



# **Trade Unions and the Enforcement of Minimum Employment Standards in Australia**

**Research Report**  
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## 1 INTRODUCTION

The monitoring and enforcement of compliance with minimum standards is a critical element of any effective labour regulation regime. While these tasks are assigned principally to the government labour inspectorate,<sup>1</sup> non-state actors can and do play instrumental roles in promoting and securing compliance with labour laws. In Australia, trade unions have historically performed a significant, if not pre-eminent, role in the monitoring and enforcement of minimum labour standards.<sup>2</sup> The *Fair Work Act 2009* (Cth) ('FW Act') continues to recognise this regulatory function of unions through, among other things, providing unions with rights to enter workplaces for compliance purposes and standing to apply to a court for an order in relation to a contravention of provisions of the Act, a modern award or a workplace agreement on behalf of an employee.<sup>3</sup> However a number of developments in recent decades, including declining union density, a more powerful and better resourced government inspectorate, and less conducive legal frameworks, have led observers to suggest that the monitoring and enforcement functions of unions has declined significantly.<sup>4</sup> If correct, this has significant implications for the nature and effectiveness of Australia's system of labour regulation, as well as for the ongoing role and legitimacy of trade unions. To date, however, such observations have been largely speculative, with little empirical examination having been conducted into the actual enforcement roles and practices of Australian unions.<sup>5</sup>

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<sup>1</sup> See, e.g., the ILO's *Labour Inspection Convention*, open for signature 11 July 1947, 54 UNTS 3 (entered into force 7 April 1950) (No. 81).

<sup>2</sup> B Creighton and A Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010) 499-502; G Maconachie and M Goodwin, 'Enforcing Minimum Labour Standards in Australia from 2010: Correcting or Compounding Problems?' (Proceedings of the 23<sup>rd</sup> Conference of the Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ), Newcastle City Hall, 4-6 February 2009); and T Hardy and J Howe, 'Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22 *Australian Journal of Labour Law* 306; M Lee, 'Regulating Enforcement of Workers' Entitlements in Australia: the New Dimension of Individualisation in Australia' (2006) 17 *Labour and Industry* 41; 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), 163-4; L Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (Law Book Co, 1994) 136. In this paper, the term 'minimum employment standards' is used to refer to minimum wages and other basic employment standards, such as working hours and leave entitlements, as set out in the FW Act, enterprise agreements and modern awards.

<sup>3</sup> For a detailed analysis of the extent to which the FW Act and preceding legislative regimes provide for the enforcement role of unions, see Hardy and Howe, above n 2.

<sup>4</sup> Hardy and Howe, above n 2; M Goodwin and G Maconachie, 'Minimum Labour Standards Enforcement in Australia: Caught in the Crossfire?' (2011) 22(2) *The Economic and Labour Relations Review* 55.

<sup>5</sup> The lack of empirical data documenting the enforcement activities of unions has been observed by Lee, above n 2, 47; and Hardy and Howe, above n 2, 317.

This report presents the preliminary findings of a study that has sought to empirically examine the extent to which and how trade unions in Australia monitor and enforce minimum employment standards concerning wages, hours of work and leave.<sup>6</sup> It builds upon on work undertaken by several of the authors into the extent to which labour law in Australia has and continues to facilitate the performance by unions of an enforcement role and how, in performing this role, unions interact with the federal state enforcement agency.<sup>7</sup> This study has consisted of qualitative case studies of five Australian trade unions, involving in-depth, semi-structured interviews with elected officials, industrial/legal officers and organisers in each union as well as analysis of relevant material provided by the unions. Among the issues investigated through the case studies include how unions structure and resource their enforcement activities; how they use legal procedures; and how, if at all, the unions' enforcement practices have changed over time. The research has also sought to explore how unions relate to other actors in the regulatory system, including the federal labour inspectorate (the Fair Work Ombudsman or FWO).

This research is important for a number of reasons. First, while data on the precise levels of employer non-compliance with minimum labour standards in Australia is not available, the evidence suggests that non-compliance is persistent and widespread.<sup>8</sup> This has serious implications for the quality of work and workers' lives, particularly disadvantaged workers who are most reliant on the safety net and most vulnerable to exploitation. The effective maintenance of minimum labour standards also has broader implications for the integrity of the regime of labour regulation, as well as for the capacity of any such regime to achieve broader social objectives such as the promotion of fairness in the labour market.<sup>9</sup>

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<sup>6</sup> Throughout this report, the term 'minimum employment standards' is used to refer to these conditions. In doing so, we recognise that we are using the term very narrowly and that the terms 'minimum employment standards' or 'minimum labour standards' are in fact broader than this and encompass both procedural and substantive rights. For a brief discussion of the scope and meaning of the term minimum labour standards, see M Quinlan and P Sheldon, 'The Enforcement of Minimum Labour Standards in an Era of Neo-Liberal Globalisation: An Overview' (2011) 22 *The Economic and Labour Relations Review* 5.

<sup>7</sup> Hardy and Howe, above n 2. This research draws upon, and supplements, research already undertaken by three of the authors, under the auspices of an Australian Research Council Linkage Grant with the Fair Work Ombudsman, into compliance strategies of the federal labour inspectorate.

<sup>8</sup> See, e.g., M Goodwin and G Maconachie, 'Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategy and Outcomes 1952-95' (2007) 49 *Journal of Industrial Relations* 523.

<sup>9</sup> P Sheldon and M Quinlan, 'Minimum Labour Standards and their Enforcement' (2011) 22 *Economic and Labour Relations Review* 1.

In considering how to secure and improve compliance with minimum standards, there is now a considerable body of theoretical and empirical literature suggesting that non-state actors can play an important role in supplementing state-based enforcement of labour standards.<sup>10</sup> Among the potential benefits that trade unions specifically can bring to compliance frameworks include greater capacity to monitor employer compliance with labour standards and to reach workers, as a result of their presence in workplaces (through their members, delegates and organisers); independence from employers; and expertise in workplace matters as well as the industries and sectors in which they operate.<sup>11</sup> For David Weil, for example, ‘... absent a labor union, it is difficult to devise an institutional arrangement that effectively aligns its interests with those of the workforce and at the same time has the kind of access to the workplace necessary to act upon those interests.’<sup>12</sup> Trade unions can also play a role in assisting and supporting individual workers who may have the legal right to enforce their own entitlements but who may not be aware of their rights or how to enforce them, find the costs associated with pursuing their claims through the courts prohibitive (especially where they are seeking to recover relatively small sums) or be reluctant to enforce their rights for fear of employer reprisal and retribution.<sup>13</sup> Finally, unions can play important roles in educating both workers and employers as to their obligations under labour laws.<sup>14</sup>

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<sup>10</sup> See generally I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992). In relation to labour standards specifically, see, e.g., D Weil, ‘Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets’ in R B Freeman, J Hersch and L Mishel, *Emerging Labor Market Institutions for the Twenty-First Century* (University of Chicago Press, 2004); J Fine and J Gordon, ‘Strengthening Labor Standards Enforcement through Partnerships with Workers’ Organizations’ (2010) 38 *Politics & Society* 552. See also T Colling, ‘What Space for Unions on the Floor of Rights? Trade Unions and the Enforcement of Statutory Individual Employment Rights’ (2006) 35 *Industrial Law Journal* 140, 144-5; B Lierman, ‘“To Assure Safe and Healthful Working Conditions”: Taking Lessons from Labor Unions to Fulfill OSHA’s Promises’ (2010) 12 *Loyola Journal of Public Interest Law* 1.

<sup>11</sup> T Hardy, ‘Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards’ (2011) 22(3) *The Economic and Labour Relations Review* 117, 121-4; Hardy and Howe, above n 2, 313; C Estlund, ‘Rebuilding the Law of the Workplace in the Era of Self-Regulation’ (2005) 105 *Columbia Law Review* 319, 364; Fine and Gordon, above n 10; Weil, above n 10.

<sup>12</sup> Weil, above n 10, 36.

<sup>13</sup> See further C Arup and C Sutherland, ‘The Recovery of Wages: Legal Services and Access to Justice’ (2009) 35(1) *Monash University Law Review* 96; Lee, above n 2; 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).

<sup>14</sup> Weil, above n 10, 24. Studies in the UK have found that union members are much more likely than non-members to be aware of their employment rights: see, e.g., J Casebourne et al, Institute of Employment Studies, ‘Employment Rights at Work: Survey of Employees 2005’ (Employment Relations Research Series, London: Department of Trade and Industry, 2006).

Second, the capacity of unions to monitor and enforce minimum employment standards is widely viewed as an important factor underpinning trade union legitimacy. Of the five principal functions of trade unions identified by Ewing, the enforcement function spans two: the *service* function, involving the provision of professional services to members (legal advice and representation to assist with problems at work), as well as the *workplace representation function* which encompasses the representation of individuals in the course of disputes or pursuing claims at the workplace.<sup>15</sup> It has also been suggested internationally that this enforcement role may assist unions in renewing or consolidating their presence in workplaces through demonstrating the utility and relevance of union membership to members and non-members and augmenting the collective bargaining agenda.<sup>16</sup> In Australia, Hardy and Howe have expressed their view that a continuing enforcement role for unions is important to maintaining the social legitimacy of unions, as well as assisting in retaining and attracting members.<sup>17</sup> It is also hoped that this research may prompt reflection within unions of their role in enforcement and opportunities to strengthen this role.

This report is structured as follows. Part 2 provides a brief overview of the context in which this study has taken place. It outlines the main developments which are commonly identified as contributing to a decline in the enforcement role of unions in Australia, including a sharp decline in union membership; structural changes in the labour market; an increasingly active and powerful federal labour inspectorate; and legal frameworks less supportive of unions' compliance roles. Part 3 of the report explains the methodology employed in this study and provides a brief overview of the five case study unions. In Part 4, we present key findings of the study, covering such themes as the extent to which unions continue to perform monitoring and compliance functions; how they detect cases of employer non-compliance; factors they consider in deciding whether to pursue enforcement action; enforcement strategies; and how they use the Fair Work Commission and/or courts to secure compliance by employers with minimum standards. We also present findings on the perceptions among those interviewed of the role and activities of the Fair Work Ombudsman. Part 5 of the report identifies and discusses a number of key themes to emerge from the research.

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<sup>15</sup> K Ewing, 'The Function of Trade Unions' (2005) 34 *Industrial Law Journal* 1, 3.

<sup>16</sup> Colling, above n 10. See also T Novitz, 'A Revised Role for Trade Unions as Devised by New Labour: the Representation Pyramid and "Partnership"' (2002) 29 *Journal of Law and Society* 487.

<sup>17</sup> Hardy and Howe, above n 2, 335.

## 2 THE EVOLVING ROLE OF UNIONS IN ENFORCEMENT

It is widely recognised that trade unions have long played a significant role in the monitoring and enforcement of minimum labour standards in Australia.<sup>18</sup> This ‘important aspect of unions’ regulatory function’ has historically been supported by Australia’s industrial law framework, in particular the federal conciliation and arbitration system that operated for much of the twentieth century.<sup>19</sup> A number of commentators have observed, however, that the capacity of unions to monitor and enforce minimum labour standards in Australia appears to have declined since the early 1990s.<sup>20</sup> This has been attributed to a number of developments, including falling union membership; structural changes to the labour market which have made it more difficult for unions to perform their compliance and enforcement roles; an increasingly well-resourced and powerful federal labour inspectorate; and changes in the federal labour law system which have affected union enforcement capacity, including restrictions on right of entry.<sup>21</sup> Each of these developments is outlined briefly below.

### Declining union membership

Union density in Australia has declined dramatically in recent decades: from around 49 percent of workers in the early 1980s to around 18% today.<sup>22</sup> The reasons for this decline (which generally include such factors as structural changes to the economy and labour market, employer strategies, regulatory environments and worker attitudes) are analysed exhaustively elsewhere.<sup>23</sup> What is relevant for our purposes is the implications of this decline for the monitoring and enforcement capacities of unions. First, the decline in membership has significant ramifications for union resources, with fewer members equating to less funds for unions to expend on compliance activities. Second, the decline in union density presumably means that increasing numbers of workplaces do not have a union presence, which presents greater challenges to unions’ monitoring and compliance roles.<sup>24</sup>

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<sup>18</sup> Creighton and Stewart, above n 2, 499-502; Maconachie and Goodwin, above n 2; and Hardy and Howe, above n 2; Lee, above n 2; Goodwin, above n 2; Bennett, above n 2.

<sup>19</sup> See further Hardy and Howe, above n 2.

<sup>20</sup> Hardy and Howe, above n 2; Maconachie and Goodwin, above n 2.

<sup>21</sup> See further M Goodwin and G Maconachie, ‘Recouping Wage Underpayment: Increasingly Less Likely?’ (2006) 41 *Australian Journal of Social Issues* 328, 339; and Hardy and Howe, above n 2, 318-9.

<sup>22</sup> Australian Bureau of Statistics, 6310.0 - *Employee Earnings, Benefits and Trade Union Membership* (17 May 2013) Australian Bureau of Statistics.

