See also I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York, 1992; R Baldwin and J Black, 'Really Responsive Regulation' (2008) 71 *Modern L Rev* 59.

22 J Black, 'Managing Discretion', paper presented at Penalties: Policy, Principles and Practice in Government Regulation, Australian Law Reform Commission Conference, Sydney, 8 June 2001.

23 Ibid, p 18.

Role of non-state actors

In addition to recognising the importance of the regulatory pyramid, the regulatory studies literature and ILO Convention No 81 also recognise the important role of both state and non-state actors in securing compliance with minimum standards. The concept of 'responsive regulation' is designed not only to allow regulation to respond to these factors and the environment in which it operates, but also provide for more meaningful participation of interested stakeholders, such as the state, business, and workers' representatives.[24] This collaborative, tripartite approach is perceived as enhancing the effectiveness and legitimacy of the regulation being enforced, and achieving an outcome which is largely self-regulating and tailored to the circumstances of the particular situation. This is so even where a regulatory system is focused on individual rights, as 'social efficiency is enhanced where individually based rights are exercised via an agent operating in the collective interest'.[25]

Further, accountability is enhanced where a system relies on multiple actors to secure compliance, thus avoiding a number of problems with state enforcement. These problems include the potential for 'regulatory capture' of state agencies by industry, and insufficient resourcing of state agencies leaving gaps in supervision of a regulated sphere or community.[26] In such situations, the presence of non-state actors monitoring for compliance with minimum standards can increase the chances of detection of non-compliance. Moreover, Bennett has noted that in the labour standards context, the presence of unions (and other 'well organised pressure groups' such as employers) can often shape the state enforcement agency's operations. In this respect, Bennett has argued that, in the past, 'an enforcement agency without unions (or strong unions) is unlikely to take significant action against employers who deprive workers of their entitlements'.[27]

It is also important to note that non-state actors might also employ the regulatory pyramid described earlier, albeit with a number of different sanctions. The apex of a union's regulatory pyramid might be similar to that of a state agency's, in that it might have access to formal sanctions through the capacity to threaten court proceedings. A union might also be able to employ alternative and less formal approaches, such as by negotiating directly with employers at the workplace, making use of administrative tribunals and other dispute resolution bodies, or by employing economic sanctions, including the taking of industrial action.[28]

---

24 Ayres and Braithwaite, above n 21, especially Ch 3. For consideration in the context of labour regulation, see Estlund, above n 17, at 323.

25 D Weil, 'Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets' in R Freeman, J Hersch and L Mischel (Eds), *Emerging Labor Market Institutions for the 21st Century*, University of Chicago Press, Chicago, 2005, p 23.

26 Estlund, above n 17, at 357–66; D Weil and C Mallo, 'Regulating Labour Standards via Supply Chains: Combining Public/Private Interventions to Improve Workplace Compliance' (2007) 45(4) *BJIR* 791.

27 Bennett, above n 4, p 237.

28 For a more sophisticated conception of the different regulatory approaches available to state and non-state actors, see Arup and Sutherland, above n 13.

While there has been state enforcement of Australian labour law at federal level since the 1930s, trade unions played an instrumental role prior to this period and have subsequently continued to carry out — particularly in unionised sectors — considerable enforcement activity as part of a wider, often unrecognised, regulatory role.[29] Ewing identifies the regulatory function of unions among a number of distinct trade union functions, ranging from the 'service' function and 'workplace representation' functions to their governmental and public administration functions.[30] Ewing defined the regulatory function of unions as acknowledging 'that trade unions are involved in a process of rule-making that extends beyond their members or the immediate colleagues of their members'.[31] This could be distinguished from the more limited service function and workplace representation functions, where unions provide services and set rates of pay and other conditions only for union members at a particular enterprise. When performing regulatory functions, rates of pay may also be set for non-union members and also for enterprises where the unions may not be recognised or have any right to representation.

It follows that when unions act to enforce rules set beyond membership and enterprise, they are further engaging in a regulatory function. Bennett has noted that the enforcement role played by unions is unique in the sense that it acts as an intermediary between the 'classic role of the individual and the State enforcement agency'.[32] This stands in contrast to the prevalent enforcement model where legal regulation is enforced by a specialist arm of the state, such as the police or tax office. Unions have been recognised as very effective non-state 'watchdogs' because:

> they exist both inside and outside the workplace: unions supply regulatory eyes and impulses from the workers directly affected: yet they have greater expertise, independence from the employer, and insulation from reprisals than any group of employees alone could have.[33]

The regulatory function of unions — including the enforcement role — is not only important to the effectiveness of a system of labour regulation, it is crucial to trade union legitimacy, industrial effectiveness and longevity. Ewing observes that '[t]he regulatory function is perhaps the most important function of trade unions, this being the most visible manifestation of the trade union role in promoting fairness and justice not only at work but in the economy as

29 The lack of recognition of the regulatory function of unions in the academic literature may stem from the conventional economic view of trade unions 'as operating for the benefit of their members and themselves as organisations but to the detriment of society as a whole'. This perspective overlooks the positive role that unions can play in establishing and enforcing standards which benefit the wider community: P Gahan, 'Trade Unions as Regulators: Theoretical and Empirical Perspectives' in Arup et al, above n 2, p 261 at pp 266–7, quoting R Freeman and J Medoff, *What do Unions Do?*, Basic Books, New York, 1984.

30 K D Ewing, 'The Function of Trade Unions' (2005) 34 *ILJ* 1.

31 Ibid, at 4.

32 Bennett, above n 4, p 136.

33 Estlund, above n 17, at 364. See also Goodwin and Maconachie, above n 16.

a whole'.[34] In this sense it is likely to be an important factor in trade union legitimacy in the eyes of the general public, and therefore in the attraction of new members to unions.[35]

In the Australian context, unions have performed important regulatory functions as a result of the central role they were afforded under the conciliation and arbitration system. One of the key aspects of the regulatory function of unions was their role in monitoring and enforcing award conditions. This historical role will be explored in greater detail in the next four sections of the article, as we compare the legal and institutional support provided to unions and the state in relation to enforcement in a number of respects. We also question whether the new regulatory system established by the FW Act will support the involvement of trade unions as a so-called 'partner' engaged in monitoring and enforcing minimum employment standards.

3 Federal Labour Law Enforcement under the Conciliation and Arbitration System

Although regulation of workplace relations in Australia has virtually always provided for some form of remedial action for failure to comply with minimum labour standards, for the first three decades of the conciliation and arbitration system, unions were the only bodies capable of effecting enforcement.[36] The expansive role played by unions in the pre-Work Choices period was strongly connected with their right to institutionally establish wages and conditions of employment through awards. The nature of conciliation and arbitration meant that unions had an inherent and legitimate interest in ensuring awards were enforced, at least in respect of union members.[37]

This did not, however, prevent unions from calling for government inspectors to be appointed in order to reduce their own enforcement burden. This also perhaps evidences the willingness of unions to work with a government enforcement agency.[38] Goodwin notes that employer associations were also pressing for an inspectorate, but for different reasons. Many employers supported enforcement in order to prevent rogue employers from competing with 'good' employers on the basis of labour costs. However, they preferred a government inspectorate to fill the enforcement role historically played by unions, as removing union enforcement rights would also undermine union power.[39]

The federal government resisted the employers' calls for substitution of union enforcement by government enforcement, instead deciding to establish a government inspectorate while maintaining union enforcement powers.[40]

---

34 Ewing, above n 30, at 13.
35 See generally, G Chaison and B Bigelow, *Unions and Legitimacy*, Cornell University Press, Ithaca NY, 2002.
36 Goodwin, above n 4, p 66.
37 Ibid, p 164.
38 Bennett, above n 4, p 146, citing Arbitration Inspectorate, *Annual Report 1972*, p 9.
39 Goodwin, above n 4, pp 171–2.
40 Ibid, pp 175–6.

