

# **'It's Oh So Quiet?' Employee Voice and Enforcement of Employment Standards in Australia**

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## **Introduction**

In the past, it was often assumed that enforcement of employment standards regulation was 'unproblematic'<sup>1</sup> in Australia. The apparent silence on the part of employees was seen as a sign that minimum employment standards were largely respected and upheld by employers. Contrary to these common conjectures, however, there is now evidence to suggest that employer non-compliance with such standards is a significant problem.<sup>2</sup>

Although compliance is critical to the overall integrity of the regulatory scheme, a reduced premium has been placed on problems of enforcement which have generally been perceived as incidental to the 'key' industrial relations issues, such as recognizing and supporting trade union and collective bargaining activity.<sup>3</sup> However, the underlying shifts to the labour market and legislative framework across the common law world including the decline of collective bargaining and trade unionism, the growth in individual rights, the increase in atypical employment arrangements, and the pervasive spread of globalization, have led to a resurgence of interest in the regulatory role of the state and prompted a search for new forms of worker participation, representation, and agency.<sup>4</sup>

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<sup>1</sup> See Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (The Law Book Co, 1994) 145.

<sup>2</sup> Historically, employer non-compliance in Australia has been found to be 'significant and sustained'. See Miles Goodwin and Glenda Maconachie, 'Unpaid entitlement recovery in the federal industrial relations system: Strategy and outcomes 1952–95' (2007) 49(4) *Journal of Industrial Relations* (JIR) 523, 523. This trend appears to have continued. For example, the average rate of employer non-compliance in national audits finalized by the FWO in 2011/2012 was around 25 per cent. Further, in some previous targeted campaigns—such as the audit undertaken by the FWO in the security industry in 2009—the contravention rate was as high as 47 per cent.

<sup>3</sup> Miles Goodwin, 'The Great Wage Robbery: Enforcement of Minimum Labour Standards in Australia' (PhD Thesis, University of New South Wales, 2003) 13.

<sup>4</sup> See Linda Dickens (ed.), *Making Employment Rights Effective: Issues of Compliance and Enforcement* (Hart Publishing, 2012); David Weil, 'Individual Rights and Collective Agents: The Role of Old and New Workplace

This chapter centres on the emergence of a somewhat novel institutional vehicle for worker voice and one that has not been readily recognized in the existing literature on voice, namely the labour inspectorate.

More specifically, this chapter will explore some of the ways in which the federal labour inspectorate in Australia—now known as the Fair Work Ombudsman (FWO)<sup>5</sup>—has sought to develop mechanisms for promoting and protecting voice outside the classical collective bargaining framework and in the context of the contemporary regulatory landscape. This chapter begins by first considering the importance of voice to employer compliance with, and enforcement of, minimum employment standards—an issue which has been largely neglected in the academic debate. It then surveys the evolution of employment standards regulation in Australia and analyses how the changing source and structure of legal norms and employment rights have influenced the compliance and enforcement position of institutional actors, such as trade unions, the federal industrial tribunal, and the federal labour inspectorate. The chapter goes on to consider the ways in which the FWO provides a possible channel for voice through their outreach activities and their new dispute resolution process. Finally, the chapter offers some reflections on how labour inspectorates, like the FWO, may seek to ensure that voice is amplified, not muted, and in doing so, provide some protection to those workers who are the least likely to speak out.

### **Employee Voice and Enforcement**

While debates over ‘voice’ have an extended history, they have largely focused on a limited number of channels: traditionally, independent trade unions and industrial tribunals; and more recently, employer-sponsored schemes and statutory workplace committees.<sup>6</sup> However, the shift away from manufacturing to service industries, the fall in trade union membership, the increase in individualized, legislated standards, the expansion in the small business sector, and the rise in precarious working arrangements

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Institutions in the Regulation of Labor Markets’ in Richard B. Freeman, Joni Hersch, and Lawrence Mishel (eds), *Emerging Labor Market Institutions for the Twenty-First Century* (UCP, 2005); Cynthia Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (Yale University Press, 2010).