<sup>23</sup> See, e.g., D Peetz and J Bailey, ‘Dancing Alone: The Australian Union Movement over Three Decades’ (2012) 54 *Journal of Industrial Relations* 525.

<sup>24</sup> Hardy and Howe, above n 2, 326.

## Structural changes in the labour market

It has also been emphasised that changes to the structure of the labour market have presented challenges to the compliance role historically adopted by trade unions. This includes changes in industry and occupational structures, an increase in the proportion of smaller businesses, as well as the use of increasingly complex outsourcing and supply chain arrangements. There has also been a growth in the use and diversity of ‘non-standard’ forms of engaging labour, such as casual employment, labour hire arrangements and contracting. These developments have made it increasingly difficult for unions to detect non-compliance as well as to deploy traditional compliance and enforcement strategies.<sup>25</sup>

## An increasingly active federal labour inspectorate

Under Australia’s conciliation and arbitration system which operated for most of the twentieth century, trade unions played a very significant – if not pre-eminent – role in both setting standards and monitoring and enforcing their compliance through awards.<sup>26</sup> Under this system, unions enjoyed a range of legal supports for their enforcement activities, including rights of entry (originally arising under terms of awards and later through statute) and standing to seek recovery of wages and penalties for breaches of minimum standards of employment in awards in the courts.<sup>27</sup> During most of this time, the federal state inspectorate in Australia was relatively under-developed, with the first federal labour inspector not appointed until the early 1930s and the inspectorate generally under-resourced and of limited effectiveness until the 1990s.<sup>28</sup> As Hardy and Howe observe, there has been a general assumption that unions ‘filled the void’ left by an under-resourced state inspectorate.<sup>29</sup>

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<sup>25</sup> Hardy and Howe, above n 2, 318; Bennet, above n 2, chs 5-6.

<sup>26</sup> Bennett, above n 2; Hardy and Howe, above n 2; M Bray and J MacNeill, ‘Individualism, Collectivism and the Case of Awards in Australia’ (2011) 53 *Journal of Industrial Relations* 149; Maconachie and Goodwin, above n 2.

<sup>27</sup> *Conciliation and Arbitration Act 1904* (Cth) s 44. While unions and state inspectors were able to recover penalties so that non-union members could recover wage underpayments, it was not until 1990 that non-union members had standing to seek remedies for breaches of awards under federal legislation: see Goodwin, above n 2, 186; and R McCallum, ‘The Imperfect Safety Net: the Enforcement of Federal Awards and Agreements’ in R McCallum, G McCarry and P Ronfeldt (eds), *Employment Security*, (Federation Press, 1995) 201.

<sup>28</sup> M Goodwin and G Maconachie, ‘Employer Evasion of Workers’ Entitlements 1986-1995: What and Whose?’ in M Baird, R Cooper and M Westcott (eds), *Reworking Work* (Proceedings of the 19<sup>th</sup> Conference of the Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ), Volume 1, University of Sydney, February 2005); Hardy and Howe, above n 2.

<sup>29</sup> Hardy and Howe, above n 2, 315. The authors note, however, that this presumption has yet to be subject to significant empirical scrutiny.

The 1990s saw the beginning of a significant shift in the relative functions and powers of the federal government labour inspectorate and trade unions.<sup>30</sup> Under the *Workplace Relations Act 1996* (Cth)(WR Act), the former Coalition Government established a number of state agencies with responsibility for monitoring and enforcing various aspects of the new labour relations system, including the Office of Workplace Services, the Office of the Employment Advocate and the Australian Building and Construction Commission. The focus of several of the new state agencies (at least the two latter) was firmly on enforcing those provisions of the WR Act that promoted Australian Workplace Agreements (AWAs) and that restricted the roles and functions of trade unions.<sup>31</sup> This politicization of the state inspectorate under the former Coalition Government, as well as the role of the inspectorates in not only enforcing those provisions of labour laws that benefit workers but also in prosecuting unions for breaches of workplace laws, are important to understanding the nature and dynamics of the relationships between the current federal state inspectorate and trade unions (see further below).

Following the passage of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Work Choices) in 2005, the powers and resources of the federal labour inspectorate were substantially augmented. As Hardy and Howe summarise, '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'.<sup>32</sup> Among other changes, the state agency also adopted a more proactive and aggressive enforcement approach, abandoning its former 'weak persuasive compliance' enforcement model in favour of the increasing use of litigation as a tool for securing compliance.<sup>33</sup> These changes have been attributed to a number of factors, including the then Government's professed commitment to enforcement of minimum employment standards under the new legislation (particularly in the wake of suggestions that the impact of Work Choices was

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<sup>30</sup> For a detailed discussion of the development of the federal labour inspectorate and the apparent shift in the balance between union and state enforcement, see Hardy and Howe, above n 2. See also T Hardy, J Howe and S Cooney, 'Mandate, Discretion and Professionalisation in an Employment Standards Enforcement Agency: An Antipodean Experience' (2012) 35 *Law and Policy* 81.

<sup>31</sup> The focus of the state inspectorates under the former Coalition Government is well-illustrated by the fact that, during the period 1996/1997 to 2005/2006, only 35 enforcement proceedings were recommended against employers: M Goodwin and C Maconachie, 'Political Influence and the Enforcement of Minimum Labour Standards in the Australian Federal Industrial Relations Jurisdiction' (Paper presented at the 22<sup>nd</sup> Conference of the Association of Industrial Relations Academics of Australia and New Zealand, Melbourne, 6 February 2008) 7. The authors note, however, that poor reporting standards in the years 1999/2000 and 2001/2002 may have led to underreporting of prosecutions.

<sup>32</sup> Hardy and Howe, above n 2, 329. For a detailed overview of the state inspectorate, see also Goodwin and Maconachie, above n 4.

<sup>33</sup> Hardy and Howe, above n 2, 321.

undermining government support);<sup>34</sup> and the shift to a national workplace relations system, with the federal government taking over responsibility for many employees previously falling within the jurisdiction of state inspectorates.<sup>35</sup>

While the federal state inspectorate has been renamed under the Labor Government's *Fair Work Act 2009*, and its emphasis has been somewhat re-oriented towards the promotion of 'harmonious and cooperative workplace relations', the inspectorate has maintained similar focus and functions to its predecessor agencies.<sup>36</sup> It has continued to enjoy significant enforcement powers<sup>37</sup> and to be relatively well-resourced, although government funding has started to contract in the past year or so.<sup>38</sup> Of potential significance for the nature of the inspectorate's relations with unions (discussed further in Part 4 below), the FWO also continues to have the capacity to prosecute not only employers for breaching the FW Act but also trade unions. The significant empowerment of the state inspectorate since the 1990s, along with the imposition of significant restrictions on unions' regulatory functions (outlined further below) have led some commentators to suggest that unions have gone from being 'partners in enforcement' with the government inspectorate prior to the 1990s, to becoming 'the junior partner'.<sup>39</sup>

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<sup>34</sup> Bray and MacNeill, above n 26, 160.

<sup>35</sup> Hardy and Howe, above n 2, 321.

<sup>36</sup> For detailed discussion, see Hardy and Howe, above n 2; Goodwin and Maconachie, above n 4.

<sup>37</sup> Indeed, the powers of state inspectors have been enhanced under the FW Act – see Hardy and Howe, above n 2, 328.

<sup>38</sup> Figures extracted from the FWO's Annual Reports show the amounts as set out in the Portfolio Budget Statements for Outcome 1 - 'Compliance with workplace relations legislation by employees and employers through advice, education and where necessary enforcement'. These figures suggest that in the last three financial years the funding has steadily decreased from around \$154 million in 2009/2010, to \$149 million in 2010/2011 to \$143 million in 2011/2012. The Budget delivered in May 2013, however, stated that the federal government will provide \$25.7 million over four years to the Office of the Fair Work Ombudsman (OFWO) to provide compliance, education and advisory services in support of the national workplace relations system. In the same budget, the government committed to provide an additional \$3.4 million over four years to enable the Fair Work Ombudsman to monitor and enforce employer compliance with subclass 457 visa conditions. See Commonwealth of Australia, *Budget Paper No. 2 - Part 2: Expense Measures, Education, Employment and Workplace Relations* (14 May 2013) [http://www.budget.gov.au/2013-14/content/bp2/html/bp2\\_expense-09.htm](http://www.budget.gov.au/2013-14/content/bp2/html/bp2_expense-09.htm) (accessed 15 January 2014).

<sup>39</sup> Hardy and Howe, above n 2, 306. The term 'partners in enforcement' is used in Goodwin, above n 2, citing the Australian Government's *Report to the International Labour Organisation under Article 22 of the ILO Constitution*, 1989-90. Hardy and Howe suggest that the term overstates the extent of collaboration between the state agency and unions, with perhaps a more accurate characterisation of the relationship being one in which the institutions worked 'on parallel tracks': Hardy and Howe above n 2, 318.

## Less conducive legal frameworks

The shift from the system of labour regulation based on conciliation and arbitration and awards to one based on enterprise bargaining has diminished the relative importance of awards and, correspondingly, the regulatory role of unions. At the same time, the increasing emphasis given to other means of setting minimum standards of employment, including enterprise bargaining, has presented further challenges to the enforcement capacity of unions, not least through the potential for union involvement in these processes to soak up union resources and detract from monitoring and enforcement functions.<sup>40</sup> From the mid-1990s, restrictions placed on the capacity of the federal industrial tribunal to resolve disputes (with the WR Act limiting its powers of conciliation and arbitration to the resolution of disputes over matters arising under the terms of awards and agreements) further reduced ‘the capacity of trade unions to utilize the tribunal as a more informal mechanism of enforcement...’<sup>41</sup> These trends were further consolidated through Work Choices.

Of significant importance for the enforcement function of unions, since the 1990s Australia’s labour relations framework has been increasingly individualised.<sup>42</sup> An important aspect of this individualisation has been the increase in statutory regulation of individual employment rights, with ‘legal rights being granted to individuals with an accompanying capacity to enforce those rights through legal action.’<sup>43</sup> This trend commenced with the legislative entrenchment in the WR Act, as amended by Work Choices,

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<sup>40</sup> Goodwin and Maconachie, above n 21, 332; Hardy and Howe, above n 2, 319, 308, 334.

<sup>41</sup> Hardy and Howe above n 2, 319.

<sup>42</sup> S Deery and R Mitchell, *Employment Relations: Individualisation and Union Exclusion – An International Study* (Federation Press, 1999). In a recent article which provides a more sophisticated typology of individualism and collectivism in Australian labour relations, Bray and MacNeill observe that individualism (or collectivism) can be found in at least three dimensions of employment relations: the *rules* of the employment relationship; the social processes for the *making* of these rules; and the social processes for the *enforcement* of these rules. The first and third of these dimensions are particularly relevant for our purposes: Bray and MacNeill, above n 26, 153. This trend is by no means limited to Australia: e.g. the OECD has noted a shift in the dominant source of regulation away from voluntary self-regulation at the collective level to formal individual rights enforced through the courts: OECD (2012), *OECD Employment Outlook 2012*, (OECD Publishing 2012) 144-5.

<sup>43</sup> Bray and MacNeill, above n 26, 151. See also Creighton and Stewart, above n 2, 31; 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* (Federation Press, 2009) 164; A Stewart, ‘A Question of Balance: Labor’s New Vision for Workplace Regulation’ (2009) 22 *Australian Journal of Labour Law* 3. This trend is of course not limited to Australia, for analysis of the individualisation of employment rights in the UK and its implications for enforcement: see, e.g., B Hepple and G Morris, ‘The Employment Act 2002 and the Crisis of Individual Employment Rights’ (2002) 31 *Industrial Law Journal* 245; L Dickens, ‘Delivering Fairer Workplaces through Statutory Rights? Enforcing Employment Rights in Britain’ (Paper presented at the 15<sup>th</sup> World Congress of the International Industrial Relations Association (ILERA), Sydney, August 2009); Colling, above n 10; A Pollert, ‘The Unorganised Worker: The Decline in Collectivism and New Hurdles to Individual Employment Rights’ (2005) 34 *Industrial Law Journal* 217.

of a core set of minimum employment standards known as the Australian Fair Pay and Conditions Standard and has been consolidated by the FW Act.<sup>44</sup> There is no doubt that the FW Act re-collectivised Australian labour relations to some extent, particularly through the rejuvenation of awards and the role of the federal tribunal and its focus on promoting good faith bargaining at the enterprise level. Through removing the capacity of parties to make individual statutory agreements, it also 'dispensed with the more egregious manifestations of individualisation introduced by the Howard Government'.<sup>45</sup> However the new system has maintained an emphasis on individual employment rights.<sup>46</sup> It consolidates the concept of statutory individual minimum employment standards through the establishment of ten National Employment Standards (NES), and while awards have been revived and are more comprehensive than under the WR Act, these instruments are now 'essentially codes of individual employment rights'.<sup>47</sup>

Australian labour law has also become more individualised in the manner in which employment standards are enforced.<sup>48</sup> Prior to the 1990s, the task of enforcing awards was largely left to the unions: indeed until 1990 an individual employee who was not a union member did not have the right to pursue legal action to enforce federal award provisions.<sup>49</sup> Under the WR Act and Work Choices, enforcement of provisions in legislation and awards became increasingly individualistic in nature.<sup>50</sup> The FW Act continues to provide individuals with the capacity to enforce their own legal rights under agreements and modern awards. It has also expanded the small claims jurisdiction through increasing the monetary limit for small claims up to \$20,000 and conferring this jurisdiction on the Federal Circuit Court, as well as State and Territory courts,<sup>51</sup> as well as providing a wider range of civil remedies recoverable (such as orders, injunctions, compensation and re-instatement).