The federal legislation was amended in 1928 to allow for the appointment of government inspectors, although the first inspector was not appointed until 1934. In the decades that followed, the fortunes of the federal inspectorate waxed and waned.[41] In 1952, after unsuccessfully attempting to move the inspectorate out of the federal sphere, the Menzies Government transferred what was by then a loose group of appointed inspectors into a dedicated Arbitration Inspectorate. In the early 1970s, attempts by the Whitlam Labor Government to increase the effectiveness of the Inspectorate were only partially successful. The Inspectorate then survived the Fraser Coalition Government's attempt to shift the agency's focus from non-complying employers to the control of rogue unions through the controversial establishment of the Industrial Relations Bureau (IRB). Under the Hawke and Keating Labor Governments, the Arbitration Inspectorate was restored, the IRB abolished and an insistence compliance approach adopted, although in 1991, the Inspectorate was brought within the Awards Management Branch of the Department of Industrial Relations and routine inspections were replaced by a more complaints-based strategy.[42] Consistently over this period, despite several changes in government and some political fine-tuning, the federal inspection agency remained relatively small, significantly under-resourced and therefore largely ineffectual.

Although there is limited empirical research concerning the extent of trade union enforcement activity and strategy in the twentieth century, it is generally assumed that unions filled the void left by the inadequacy of federal government enforcement.[43] As noted earlier, over time, the extent of union enforcement activity was itself a factor in the resourcing of the federal agency, as well as in shaping its inspection practices.[44]

Legal support for trade union monitoring and enforcement was provided by the system through a number of mechanisms. With respect to monitoring and the detection of non-compliance, union right of entry to workplaces in order to inspect relevant documentation and hold discussions with employees is a legal support identified as being crucial to the enforcement function of unions.[45] Prior to 1973, although there was no broadly applicable right of entry under federal industrial legislation, most federally-registered unions enjoyed broad rights to enter the workplaces of employers arising from the terms of awards.[46] This changed when amendments were made to the Conciliation and Arbitration Act 1904 (Cth) (C&A Act) to give all such unions a statutory entitlement to entry where there was no relevant award clause

41 A more detailed discussion of the historical evolution of the federal inspectorate can be found in Goodwin, above n 4. See also Bennett, above n 4.

42 Goodwin, above n 4, p 214.

43 See, eg, Lee, above n 4; Goodwin, above n 4, pp 163–4; Bennett, above n 4, p 136. Goodwin and Maconachie note that the inspection powers and activity of unions became more important after the federal inspectorate abandoned routine inspections in 1991: above n 16.

44 For example, the Hawke Government relied upon the capacity of unions to monitor and enforce labour standards to justify its failure to increase the resources of the federal agency: Goodwin, above n 4, p 234. In relation to the influence of trade union enforcement on federal agency inspection practices, see Goodwin and Maconachie, above n 4, at 339.

45 Lee above n 4, at 48; Goodwin, above n 4; Bennett, above n 4.

46 W Ford, 'Being There: Changing Union Rights of Entry Under Federal Industrial Law' (2000) 13 *AJLL* 1 at 2.

binding the employer.[47] Although this statutory right of entry was somewhat limited in scope, it made intentional denial of the right by employers a criminal offence. Moreover, the amendments did not prevent the federal tribunal from inserting right of entry clauses in awards, and unions could still negotiate more favourable arrangements.[48] Ultimately, this meant that the union right of entry arrangements existing before 1996 made inspection for compliance purposes relatively straightforward where employers were resistant to union enquiries.[49]

Unions were also given legal capacity to enforce minimum standards against non-complying employers. Unions had standing to seek recovery of wages and penalties for breaches of awards in the courts.[50] Indeed, the inclusion of this provision was both a key ground of one of the early constitutional challenges to the C&A Act, decided in the *Jumbunna* case,[51] as well as a factor in the High Court's reasoning in that case that parliament had intended unions to be key participants in the conciliation and arbitration system. The use of court proceedings against employers has traditionally been a less favoured but still significant aspect of trade union enforcement.[52] There is evidence to suggest that the government inspectorate has tended to be more active than unions in initiating formal enforcement proceedings, with unions concentrating their efforts on strategic use of litigation to address more complex or challenging issues.[53] Unions have even been willing to bring enforcement proceedings on behalf of non-union members, although the frequency of such actions is unclear.[54] It also appears to be the case that some unions have been more willing to use litigation than others.[55]

However, Lee has noted that the majority of union enforcement activity was informal in the sense that there was no court action taken. At one level, having a representative organisation present at a workplace 'is likely to help prevent breaches and to resolve disputes about compliance without recourse to legal recovery actions'.[56] Assuming that this presence was not enough to secure

47 See C&A Act s 42A.

48 *Meneling Station Pty Ltd v Australasian Meat Industry Employees Union* (1987) 18 FCR 51; 77 ALR 57; 22 IR 149.

49 See further, C Fenwick and J Howe, 'Union Security After Work Choices' in A Forsyth and A Stewart (Eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, The Federation Press, Sydney, 2009; Ford, above n 46.

50 See s 44 of the C&A Act.

51 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309; 14 ALR 701; [1908] HCA 95; BC0800020.

52 See, eg, Lee, above n 4.

53 W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials*, 2nd ed, Law Book Co, Sydney, 1993, p 817.

54 Non-union members did not have standing to seek remedies for breach of awards under the federal legislation until the Industrial Relations Act 1988 (Cth) was amended in 1990: see R McCallum, 'The Imperfect Safety Net: The Enforcement of Federal Awards and Agreements' in R McCallum, G McCarry and P Ronfeldt (Eds), *Employment Security*, The Federation Press, Sydney, 1995, p 201. Nevertheless, unions (and inspectors) were able to have the courts manipulate payment of penalties so that non-union members could recover wage underpayments: Goodwin, above n 4, p 186.

55 For example, the secondary literature on union enforcement cites various cases brought by the Finance Sector Union and its predecessors: see Creighton, Ford and Mitchell, above n 53, p 817; Lee, above n 4.

56 Lee, above n 4, at 47.

compliance, there are a number of ways in which unions might engage in enforcement of minimum employment standards without resorting to court proceedings. One of the key functions of trade unions is to provide a counter-balance to employer market power by fostering collective action among employees. Thus, trade unions and their members frequently employ negotiation and the withdrawal of labour (industrial action) to exert market pressure on employers. Although the taking of industrial action was technically prohibited under federal legislation for much of the twentieth century, the law was never properly enforced.[57] Many unions were therefore able to make frequent use of industrial action to place pressure on employers over a number of issues, including compliance.[58]

Another relatively informal enforcement mechanism employed by unions derived from the conciliation and arbitration system, and involved the notification of a dispute to the federal tribunal about the application of an award or agreement. Prior to the introduction of tighter legal controls over industrial action, this may have occurred during or after a strike or other work ban relating to the same issues, when the tribunal frequently dealt with more or less spontaneous disputes without regard for technical jurisdictional considerations.[59] This use of the tribunal's dispute resolution powers was a relatively inexpensive and speedy avenue to seek leverage against non-complying employers.[60]

The difficulty in finding evidence of the extent of informal union enforcement activity is exacerbated by Lee's conclusion that '[o]n the whole, unions do not publish details of their activities to recoup payment and in most cases do not even keep records of the total amount recovered for their members'.[61] It is nevertheless likely that unions carried out much of the inspection and monitoring of employer compliance, albeit largely in response to individual employee complaints, in the first 90 years of the Australian labour relations system. The suggestion that much of trade union enforcement activity has been informal in character suggests that unions have followed a form of enforcement pyramid in their compliance practices, with preference given to negotiation, market pressure and administrative mediation before the use of legal proceedings as a last resort. However, it should be noted that there is a need for further empirical research to provide evidence as to the actual

57 B Creighton, 'Enforcement in the Federal Industrial Relations System: An Australian Paradox' (1991) 4 *AJLL* 197.

58 For a discussion of the historical use of industrial action as a compliance tool, see Gahan, above n 29, p 275. The use of market pressure as an enforcement mechanism is also discussed in Arup and Sutherland, above n 13. Although the statistics collected on the reasons for industrial disputes in Australia do not identify 'compliance' as a possible reason behind strikes, this data does suggest that a large proportion of industrial action is taken over issues relating to working conditions (including pay): B Harley, 'Managing Industrial Conflict' in J Isaac and S Macintyre (Eds), *The New Province for Law and Order: 100 Years of Australian Conciliation and Arbitration*, Cambridge University Press, Cambridge, 2004, p 316.

59 B Creighton and A Stewart, *Labour Law*, 4th ed, The Federation Press, Sydney, 2005, pp 154–5.

60 For a discussion of the reference of compliance matters to industrial tribunals as a possible enforcement mechanism, see Arup and Sutherland, above n 13.