<sup>5</sup> In 2006, the year Work Choices took effect, the labour inspectorate operated as an executive agency known as the Office of Workplace Services. From 2007, the labour inspectorate was transformed into a statutory agency known the Office of the Workplace Ombudsman. This agency was later renamed the Office of the Fair Work Ombudsman from 1 July 2009 as part of the Fair Work reforms. While this chapter will touch on the work performed by these predecessor agencies, the focus is largely on the activities and approach of the FWO.

<sup>6</sup> For a recent overview of this literature, see John Budd, Paul Gollan, and Adrian Wilkinson, ‘New Approaches to Employee Voice and Participation in Organisations’ (2010) 63(3) *Human Relations* 303.

mean that, in many common law countries, the majority of workers are no longer represented by unions or covered by enterprise bargaining agreements.

These underlying shifts have led to the fracturing of worker identities and interests and strengthened the call for new locations, institutions, and mechanisms for expressing voice.<sup>7</sup> In particular, Harry Arthurs argues that with the decline in collective bargaining in advanced industrial economies, there is a need to ‘explore new ways to provide workers with some measure of industrial justice, for promoting sensible and orderly resolution of workplace conflicts, and especially for ensuring that states, markets and employers are accurately informed about and responsive to the needs and preferences of workers’.<sup>8</sup>

In order to better reflect and capture the diverse needs and desires of workers, there has been a departure from traditional conceptualizations of participation which were rooted in industrial democracy.<sup>9</sup> In its wake, a more inclusive definition of voice has surfaced which is ‘less concerned with a balance of bargaining power and material benefits for workers, but more oriented to broader social objectives in a deliberative and reflexive legal framework’.<sup>10</sup> Indeed, for many non-unionized or vulnerable workers, voice—in the classical sense—may not be a primary objective. For these workers, voice may be less about improving or influencing conditions at the workplace, and more about simply ensuring that the existing standards are respected and upheld. Indeed, an important, but neglected function of voice is the role it plays in compliance and enforcement. It is increasingly clear, however, that the ability of employees to raise a grievance and seek a fair resolution—either within or outside the organization—is critical. It is this particular conceptualization of voice which frames the analysis in this chapter.

When unions are weak, and collective bargaining is less dominant, it is unsurprising that minimum employment standards as prescribed by legislation grow in significance.<sup>11</sup> It is somewhat of a paradox then, that it is precisely when workers are not unionized that statutory rights and protections are less likely to be raised and relied upon.<sup>12</sup> While an absence of law can have significant implications for working standards, Otto Kahn-Freund

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<sup>7</sup> See Ian Watson, John Buchanan, Iain Campbell, and Chris Briggs, *Fragmented Futures: New Challenges in Working Life* (Federation Press, 2003).

<sup>8</sup> Harry Arthurs, ‘Reconciling Differences Differently: Reflections on Labor Law and Worker Voice After Collective Bargaining’ (2007) 28 *Comparative Labor Law and Policy Journal* (CLLPJ) 155, 156.

<sup>9</sup> Budd et al. (n 6) 304.

<sup>10</sup> Alan Bogg and Tonia Novitz, ‘Investigating “Voice” at Work’ (2012) 33 *CLLPJ* 323, 324.

<sup>11</sup> It is worth acknowledging, however, that where unions are especially weak, particularly politically, this can lead to an erosion of legislated labour standards. The United Kingdom is a prime example of this phenomenon.

<sup>12</sup> Neil Gunningham, ‘Occupational Health and Safety, Worker Participation and the Mining Industry in a Changing World of Work’ (2008) 29 *Economic and Industrial Democracy* (EID) 336, 346.

has observed that the law cannot, on its own, guarantee satisfactory working conditions. He added:

[a]s a power countervailing management trade unions are much more effective than the law has ever been or can ever be....Everywhere the effectiveness of the law depends on the unions far more than the unions depend on the effectiveness of law.<sup>13</sup>

Without access to a labour market intermediary, such as a union, employees are less likely to complain about their workplace conditions, even where they are deleterious. Factors which militate against complaining include those related to the individual, such as gender, ethnicity, education, and background, as well as the workplace environment, such as size, degree of conflict, and internal policies.<sup>14</sup> From an economic perspective, it has been suggested that employees are unlikely to complain where the costs outweigh the benefits of doing so. In this instance, 'costs' include those related to obtaining information about the scope and application of minimum employment standards and how such rights may be exercised and enforced. In addition, there are also the potential costs associated with employer retaliation, including possible job loss.<sup>15</sup>