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<sup>44</sup> Stewart, above n 43; Fenwick and Howe, above n 43.

<sup>45</sup> B Creighton, 'A Retreat from Individualism? The Fair Work Act 2009 and the Re-Collectivization of Australian Labour Law' (2011) 40 *Industrial Law Journal* 116, 142.

<sup>46</sup> Ibid 125; Hardy and Howe above n 2, 322.

<sup>47</sup> Bray and MacNeill, above n 26, 164.

<sup>48</sup> Bray and MacNeill, above n 26.

<sup>49</sup> Bray and MacNeill, above n 26, 157. An amendment to the *Industrial Relations Act 1988* (Cth) in 1990 explicitly permitted employees who were not party to an award to bring enforcement proceedings.

<sup>50</sup> Bray and MacNeill, above n 26, 159-160; Hardy and Howe above n 2.

<sup>51</sup> FW Act s 548.

The FW Act recognises ‘the role employee organisations play in enforcement, particularly in relation to the safety net and instruments that apply to them.’<sup>52</sup> However in many cases these rights of union to enforce the rules are rights to enforce the rules *on behalf of* individual employees.<sup>53</sup> 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.<sup>54</sup> If the contravention relates to a workplace agreement or workplace determination covering the union, the union can also make an application in its own right and/or on behalf of an employee.<sup>55</sup> While parties are generally prevented from recovering costs in enforcement proceedings,<sup>56</sup> penalties may be ordered for breach of the relevant provisions and parties (including unions) may seek for any applicable penalty to be paid to themselves rather than into consolidated revenue.

The increasing focus on individual rights and enforcement would appear to have both potential costs and benefits for trade unions.<sup>57</sup> On the one hand, this focus may constitute a significant drain on union capacities and resources - at the workplace level if delegates and organisers are increasingly drawn into the role of representing individuals and prosecuting individual grievances, and at the higher levels where court proceedings take time and cost.<sup>58</sup> On the other hand, it could be that the greater number of individual employment rights benefits unions through increasing demand among workers for unions’ representative and advisory services.<sup>59</sup> As employment rights are more individualised, the need for more support and empowerment for workers if they are to enforce these rights only becomes more imperative. Studies in Australia and overseas have emphasised that access to reliable, independent and affordable support and advice outside the workplace is critical if there is to be any prospect of workers enforcing their rights.<sup>60</sup> There is the potential for unions to expand their activities in this area. Indeed, in the UK Context, Ewing has observed that ‘[a]s the regulatory [rule-making] function of trade unions

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<sup>52</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth), Parliament of Australia, 2008, 326.

<sup>53</sup> Bray and MacNeill, above n 26.

<sup>54</sup> While not discussed further here, it should be noted that the FW Act also provides, for the first time, unions with the capacity to bring actions in the area of anti-discrimination through an expanded general protections regime.

<sup>55</sup> FW Act s 540.

<sup>56</sup> FW Act s 570.

<sup>57</sup> For an analysis of these costs and benefits for unions in the UK, see T Colling, ‘Trade Union Roles in Making Employment Rights Effective’ in L Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart Publishing, 2012) 183.

<sup>58</sup> Ibid 198-9.

<sup>59</sup> Ibid 196.

<sup>60</sup> Arup and Sutherland, above n 13; Pollert, above n 43; Weil, above n 10.

retreats so the service function advances to fill the space'.<sup>61</sup> There is also the potential for unions – through assisting workers enforce statutory employment rights – to demonstrate the efficacy of representation and to augment their collective bargaining and organising agendas.<sup>62</sup> However this is by no means a necessary outcome. As Colling has emphasised:

*'If the benefits of legal engagement are to be maximised, outcomes need to provide either inspirational or radiating effects that can be diffused from individual cases to wider organising strategies... Inspirational effects are those which might validate a sense of injustice amongst (potential) members and galvanise support for action. Radiating effects are those that can extend from the specific case to change behaviour among other employers or membership constituencies'.*<sup>63</sup>

A final legal development which is widely recognised as impacting upon the capacity of unions to perform their monitoring and enforcement functions is restrictions on the capacity of unions to enter workplaces.<sup>64</sup> Historically, the right of unions to enter workplaces for compliance purposes was broad and largely regulated by unions themselves.<sup>65</sup> However these rights have been subject to an increasing volume and detail of regulation. Under the *WR Act*, union rights of entry were significantly curtailed.<sup>66</sup> Union right of entry was comprehensively regulated in the Act, and while agreements could still contain right of entry terms, such terms in awards were rendered unenforceable. In addition, exercise of rights of entry was made subject to the oversight of the federal tribunal's registry. The scope of union rights of entry was also significantly narrowed, from a general right to enter workplaces to ensure the general observance of the Act or instruments made under that Act to the use of entry powers for the purposes of investigating specific breaches of terms of the Act or industrial instruments.<sup>67</sup> For the first time, a

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<sup>61</sup> Ewing above n 15, 7.

<sup>62</sup> Colling, above n 10; Colling, above n 57; E Heery, 'Debating Employment Law: Responses to Juridification' in P Blyton, E Heery and P Turnbull (eds), *Reassessing the Employment Relationship* (Palgrave, 2010); R Hickey, S Kuruvilla and T Lakhani, 'No Panacea for Success: Member Activism, Organizing, and Union Renewal' (2010) 48 *British Journal of Industrial Relations* 53.

<sup>63</sup> Colling, above n 57, 198.

<sup>64</sup> Bray and MacNeill, above n 26, Hardy and Howe, above n 2.

<sup>65</sup> Hardy and Howe, above n 2, 324; *Industrial Relations Act 1988* (Cth) s 286.

<sup>66</sup> See Fenwick and Howe, above n 43, 169-70.

<sup>67</sup> Whereas under the former *Industrial Relations Act 1988* (Cth), unions had the capacity to enter, inspect and interview in order to ensure the general observance of the Act and any industrial instrument made under it, under the *Workplace Relations Act 1996* (Cth) these powers could only be exercised for the purposes of investigating specific breaches of terms of the Act or an instrument such as an award or an agreement.

union was also required to have a subjective belief or suspicion that an employer was in breach prior to exercising its right of entry for compliance purposes, and to provide the employer with at least 24 hours' notice of their intention to enter the premises. Union right of entry was subject to further and unprecedented restrictions under Work Choices, with awards and agreements prohibited from regulating rights of entry.<sup>68</sup> As Hardy and Howe observe, these ever-increasing restrictions on union right of entry were accompanied by a significant increase in the enforcement powers of federal workplace inspectors to enter workplaces and exercise rights of inspection and enforcement.<sup>69</sup>

While the Labor Government largely carried over the right of entry architecture from the WR Act, there have been some important changes. Among those rules essentially retained from the former legislative regime include those governing eligibility of union officials for right of entry permits and requirement to give at least 24 hours' notice in order to enter workplaces for the purposes of investigating suspected contraventions of the FW Act or instruments made under it have been retained. However, unlike the WR Act, there is no 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. In the case of suspected breaches, a union need only have a member in the workplace who is affected by the contravention.<sup>70</sup> In another change, the FW Act appears to have narrowed the scope of documents that are accessible by a permit holder, providing that an employer is only required to provide documents if they are 'directly relevant' to the alleged contravention.<sup>71</sup> In addition, a union's capacity to monitor non-compliance by employers is further restricted by the requirement that non-member records can only be accessed with the consent of the employees concerned, or by order of FWC.<sup>72</sup>

### 3 METHODOLOGY

To examine the extent to which and how trade unions in Australia seek to monitor and enforce minimum employment standards in the context of this apparent decline in their capacity to do so, we initially focused our research on formal court proceedings. We compiled and analysed all published decisions in the Federal Court of Australia, the Federal Circuit Court, and two relevant state courts

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<sup>68</sup> *Workplace Relations Act 1996* (Cth) s 518; *Workplace Relations Regulations 2006* (Cth) ch 2, reg 8.5(1)(g).

<sup>69</sup> Hardy and Howe, above n 2, 325.

<sup>70</sup> FW Act s 481. For right of entry for the purposes of discussions, a union need only at least one employee working on the premises whose industrial interests the union is entitled to represent, and that the relevant employees want to be involved in those discussions: FW Act s 484.

<sup>71</sup> FW Act ss. 482-3, 483AA.

<sup>72</sup> FW Act ss. 482-3, 483AA.

concerning compliance by employers of minimum standards concerning wages, hours and leave, over the period 1990 – 2010, with a view to discerning patterns or trends in the number and nature of applications made over time by the various actors (state inspectorate; unions and individuals). However this methodology suffered from a number of serious limitations. First and foremost, it is of course impossible to tell from published decisions the extent to which unions may have used the threat or initiation of legal proceedings for enforcement purposes but have settled cases prior to judgment. In addition, it is often difficult if not impossible to tell those cases where the plaintiff may be formally identified as an individual employee or group of employees, but in fact a union was extensively involved in supporting and assisting the worker(s) in pursuing their claims. Finally, a narrow focus on court proceedings tells us little about the extent to which and how trade unions deploy other strategies to promote and enforce compliance.

To overcome some of these obstacles and further examine the key research questions, we undertook qualitative case studies of five state branches of national trade unions, based in either NSW or Victoria. In each of the five unions, we sought to conduct interviews with an elected official, an industrial and/or legal officer and an organiser. Interviewing employees with different positions within the organisations was intended to help us gain a more comprehensive understanding of the approach of the unions to enforcement issues and the enforcement strategies employed. We were successful in following this model in three of the five unions studied. In one union we interviewed a senior legal officer, an industrial/legal officer with responsibility solely for enforcement matters, and an organiser; and in another union we interviewed only an elected officer and a legal officer with responsibility for the enforcement work of the union. Fourteen interviews were conducted in total, between September 2012 and June 2013. These semi-structured interviews were supplemented by documentary material provided by the respondents, such as recruitment material, policies and procedures; as well as material available in the public domain such as union websites courts and media sources. This data was thematically analysed using Nvivo qualitative data analysis software.

Six of the fourteen interviewees had been employed in their union for over 20 years, which enabled us to directly inquire into the extent to which, and how, they believed enforcement practices may have changed in past decades, along with changes to legislative frameworks and the state inspectorate. Several of the interviewees had also worked for different unions, which assisted us in developing an understanding of the extent to which enforcement focus and activity varied between different unions and the reasons for this.

A deliberate attempt was made to include a diversity of unions within the study. The five participant unions covered a broad range of industries, both blue-collar and white-collar, mostly but not exclusively in the private sector. The unions ranged significantly in size from those with a branch membership of several thousand to among the largest unions in Australia. Other factors that were taken into consideration when selecting the case study unions were estimated extent of compliance problems in the relevant industry/occupation; relationship with the FWO and other federal inspectorates (in that we sought to include in our study both unions that had been the focus of investigation or prosecution by the government inspectorate and those that had not been); and willingness to participate.

## 4 KEY FINDINGS

### **An overview of the enforcement function within the case study unions**

While the perceived extent of non-compliance by employers with industrial instruments in the industry or occupation covered by the unions varied among interviewees, all believed it was a major issue in the industries in which their members worked. For interviewees in two unions, non-compliance with minimum standards in their respective industries was ‘rampant’,<sup>73</sup> ‘chronic’,<sup>74</sup> and ‘endemic’.<sup>75</sup> For the other unions, non-compliance was also considered common, though it was observed that high rates of non-compliance tended to be confined to certain sectors or types of companies.

According to the respondents, non-compliance by employers with minimum standards was deliberate in some cases and based on ignorance as to regulatory requirements in others. A number of factors were identified as contributing to non-compliance by employers with minimum standards. These commonly included the size of the employer (with smaller employers more likely to be ignorant of their legal obligations); frequent changes in regulation (including different legislative regimes and processes such as award modernisation) which contributed to higher levels of confusion and lack of understanding

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<sup>73</sup> Interviewee 3B; Interviewee 2A; and Interviewee 2C.