61 Lee, above n 4, at 47.

enforcement practices of trade unions in Australia.

In conclusion, it appears that although there was a dual system of award enforcement in the federal system after the 1930s, to describe the relationship between the federal inspectorate and the unions in this period as a 'partnership' would seem to overstate the extent of the collaboration between the institutions. Arguably, at least until the 1970s, unions and the inspectorate operated largely on parallel tracks, as the agency tended to confine its activities to non-unionised industries, leaving unions to fund enforcement in other sectors.[62] While the Whitlam Government attempted to promote greater cooperation in enforcement between the inspectorate and unions,[63] this was undone by the establishment of the IRB by the Fraser Government. Bennett has observed that:

> The IRB recognised that its operations and functions required it to establish close relationships with employers and unions and their respective peak organisations and these relationships needed to be characterised by 'mutual respect and recognition of each party's expertise and function in the overall industrial relations system'. The legislation passed by the Fraser government, however, forced it into a confrontationalist role with those upon whom it relied for cooperation . . .[64]

The establishment of the IRB is an interesting example of how the 'partners in enforcement' concept was explicitly recognised by government, but then undermined in practice. This suggests that for unions and agencies to work together as collaborative partners, the legislative framework and government policy must be conducive to such a relationship.[65]

Since the early 1990s, unions' capacity to carry out monitoring and enforcement of labour standards has declined. Goodwin and Maconachie argue that three key factors have combined to cause this change: the shift in the Australian labour relations system from conciliation and arbitration and award-making to enterprise bargaining; a continuing decline in union membership; and restrictions on union right of entry.[66] A number of other challenges to enforcement by both unions and the federal government emerged during this period, including a growth in non-standard employment, and shifts in business size and structure such as a growth in outsourcing arrangements and an increase in smaller business units.[67] While these developments are significant in terms of the capacity of unions and enforcement agencies to detect non-compliance, we will confine our comments to the factors identified by Goodwin and Maconachie, as well as other changes in the federal labour law system which have affected union and government enforcement capacity. We will group our discussion of recent changes into three categories: the impact of systemic change on enforcement;

---

62 Goodwin, above n 4, p 195. See also Creighton, Ford and Mitchell, above n 53, p 817.

63 Achieving greater cooperation between the inspectorate and trade unions in the enforcement of awards was one of the key policy objectives which the Whitlam Labor Government took into office: Goodwin, above n 4, p 196.

64 Bennett, above n 4, p 154, quoting IRB, *Annual Report 1978-79*, pp 20–1.

65 In our view, this approach is the opposite of that taken by the Howard Government in establishing the Australian Building and Construction Commissioner (ABCC) in 2005.

66 Goodwin and Maconachie, above n 4, at 339.

67 See, eg, Bennett, above n 4, Chs 5 and 6; I Campbell, 'Casual Employment, Labour Regulation, and Australian Unions' (1996) 38 *JIR* 571.

changes in legal support for inspection by trade unions and the government agency; and changes to both legal standing and the sanctions available to unions and the government agency.

4 Systemic Change from the Early 1990s and Implications for Enforcement

It is widely recognised that union goals and behaviour are likely to be shaped by economic, political and institutional context.[68] If both conservative and Labor governments were largely ambivalent concerning the state role in enforcement for most of the last century — and at the very least tolerant of the ongoing union role — this changed with the election of the Howard Government in 1996. This period was shaped by political antagonism towards both unions and the federal tribunal, with the intention and result of undermining the role of unions.

Of particular significance to the traditional regulatory role of unions, the role of awards was reduced through the promotion of enterprise bargaining — especially the affording of priority to certified agreements and Australian Workplace Agreements (AWAs) over awards. The importance of awards and, accordingly, unions, was further diminished by the restrictions placed on award content and the corresponding limitations on the arbitration powers of the federal tribunal. The emphasis on enterprise level bargaining threatened to bring about a change to the traditional role of unions in the Australian system, from representation of sectoral or group interests (therefore consistent with Ewing's definition of the regulatory function of unions), to a model of union representation in which unions were restricted to acting as bargaining agents of their members at a particular enterprise (a narrower, representative function).[69] Since its introduction in the early 1990s by the Keating Labor Government, formalised enterprise bargaining had also resulted in a sharp increase in the number of instruments setting minimum standards of employment, creating a further enforcement challenge for both unions and the inspectorate.[70]

The restrictions placed on the federal tribunal in 1996 reduced the capacity of trade unions to utilise the tribunal as a more informal mechanism of enforcement, as the WR Act limited the tribunal's powers of conciliation and arbitration to resolve disputes to those matters that could be covered by awards.[71] While some unions made use of dispute resolution clauses in certified agreements as an alternative way of accessing the tribunal, this was limited in scope to disputes over matters arising under the terms of these

68 Gahan, above n 29.

69 See A Frazer, 'Trade Unions under Compulsory Arbitration and Enterprise Bargaining: a Historical Perspective' in P Ronfeldt and R McCallum (Eds), *Enterprise Bargaining, Trade Unions and the Law*, The Federation Press, Sydney, 1995, p 52.

70 Goodwin and Maconachie, above n 4, at 332.

71 A Forsyth, 'Arbitration Extinguished: The Impact of the Work Choices Legislation on the Australian Industrial Relations Commission' (2006) 32(1) *ABL* 27; J Riley, 'From Industrial Arbitration to Workplace Mediation: Changing Approaches to Dispute Resolution' in Forsyth and Stewart, above n 49, p 186.

enterprise-level agreements.[72] This effectively shrank the range of sanctions available in the unions' enforcement pyramid, thereby further undermining their effectiveness and legitimacy as regulators.

After gaining control of the Senate at the 2004 election, the Coalition Government moved to institute more radical workplace relations reforms, with the effect of further undercutting the regulatory function of unions and the federal tribunal. First, awards were relegated to a residual role with greater constraints placed on award content. Second, enterprise bargaining and especially AWAs were vigorously promoted, and for virtually the first time in federal workplace relations, minimum terms and conditions were legislatively entrenched as individual entitlements through the Australian Fair Pay and Conditions Standard (AFPCS).[73] While the introduction of the 'fairness test' in May 2007 partly revitalised the role of awards, their overall importance in the regulatory system was undeniably diminished. So too was the federal tribunal, which no longer had a role in updating awards or responding to dispute notifications by the industrial parties (except where it was given jurisdiction by dispute resolution clauses in awards and collective agreements).[74] A final indicator of the shift in the nature of the Australian system of regulation was the fact that penalties attached 'to almost every facet of workplace relations dealt with by the [WR Act]'.[75] Combined, these changes had a flow-on effect in respect of enforcement practices, which (as discussed in more detail below) reinforced the 'command and control' nature of the new industrial relations system.

Even as union regulatory activity was being constrained under the Howard Government, there was a propensity to increase the number of state agencies with responsibility for different aspects of the labour relations system. From 1996 onwards, the traditional enforcement model was gradually reconstructed with the Awards Management Branch being replaced by the Office of Workplace Services (OWS). The government also established two more separate but related agencies: the Office of the Employment Advocate (OEA), and the Building Industry Interim Taskforce, which was subsequently replaced by the Australian Building and Construction Commissioner (ABCC). While the OWS assumed the role of enforcement of minimum standards set out in awards, agreements and legislation, the OEA and the ABCC were responsible for enforcing a broader range of federal rights and responsibilities ranging from freedom of association to compliance with controls over industrial action, with the ABCC focused only on the building industry. These institutional changes were initially targeted at the enforcement of the WR Act against trade unions, and the achievement of the Howard Government's broader political agenda to promote AWAs and other forms of employer 'flexibility', while the enforcement of minimum standards continued to languish.[76]

---

72 See the discussion in Lee, above n 4, pp 47–8.

73 See generally A Stewart, 'Work Choices in Overview: Big Bang or Slow Burn' (2006) 16(2) *Ec Lab Rel Rev* 25.

74 Forsyth, above n 71. See also Riley, above n 71.

75 K Wheelwright, 'Enforcement under Work Choices: Recent Developments' (2007) 13(6) *Employment Law Bulletin* 58 at 58.

76 See M Goodwin and G Maconachie, 'Political Influence and Enforcement of Minimum

This is best illustrated by the fact that in the period from 1996/1997 to 2005/2006, only 35 enforcement proceedings were recommended against employers.[77] This apparent reluctance to prosecute is not only indicative of the persuasive compliance approach adopted at the time, but is also the result of a lack of resources. For example, in the original budget for the 2005/2006 financial year, only $21 million was allocated to the OWS, while in the same period and covering a much smaller proportion of the workforce, the ABCC received $22 million in federal funding.[78]