While adverse treatment of complainants by employers is prohibited under the Fair Work Act 2009 (Cth) (FW Act),<sup>16</sup> behavioural studies suggest that many employees abstain from speaking out because of the perceived psychological and societal costs, such as fear, guilt, and isolation by peers and community.<sup>17</sup> Indeed, while some of these costs may decrease after the employment ends, concerns about future employment prospects can still serve to curtail complaints about a former employer.<sup>18</sup>

Unions have been shown to effectively lower these costs in various ways and this can lead to higher complaint rates and improved compliance levels.<sup>19</sup> This trend can be linked to the fact that employees in unionized firms have an increased capacity to review and interpret legal standards, mediate and challenge their implementation by management,

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<sup>13</sup> Otto Kahn-Freund, *Labour and the Law* (Stevens, 1977) 10.

<sup>14</sup> See David Weil, 'Are Mandated Health and Safety Committees Substitutes for or Supplements to Labor Unions' (1999) 52(3) *Industrial and Labor Relations Review* 339, 341–2.

<sup>15</sup> Weil (n 4) 20.

<sup>16</sup> The FWO takes any allegations of victimization (known as 'adverse action' under the FW Act) seriously and has previously pursued a number of cases against employers who have taken adverse action against employees who have complained about their pay and conditions. See e.g. Fair Work Ombudsman, 'Melbourne company fined \$35,000 for sacking workers who complained about pay', Media Release, 13 April 2010.

<sup>17</sup> Yuval Feldman and Orly Lobel, 'The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality' (2010) 88 *Texas Law Review* 1151, 1157–8.

<sup>18</sup> Bennett (n 1) 143.

<sup>19</sup> See Weil (n 4) 25–7.

and attract the attention of labour inspectorates by voicing their grievances.<sup>20</sup> Unions assist employees in performing these functions by reducing or internalizing the costs of exercising individual rights conferred to workers—for instance, by facilitating a means for workers to make complaints anonymously.<sup>21</sup>

Another important feature of institutional representation is that it can help to ensure that changes at the workplace are undertaken in a way that benefits groups of employees, not just those individuals who are willing and able to explicitly raise their concerns. This overcomes one of the major weaknesses of individual voice and a heavily complaints-orientated strategy which can lead to investigations that are shaped by the specific concerns of one worker and confined to the immediate employer. In comparison, unions exercising collective voice are able to consolidate information gathered from workers to build a more intricate understanding of the network of employers or contractors which may assist in widening the enquiry beyond the scope of the initial complaint by identifying and helping others who have been similarly affected.<sup>22</sup> In this respect, it has been observed that ‘social efficiency is enhanced where individually based rights are exercised via an agent operating in the collective interest’.<sup>23</sup>

Part of the reason that unions are able to perform these important compliance and enforcement functions is that they generally have the power and authority to take formal and informal action in the face of employer resistance to conform. In particular, in the Australian system, trade unions have legal standing to enforce statutory employment rights, even when those rights are individually vested.<sup>24</sup> While unions have access to sanctions, such as civil penalties, through the court system, these formal powers are rarely invoked. Rather, union enforcement activity more commonly involves alternative and less formal approaches, such as direct negotiation with employers at the workplace,

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<sup>20</sup> See David Weil, ‘Enforcing OSHA: The Role of Labor Unions’ (1991) 30(1) *Industrial Relations* 20; Margaret Lee, ‘Regulating Enforcement of Workers’ Entitlements in Australia: The New Dimension of Individualisation’ (2006) 17(1) *Labour & Industry* 41.

<sup>21</sup> David Weil and Amanda Pyles, ‘Why Complain? Complaints, Compliance and the Problem of Enforcement in the US Workplace’ (2005) 27(1) *CLLPJ* 59.

<sup>22</sup> Janice Fine and Jennifer Gordon, ‘Strengthening Labour Standards Enforcement Through Partnerships with Workers’ Organisations’ (2010) 38(4) *Politics and Society* 552.

<sup>23</sup> Weil (n 4) 23.