<sup>74</sup> Interviewee 2B

<sup>75</sup> Interviewee 3A. Interviewee 3C also observed, ‘I think it would be fair to say that 90% of employers are either underpaying people either in wages or allowances in some shape or form’.

about legal obligations; and deliberate evasion of legal obligations.<sup>76</sup> In specific sectors, hyper-competitive contracting systems were also identified as major contributors to non-compliance.<sup>77</sup> Evasion of legal obligations was both direct (through non-payment of wages and entitlements) and through mechanisms such as contracting of work through supply chains to minimise costs and legal liabilities; sham contracting and phoenixing activities.<sup>78</sup>

Our interviews confirmed that the task of securing compliance by employers of minimum wages and conditions of employment continue to constitute a dominant function of trade unions in Australia and to take up a significant proportion of unions' time and resources. The task of monitoring and enforcing compliance by employers was described by various interviewees, for example, as 'a core part of what unions are about'<sup>79</sup> and as '...bread and butter work for unions'.<sup>80</sup> This work was seen as an integral part of the benefits offered by a union to its members. Several of the respondents also pointed out that the interest of their union in enforcing minimum standards lay both in ensuring members received their legal entitlements, and in protecting their members' wages and conditions through ensuring that 'good employers' who complied with their legal obligations under the applicable award or agreement were not undermined by non-compliant ones.<sup>81</sup>

However the interviews revealed significant variation between the five case study unions in terms of the extent to which they felt their union focused on compliance-related work, relative to other common functions of unions such as bargaining and organising. While several of the unions noted that compliance-related work would take up a very significant, if not the majority, of their union's time and resources, others noted that their union was much more focused on bargaining and/or organising. The relative emphasis placed on compliance work seemed fairly consistent within the unions studied: that is, it did not seem to vary significantly according to the position of the interviewee within the union.

The five case study unions adopted different internal structures for dealing with their enforcement work. In three of the five unions, the legal and industrial work associated with compliance-related

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<sup>76</sup> Interviewee 1A; Interviewee 1C; Interviewee 3A; Interviewee 3C; and Interviewee 5C.

<sup>77</sup> Interviewee 4A.

<sup>78</sup> Interviewee 3A; Interviewee 1A; Interviewee 2C; and Interviewee 4B.

<sup>79</sup> Interviewee 4A.

<sup>80</sup> Interviewee 1A.

<sup>81</sup> Interviewee 3A.

activities was generally carried out by the same staff as the organising and bargaining functions.<sup>82</sup> In two of the unions studied, the legal and industrial work associated with enforcement was carried out by separate units or departments with responsibility for compliance-related activities.<sup>83</sup> While this division of labour may in part be attributable to the size and resources of the union, with larger unions being more likely to have specialist divisions, there appeared other reasons for it. In one union, this division of labour was explained as partly a historical legacy, partly a response to the significant body of work enforcement function created, and partly in recognition of the differing expertise and skills needed by staff in this area (such as accounting skills in determining the existence and quantum of any alleged underpayment).<sup>84</sup> In Union 4, however, the union's leadership had made a deliberate strategic choice to separate the enforcement work from the organising and bargaining functions, so as to better promote and support 'the organising principle' of the union.

In four of the five unions studied, union organisers were expected to play a key role in the enforcement activities of the union (as well as other tasks such as encouraging workers to join the union and negotiating enterprise agreements). Organisers were generally tasked with monitoring compliance with the award/ agreement in workplaces, receiving complaints, conducting the initial investigations, raising the issue with the employer at first instance and resolving the complaint at the workplace level where possible.<sup>85</sup> Complaints were referred to the legal and industrial team only where they could not be resolved at the workplace level. Union 4, however, adopted a different approach, in which organisers were no longer expected to perform the enforcement work, with inquiries into existing rights and entitlements and suspected cases of non-compliance being immediately referred to the enforcement unit within the union. This latter approach again reflected the strategic decision by that union to embrace an 'organising model' of unionism whereby the enforcement and bargaining functions are removed from the organiser's responsibilities and 'the organiser is able to focus upon growing the union and campaigning'.<sup>86</sup> It was also seen as more desirable as it led to a greater professionalisation of the enforcement work, greater efficiencies and consistency in approach.<sup>87</sup> This relationship between enforcement activity and organising is discussed further below.

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<sup>82</sup> Union 1; Union 2; Union 5.

<sup>83</sup> Union 3 and Union 5.

<sup>84</sup> Union 3.

<sup>85</sup> Union 3.

<sup>86</sup> Interviewee 4A.

<sup>87</sup> Interviewee 4B.

## Detecting non-compliance

A first and key step involved in the carrying out of enforcement activities is of course the detection of non-compliance. All the case study unions relied on complaints from workers as the principal means through which they became aware of instances of non-compliance by an employer. In most cases, this complaint took the form of a phone call by the worker in the relevant industry or occupation to the union. Several of the unions studied (and other unions) have direct phone lines that are dedicated to responding to members' concerns and promoted among their membership and workers more broadly.

Instances of suspected non-compliance were also commonly brought to the attention of the unions by union delegates (that is, workers elected by other union members in the specific workplace or company to represent union members). Delegates were described by one interviewee as being 'the eyes and ears' of the union in the workplace and particularly important given union's limited resources to visit and monitor every workplace.<sup>88</sup> An interview from another union, however, conceded that while the role of delegates in monitoring employer non-compliance was important, in practice in their union it had decreased significantly in recent years. This decline was attributed to a 'change of culture' in the industry, the deterioration of existing delegate structures and the failure of the union to 'keep up to date with training our delegates as much as we should have been.'<sup>89</sup>

According to interviewees, other means through which instances of non-compliance were brought to the union's attention included anonymous tip-offs (suggesting that the union check a specific workplace or employer);<sup>90</sup> and direct contact by employers in the industry concerned that another employer may be failing to comply with minimum standards (and so undercutting them).<sup>91</sup>

Much of the compliance work done by the unions studied appears to be reactive: that is, based on and driven by complaints. However four of the five unions also adopted more proactive and strategic approaches to their monitoring and inspection activities. For three of the unions, these proactive approaches took the form of visiting/ auditing specific groups of employers within the context of

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<sup>88</sup> Interviewee 2B.

<sup>89</sup> Interviewee 3B.

<sup>90</sup> Union 2.

<sup>91</sup> Interviewee 3C.

broader campaigns targeted at organising specific workplaces, regions or sectors.<sup>92</sup> These campaigns often initially took the form of organisers visiting a workplace, introducing themselves as from the union and asking workers whether they had any concerns or problems in their workplace.<sup>93</sup> One of these unions also conducted compliance drives or audits, focusing on specific standards that are commonly breached by employers in the industry or specific groups of employers.<sup>94</sup> At Union 2, the elected official interviewed explained that the union had deliberately sought to become ‘more systematic about our compliance work’ in the face of the large volume of information the union obtained concerning potential non-compliance and the limited resources available to it.<sup>95</sup> This union operated in an industry with extensive and complex supply chains and a strategic approach involving focusing on a single supply chain, mapping that supply chain and checking compliance at each level of the chain was seen as more effective in identifying where the problems are and the points of leverage to rectify problems.<sup>96</sup> The union was assisted in the task of identifying potential non-compliance through the existence of regulatory initiatives which required employers to become accredited and provide, on a regular basis, details on their supply chains. The union was also involved in a multi-stakeholder regulatory initiative in which the union was accorded a formal role in monitoring compliance by participating employers.

### **Deciding whether to pursue enforcement activity**

Once a suspected case of non-compliance by an employer with minimum employment standards had been detected, a union must decide whether or not to pursue the case. A number of factors were identified by interviewees as influencing this decision - including whether the person was a member of the union; the merits of the claim; the number of members and workers affected; and whether it was a company the union wanted to make an example of an employment standard that the union wanted to generate further awareness around.

The most significant factor identified by those interviewed in deciding whether or not to pursue enforcement action against an employer on behalf of a worker was, unsurprisingly, whether that worker was a member of the union. All unions explained that they would assist members who had concerns that they were being underpaid or otherwise denied a lawful entitlement by their employer. All unions

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<sup>92</sup> Union 1, Union 3 and Union 5.

<sup>93</sup> Union 1 and Union 5.

<sup>94</sup> Interviewee 3B.

<sup>95</sup> Interviewee 2A.

<sup>96</sup> Interviewee 2A.

were also regularly contacted by non-members with suspected cases of non-compliance, and all had a general policy of not assisting non-members with pre-existing instances of underpayment of wages or entitlement claims.<sup>97</sup> These policies were in place in an effort to ensure that workers could not simply join the union for the purposes of assistance with their claim and fail to renew their membership shortly after. There was also a strong awareness of how assisting a non-union member (particularly in the context of a highly unionised workplace) may be seen by longstanding union members: as one interviewee explained, ‘Why bother paying 30 years of union dues when I can just jump in when I’ve got a problem? It sends the wrong message’.<sup>98</sup> For two interviewees, addressing non-member issues was also viewed as an unjustifiable means of spending its members’ union fees.<sup>99</sup> It was also seen as against their philosophy as unions - they were not ‘fee for service’ service-providers.<sup>100</sup> In the words of one interviewee, ‘We’re an organisation that you need to join not because you have a problem but because you want the benefits of being a member, and one of the benefits is if you do have a problem we can help you.’<sup>101</sup>

The general policy shared by the unions of not assisting non-members with underpayment claims were, however, universally identified by the unions studied as flexible or as a ‘preferred position’.<sup>102</sup> Respondents identified a number of circumstances in which these policies were waived in practice.<sup>103</sup> First, several of the unions were prepared to assist workers who are non-members or non-financial members where the worker joined the union and undertook to pay a sum equivalent to a certain period of membership dues.<sup>104</sup> As one organiser explained it, this approach was about reconciling the tensions between wanting to recruit new members and not wanting to be seen to be encouraging or assisting workers who join up simply because they need the union’s assistance in a specific instance – ‘how do we actively recruit if we put a blanket ban across anyone who’s got an existing problem being ineligible to join?’<sup>105</sup> One union also required a worker seeking assistance to, in addition to joining the union and

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<sup>97</sup> In at least one union, this policy extended to cover a certain period after membership is taken out (Union 4). One organiser noted that, in previous decades, the union used to have a policy that it would assist a non-member with a pre-existing issue if he/she paid back fees (Interviewee 5C) but that this had been changed.

<sup>98</sup> Interviewee 1C.

<sup>99</sup> Interviewee 4B; Interviewee 5C.

<sup>100</sup> Interviewee 5B; Interviewee 4B.

<sup>101</sup> Interviewee 5B.

<sup>102</sup> Interviewee 3C.

<sup>103</sup> Union 1, Union 3 and Union 5.

<sup>104</sup> Union 1 and Union 3.

<sup>105</sup> Interviewee 1C.

paying back dues, make a contribution to a fund designed to assist the union with its compliance activities in the future.<sup>106</sup>

Interviewees identified a range of factors which were also taken into account when exercising discretion as to whether or not to assist a non-member. A commonly identified consideration was where a case of non-compliance presented organising opportunities (e.g. where the non-compliance affects a number of workers at a workplace).<sup>107</sup> As one union official explained:

*'You've got to look at – how many people work in that workplace? How many people does it affect? How many potential members can we get out of it? So being almost clinical and cold-hearted about the ones that we're going to run and the ones that we're not.'*<sup>108</sup>

Another interviewee noted that factors such as whether the problem was 'fairly easy to deal with' and the gravity of the breach ('the ones who you believe have been genuinely just really badly treated') were also taken into account.<sup>109</sup> Another factor identified was how long the worker had been in the workplace (with a view to whether the worker had in fact had opportunities to join the union).<sup>110</sup>

Interestingly, the unions studied had different perspectives and approaches to the question of how they approach circumstances in which an employer may be underpaying its entire workforce, not just union members. An interviewee in Union 1 drew an analogy with enterprise agreement negotiations, and it was noted that 'sometimes non-members will get the benefits that the members get'.<sup>111</sup> For organisers in two unions, in cases in which employers had engaged in underpayment of their workforce across the board, the union would try to campaign around the issue and actively recruit around the issue.<sup>112</sup>

Similarly, for an interviewee in Union 4:

*'I think ... sometimes we're getting into a situation where we're almost recruiting around the issue. So you might go to a workplace and say, "Look there seems to be an issue here. There's a*

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<sup>106</sup> Interviewee 3C.

<sup>107</sup> Interviewee 1B; Interviewee 3C.

<sup>108</sup> Interviewee 1A.

<sup>109</sup> Interviewee 1B.

<sup>110</sup> Interviewee 1A.

<sup>111</sup> Interviewee 1C.

<sup>112</sup> Interviewee 1C; Interviewee 3C.

*member here who has sort of told us about it but all of you guys aren't members. If you join the union then we need to talk about whether we can sort of take this further or whatever." And you see what I mean about it being a challenge and something we're grappling with, like it's quite fraught. I mean you know unions generally don't want to recruit simply around an enforcement issue, or at least that's not our philosophy. I mean we want people to join our union because they want to build power in their industry and improve standards.<sup>113</sup>*

For an organiser in Union 2, 'If there's an underpayment I'd just say to the boss, "You've got to fix it for everyone"',<sup>114</sup> however the union would only seek to recover back pay for its members.<sup>115</sup> Even in one of the unions where the elected official interviewed expressed considerable wariness about directly assisting non-members and explained that this was not the approach taken by that union, he also noted that there were certainly examples in which the union had discovered an instance of non-compliance and requested the employer to correct the error for its entire workforce.<sup>116</sup>

Only one union appeared to adopt an approach in which they would respond to instances of employer non-compliance in workplaces where they had no members. This union explained,

*'...if someone lets us know, whether we've got members or not, of something that sounds very dodgy, then we'll go in fast. Or if we get told someone's being harassed, or assaulted, or bullied, you know those sorts of complaints, whether there's a member or not, we'll get in quickly. If it's something that's more general, and there are no members, then we'll schedule to get someone there and have a look, and then make a judgment about it in terms of what action we take.'<sup>117</sup>*

As made clear in the quote above, this type of intervention by the union appeared to be limited to those circumstances where breaches were considered particularly severe.