The lack of funding dedicated to enforcement in the pre-Work Choices era was in complete contrast to the approach taken after Work Choices took effect, when (somewhat surprisingly) the Howard Government sought to 'beef up' the federal enforcement agency. First and foremost, the agency was provided with increased funding. At the time, then Prime Minister Howard stated that the additional resourcing was 'an indication of the Government's determination to ensure that the standard under the new legislation is fully met and that the rights and interests of employees under that legislation are fully observed'.[79] A second key change was the adoption of a more aggressive enforcement strategy in the form of an insistence compliance, rather than a weak persuasive compliance, enforcement model. Combined, these factors contributed to a spike in prosecution activity which rose sharply from four matters in 2005–06 to 53 matters the following year to 67 matters the next.[80]

The creation of a significantly better-resourced inspectorate after so many years of neglect was perhaps motivated by the shift to a national workplace relations system, with the federal government taking responsibility for the working conditions of employees previously overseen by state inspectorates. It is also possible, and perhaps more likely given the wave of negative publicity generated by Work Choices, that the government wanted to demonstrate its commitment to the 'protected by law' slogan used to promote the new legislative regime.

The Rudd Labor Government entered the 2007 federal election with a plan to overhaul workplace relations regulation in Australia under its 'Forward with Fairness' policy. Enforcement of minimum standards was not a key area of debate regarding this policy, or the substantive reform legislation when it was introduced into parliament in late 2008. More central to that debate was the role of unions in the new system, and the extent to which the legislation would resurrect awards and the tribunal and otherwise shift the Australian system back to a more collectivist basis.[81] Notwithstanding the relatively low

---

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, p 7.

77 Ibid. However, Goodwin and Maconachie acknowledge that poor reporting standards during 1999/2000 and 2001/02 may have led to a few prosecutions going unreported.

78 See Queensland Department of Industrial Relations, *Industrial Relations Perspectives*, March 2005; and NSW Department of Commerce, *The Year in Review*, Office of Industrial Relations, 2005. See also Lee, above n 4.

79 Hon John Howard MP, Prime Minister of Australia, Press Conference, Parliament House, Canberra, 30 March 2006.

80 See Workplace Ombudsman, *Annual Report 2007/2008*, Parliament of Australia, AGPS, Canberra, 2007, pp 2, 25.

81 See, eg, 'Fair Work Bill will Increase Union Powers', *ABC News*, 27 January 2009;

level of interest in enforcement in this debate, the FW Act does, in some ways, enhance the role of the state enforcement agency, now known as the FWO. However, the new legislation has a more mixed impact on trade union regulatory functions.

There are a number of aspects of the new legislation which are relevant to the discussion in this article.[82] First, although the FW Act partly signals a return to the collectivist model, in many respects, it maintains an individualistic focus. For example, the FW Act allows for employers and employees to opt out of modern awards through 'individual flexibility arrangements', retains (and enhances) the concept of statutory minimum employment standards through the National Employment Standards (NES), and provides for legislative protection of 'workplace rights', as part of a broader suite of general protections against discriminatory or wrongful treatment. This ensures that the federal system continues to be premised on civil penalties being imposed for non-compliance, thereby reinforcing the importance of formal legal sanctions and (arguably) the role of the state agency.

To the extent that the FW Act does re-introduce collectivism, it is largely through a reinvigoration of the collective enterprise bargaining system. The FW Act introduces the concept of 'good faith bargaining', borrowed from North American labour law systems.[83] Industry-wide 'modern awards' also retain a role for unions in industry and occupation-wide standard setting, but the subject matter of these awards is still constrained, and unions and the tribunal (now known as FWA) will have a limited role in the updating of awards. Moreover, restrictions on 'pattern bargaining' have been retained so that enterprise bargaining cannot be conducted with multiple employers, with certain limited exceptions. The federal tribunal's broad conciliation and arbitration powers which allowed unions quick and inexpensive access to an independent third party have not been reintroduced. FWA will only have jurisdiction to exercise private arbitration where this power is conferred upon it by dispute resolution clauses in enterprise agreements, modern awards or contracts of employment dealing with a provision of the NES or a safety net contractual entitlement.[84]

Another significant development is that under the FW Act, trade unions are designated as one possible 'bargaining representative' of employees wishing to engage in enterprise agreements.[85] As a bargaining representative, unions can initiate enterprise bargaining and request to be covered by an agreement. However, unions will not automatically be parties to agreements. As

---

B Norington and P Karvelas, 'Business Backlash over "Dangerous" Union Era', *The Australian*, 2 December 2008; 'Right of Entry, Transmission of Business, Key Employer Concerns', *Workplace Express*, 25 November 2008.

82 For an overview of the FW Act generally, see A Stewart, 'A Question of Balance: Labour's New Vision for Workplace Regulation' (2009) 22 *AJLL* 3.

83 The Keating Government's enterprise bargaining reforms of 1993 represented the first attempt to introduce good faith bargaining in Australia, although two AIRC test cases narrowed the scope of the provisions and they were removed by the Howard Government in the WR Act: see A Forsyth, '"Exit Stage Left", now "Centre Stage": Collective Bargaining under Work Choices and Fair Work' in Forsyth and Stewart, above n 49, p 120 at pp 121–2.

84 FW Act ss 738, 739. See Riley, above n 71, p 200.

85 FW Act s 176.

bargaining representatives, unions will still be able to enforce enterprise agreements, and in this sense, are in a similar position to when they were parties to such agreements. Nevertheless, the change is symbolic of the shift from trade unions being central regulatory actors in the system representing groups or classes of workers, to one where unions are one of a number of possible participants or bargaining agents at enterprise level. In combination, these changes suggest that unions will continue to prioritise a 'workplace representation' function as described by Ewing. Union activity around revision of modern awards every 4 years as well as in the 'low paid' enterprise bargaining stream may prove an exception to the limitations on the role of trade unions in performing regulatory functions. The latter allows unions to make multi-employer agreements and gives FWA greater powers of intervention than in relation to other enterprise agreements. However, we will not know how broad the scope of these provisions is likely to be until unions start to make use of them and we begin to get some indication of how FWA will interpret its powers in relation to low-paid bargaining.[86]

Interestingly, this shift in the role of unions was to some extent condoned by the trade union movement, which may itself signal that unions are somewhat resigned to playing less of a regulatory role in the future. In 2006, the ACTU Congress adopted a new policy to pursue reforms that would endorse the shift to enterprise level bargaining as long as a legal right to collective bargaining was enshrined within the system.[87] This plan was developed by an ACTU taskforce which toured the United States, Canada and the United Kingdom to develop a greater understanding of the promises and pitfalls of these jurisdictions. It is to some extent puzzling that the union movement would explore alternative models within systems which have been widely criticised as providing only weak protection for trade union interests.[88] This is perhaps explained by trade union acceptance of a hostile political climate, and wanting to pursue a palatable alternative with the Labor Party, which in opposition had made it clear that it was not willing to return to a pre-WR Act style system if it won government.[89] Whatever the motivation behind these efforts, the result was that when Labor won the November 2007 federal election, the focus of its proposed new 'Fair Work' system became enterprise bargaining, with little consideration apparently being given to other, more sectorally-based models of industrial relations regulation such as those which exist in some European countries.

5 Inspection and Oversight of Compliance with Employment Standards

It was noted earlier that detection of non-compliance is an essential precondition to the effective enforcement of minimum standards. In this area,

86 See Cooper and Ellem in this issue of the *AJLL*.

87 *A Fair Go at Work: Collective Bargaining for Australian Workers*, ACTU, Melbourne, 2006.

88 See, eg, R Adams, 'Why Statutory Union Recognition is Bad Labour Policy: the North American Experience' (1999) 30 *IRJ* 96; J Logan, 'The Union Avoidance Industry in the United States' (2006) *BJIR* 651.

89 See, eg, S McCrystal, 'A New Consensus: The Coalition, the ALP and the Regulation of Industrial Action' in Forsyth and Stewart, above n 49, p 141.

developments over the last two decades have restricted trade union capacity to carry out monitoring and inspection, while the role of state agencies has been enhanced.