<sup>24</sup> Section 540 of the FW Act provides that a trade union may apply for a court order in relation to a contravention or proposed contravention of a civil remedy provision in relation to an employee if: (a) the employee is affected by the contravention (or will be affected by the proposed contravention); or (b) the trade union is entitled to represent the industrial interests of the employee.

accessing external dispute resolution, or employing economic sanctions, including various forms of industrial action.<sup>25</sup>

While unions are clearly integral to the exercise of employee voice and the effective enforcement of minimum employment standards, this channel of voice is no longer available in many workplaces. The key question is whether a government agency—such as a labour inspectorate—can replicate some of the core benefits already outlined in a way that leads to enhanced employee voice and improved compliance. For example, can the labour inspectorate help employees understand, interpret, and apply their rights to be paid and employed in accordance with minimum employment standards? Is the inspectorate able to effectively shield employees from employer retribution by allowing individuals to complain anonymously or on behalf of a group of workers? Can the regulatory agency assist in delivering workplace justice by providing an informal forum for the fair resolution of disputes? The evolution of employment standards regulation in Australia, and the changing pattern of employee representation and dispute resolution, provides a useful case study in this respect.

### **The Evolution of Employment Standards Regulation and Enforcement in Australia**

In the Australian context, ‘union voice has historically been the most prominent means by which workers were organised and represented in the employment relationship’.<sup>26</sup> This can be linked to the conciliation and arbitration system, which was a defining feature of the Australian workplace relations regime for most of the twentieth century. This unique system of dispute settlement performed several key regulatory functions and had a number of significant effects on the power and position of regulatory actors.

First, the key driver of conciliation and compulsory arbitration was to secure industrial peace and avoid economically destructive disputes. To achieve this objective, the system entrenched a strong and distinctive tradition of resolving workplace conflict through dispute resolution mechanisms overseen and administered by an independent industrial umpire. A central outcome of this process was to impose protective standards for workers

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<sup>25</sup> See Tess Hardy and John 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* (AJLL) 306.

<sup>26</sup> Amanda Pyman, Brian Cooper, Julian Teicher, and Peter Holland, ‘A Comparison of the Effectiveness of Employee Voice Arrangements in Australia’ (2006) 37(5) *Industrial Relations Journal* 543, 545. Throughout most of the twentieth century, union membership levels hovered around 50 per cent of the workforce in Australia, albeit with some ebbs and flows during this period. See David Peetz, *Unions in a Contrary World* (Cambridge University Press, 1997). Union density is currently around 18 per cent in Australia. See Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership* (Cat 6310.0, May 2013).

across industry sectors or occupational classes in the form of ‘awards’. Trade unions were effectively charged with ‘policing’ this system, and accordingly, were afforded extensive privileges and protections, such as rights of entry and legal standing to commence court proceedings. That said, it appears that it was far more common for unions to rely on less formal avenues to resolve disputes about compliance—for example, by exercising industrial muscle and leaning on the employer or by notifying a dispute and gaining access to the arbitral powers of the federal industrial tribunal.<sup>27</sup>

The dominant role played by unions on the compliance and enforcement front had a profound effect on the position of the federal labour inspectorate.<sup>28</sup> For the first three decades of the conciliation and arbitration system, unions provided the only avenue of enforcement. The general neglect of the labour inspectorate, which persisted over the course of the twentieth century, appears to have been premised on an assumption that enforcement of employment standards regulation was more properly the role of trade unions than the government.<sup>29</sup>

This regulatory landscape, and the entrenched role of trade unions within it, all changed with the election of the Howard Coalition government in 1996. In its first year, the Howard government introduced the Workplace Relations Act 1996 (Cth), which encouraged individualization strategies, restricted union rights, and curtailed the powers of the federal industrial tribunal—the most significant regulatory institution within the conciliation and arbitration system. Employee voice was progressively characterized as direct and this was ‘fuelled by an increasingly aggressive focus on managerial prerogative, the decline of unionism and the primacy of regulation of the employment relationship at the enterprise level’.<sup>30</sup> These developments were later associated with a ‘significant and growing “representation gap” in Australia’.<sup>31</sup>

This gap soon widened with the arrival of the Coalition government’s Work Choices legislation in 2006.<sup>32</sup> As has been well-documented,<sup>33</sup> the collective, award-based framework which largely defined the first century of industrial relations in Australia was

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<sup>27</sup> Hardy and Howe (n 25); Chris Arup and Carolyn Sutherland, ‘The Recovery of Wages: Legal Services and Access to Justice’ (2009) 35 Monash University Law Review (Monash ULR) 96.