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<sup>113</sup> Interviewee 4B.

<sup>114</sup> Interviewee 2C.

<sup>115</sup> Interviewee 2C.

<sup>116</sup> Interviewee 4B.

<sup>117</sup> Interviewee 2A.

## Enforcement strategies

There are a range of approaches and techniques that regulatory actors (including unions) may employ to carry out their enforcement activities.<sup>118</sup> Through our interviews, we sought to examine what enforcement strategies used by unions and how unions decide which strategy to pursue in a particular circumstance. Strategies identified by interviewees ranged from informal approaches based on direct dealing with employers through to formal use of the legal system, and included the provision of education and information to workers and, to a lesser extent, to employers; direct negotiation with employers at the workplace; public ‘naming and shaming’ of non-cooperative employers; industrial action; making use of other forms of available leverage or pressure (such as industry associations or companies higher up in the supply chain); using industrial or administrative tribunals and, finally, initiating court proceedings to recover underpayments and penalties against non-compliant employers.

Seeking to settle the dispute with an employer at the workplace was universally identified as the first and most common strategy for resolving instances of suspected non-compliance. This was seen not only as the most effective means of resolving the dispute (in terms of expenditure of union time and resources) but also the least demanding and stressful for worker(s) concerned.<sup>119</sup> Attempts to resolve the issue were generally commenced through the initiation of contact with the relevant supervisor before (depending upon the size of the employer) escalating contact up the chain of seniority.<sup>120</sup> Several interviewees explained they may vary their initial approach to an employer suspected of underpaying a member where the worker concerned does not wish to be identified (e.g. the union would find another means of approaching the employer and raising its concerns).<sup>121</sup> Interviewees in two unions also noted that – particularly with smaller employers – this initial approach may be couched in terms of approaching and educating them on their obligations under the relevant industrial instrument.<sup>122</sup> In all unions studied, the initial task of settling the dispute at the workplace level was undertaken by a delegate and/or organiser after he or she had conducted a brief initial assessment of the merits of the claim.<sup>123</sup> Several of unions studied emphasised the training provided to their delegates and/or

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<sup>118</sup> There is a large body of literature focusing on regulatory techniques and for a brief application of this literature to the role of unions in Australia, see Hardy and Howe above n 2, 310–3 and Arup and Sutherland, above n 13.

<sup>119</sup> Interviewee 5A.

<sup>120</sup> Interviewee 1C.

<sup>121</sup> Interviewee 3C.

<sup>122</sup> Interviewee 5C.

<sup>123</sup> Union 3, Union 2 and Union 5.

organisers so that they could effectively perform this role.<sup>124</sup> This training took the form of education on the relevant industrial instruments that applied at the workplace, as well as general dispute resolution skills.<sup>125</sup>

A common related strategy – deployed where the employer may not have been initially receptive to the union’s requests that they rectify the issue - involved contacting other actors that were seen as being in a position to influence the compliance behaviour of the employer and seeking their assistance in having the matter resolved. Here, unions appeared to be quite creative in identifying and using available sources of pressure or leverage. Depending upon the structure of the specific industry in which the union worked, this may involve drawing upon existing relationships with industry associations;<sup>126</sup> or approaching a company at the top of a specific supply chain in which the instance of non-compliance had been identified;<sup>127</sup> or a head office of a franchise.<sup>128</sup>

If at such point the employer continued to dispute the claim of non-compliance or undertook to rectify the issue and then failed to do so, the formality of the process was generally escalated through the sending by the union of one or more letters of demand, requesting action be taken and notifying the employer of the consequences of not rectifying the non-compliance.

There was some evidence to suggest that unions use compliance issues as a means of pursuing bargaining-related objectives but this did not appear to be very common. One interviewee identified linking an issue to collective bargaining negotiations as a strategy for fixing issues of non-compliance in some cases, whereby the union may identify an issue of non-compliance towards the end of negotiations and offer in-principle agreement on the draft agreement if the issue is resolved.<sup>129</sup> The union would then approach its members to seek their opinion on the overall deal. However for an interviewee in another union, linking the two issues was fraught as it ‘muddied the waters’ and there was the potential for the non-compliance to be bargained away in the sense that the employer may

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<sup>124</sup> Interviewee 3C and Interviewee 5A.

<sup>125</sup> Interviewee 5A.

<sup>126</sup> Interviewee 5B.

<sup>127</sup> Interviewee 2A.

<sup>128</sup> Interviewee 5B.

<sup>129</sup> Union 1.

offer to sign the enterprise agreement on the basis that the union not pursue any former non-compliance.<sup>130</sup>

A further obvious sanction available to unions (though not lawful under Australian law) is the taking of industrial action as a means of exerting economic pressure on the employer.<sup>131</sup> While a number of interviewees observed that this may have been a strategy adopted by their union in the past, only two of the interviewees (from two different unions) identified this as a strategy their union may employ 'very occasionally' to secure compliance by an employer. Overall, this did not feature as a commonly-employed enforcement strategy among the unions studied.

Three unions noted that they did in certain circumstances use the media as a means of trying to raise awareness among the public of the issue and encourage companies to comply with their obligations.<sup>132</sup> This took the form of direct attempts to 'name and shame' an employer, as well as less direct forms of awareness-raising among the public, such as organising some form of 'protest action' outside an employer's site.<sup>133</sup> This was identified as potentially effective where the employer concerned had a recognizable brand and so was potentially susceptible to reputational damage.<sup>134</sup>

All unions lodged claims in the tribunal or initiate court proceedings where these avenues were available and less formal attempts to resolve the dispute had failed. In considering whether to pursue a specific case of suspected non-compliance through the court system (a potentially expensive and lengthy process), interviewees identified the following factors that were taken into consideration by the union: the prospect of success; the number of workers involved; whether the prosecution had the potential to send an important message in the industry; and where the issue was seen to have broader significance

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<sup>130</sup> Interviewee 4A and Interviewee 1C.

<sup>131</sup> Hardy and Howe, above n 2, note that while the taking of industrial action for these purposes has been prohibited by law for most of the twentieth century, these laws were historically not properly enforced. See further B Creighton, 'Enforcement in the Federal Industrial Relations System: An Australian Paradox' (1991) 4 *Australian Journal of Labour Law* 197; and P Gahan, 'Trade Unions as Regulators: Theoretical and Empirical Perspectives' in C Arup et al, *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour*, (Federation Press, 2006) 261, 275.

<sup>132</sup> Union 2, Union 3 and Union 4.

<sup>133</sup> This is distinguishable from industrial action as it generally involved workers protesting outside their work time and also involved workers from other employers and members of the community.

<sup>134</sup> Interviewee 2C.

(in terms of potential impact).<sup>135</sup> While the unions studied varied slightly in terms of their internal procedures for pursuing claims, all interviewees noted that elected officers would be consulted prior to the initiating of any legal proceedings. The extent to which, and how, the unions use the tribunal and courts is discussed further in the next section.

In terms of which strategies were used in a particular context, a number of interviewees identified that there was no one correct strategy or tool and that they would use whatever they have available to them in the particular circumstances to remedy the issue.<sup>136</sup> However, through the interviews, two factors stood out as featuring particularly prominently in considerations of which strategy to pursue in securing compliance.

The first was the relationships with the employer. According to a number of interviewees, the extent to which unions would pursue less formal means of resolving the dispute (and the length of time they would wait before escalating a dispute to more formal venues) was determined largely by the union's relationship with the employer. The union was more likely to try and resolve the dispute informally and saw its prospects of doing so more likely, where there were pre-existing relationships with the employer:

*'It depends on the relationships you have in the area. So if you don't have relationships with some of the employers, you've not dealt with them before, you've got to sort of break down those barriers before you can sort of have discussions with them. Whereas if it's someone you've been dealing with for a long time, the member or the individual may be having difficulty with payroll, whereas we'll have relationships with more senior IR/HR and we'll give them a call, and say "Look you need to get this sorted before it gets any bigger. This person needs to be paid, or they need to be back paid for something."'*<sup>137</sup>

It was observed that these needn't be 'friendly' relationships, just 'a point of contact'.<sup>138</sup> For one union, the relationship with the employer was particularly important where the nature of the membership may mean that the members affected were reluctant to pursue their rights. In such cases, the union tended

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<sup>135</sup> Interviewee 2C and Interviewee 3A.

<sup>136</sup> Interviewee 1C.

<sup>137</sup> Interviewee 1C.

<sup>138</sup> Interviewee 1C.

to focus more on securing compliance through maintaining cordial relations with the large employers in the industry than on other strategies.<sup>139</sup>

The second prominent factor in determining which enforcement strategy to use was the extent of union presence or density within the workplace concerned. As one elected officer put it bluntly,

*'We'd like to think that we'll look at it in terms of whether we can deal with it on the ground or not first. But for a lot of those single member workplaces where people have just got no industrial power at all there aren't too many choices really. If their employer's not going to come to the party and say "Oh yes, you're right [name of union]. I haven't paid my employee correctly", there isn't much choice but to try and litigate somewhere.'*<sup>140</sup>

Generally speaking, the unions tended to use formal avenues more where the issue was limited to the individual, and/or where membership density in the workplace was less chance of persuading the employer through strength or resources on the ground in the workplace.<sup>141</sup> However this was not universally identified as the case: with one interviewee observing that their union would take a lot more matters to the Commission or court on behalf of workers in a strongly organised sector where the workers were less hesitant to pursue their rights and entitlements.<sup>142</sup>

### Using the tribunal and the courts

Our interviews revealed a strong preference among unions for avoiding formal proceedings where possible. As one interviewee explained:

*'... at the end of the day our process would be to do everything we possibly can to resolve the matter before we action either a Commission process or the Courts. If say a law firm generally made three attempts to resolve a matter informally before litigating about it [sic], I would say we would use five.'*<sup>143</sup>

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<sup>139</sup> Interviewee 5C.

<sup>140</sup> Interviewee 1A.

<sup>141</sup> Interviewee 4A; Interviewee 1C.

<sup>142</sup> Interviewee 5C.

<sup>143</sup> Interviewee 4B.

And another:

*'And you try and avoid the legal jurisdictions as much as is possible anyway. And often ... 99 times out of 100 you apply a little bit of common sense and logic.'*<sup>144</sup>

*This view appeared to be shared across organisers, industrial officers and elected officials.*<sup>145</sup>

Where it was deemed necessary to use formal avenues to resolve the dispute, most of the unions studied expressed a preference for resolving disputes in the Fair Work Commission rather than the courts on the basis that this was seen as a more familiar, quicker and less formal means of dispute resolution.<sup>146</sup> However it was noted that the capacity of unions to access the industrial relations tribunal to resolve issues related to employer non-compliance with minimum standards under the FW Act is much more limited than in the past. One organiser explained:

*'We used to very effectively use what was the Industrial Relations Commission to get companies pretty quickly in there, and you would find that once you had them in front of a Commissioner, well before any arbitration, once the Commissioner confirmed, "Yes, the Union's right, you are underpaying, or you are not giving the right hours, or breaks", or whatever – that was a very effective, quick, easy way of getting companies to comply. That's no longer the case. So now we still try to use Fair Work Australia in that manner, but it's much less effective...'*<sup>147</sup>

For one interviewee, the fact that the Commission was 'a much, much less effective way of getting companies to comply than it used to be...' had compelled the union to find other means and mechanisms for securing compliance by employers, such as applying pressure to actors higher up in the supply chain or using the media.

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<sup>144</sup> Interviewee 1C.

<sup>145</sup> The finding that unions have a strong preference for pursuing non-compliance by employers through 'informal' strategies is consistent with observations made in earlier studies: see, e.g., Hardy and Howe, above n 2, 316; Lee, above n 2, 47; W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials*, (Law Book Co, 2<sup>nd</sup> ed, 1993) 817.

<sup>146</sup> Interviewee 4A; Interviewee 1A; Interviewee 1B; Interviewee 2B.

<sup>147</sup> Interviewee 2A; Interviewee 3A.