Inspection and oversight under the WR Act and Work Choices

In addition to its emphasis on individualised bargaining over collective instruments and the undermining of the federal tribunal, a number of changes introduced by the WR Act were more specifically targeted at the role of trade unions in the federal system. These included the abolition of union preference rights, tight constraints on union recruitment and organisational activity, and the freedom to take industrial action. More significantly for the enforcement role of unions, the Howard Government introduced new restrictions on trade union right of entry.[90]

The 1996 legislative changes included a new set of detailed provisions regulating union right of entry in Pt IX of the WR Act, and rendered right of entry provisions in awards unenforceable.[91] The new provisions also made the federal tribunal a disciplinary agency with regard to the exercise of right of entry powers. Prior to the WR Act, unions themselves were essentially responsible for authorising right of entry.[92] The new legislation altered this, requiring any union official who wished to enter an employer's premises to obtain a right of entry permit from a registrar of the federal tribunal.

Another important change concerned the scope of union right of entry. The Industrial Relations Act 1988 had allowed the exercise of powers of entry, inspection and interview in order to ensure the general observance of the Act and any industrial instruments made under it. By contrast, under the WR Act, these powers could only be exercised for the purpose of investigating *particular breaches* of terms of the Act or an instrument such as an award or an agreement. The new provisions further tightened the purpose requirement by mandating the necessity of a subjective belief or suspicion that an employer was in breach. Furthermore, permit holders were required to give the occupier of the premises at least 24 hours notice of their intention to enter the premises. These changes significantly hampered the ability of unions to monitor compliance with federal industrial instruments.

Work Choices brought about a further, fundamental shift in legal support for the regulatory function of unions by placing additional restrictions on right of entry to workplaces.[93] The new Pt 15 of the WR Act maintained the Act as a code with respect to right of entry, with both awards and now workplace

90 A more detailed discussion can be found in Fenwick and Howe, above n 49, pp 169–70.

91 Pre-Work Choices WR Act s 127AA. Right of entry provisions could still be included in certified agreements, subject to the requirement that they met the 'matters pertaining' requirement: see *Re Rural City of Murray Bridge Nursing Employees, ANF (Aged Care) — Enterprise Agreement 2004* (2005) 142 IR 289; Print PR956575.

92 See Industrial Relations Act 1988 s 286.

93 For a more detailed discussion of these changes, see Fenwick and Howe, above n 49; A Forsyth and C Sutherland, 'From "Uncharted Seas" to "Stormy Waters": How Will Unions Fare Under the Work Choices Legislation' (2006) 16(2) *Ec Lab Rel Rev* 215 at 223–6.

agreements prohibited from including provisions dealing with right of entry.[94] A substantial increase in the volume of regulation pertaining to right of entry narrowed the scope of the rights, as well as further restricting the scope of the powers held by authorised union officials. The provisions also narrowed the discretion of the federal tribunal, while excluding co-regulation of entry rights through bargaining between employers and unions.

Contrastingly, the WO was given a broad set of new enforcement powers under Work Choices, exceeding those possessed by trade unions.[95] For example, workplace inspectors appointed by the WO were given a relatively broad right to enter premises where they had reasonable cause to believe that work to which a relevant instrument or legislative entitlement applied was being or had been performed, or where there were relevant documents relating to such instruments or entitlements.[96] By comparison, under the pre-Work Choices regime, federal inspectors were only empowered to exercise their rights of inspection in relation to awards and certified agreements, but not AWAs (which fell within the domain of 'authorised officers' appointed by the Employment Advocate).[97] While the powers of the workplace inspectors were not as far-reaching as those given to the ABCC and its inspectors,[98] they were still fairly significant and some carried criminal penalties.[99] Unions, on the other hand, could not investigate a suspected breach of an individual statutory agreement, unless the employee party to the agreement made a written request to the union to investigate the breach.[100]

In addition to the new legal restrictions on trade union activity, and as federal government enforcement was ramping up after decades of neglect, the capacity of unions to monitor and enforce working conditions across the workforce was significantly weakened by the very steep decline in union membership rates over the previous 20 years. The formal role of unions within the compulsory arbitration system was an important factor in the growth and organisational security of unions for much of the twentieth century. After peaking at 63% of the total labour force in 1953, trade union membership remained around 50% until the early 1980s.[101] Since that time, union membership rates have fallen to less than 20% of the workforce.[102] One factor in this decline was the process of change in the Australian labour relations

94 See WR Act s 518; Workplace Relations Regulations 2006 (Cth) (WR Regulations) Ch 2 reg 8.5(1)(g).

95 For an overview, see T Hardy, 'A Changing of the Guard: Enforcement of Workplace Relations Laws Since Work Choices and Beyond' in Forsyth and Stewart, above n 49, p 75.

96 WR Act s 169. The relevant instruments and entitlements were: workplace agreements; awards; the AFPCS; minimum entitlements and orders under Pt 12; and the requirements of the WR Act (other than s 905) and WR Regulations. Cf pre-Work Choices WR Act Act s 86(1); under the former provisions, federal inspectors could not exercise rights of inspection in relation to AWAs, which fell within the domain of 'authorised officers' appointed by the Employment Advocate: pre-Work Choices WR Act s 83BB.

97 Pre-Work Choices WR Act s 83BB.

98 BCII Act Ch 7.

99 WR Act s 819.

100 WR Act s 747(2).

101 See Forsyth and Sutherland, above n 92; M Crosby, *Power at Work: Rebuilding the Australian Union Movement*, The Federation Press, Sydney 2005, pp 12, 42–3; see further M Rimmer, 'Unions and Arbitration' in Isaac and Macintyre, above n 58, p 275.

102 See, eg, ABS, above n 1, p 5.

system described above. However, a range of other factors have also been relevant,[103] including the decline in highly-unionised manufacturing employment; the growth of casual, part-time and 'contract' labour arrangements; and the increasing adoption of aggressive 'individualisation' and 'de-unionisation' strategies by employers.[104]

The decline in membership has significant resourcing implications for unions, especially given the shift in focus of the system to enterprise bargaining. Flagging union membership and the diminishing importance of awards also means that there are more industries in which workplace inspectors might now fill the role traditionally played by unions exercising rights of entry to workplaces for the purpose of monitoring compliance with industrial instruments.[105] This is particularly noticeable in less unionised industries and sectors, such as hairdressing and hospitality, where workers have become more dependent on government agencies for enforcement of minimum standards.

While these trends may have allowed unions to focus scarce resources on unionised sectors or bargaining functions, the more prominent role played by government agencies under Work Choices was not necessarily welcomed by the union movement. This is illustrated by the case involving Cowra abattoirs — one of the first to hit the headlines in the wake of Work Choices.[106] The case involved allegations that an employer had sacked a number of its employees and re-hired them as independent contractors. The OWS investigation into the Cowra abattoirs case, and its conclusion that there had been no relevant contraventions of the WR Act, led the ACTU to accuse the OWS of being Howard's 'secret police'.[107] At this point, partnership in enforcement between state and non-state actors seemed a long way off. However, the change in government in November 2007 not only partly restored union regulatory functions, but appears to have led to a softening of relations between the two stakeholders.

The FW Act and restoration of trade union inspection powers

Labor had made it clear in the lead up to the 2007 election that it would not relax many of the Howard-era restrictions on trade union rights, two of which are particularly crucial to trade union enforcement: right of entry and

103 See generally Crosby, above n 100; D Peetz, *Unions in a Contrary World: The Future of the Australian Trade Union Movement*, Cambridge University Press, Cambridge, 1998.

104 Forysth and Sutherland, above n 92. On individualisation strategies, see S Deery and R Mitchell (Eds), *Employment Relations: Individualisation and Union Exclusion*, The Federation Press, Sydney, 1999.

105 See J Riley and K Peterson, *Work Choices: A Guide to the 2006 Changes*, Thomson, Pyrmont NSW, 2006, p 47.

106 See, eg, 'Cowra Abattoir Becomes Work Choices Battleground', *Workplace Express*, 3 April 2006.

107 See Office of the Workplace Ombudsman, 'Summary of the investigation into alleged breaches of the Workplace Relations Act 1996 at Cowra Abattoir', media release, 7 July 2006; and 'ALP to Axe OWS, as Unions Outraged Over Unfair Dismissal Investigation', *Workplace Express*, 26 July 2006.

industrial action.[108] In relation to right of entry, Labor ultimately provided unions with some more 'room to move' under the FW Act while retaining the largely restrictive framework for the exercise of entry rights.[109] Union officials must still obtain an entry permit and give 24 hours' notice in order to enter workplaces for the purpose of either investigating suspected contraventions of the FW Act or instruments made under it, or to hold discussions with employees. In addition, permit holders still have to meet certain standards of conduct in order to retain their permit.