<sup>28</sup> Glenda Maconachie and Miles Goodwin, ‘Recouping Wage Underpayment: Increasingly Less Likely?’ (2006) 41 Australian Journal of Social Issues 328, 339.

<sup>29</sup> Hardy and Howe (n 25).

<sup>30</sup> Pyman et al. (n 26), 547.

<sup>31</sup> Mark Bray, Peter Waring, Duncan Macdonald, and Stephane Le Queux, ‘The “Representation Gap” in Australia’ (2001) 12(2) Labour & Industry 1, 25.

<sup>32</sup> Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (‘Work Choices’).

<sup>33</sup> See generally the various articles in the special issue of the Australian Journal of Labour Law ((2006) 19(2)).

displaced by an avid promotion of individual statutory agreements and the legislative entrenchment of a core set of minimum employment standards. Work Choices also sought to marginalize unions as the legitimate representatives of employees by placing limits on the capacity of unions to take industrial action, exercise rights of entry and access the dispute resolution jurisdiction of the Commission.<sup>34</sup>

The Work Choices legislation also had significant implications for compliance and enforcement of employment standards regulation. In particular, replacing a collectivist system with a rights-based model had the effect of elevating the role of formal enforcement mechanisms utilized by the federal labour inspectorate and overseen by the courts at the expense of informal dispute resolution processes initiated by trade unions and administered by the federal tribunal. The changing dynamics between these institutional actors was further perpetuated by the fact that, during the Work Choices period, the federal labour inspectorate received an influx of resources and an unexpected flush of political enthusiasm for enforcement. Combined, these factors directly led to a boost in the inspectorate's workforce, a shift in enforcement strategy, and a spike in litigation.<sup>35</sup>

Soon after being elected in late 2007, the new Rudd Labor government started to unwind some of the key policy positions taken by the former Coalition government. In particular, the FW Act sought to restore the central place of enterprise bargaining and remove easy access to individual statutory agreements. Although the FW Act signalled some significant reforms, the Work Choices legacy lived on in a number of critical respects. For example, while the Fair Work reforms returned a sense of legitimacy to unions as a voice for employees, most workers remained without union membership.<sup>36</sup> Basic working conditions, such as leave and termination entitlements, continue to be principally secured by legislation. Minimum wages are now set down in 'modern awards', which are no longer the product of negotiation between industrial parties, but the outcome of determination made by the Fair Work Commission (FWC)—the name now given to the federal industrial tribunal. The scope of the dispute resolution procedure administered by the FWC is also strongly influenced by the changes which took place under Work Choices insofar as the

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<sup>34</sup> Anthony Forsyth, 'Workplace Conflict Resolution in Australia: The Dominance of the Public Dispute Resolution Framework and the Limited Role of ADR' (2012) 23(3) *International Journal of Human Resource Management* 476, 478.

<sup>35</sup> See Tess Hardy 'A Changing of the Guard: Enforcement of Workplace Relations Laws Since Work Choices and Beyond' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009).

<sup>36</sup> Andrea Kirk and Eve Anderson, 'Examining the New Actor Status of Employee Assistance Programs: A Voice for Employees' in Grant Michelson, Suzanne Jamieson, and John Burgess (eds) *New Employment Actors: Developments from Australia* (Peter Lang, 2008) 267, 269.

Commission only has jurisdiction to exercise private arbitration where this power is conferred upon it by the relevant dispute resolution clause.<sup>37</sup>

These shifts are important in a number of ways. First, one of the inherent values of the conciliation and arbitration process was the way in which it transformed informal regulation and decision-making processes into a legitimate model of corporate governance. In doing so, the award-making process, as well as the negotiation of enterprise agreements, underlined the important role of workers and their representatives in developing and implementing the normative regime of the workplace.<sup>38</sup> In comparison, the rise of individual employment rights prescribed by legislation positions workers and their advocates as passive beneficiaries of actions taken on their behalf by legislators, albeit trade unions and employer associations have often been active participants in the political debate and legislative processes.<sup>39</sup> At the same time, the promise of individual rights often has the effect of heightening calls for their enforcement.<sup>40</sup> It is now the case in Australia, as it is in many common law countries, that unions frequently enforce standards set by Parliament<sup>41</sup> or refer matters directly to the labour inspectorate for further investigation and follow up.<sup>42</sup> Indeed, as legislated standards have expanded, so too has the role of the government agency responsible for upholding these standards.<sup>43</sup>