For an elected official of one union, however, there was no philosophical preference within the union for one forum over another: rather, it was simply a matter of tactics. The union would use the Commission where it thought that a speedy and informal approach would settle the matter, but would take the matter to a court where ‘we think we’ve got something that is sort of open and shut [and] we don’t feel like there’s very much room to move on our part.’<sup>148</sup>

A number of interviewees noted, however, that where the union has an agreement with an employer that includes a dispute settlement procedure (DSP) that provides for the FWC to arbitrate disputes that arise with respect to the application of an agreement, they would still try to use this avenue as a means of accessing the FWC’s assistance in resolving a dispute with respect to wages or conditions of employment in the Commission.<sup>149</sup> According to one interviewee, the process of conciliation within the tribunal can by itself assist in resolving the dispute through bringing the parties together to discuss the issue.<sup>150</sup> Another industrial officer from another union explained: ‘part of it’s just trying to get the employer to the table really. Sometimes they’re just ignoring us, and so the idea is to try and get some sort of third party authority to at least get them to a conference.’<sup>151</sup>

In general, the interviewees saw court proceedings as lengthy and costly.<sup>152</sup> For one interviewee, pursuing a claim in the tribunal or court also delivered less effective outcomes in terms of organising than pursuing an issue ‘on the ground.’<sup>153</sup> Nonetheless while there was clearly a strong preference for resolving the matter informally, the unions studied were not averse to pursuing claims through the courts where necessary. Several of the unions emphasised that if a case of non- or under-payment of a member was not resolved at the workplace level, they would generally ‘pursue it to an end result.’<sup>154</sup> All had employees within their industrial teams who were legally qualified, and it was noted that ‘in-house’ legal expertise had and was continuing to improve significantly. This was seen as ‘increasingly necessary, because of the whole system becoming more litigious.’<sup>155</sup> The move towards more legalistic dispute resolution processes also appeared to lead to a sharper division of labour and greater specialization

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<sup>148</sup> Interviewee 4B.

<sup>149</sup> Interviewee 1C.

<sup>150</sup> Interviewee 1C.

<sup>151</sup> Interviewee 2B.

<sup>152</sup> Interviewee 1C.

<sup>153</sup> Interviewee 1C.

<sup>154</sup> Interviewee 2C; Interviewee 3B.

<sup>155</sup> Interviewee 2C.

between organisers and industrial officers than existed in previous decades.<sup>156</sup> Three of the five unions ran most of their compliance-related cases themselves (as opposed to briefing an external law firm), unless the law involved was unfamiliar, particularly complex or the matter was being heard at a higher-level court.<sup>157</sup>

Where the unions did pursue court proceedings, the vast majority of claims were settled.<sup>158</sup> This was attributable in part to the fact that they were often cautious in only filing proceedings where they felt the case had a strong prospect of success.<sup>159</sup> Two of the interviewees (from two different unions) noted that any proposed settlement would be taken to the workers concerned for approval prior to being formalised.<sup>160</sup> One of the interviewees also emphasised that, in considering any such proposals from employers, the union would be careful to assess whether the business was likely to cease trading in the near future, in which case they would not agree to any staged or delayed payment.<sup>161</sup> Only one union appeared to regularly seek to recover penalties (payable to the union) to offset some of the costs of the proceedings.<sup>162</sup>

The small claims jurisdiction was widely perceived by interviewees as a positive and important development.<sup>163</sup> One interviewee noted it was not dissimilar to Commission proceedings, and the processes and forms were relatively simple.<sup>164</sup> For one union, however, the small claims jurisdiction was of limited use, because of the limits on recovery (with many instances of non-compliance in their industry well beyond the threshold limit) as well as the incapacity to claim penalties (which they saw as important in offsetting some of the costs incurred in initiating the proceedings).<sup>165</sup>

### **The provision of information and education**

It is widely recognised that unions can and do play important roles in raising awareness among workers of their legal rights and entitlements. In Australia, this is a role which continues to be recognised to

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<sup>156</sup> Interviewee 3C and Interviewee 2C.

<sup>157</sup> Union 3, Union 4 and Union 5.

<sup>158</sup> Interviewee 2B; Interviewee 4A.

<sup>159</sup> Interviewee 2B.

<sup>160</sup> Interviewee 2A; Interviewee 3C.

<sup>161</sup> Interviewee 2A.

<sup>162</sup> Union 2.

<sup>163</sup> Interviewee 4A; Interviewee 1B.

<sup>164</sup> Interviewee 1B.

<sup>165</sup> Interviewee 2B.

some extent by government: for example, under the former Labor Government, funding was provided to unions and employer associations to assist in educating workers and employers on the requirements of new labour laws.<sup>166</sup> Many unions offer information/ assistance line whereby members may call to inquire about entitlements at work.

All five case study unions distributed material regularly to members on applicable rates of pay (including regular updates following pay increases), superannuation entitlements, allowances, paid holidays and so on. This material could be generic in nature or in some cases targeted to a specific workplace, and be provided fairly regularly in the form of newsletters or bulletins. The unions appeared to differ as to whether this material was targeted at, and distributed to, members or whether it was provided more broadly to members and non-members alike. There did appear to be some tailoring of the content of the information and the medium through which it was distributed to the workers concerned.

For at least one elected officer, this distribution of material was seen as important as it reached members in small and/or non-unionised workplaces who may otherwise not be visited regularly by a union organiser.<sup>167</sup> A number of unions provide this type of information in multiple languages.<sup>168</sup> One elected officer emphasised the information they provided but conceded that it was a task that the union could improve, in terms of the regularity and scope of information provided.<sup>169</sup>

Several unions adopted innovative approaches to educating workers on their rights and entitlements. This included, for example, organising activities, events and training courses for vulnerable and/or isolated workers and their families which, although not necessarily focused directly on workplace rights issues, sought to facilitate interaction between workers and to address some of the factors contributing to employees' vulnerability.<sup>170</sup>

At least two of the unions also provided information to *employers* on their obligations under the relevant laws and industrial instruments, on the basis that it was in the interest of workers employed by

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<sup>166</sup> See, for example, Commonwealth of Australia, *Budget measures: budget paper no. 2: 2010–11* (11 May 2010) 136, 146, <[http://www.budget.gov.au/2010-11/content/bp2/html/bp2\\_prelims.htm](http://www.budget.gov.au/2010-11/content/bp2/html/bp2_prelims.htm)>. (accessed 15 January 2014).

<sup>167</sup> Interviewee 5A.

<sup>168</sup> Union 3, Union 2.

<sup>169</sup> Interviewee 5A.

<sup>170</sup> Interviewee 2C.

those employers that they complied with the law.<sup>171</sup> This took the form of preparing and distributing material directly tailored to employers by the union, and provision of general information to employers in response to direct requests for information. One union also participated in industry or regulatory initiatives to provide input into resource material.

### **Relationship with the Fair Work Ombudsman**

One question we sought to explore through our cases studies was whether unions saw the Fair Work Ombudsman as a collaborator in the enforcement of minimum employment standards, as an alternative avenue for enforcement operating in parallel to the unions, or as a threat to the role of unions in upholding employment rights.

The unions studied had varying degrees of contact in the past with the Fair Work Ombudsman. Where this contact had taken place, it had generally taken the form of FWO contacting the union for advice on the interpretation of provisions in specific awards or agreements or to inform the union that it intended to run a campaign or audit in a particular industry or sector;<sup>172</sup> or the unions contacting the Ombudsman with assistance on particular matters.<sup>173</sup>

The interviewees varied significantly in terms of their view of the FWO, both between and within unions. There was recognition among most interviewees that FWO was a practical necessity in light of the limited resources of the unions. However one interviewee expressed the view that this worked both ways, in that the FWO did not have unlimited resources either and needed the union to have a role in compliance.<sup>174</sup> There was also a practical recognition that a government regulator was necessary to ensure that the non-unionised sector workplaces were not able to undercut unionised workplaces through failing to pay the legal minimum wages and conditions.<sup>175</sup> In this sense, the roles of the unions and FWO were seen as complementary.

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<sup>171</sup> Union 2 and Union 3.

<sup>172</sup> Interviewee 1A; Interviewee 1C; and interviewee 5B.

<sup>173</sup> For a detailed account of the ways in which the FWO has sought to 'enrol' non-state actors in its compliance activities, see Hardy above n 11.

<sup>174</sup> Interviewee 1A.

<sup>175</sup> Interviewee 5A.

In practice, this approach has tended to translate into a working but not a close relationship and degree of engagement with the FWO. As one respondent explained, ‘... they have a job to do, we have a job to do, we try to work co-operatively together...’<sup>176</sup> Elected officers in two unions similarly observed that he thought the FWO had a complementary role to play in terms of targeting and working in industries or sectors with high-levels of non-compliance.<sup>177</sup> Overall, the unions studied tended to adopt an instrumental approach to their engagement with the FWO: referring matters to or seeking out the assistance of the FWO where it was believed this would help the union achieve a specific objective.<sup>178</sup> One elected officer explained that FWO constituted another strategy or channel that the union would consider using in certain circumstances to secure compliance by an employer: for example, the union may approach the FWO where they thought a specific employer would be more likely to respond to a formal notice issued from the FWO than correspondence from the union or where the cost of a potential action against an employer was considered to be very high and the union did not believe it had sufficient capacity to resource the legal action.<sup>179</sup> An elected officer in another union explained that they may refer matters to FWO where there were members who felt strongly that they wanted to pursue a matter but that the union did not believe the members were being denied a lawful entitlement or believe there was any prospect of success.<sup>180</sup> One union noted that they had sought the FWO’s assistance on a number of occasions in the past where they were unable to access certain employment records of the member they wished to assist.<sup>181</sup> Interviewees from all the unions, however, emphasised the risks they saw as implicit in seeking FWO assistance with respect to issues being encountered by union members, on the basis that if the union did not perform this work for their members, the members would question why they were paying union membership dues.<sup>182</sup> One elected officer also emphasised that the union would not consider referring a matter to the FWO or otherwise seeking its assistance where ‘we’ve got strength on the ground.’<sup>183</sup>

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<sup>176</sup> Interviewee 3C.

<sup>177</sup> Interviewee 5A and Interviewee 4B.

<sup>178</sup> This appears broadly consistent with reports by FW Inspectors to the effect that unions commonly referred matters to the FWO because they lacked the resources or powers to pursue them, or because they could not utilise their statutory inspection powers, such as where the complainant wishes to remain anonymous: reported in Hardy above n 11, (133).

<sup>179</sup> Interviewee 1A.

<sup>180</sup> Interviewee 4B.

<sup>181</sup> Union 3.

<sup>182</sup> Interviewee 4B and Interviewee 1B.

<sup>183</sup> Interviewee 1A.

Three of the five unions noted that they did on occasion refer non-members who contacted them with concerns of employer non-compliance to other bodies which may be able to assist, including the FWO.<sup>184</sup> The two unions who noted they were unlikely to refer non-members to the FWO expressed significantly greater reservations about FWO and its activities in their respective industries. Interviewees from these unions noted they would not generally refer suspected cases of employer non-compliance to the FWO. According to one industrial officer, this was in part because the FWO was ‘trying to be in the place of unions.’<sup>185</sup> Interviewees in both these unions expressed limited confidence in the FWO, noting that the FWO had in the past provided employers in their industry with incorrect information on their employees’ rights and entitlements or had conducted compliance activity in the industry without consulting the union.<sup>186</sup> They also expressed some concern over some of the practices or policies of the FWO: for example, that the FWO generally did not pursue matters under a certain threshold sum.<sup>187</sup> Both interviewees also felt that the FWO was closer to, and more willing to assist, employers and employer organisations than unions.

Interestingly, the two unions who adopted more cautious approaches to the FWO shared some similar characteristics. Out of the five unions studied, these two unions identified non-compliance in their respective industries as most widespread and endemic, and appeared to have the most prominent focus on compliance-related activities. These two unions displayed the most sophisticated and innovative approaches to carrying out their compliance-related activities. Both unions also appeared to have a strong sense of pride in their compliance-related activities and a strong sense of ownership of their industry, in that they felt they had significantly more industry-specific expertise and understanding than the FWO. As the elected officer from one of these unions explained:

*‘It’s been the union for a long time [carrying out the compliance activity in the industry] ... So as much as I’m critical, I also acknowledge that they’ve got the whole of Australia to deal with, and many different industries, and our industry – and dealing with compliance in it is difficult and specialized, and does require people to build up expertise and understanding on it. So, you know,*

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<sup>184</sup> Interviewee 4A; Interviewee 1A and Union 5.

<sup>185</sup> Interviewee 3B.

<sup>186</sup> Interviewee 3B and Interviewee 2A.

<sup>187</sup> Interviewee 2A and Interviewee 4A.

*my point is there should be sufficient resources for us to do it properly. I don't actually think anyone else does it as well.*<sup>188</sup>

All unions studied adopted the view to the effect that while FWO is to be tolerated, even that its efforts and activities were to be recognised and encouraged in specific (generally non-unionised) areas, the government inspectorate would never fill the space occupied by trade unions. An elected officer in one union explained, 'I think we can stand on our own feet, and there might be a certain number of people who say they'll fix up something for me, but I don't think that takes away from the role of unions. I think it's much bigger than that.'<sup>189</sup> There was a strong sense among a number of the unions that the Ombudsman approached compliance activity in a very different way to unions and that the approach taken by the FWO was not as effective or sustainable. While the unions' approach to compliance activity rested on empowering workers, the approach taken by the Inspectorate was seen as disempowering. As one industrial officer observed:

*'I think those workers need to be empowered to fix their own matters. I don't necessarily see any government watchdog achieving that goal. I mean the thing is they will be paid correctly when they're respected, but if employers think they can get away with screwing the workers and taking the money they will. It's a total lack of respect. But if the worker is empowered and able to stand up for their rights in the workplace, the boss is less likely to try and screw them out of the money or whatever the issue is, so the trick is empowering the worker. I don't think a government watchdog necessarily does that.'*<sup>190</sup>

Another organiser observed:

*'I suppose it's not a bad thing to have in place for people to go to, to have the ability to have something resolved... [But] It doesn't give people the sense of involvement with their workmates, or any sense of collectivism or anything like that, so they might fix something, but it doesn't necessarily stop it from occurring in the future, because the company is just – "Oh, we'll just fix that individual because the Ombudsman asked me to." But it doesn't build any strength or power*

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<sup>188</sup> Interviewee 2A.