However, the FW Act abolishes the requirement for an award or agreement to be binding on a union at a workplace in order to trigger a right of entry to that workplace. Employer groups had raised the possibility that the process of award modernisation could have the unintended consequence of expanding union rights of entry, as the reduction in the number of industry awards could mean that unions became party to awards covering employers with which they had not previously had contact.[110] By removing the connection between award coverage and right of entry, the FW Act goes even further. In the case of suspected contraventions, a union need only have a member in the workplace who is affected by the contravention.[111] Entry for discussion purposes requires only that there is at least one employee working on the premises whose industrial interests the union seeking entry is entitled to represent, and that the relevant employees want to be involved in those discussions.[112]

Nevertheless, the FW Act also introduced some tighter controls on union permit holders which may be restrictive of unions' enforcement functions. Employers are only obliged to provide documents to the permit holder if they are 'directly relevant' to an alleged contravention, which appears to narrow the scope of documents that may be inspected compared with the provisions of the WR Act.[113] The ability of permit holders to monitor non-members entitlements was further curtailed by the last minute inclusion in the FW Act of a requirement that non-members' records may only be accessed with the consent of the employees concerned, or by order of FWA.[114]

With respect to the role of the state enforcement agency, Labor committed to maintaining the resourcing and powers of the WO, with some enhancements. The focus and functions of the FWO under the FW Act are broadly similar to those of the WO.[115] The objective of securing compliance with the Act and of instruments made under the Act, and of performing the functions of monitoring, investigation, commencement of proceedings and so on is a sign of continuity from the previous regime.[116] However, the FWO has been given a new objective and the express power to perform a more

108 See Fenwick and Howe, above n 49; and McCrystal, above n 88.
109 Fenwick and Howe, above n 49, p 182.
110 'Danger That Modernisation Could Expand Union Right of Entry, says AiG', *Workplace Express*, 12 September 2008.
111 FW Act s 481.
112 FW Act s 484.
113 See *NTEU v Central Queensland University* [2009] FWA 780.
114 FW Act ss 482, 483 and 483AA. The Act also provides that any personal information obtained by a union official must be treated in accordance with the Privacy Act 1988 (Cth): s 504.
115 For a more detailed discussion, see Hardy, above n 94.
116 See FW Act s 682(1); cf s 166B of the WR Act.

promotional role. The FW Act provides that the Office of the FWO aims to promote 'harmonious and cooperative workplace relations' and compliance with the FW Act and fair work instruments, including by providing education, assistance and advice.[117] While the WO was empowered to promote compliance with the WR Act by providing assistance and disseminating information, the FWO has been given the education function previously held by the Workplace Authority (now abolished), as well as funding to carry out this role.[118] The FW Act goes further because it empowers the FWO to promote particular approaches to workplace relations by 'producing best practice guides to workplace relations or workplace practices'.[119]

Under the FW Act, the inspectors' powers are broader than they were under the WR Act. An inspector cannot only exercise his or her compliance powers in determining whether the FW Act or a fair work instrument is being, or has been, complied with, but the inspector can now also use these same powers to determine whether a 'safety net contractual entitlement' is being, or has been contravened by a person (that is, an entitlement under a contract between an employer and an employee relating to any of the subjects covered by the NES or a modern award).[120]

While the FWO was given many of the additional powers of investigation that the WO had been calling for prior to the release of the Fair Work legislation,[121] one power that the WO did not request was the ABCC's power to compel attendance at interviews.[122] This particular power has been a major bone of contention for the unions, which have called for the abolition of the ABCC. The government's original plan for the ABCC to become a specialist division within the FWO, retaining the coercive powers albeit with new checks and balances, may have inhibited the development of a closer relationship between the FWO and trade unions — given the ABCC's past focus on ensuring union compliance with industrial action and freedom of association regulation in the building industry. The government's subsequent decision to establish a separate Building Industry Inspectorate to replace the ABCC[123] may overcome such concerns (although unions remain opposed to the concept of separate regulation of workplace relations in the construction industry). In any case, the fact that the FWO has greater investigatory powers

117 See FW Act s 682(1)(a).

118 Regarding the education function of the Workplace Authority Director, see s 150B of the WR Act.

119 FW Act s 682(1)(a)(ii).

120 FW Act s 706.

121 'Ombudsman Seeks New Powers', *Workplace Express*, 22 August 2008.

122 This power arises under s 52 of the Building and Construction Industry Improvement Act 2005 (Cth). For discussion of the s 52 power, see G Williams and N McGarrity, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *AJLL* 244.

123 Legislation to implement this transition is presently before the Senate: Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (Cth). For an overview of the background to the legislation, see E Goodwin, 'Constructing Fair Work for the Australian Building and Construction Industry: the Honorary Murray Wilcox QC's Report *Transition to Fair Work Australia for the Building and Construction Industry*' (2009) 22 *AJLL* 173. On trade union opposition to the government's policy, see 'Congress Condemns Government over Building Industry Ahead of Gillard Visit Tomorrow', *Workplace Express*, 2 June 2009.

than unions may tempt some unions to refer complaints to the FWO to investigation, rather than utilising their more restricted right of entry for such purposes.[124]

6 Standing and Enforcement Approaches

It was noted earlier that the effectiveness of any regulatory system will be influenced by the mix of regulatory approaches available to both state and non-state regulators, including the availability of sanctions such as penalties imposed by courts.

Standing and enforcement approaches under the WR Act and Work Choices

In the early years of the Howard Government, the federal inspectorate was largely left to languish and the burden of enforcing employer compliance by way of legal action was increasingly shifted to individual employees and unions.[125] While the federal enforcement agency still facilitated the recovery of underpayments on behalf of employees, the complaints-based inspection strategy — combined with the weak persuasive compliance approach — meant that in the years immediately preceding Work Choices, the agency appeared to have virtually stopped prosecuting employers for breaches of the federal legislation.[126] Further, claims were frequently settled by agreement, presumably for a lesser amount than that due to the aggrieved employee.[127]

On the basis of the research undertaken by Goodwin and Maconachie, it appears that the enforcement strategies adopted by the federal inspectorate prior to and during this period — particularly the use of prosecution as a last resort — reduced the probability of detection, provided little deterrence and implicitly allowed employer evasion.[128]

By creating a well-resourced agency with standing to bring court proceedings and seek the higher penalties that had been introduced in 2004, Work Choices brought about a major shift in state enforcement activity. As noted above, central to the WO's regulatory approach was the use of litigation as a tool for securing compliance, a major shift in policy from that of previous labour inspectorates. The WO commenced a number of cases against employers for breach of minimum standards, especially wages. By doing so, the WO has also tested the courts' interpretation of the 2004 penalty increases. This shift in approach has been perpetuated by the broader changes to the

124 The potential for unions to refer matters to the FWO may be undermined if FWO chooses to exercise its power to regulate trade union compliance with the Act outside of the building industry. The FWO has recently commenced proceedings against the Transport Workers Union over alleged breaches of restrictions on the taking of industrial action, also announcing that it intends to bring further proceedings against trade unions: see 'FWA Investigating Unions', *Workplace Express*, 19 October 2009.

125 See Lee, above n 4, at 41.

126 See A Group of 150 Australian Labour Market and Legal Academics, above n 10; Office of Workplace Services, *OWS Policy Guide*, 2004.

127 See Lee, above n 4, at 53. Lee notes that details regarding the settlement amounts were not available, so it is difficult to know whether settlement amounts reflect the actual amounts owed.

128 Goodwin and Maconachie, above n 4.

legislative framework, which have meant that 'for many workers the only way to resolve a dispute over employment conditions or entitlements is to institute court proceedings — or persuade a government inspector to do so on their behalf'.[129] The amended legislative framework and litigation guidelines not only enhanced the importance of formal legal sanctions following Work Choices, but also had the effect of further undermining the role of unions as regulators of the system.

For example, unions did not have equally broad rights of standing as inspectors, and this may have had an implicit effect on their ability to assist in ensuring compliance and enforcement. Prior to Work Choices, neither a union nor the OEA (who was then responsible for administering AWAs) could bring proceedings on an employee's behalf for breach of an AWA.[130] In this sense, state and non-state actors were on an equal footing. Comparatively, after Work Choices, a workplace inspector had broad standing to initiate legal action in respect of a breach of an applicable provision of an individual statutory agreement, amongst other instruments,[131] while unions only had a right to bring enforcement proceedings in relation to these instruments if they were requested to do so in writing by the employee.[132] It appears that such restrictions — in addition to the promotion of AWAs and the more restrictive rights of entry — were another, more subtle manifestation of the Howard Government's strategy to undermine the regulatory role unions had traditionally played in the Australian system.

As with the changes Work Choices brought about in relation to resourcing and inspection, these developments were again suggestive of a preference for the WO replacing unions with regard to inspection and enforcement. While unions were still able to carry out monitoring and enforcement, their capacity to do so had been undermined. There was certainly no legislative support for the two agencies to work collaboratively.

Standing and enforcement approaches under the FW Act

While the standing provisions have not changed much under the FW Act, unions have an enhanced ability to bring enforcement proceedings. Under the FW Act, a union can apply for an order in relation to a contravention or proposed contravention of a civil remedy 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.[133]

These changes appear to be linked to the express recognition by the legislature of 'the role employee organisations play in enforcement,

129 A Stewart, *Stewart's Guide to Employment Law*, The Federation Press, Sydney, 2008, p 157.
130 See pre-Work Choices WR Act s 170VV(3).
131 WR Act s 718(2)–(4). In addition, inspectors were given the ability to 'take over' court proceedings.
132 WR Act s 718(5)–(6).
133 FW Act s 540.

particularly in relation to the safety net and instruments that apply to them'.[134] While this seems to herald a partial return to co-regulation, there is little else in the legislation which actively encourages cooperation between the FWO and unions. It will also be interesting to see how this plays out in practice. For example, it is not clear whether unions will have the capacity, resources and inclination to utilise this new enforcement power, particularly as there is still no ability for a party to recover their costs in an enforcement proceeding.[135] Further, there is no ability for unions to bring enforcement proceedings on behalf of affected employees in relation to safety net contractual entitlements. If, despite these hurdles, unions take an active role in the enforcement arena, this has the potential to influence the activities of the federal enforcement agency. An active union role may allow the agency to better target its resources towards the non-unionised sector. However, it might also be used by government to justify a reduction in resource allocation.[136]

The recently announced 'Horticulture Industry Shared Compliance Program' is perhaps the first sign of things to come. This program, which is to be jointly delivered by the FWO, the Australian Workers' Union, the National Farmers' Federation and the Australian Industry Group, is intended to assist the horticulture industry to understand and comply with its legal obligations under the new statutory regime.[137] In practice, however, it appears that while all of the project partners will be involved in conducting various educational activities, the FWO will be solely responsible for undertaking a national auditing campaign to assess the level of compliance across the horticulture industry. While there appears to be an emphasis on cooperation between the relevant stakeholders at one level, there also seems to be an emphasis on the FWO, rather than unions, playing the primary enforcement role. There are also some early signs that the FWO intends to exercise its power to enforce provisions in the FW Act that are restrictive of union activities, such as the limitations on industrial action.[138] If the experience with the ABCC is any guide, this action may undermine the likelihood of any collaboration between unions and FWA in the enforcement of minimum employment standards.

Nevertheless, the new standing and civil remedy provisions may increase the number of matters that unions are able to bring before the courts, although it is in the area of anti-discrimination where there is the greatest potential for litigation with the introduction of the concept of 'adverse action' under the general protections provisions.[139] On the one hand, it seems that unions are being given greater scope to use the court system to pursue enforcement. On the other hand, there is less scope for leverage through less formal enforcement mechanisms. Question marks remain concerning the scope of

134 Explanatory Memorandum, Fair Work Bill 2008 (Cth), Parliament of Australia, 2008, p 326.
135 However, a union may apply for payment of any penalty imposed by a court to be redirected to the union: see FW Act s 546(3).
136 Goodwin, above n 4, at 66.
137 'New national campaign to assist horticulture industry', Office of the Fair Work Ombudsman, media release, 28 August 2009.
138 See text in n 124 above, and 'FWA Investigating Unions', above n 124.
139 'IR Experts Ponder What's to Come under Fair Work Act', *Workplace Express*, 18 May 2009.

union access to the dispute resolution functions of FWA, and the maintenance of restrictions on industrial action will limit resort to economic pressure. While there are now a range of remedies available, including injunctions, which may be less costly and more effective, court proceedings are resource-intensive and the costs are likely to be largely prohibitive for unions. This is especially the case given the focus on enterprise bargaining encouraged under the FW Act.

Resourcing will be much less of a problem for the FWO. The government has made clear that it intends to commit significant resources to the federal inspectorate so that it can 'properly manage the transition to . . . the new workplace relations system'.[140] This influx of funds is clearly important given that one of the most influential drivers in terms of shaping the work of the federal enforcement agency appears to be resource allocation.[141]

As noted earlier, the FW Act has also enhanced the mix of enforcement approaches available to the FWO. 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. The Explanatory Memorandum reinforces that the FWO has been provided with a range of tools with which to achieve compliance by noting that 'the functions of the FWO emphasise preventative compliance (eg, through education and advice) and cooperative and voluntary compliance (eg, through enforceable undertakings)'.[142] Therefore, the statutory objectives and substantive provisions appear to be in line with the enforcement pyramid, and geared towards enhancing the ability of the regulator to engage in responsive regulation — a position which largely reflects the enforcement strategy set out in the FWO's current Litigation Policy.[143]

These provisions are intended to provide 'the FWO with another option to deal with non-compliance (by encouraging cooperative compliance) instead of pursuing court proceedings'.[144] These new powers provide legislative support for alternative, less formal approaches to enforcement than court proceedings, approaches that have been tested in other jurisdictions.[145] Over the next few years, it will be interesting to see what sort of balance the FWO achieves between these new approaches and more traditional enforcement mechanisms utilised by the federal enforcement agency.

The enhancement of the FWO's educative role and less formal powers of enforcement stands in contrast to the position of trade unions. While the

---

140 Commonwealth of Australia, *Budget Paper No 2: 2008/09*, 13 May 2008, p 152.

141 Goodwin, above n 4, p 346.

142 Explanatory Memorandum, Fair Work Bill 2008 (Cth), Parliament of Australia, 2008, p 386.

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

144 Explanatory Memorandum, Fair Work Bill 2008 (Cth), Parliament of Australia, 2008, p 400.

145 Two examples are: the Australian Competition and Consumer Commission, see C Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67 *Mod Law Rev* 209; and occupational health and safety regulation, see R Johnstone and M King, 'A Responsive Sanction to Promote Systematic Compliance? Enforceable Undertakings in Occupational Health and Safety Regulation' (2008) 21 *AJLL* 280.

potential for unions to engage in enforcement through court proceedings appears to be enhanced, it is less clear whether access to dispute resolution in FWA through dispute settlement clauses in awards and agreements will be an adequate replacement for conciliation and arbitration. In addition, unions do not have the ability to employ the alternative enforcement mechanisms at the FWO's disposal, such as enforceable undertakings or compliance notices. Moreover, FWO's new education powers may to some extent usurp the role that trade unions have historically played in raising awareness of employment rights and entitlements, most recently in the 'Your Rights at Work' Campaign.

7 The FW Act Enforcement Model and the Future Role of Trade Unions in Australian Labour Law

At the beginning of this article, we argued that there were two key aspects of effective enforcement regimes: the existence of a state inspectorate with a range of enforcement approaches and sanctions at its disposal, which are applied in a regulatory enforcement pyramid; and the importance of collaboration between the government inspectorate and non-state actors such as trade unions in securing compliance.

The existing evidence suggests that, before Work Choices, enforcement of minimum employment standards was characterised by an active role for trade unions, with the state inspectorate weakened by less than optimal resourcing and, from time to time, a weak enforcement strategy. Work Choices ensured that Australia finally had a well-resourced federal inspectorate with an improved range of sanctions, and the inspectorate quickly employed a more aggressive enforcement strategy than its immediate predecessor. However, the role of trade unions in securing compliance was undermined by the decline in trade union membership and the withdrawal or reduction of legal support for trade unions under the WR Act and, later, Work Choices.