<sup>189</sup> Interviewee 5A.

<sup>190</sup> Interviewee 4A.

*or collectivism in the workplace. So the employer will just do it time and time and time again, rather than – I suppose when the union gets involved, they know we’re around. They know we’re going to stay...*<sup>191</sup>

A number of interviewees also emphasised that unions not only assisted a member rectify a specific instance of non-compliance, but were also capable of providing ongoing monitoring of an employer.<sup>192</sup> For one interviewee, the unions approach was compared to that adopted by FWO, which was more likely to engage in ‘scalp-hunting’, and ‘getting the flashy victory to sort of be able to publicise it’.<sup>193</sup>

### **Key challenges identified by unions to their enforcement functions**

The interviews also sought to explore key challenges that unions encounter in conducting their enforcement-related activities. Three broad categories of challenges can be distilled from the interviews. The first set of challenges arose out of the structure and features of the labour market in which the unions operated. Among those features of the labour market most commonly identified by interviewees as presenting challenges to their monitoring and enforcement activities include the rise in precarious employment (including sham contracting arrangements); strong competitive pressures within industries which have the effect of increasing the pressures on employers to reduce costs, including through non-compliance with workers’ rights and entitlements;<sup>194</sup> and where efforts to recover money on behalf of members were routinely frustrated due to employers going bankrupt or disappearing.<sup>195</sup>

A second source of difficulties arose out of resourcing constraints. As one interviewee noted, ‘We only touch the tip of the iceberg... there’s so much exploitation that occurs and, you know, we can only do what we can do within the capacities of our team.’<sup>196</sup> Somewhat unsurprisingly, resourcing constraints tended to be emphasised more by smaller unions and by those unions that operated in industries where non-compliance was perceived as particularly widespread.<sup>197</sup>

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<sup>191</sup> Interviewee 1C.

<sup>192</sup> Interviewee 2C.

<sup>193</sup> Interviewee 4A.

<sup>194</sup> A number of these factors are similarly identified by Goodwin and Maconachie as factors that increase the chance of workers being underpaid. See further Goodwin and Maconachie, above n 28.

<sup>195</sup> Interviewee 3C.

<sup>196</sup> Interviewee 2C; Interviewee 3A and Interviewee 2B.

<sup>197</sup> Union 2 and Union 3.

A third set of difficulties identified by the unions studied arose out of the legal framework in which they carried out their inspection and enforcement activities. Two features of the FW Act were identified as particularly problematic.<sup>198</sup> The first was continuing restrictions on right of entry and difficulty in accessing material to enable assistance with member claims were identified as problems.<sup>199</sup> The incapacity to access records held by an employer of former employees was identified as a particular problem. For one union, this was identified as particularly problematic given that the majority of wage claims were from workers concerning ex-employers.<sup>200</sup> However while right of entry was a particular concern for some unions, other unions noted this was not such an issue for them - their organisers did not commonly use right of entry as a tool used for compliance on the basis that right of entry permit was rarely demanded by employers.<sup>201</sup> The second most commonly identified legal impediment was the decreased capacity to access arbitration in the Fair Work Commission. This was consistently identified by interviewees as posing challenges to the capacity of unions to take enforcement activity, particularly for more vulnerable workers who may be less likely to have an EBA which provides for arbitration of disputes. As one union official put it simply, 'more options to use Fair Work for those sorts of individual claims would be cheaper, simpler, faster.'<sup>202</sup>

However a number of interviewees also expressed the view that the legal framework in which they operated did not have a strong bearing on their strategies or practices. One organiser, who observed that their union had operated under five different sets of minimum terms and conditions of work in the last eight years, explained: 'It comes down to really having the hearts and minds of people on the ground, and your ability to deliver things on the ground. And you try and avoid the legal jurisdictions as much as is possible anyway. And often ... 99 times out of 100 you apply a little bit of common sense and logic.'<sup>203</sup> It was observed by another interviewee that, given the high levels of change in Australian industrial relations (including relevant issues such as restrictions on the capacity of the tribunal), unions had become adept at operating around the legal framework rather than relying upon it as the principal avenue through which to pursue their objectives.<sup>204</sup>

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<sup>198</sup> A less commonly identified legal impediment noted by interviewees was restrictions on industrial action – specifically the incapacity to take industrial action over compliance-related matters.

<sup>199</sup> Union 3; Union 4 and Union 2.

<sup>200</sup> Union 3.

<sup>201</sup> E.g. Union 1, Union 3 and Union 5.

<sup>202</sup> Interviewee 1A.

<sup>203</sup> Interviewee 1C.

<sup>204</sup> Interviewee 1C.

## 5 DISCUSSION

### How the compliance role of unions has changed over time

It was clear from the case studies conducted that trade unions in Australia continue to regard the monitoring and enforcing of compliance by employers with workplace standards as one of their most significant roles. However there was also a clear recognition by those interviewees who had worked for significant periods of time (in many cases, decades) in the union movement that the capacity of unions in Australia to enforce minimum standards at the workplace had declined over the past decades. The most significant change identified by interviewees was the significant increase in the legal restrictions on their capacity to enforce rules informally at the workplace. A number of interviewees emphasised that this development had been accompanied by a decline in membership and resources which made the enforcement-related activities of the union more difficult.<sup>205</sup>

Interviewees identified a number of informal strategies which were identified as being effective compliance strategies in the past but were no longer permissible. These included ‘no ticket no start’ arrangements (as an effective means of controlling entry to a specific industry by employers through regulating and controlling the employers that operated in an industry);<sup>206</sup> and imposing forms of economic pressure (such as ‘downing tools’) to compel a non-cooperative employer to make good any underpayment.<sup>207</sup> An organiser also explained:

*‘It’s a little bit more difficult. You’ve got to be smarter. You’ve got to box smarter. Gone are the days where you could turn around and say, “There’s been an underpayment,” or “You’ve done the wrong thing, and we’re going to sit everybody in the lunch sheds until you fix it...”’.*<sup>208</sup>

The case studies confirmed the trend – discussed above in Part 2 of this report – towards the increased juridification of enforcement in Australia. One organiser who had worked for several decades in the union movement described the changing context in which he worked, observing that with the increased level of paperwork associated with enforcement, ‘I consider myself now a glorified clerk...’<sup>209</sup> The

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<sup>205</sup> Interviewee 1A.

<sup>206</sup> Interviewee 3C.

<sup>207</sup> Interviewee 3C and Interviewee 1C.

<sup>208</sup> Interviewee 1C.

<sup>209</sup> Interviewee 3C.

increased scope to use legal rules had been accompanied, at least according to one elected officer, by a reduced willingness of the parties and/or their industry representatives to make efforts to resolve disputes informally and through ‘talking it through’.<sup>210</sup> This was attributed by that interviewee in part to the increased tendency for law firms to be involved in disputes from an early stage, including those with an antagonistic and legalistic approach.<sup>211</sup> It was observed by several interviewees that the increasing legalization of enforcement had rendered enforcement more difficult and complex:

*‘I think anecdotally... over the years that it has got more difficult to recover people’s entitlements, because you used to have more scope to go to the Industrial Relations Commission and not get bogged down in jurisdictional arguments than you do today.’<sup>212</sup>*

Another interviewee emphasised, ‘Our compliance role’s been weakened - definitely under Work Choices and still under the Fair Work Act because it’s messy and expensive and complicated.’<sup>213</sup>

### **The lack of formalisation of enforcement-related policies and procedures**

A clear theme to emerge from the case studies undertaken was a lack of formalization and documentation by the unions studied with respect to their enforcement activities, a somewhat surprising finding given the significance of this activity to the unions’ work. Only one of the five unions studied, for example, reported they had any type of written policies or procedures about compliance strategies.<sup>214</sup> When asked whether their union had written policies or procedures governing their compliance-related activities, interviewees referred to ‘unwritten policy’<sup>215</sup>, to ‘flying by the seat of our pants,’<sup>216</sup> to ‘established practice,’<sup>217</sup> or to ‘just experience really.’<sup>218</sup>

It is important to note that the dearth of formal policies does not necessarily mean that unions do not adopt a structured approach to their compliance-related activities. Indeed, in terms of the internal processes followed within unions once a suspected case of non-compliance by an employer was

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<sup>210</sup> Interviewee 2A.

<sup>211</sup> Interviewee 2A.

<sup>212</sup> Interviewee 1A.

<sup>213</sup> Interviewee 1A.

<sup>214</sup> Union 3.

<sup>215</sup> Interviewee 1A.

<sup>216</sup> Interviewee 1A.

<sup>217</sup> Interviewee 4A.

<sup>218</sup> Interviewee 5B.

identified or notified, the unions all adopted a very similar approach, with clearly established sequences as to the steps to take. Once an alleged case had been brought to the attention of the union, there was an initial basic assessment conducted of whether the claim had merit (analysis of facts and identification and analysis of relevant industrial instrument). This process was usually undertaken by an organiser, who would also make the initial attempt to resolve the dispute directly with the relevant worker's supervisor or employer. Where the dispute was unresolved, it would then be referred to the union's legal and industrial team for assessment, and who also try to resolve directly with employer. If the issue remains unresolved, the question of whether formal proceedings should be pursued would be discussed with a supervisor or elected officer within the union. Nonetheless there was a clear absence of written policies and procedures documenting these approaches and procedural steps.

The lack of formalisation and documentation was also demonstrated through a lack of comprehensive record-keeping on enforcement activities (e.g. the sums recovered in lost wages and entitlements or the number of workers assisted).<sup>219</sup> Only two of the five unions studied reported compiling data on their compliance activities: for example, on numbers of complaints received; how these complaints were resolved (if at all); prosecutions initiated and outcomes; sums recovered on behalf of workers and so on. This observation appears to be supported by a basic search of publicly-available data published by unions in Australia, whereby only few unions appear to regularly and in some detail report on the sums recovered on behalf of workers.<sup>220</sup>

The reasons for this absence of formalised policies and procedures relating to enforcement is somewhat unclear. It appears in part to be a 'cultural' issue but resources also clearly play a role. According to one union official interviewed, for example, the lack of written policies was largely 'though not exclusively' a resource issue.<sup>221</sup> One interviewee noted 'it's something we could do better'.<sup>222</sup> It is also possible that the nature of the settlements reached with employers in many cases precludes dissemination and

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<sup>219</sup> This finding is consistent with a similar observation made by Lee, above n 2, 47.

<sup>220</sup> From examination of some union websites, one union that does appear to report in some detail is the CFMEU Construction and General NSW Division, for example, reports in member publications of legal wins in a regular 'Legal' section of the journal, as well as total sums recovered: e.g. in a 2012 member journal it reported to have recovered \$4.12 million for union members in the last six months alone. *Unity: Official Journal of the Construction, Forestry, Mining and Energy Union (Construction & General Division) NSW Branch*, September 2012, p. 13. Available at [online]. See also Workplace Express, 'CFMEU to ABCC: you call that an underpayment collection?' *Workplace Express*, 20 January 2012.

<sup>221</sup> Interviewee 1A.

<sup>222</sup> Interviewee 4A.

publication of specific ‘wins’, with two interviewees emphasised that the vast majority of settlements they reached with employers would include confidentiality clauses which prevent publicity around the ‘win’.<sup>223</sup>

This limited formalisation of policies and procedures would appear to have both advantages and disadvantages for unions in terms of conducting their enforcement activities. On the one hand, it would appear to leave a wide discretion to organisers and industrial officers in managing the investigation process, and (though to a lesser extent as there is often involvement of, and prior approval sought by, elected union officers) in determining the appropriate response in cases where investigations reveal non-compliance with minimum employment standards, that is, in relation to sanctioning. This may be beneficial where it enables organisers to accommodate a range of considerations and to adapt strategies or sanctions to a particular circumstance or workplace. It also appears to enable the union to take a wide range of factors into account (such as organising potential or nature of relationship with the employer) in determining whether and how to act in regards to a particular instance of non-compliance. On the other hand, it can lead to less consistency in how the union approaches complaints by different workers, and less accountability by union employees.<sup>224</sup> It would also appear to limit the extent to which unions can access and analyze the results of their enforcement work so as to improve their methods in this respect and adopt more strategic approaches to employer non-compliance in their industry. Finally, the limited extent to which many unions compile detailed data on their enforcement activities would appear to limit the extent to which they can and do raise awareness among their members and the broader public of the extent and significance of their enforcement role.<sup>225</sup>

### Innovative practices

The case studies revealed a significant degree of consistency between the approaches adopted by unions to their monitoring and enforcement work. As noted above, for example, the unions studied adopted similar internal procedures following identification of a suspected case of non-compliance and

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<sup>223</sup> Union 2 and Union 4.