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. The enforcement activities of the federal enforcement agency since Work Choices, and the groundbreaking historical research into the Arbitration Inspectorate by Goodwin and Maconachie, have revealed that non-compliance with minimum employment standards in Australia is significant, thereby justifying the need for an active state regulator. With the decline in trade union coverage over the last two decades, a significant proportion of the workforce is now dependent upon state assistance in upholding employment standards. It is unreasonable to rely on individuals to enforce their own entitlements through court proceedings due to the many obstacles confronting workers seeking access to justice.[146]

It seems evident, both from the express provisions of the FW Act and the statements contained in the Explanatory Memorandum, that the legislature appreciates the importance of responsive regulation. The FW Act expands the functions of the FWO and provides the agency with new functions and powers that enhance its capacity to engage in responsive regulation by employing the

146 Arup and Sutherland, above n 13.

regulatory pyramid. The federal courts now also have more 'firepower' in that a range of remedies, including injunctions and compensation and reinstatement orders, are at their disposal. It is arguable, however, that the FW Act fails to provide enough 'carrots', such as a due diligence defence, to encourage self-regulation and restorative justice.[147]

It will be some time before a thorough assessment can be made of the effectiveness of the former WO's approach, and of the FWO's new powers. However, responsive regulation also requires a degree of tripartism, including the involvement of non-state actors such as trade unions in the monitoring and enforcement process. It also enhances the quality of democracy by involving representative organisations in the regulatory process, which in turn is likely to enhance the legitimacy of the system of minimum standards in the eyes of the public. Although membership of trade unions has declined over recent decades, unions still represent a significant proportion of the Australian workforce. Moreover, from an enforcement perspective, unions are often closer to what is happening 'on the ground' at individual workplaces and across industries than a state agency can ever be, and are therefore likely to detect non-compliance more quickly than a state agency.

However, the extent to which the FW Act reinstates legal support for the enforcement role of trade unions is not yet clear. The changes wrought by the FW Act continue the fundamental shift that has occurred since the 1990s in the role that unions play in the Australian system of labour regulation. The legislation hastens the decline of the joint regulatory role of trade unions in the Australian system by only partially resurrecting the role of awards, and by making enterprise bargaining the centrepiece of the collective aspect of the system. To the extent that the FW Act does favour trade unions, it is with respect to the representative function of trade unions. Trade unions will likely be more focused on workplace representation at larger workplaces where enterprise bargaining is more common than on a wider regulatory role.[148] This is in part because of the changes in the system but it is also a resourcing issue. Enterprise bargaining drains union resources, and requires a focus on service delivery to members at the enterprise. The likelihood is that unions will increasingly focus their enforcement role on enterprise agreements.

Even less clear is the extent to which the legislation supports a collaborative, tripartite model of enforcement. The availability of a well-resourced government agency possibly will mean that unions will refer many enforcement matters under awards and legislation to the FWO. This will be exacerbated by the fact that under the FW Act, there is no ability for a union to recover its costs if it successfully institutes enforcement proceedings on behalf of an affected employee. Although there are some early signs of a willingness on the part of some unions to work with the FWO, as evidenced by the Horticulture Shared Industry Compliance Program, there also appears to be ongoing tension in some areas.[149]

---

147 See Black, above n 22, p 35.

148 A Forsyth and A Stewart, 'From Work Choices to Fair Work: An Assessment' in Forsyth and Stewart, above n 49, p 229 at p 237.

149 Eg, in relation to building industry regulation, and FWO prosecution of unions for breaches of the FW Act more generally. See above nn 123 and 124.

The extent to which trade unions continue to play an active role in enforcement of minimum employment standards will have significant implications for the regulatory function of trade unions in Australia. In our view, the carrying out of an enforcement role by unions is important to the maintenance of unions' regulatory function, which in turn will contribute to the future health of trade unionism. Upholding employee entitlements beyond the enterprise level is a significant service that unions can provide to members, and also benefits non-union members by improving the incentives for employer compliance with the law. The role of unions in enforcement of entitlements beyond the workplace will also be important to trade unions seeking to remain legitimate in the eyes of society, and may also assist in the attraction of new members, as well as retention of existing members.[150]

Having said this, there are some important initiatives in the legislation that may ensure unions continue to play a wider regulatory role. The system of modern awards will ensure the continuation of instruments setting some terms and conditions across industries and occupations. The changes retain the role of unions in overseeing the maintenance and updating of modern awards, although updating will only occur every 4 years, and there is less scope for the raising of disputes under awards than there was before Work Choices. The establishment of the low paid bargaining stream is another context in which there is potential for unions to transcend a workplace representation function, as it provides an opportunity for unions to expand the coverage of enterprise bargaining to vulnerable industries. The low-paid stream may enable unions to gain a foothold across a number of workplaces which, under the previous system, might have been unregulated.

Contrastingly, while unions may have less access to informal mechanisms of enforcement under the new system, there will be greater potential for unions to commence court action on behalf of affected employees under the civil remedy provisions and increased scope for employees to commence small claims proceedings with the assistance of unions. While each of these changes represents a positive development in many respects, they are not without some limitations. The emphasis placed on recovery by court proceedings presents another resourcing challenge for unions. Presumably, informal enforcement mechanisms were attractive because of the speed with which underpayments could be addressed, and their low cost. The dilemmas that unions have always faced in deciding whether the benefits of bringing recovery proceedings will outweigh the costs involved in doing so, remain unchanged.

In summary, the FW Act does reinforce the enforcement roles of both the state agency, and to a lesser degree, trade unions. While the present government and the legislation are more favourable to the role of trade unions operating alongside the FWO, there is little in the FW Act which requires the FWO and the unions to act in partnership in the monitoring and enforcement of minimum employment standards. It was noted earlier in this article that ILO Convention No 81 requires the government to make arrangements for collaboration between the labour inspectorate 'and employers and workers or

150 See R Rabin, 'The Role of Unions in the Rights Based Workplace' (1991) 25 *Uni of San Francisco L Rev* 169 at 199.

their organisations'. The FW Act gives limited, if any, effect to this goal. On the other hand, there may be very little to prevent collaboration occurring. If the FWO and trade unions are to collaborate and operate as effective partners in enforcement, it will be because they choose to work together. The FW Act does not, however, bring them together.

8 Conclusion

Historically, in the federal system of labour relations in Australia, trade unions carried out the bulk of the monitoring and enforcement of minimum employment standards for workers covered by the award system. This was an important element in their role as joint regulators in the conciliation and arbitration system.

In performing this regulatory function, unions had a number of enforcement approaches at their disposal. Substantial changes in the nature of the Australian workplace relations system, along with the curtailing of union capacity to leverage compliance other than through court proceedings, represented a challenge to the enforcement role of trade unions beyond the enterprise level.

In contrast, after decades in the background of federal labour law enforcement, in the last 4 years there has been a significant expansion in the size and sophistication of the state enforcement agency. This expansion has come at an important juncture in the history of the Australian labour market. The recent decline in union membership signifies that a substantial proportion of Australian workers are unrepresented, and possibly vulnerable to employer exploitation.

However, the extent to which the most recent changes in the system ensure that unions will continue to play a significant regulatory role in enforcement remains to be seen. While the FW Act does not reinstate the regulatory role played by unions prior to the 1990s, there are a still a number of mechanisms by which unions can perform such a role under the new legislation. Only time will tell whether unions have the inclination and the resources to make use of these provisions to act as regulators beyond the enterprise, and the implications of whatever course of action they take.

An important question that remains unanswered is the extent to which the state and unions will act as partners in enforcement, or follow parallel tracks. In the latter scenario, unions will continue to monitor and enforce compliance with employment standards applicable to their members, with the FWO assisting vulnerable workers and others that face difficulties to organise or act collectively. It is hoped that, as envisaged by ILO Convention No 81, it is the former and more collaborative path which is taken in the interests of all workers entitled to the protection of minimum employment standards in Australia.

Author/s:
Hardy, T; HOWE, J

Title:
Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia

Date:
2009

Citation:
Hardy, T. & HOWE, J. (2009). Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia. Australian Journal of Labour Law, 22 (3), pp.306-336

Persistent Link:
http://hdl.handle.net/11343/30154