<sup>224</sup> For a brief overview of the arguments for and against state labour inspectors exercising wide discretion, see Hardy, Howe and Cooney, above n 30, 93-4.

<sup>225</sup> Some union publications do regularly promote ‘wins’ as a means of educating members of their rights and demonstrating the benefits of union membership, however (and with some exceptions) the case studies revealed a general lack of media/ publications of compliance related activities and ‘wins’ beyond immediate union membership. For such an exception, see, e.g., J Power, ‘CSR Penalised for Delaying Glassworkers Rostered Days Off’, *Sydney Morning Herald* (Sydney) 19 September 2012, 4, which detailed CFMEU’s victory in assisting fifteen glassworkers in Sydney’s west who were denied as many as 180 paid rostered days off.

also adopted a similar array of strategies for securing compliance by employers. However the case studies also revealed that some unions had developed innovative practices in response to the challenges they face. These included, for example, the targeting of enforcement activities on specific sectors of the industry that were identified as having high levels of non-compliance ('audits' or 'compliance blitzes'); the mapping of complex supply chains so as to identify relevant employers and/or actors upon which pressure for improved compliance could be placed; the inclusion within settlement agreements with employers of clauses providing for an ongoing role for the union in monitoring compliance by that employer in the future;<sup>226</sup> as well as the development (often along with the state and/or other actors within the industry) of regulatory structures or instruments which formally recognised and/or facilitated the performance by the union of their monitoring and compliance role. The case studies also revealed, however, there is considerable scope for further sharing of information, experiences and approaches between unions. Indeed, several interviewees recognised that this would be helpful to their work.

### **The relationship between enforcement and organising**

In conducting the case studies, one of the themes we sought to explore was the relationship between the compliance and enforcement work carried out by unions and their strategies for recruiting/ organising workers. This theme was explored through two distinct but related questions. The first was the extent to which unions promoted or marketed their legal expertise to workers as a means of attracting and retaining membership. The second related but broader question focused on how the interviewees perceived the relationship between the enforcement and organising activities of their union.

All of the unions studied promoted their legal services to members as a benefit of membership. Analysis of union publications and media/ communications material confirmed that a number of the unions studied publicized significant recoveries of underpayments for worker in member publications, such as union journals and newsletters. At the same time, however, all unions expressed reservations over being regarded solely as 'service-based' organisations. One interviewee emphasised that the union was not a 'fee for service' organisation,<sup>227</sup> and another explained '... it's just not what we're about. We're not a clearinghouse. We're not an insurance company. In my mind it doesn't build long term power.'<sup>228</sup> In

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<sup>226</sup> Interviewee 2B and Interviewee 2C.

<sup>227</sup> Interviewee 5B.

<sup>228</sup> Interviewee 4B.

this respect ,there was a clear aversion to be seen as adopting a purely ‘servicing enforcement’ approach to the law, through which unions rely heavily on services provided to individual members and market legal services to individual members on the basis of value for money.<sup>229</sup>

Interviewees within all five unions also recognised that there was clearly a dynamic and complementarity between a union’s compliance activities and recruitment: that is, these types of activities were one way in which the union demonstrated its relevance and effectiveness. As one interviewee observed:

*‘It can be easy to organise workers when they’re a bit angry, you know, and so these kind of issues tend to make workers angry and tend to make them want to do something about it, and gives them impetus to join the union movement.’<sup>230</sup>*

For three of the unions studied,<sup>231</sup> compliance-related issues were openly recognised as key element in the unions’ recruitment of new members.<sup>232</sup> These unions appeared to promote themselves among workers to a significant degree on its capacity to enforce the law and solve problems.<sup>233</sup> They also often linked their enforcement work to their organising strategies. For example, an interviewee in Union 2 explained that it was not uncommon for the union to link cases of non-compliance by a specific employer with ‘...an organising strategy about why it’s important for people to join the union, about what benefits are in it for them.’<sup>234</sup> For an elected officer in Union 1, the union focused much of its compliance work on new workplaces where the union has just started to organise, and noted that ‘nine times out of ten we get a recruitment leap because people are not being paid correctly’.<sup>235</sup>

For these unions, enforcement work was also often tied into bargaining strategies in a particular workplace. As one organiser explained:

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<sup>229</sup> Colling, above n 10, 146-7.

<sup>230</sup> Interviewee 4A.

<sup>231</sup> Union 2, Union 3 and Union 5.

<sup>232</sup> Interviewee 3C.

<sup>233</sup> Interviewee 5C.

<sup>234</sup> Interviewee 2B.

<sup>235</sup> Interviewee 1A.

*'So if you're getting ready to do an enterprise agreement, or you want to get an enterprise agreement in place for the first time with that employer, you'll find out what the issues are in the workplace. And if there's non-compliance issues, you'll utilise those to sort of motivate people on the ground to get involved, and to see what conditions they're missing out on, I suppose, what they're entitled to, and you'll turn it into an overall strategy to bargain to get a better outcome for them....'*<sup>236</sup>

It was also observed by interviewees in this union that non-compliance could also foster bargaining where the underlying award was unclear or contained provisions which were the source of dispute in a workplace. In this type of scenario, the union could argue that it would be simpler and better if the parties simply bargained.<sup>237</sup>

Other interviewees, however, expressed unease with the proposition that the compliance-related work of the union should form a significant part of the union's organising strategy. For these interviewees, the servicing function of the union was important, but it was separate to the task of organising workers. One interviewee felt that recruiting workers in a specific workplace on the basis that their employer had or was failing to comply with minimum standards was not a sound organising tool, leading only to 'six month members.'<sup>238</sup> Another interviewee in another union felt the effects of getting a worker to join because of seeing other workers being assisted in cases of non-compliance would inevitably be 'fairly isolated.'<sup>239</sup> Another explained:

*'the reality is dispute resolutions are a messy process, entitlement enforcement is a messy process, and no-one comes out of it one hundred percent happy... So yeah, we're a bit wary about signing up people on the basis of "we will go and get this underpayment – we don't do that. We prefer to sign them up for other reasons.'*<sup>240</sup>

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<sup>236</sup> Interviewee 1C.

<sup>237</sup> Interviewee 1A.

<sup>238</sup> Interviewee 3B.

<sup>239</sup> Interviewee 4B.

<sup>240</sup> Interviewee 4A.

*Another interviewee explained that ‘... unions generally don’t want to recruit simply around an enforcement issue, or at least that’s not our philosophy. I mean we want people to join our union because they want to build power in their industry and improve standards.’<sup>241</sup>*

The differing views and perceptions of the relationship between the enforcement and organising work of the union may perhaps be explained and understood within the context of the varying extent to which the case study unions had embraced the organising model of unionism. Since the early 1990s, largely as a response to the crisis in union membership, many Australian unions have sought to shift their focus away from a ‘servicing’ model of unionism towards an ‘organising’ model. While the former is generally described as consisting more of a transactional relationship between union officials and members, where union officials take a greater role in ‘delivering for members’, and whereby services – often legalistic in nature - are provided in exchange for the payment of membership dues,<sup>242</sup> the latter focuses on the recruitment and active involvement and participation of members and delegates in union activities at the workplace level.<sup>243</sup> Key among the features of the ‘organising model’ is freeing up organisers from some of their servicing responsibilities to focus on recruitment and ‘organising’ within workplaces.<sup>244</sup> As Pocock et al explain, unions still undertake a servicing function under an organising model, but some of this is undertaken by a trained, resourced delegates and most of the rest of it perhaps by a dedicated servicing function within the union office.’ The authors further explain:

‘This might mean that servicing requests are examined to determine whether they are individual problems, and therefore warrant dealing with in a conventional servicing manner, or are collective in nature and present organizing opportunities. In such situations, instead of the union ‘solving’ the problem for the member, the union provides members with support to solve it themselves, thereby increasing activism, union awareness and broadening the experience of collective action.’<sup>245</sup>

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<sup>241</sup> Interviewee 4B.

<sup>242</sup> See, eg, D Peetz, B Pocock and C Houghton, ‘Organizers’ Roles Transformed? Australian Union Organizers and Changing Union Strategy’ (2007) 49 *Journal of Industrial Relations* 151; M Crosby, ‘Down with the Dictator: The Role of Unions in the Future’ in R Callus and R Lansbury (eds), *Working Futures: The Changing Nature of Work and Employment in Australia* (Federation Press, 2002) 115.

<sup>243</sup> See further R Cooper, ‘Peak Council Organising at Work: ACTU Strategy 1994 – 2000’ (2003) 14 *Labour & Industry* 1; B Carter and R Cooper, ‘The Organizing Model and the Management of Change: A Comparative Study of Unions in Australia and Britain’ (2002) 57 *Industrial Relations* 712.

<sup>244</sup> Peetz, Pocock and Houghton, above n 242, 153-4.

<sup>245</sup> Ibid 155.

In Australia, the shift towards an organising model of unionism has been Australia-wide and encouraged and supported by the Australian Council of Trade Unions (ACTU). However the extent to which the model has been embraced by unions has proven very uneven across different unions as well as between branches within unions.<sup>246</sup>

It is clear from the above discussion that the case study unions all displayed some aversion to a purely servicing model of unionism and more specifically to a model of unionism. However beyond this, there was considerable divergence between and within the unions, and a number of interviewees explicitly recognised the tension inherent in using enforcement work as an organising strategy. One interviewee conceded these issues were ‘fraught’ and ones that the union was grappling with on an ongoing basis.<sup>247</sup> Another interviewee from another union explicitly observed what he saw as the difficulties between the approaches:

*‘... the ACTU has been pushing for about ten years now about this moving from being a servicing model union where you help fix members’ problems to being an organising union where you create structures to empower them to fix it themselves in the workplace, and that’s great. My view is it can only go so far because you’ve got to give people something if you want their money. If they ring up and say “I’ve been underpaid”, you can’t just say “well, get everybody that you work with upset about it enough to fix it yourselves because we’re not going to help.”’<sup>248</sup>*

Overall, our interviews seem to reveal that unions are still grappling with the implications of a strategic shift towards union organising for their enforcement work, and how best that such activities – still widely considered as an integral part of the unions’ work – could best be structured and carried out so as to promote broader union efforts towards renewal and membership growth.

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<sup>246</sup> Ibid.

<sup>247</sup> Interviewee 4B.

<sup>248</sup> Interviewee 5C.

## CONCLUSION

Our study of the compliance-related activities undertaken by five unions suggests that the task of monitoring and enforcing compliance by employers with minimum employment standards continues to be a significant focus and area of activity for Australian trade unions, notwithstanding the challenges unions have faced in performing this role over the last two decades. Unions engage in a wide range of enforcement-related activities on a daily basis, including the provision of advice and support to individual workers and organisers, preparing and delivering education and training to organisers and delegates, and resolving individual and collective cases of non-compliance by employers with minimum standards through both informal and formal channels. However the case studies also reveal that the role played by unions is by no means static or homogenous. Unions go about their enforcement work and activities in distinctively different ways than they would have twenty years ago, having adapted their approaches and strategies to the different economic, legal and workplace environments in which they find themselves operating.

Where issues of non-compliance are identified by the unions, and consistent with the findings of previous studies, our study revealed a clear preference among interviewees for resolving issues of non-compliance informally and for avoiding the costs and complexities associated with litigation where possible. However the unions studied also clearly recognised the realities of the increasingly legalised environment in which they operated and displayed a strong engagement with the legal framework in which they now operate, not least through a preparedness to pursue cases on behalf of individual members through the courts where necessary. At the same time, however, largely due to scarce resources and organizational priorities, the unions studied also appeared to be acutely aware of the broader context in which they operated and of membership expectations, and in particular on the need to focus the efforts of the union where possible on workplaces, strategies and issues that would strategically provide the most beneficial outcomes for the collective, and/or assist in retaining and attracting members.

Our case studies revealed considerable diversity between unions with respect to the extent to which they devoted organizational resources to compliance-related activities, the extent to which they perceive their compliance roles as extending beyond their membership, and their relationship with, and perceptions of, the state inspectorate. There also appear to be considerable divergence – and some

continuing uncertainty – over the extent to which unions perceive compliance-related activities, including through the use of legal strategies - as constituting a legitimate and desirable basis upon which to seek to grow membership.

The case studies suggest that some unions have developed sophisticated, creative and effective strategies for monitoring and securing compliance with minimum standards that are responsive to the characteristics and dynamics of the industries in which they work. While the reasons for these divergences between unions cannot be determined conclusively from the case studies, influential factors appear to include historical factors, resourcing constraints as well as the extent of non-compliance within the industry and union strategy.

While recognising the heterogeneity of approaches adopted by different unions and the financial constraints upon which many operate, our study suggests there is considerable scope for improvement by unions with respect to their monitoring and enforcement activities. This includes in such areas as greater formalisation of policies and procedures, greater efforts to publicise ‘wins’ and raise public awareness of the positive role unions play in promoting and securing compliance with minimum labour standards, greater opportunities for collaboration and sharing of innovative practices between and within unions, as well as greater scope for strategic planning and reflection on these activities.

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