This touches on another critical issue—that is, the changing role of and interaction between the two key government institutions in this context—the FWC and the FWO. Traditionally, it was the industrial tribunal, rather than the labour inspectorate, which was principally responsible for the resolution of workplace grievances.<sup>44</sup> This traditional

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<sup>37</sup> FW Act, ss. 738–739. See Joellen Riley, ‘From Industrial Arbitration to Workplace Mediation: Changing Approaches to Dispute Resolution’ in Stewart and Forsyth (n 35) 200.

<sup>38</sup> Arthurs (n 8) 160.

<sup>39</sup> For example, following the 2007 federal election, the Rudd Labour Government established a tripartite Committee on Industrial Relations (commonly known as ‘COIL’) to develop and draft the Fair Work Bill 2009 (Cth) prior to its introduction into Parliament. In order to capture the various perspectives on the legislative reform package, this Committee consisted of a number of different advisory groups, including a business advisory group, a workers advisory group, and a small business advisory group. See ‘Legal Experts Start 10 Day Review of Labor’s Draft IR Laws’, *Workplace Express*, 7 October 2008.

<sup>40</sup> Joellen Riley, ‘Workplace Dispute Resolution under the Fair Work Act: Is There a Role for Private Alternative Dispute Resolution Providers?’ (2009) 20 *Alternative Dispute Resolution Journal* (ADRJ) 236. This trend has been similarly observed in the UK context: see Bob Hepple and Gillian Morris, ‘The Employment Act 2002 and the Crisis of Individual Employment Rights’ (2002) 31(3) *Industrial Law Journal* (ILJ) 245.

<sup>41</sup> FW Act, s. 540.

<sup>42</sup> Trevor Colling, ‘Trade Union Roles in Making Employment Rights Effective’ in Linda Dickens (ed.), *Making Employment Rights Effective: Issues of Compliance and Enforcement* (Hart Publishing, 2012) 183, 185.

<sup>43</sup> Hepple and Morris (n 40).

<sup>44</sup> See Forsyth (n 34); Therese MacDermott and Joellen Riley, ‘Alternative Dispute Resolution and Individual Workplace Rights: The Evolving Role of Fair Work Australia’ (2011) 53 *JIR* 718.

dispute resolution pathway is reflected in the 'model' dispute resolution clause that features in all modern awards and many enterprise agreements.<sup>45</sup> In particular, this 'model' clause expressly steers parties towards the Commission. However, it is arguable that this approach no longer reflects the fact that the majority of workplace disputes involve non-unionized workers. The current FWC President, Justice Iain Ross, recently acknowledged there had been a significant shift over the past fifteen years away from collective disputes in favour of individual applications.<sup>46</sup> Furthermore, to have the Commission hear a dispute arising under the NES, a modern award, or an enterprise agreement, the applicant must ordinarily still be in employment.<sup>47</sup> As noted earlier, it is increasingly rare, particularly in non-union or small workplaces, for employees to bring a complaint against their existing employer because of fears of reprisal. If a worker decides to wait until after their employment ends, their options to pursue a grievance in the Commission are limited to lodging a claim under the unfair dismissal or general protection provisions of the FW Act. Such applications must not only fall within the relevant jurisdictional parameters,<sup>48</sup> they must also be submitted within a 21-day timeframe after the triggering event. In addition, the applicant must pay a filing fee to lodge an application with the Commission, which although modest may serve to deter low-paid workers from proceeding with their claim.

In comparison to the FWC, the FWO is at much greater liberty to determine the scope and structure of the internal dispute resolution process they administer given that this process is not prescribed by legislation, but rather is at the discretion of senior management and determined by internal policy. For example, the FWO can and does receive complaints about a wide range of employment matters from disputes about minimum employment entitlements, such as minimum pay, leave, allowances, redundancy, and notice of termination, to allegations of discrimination or adverse action.<sup>49</sup> The majority of

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<sup>45</sup> FW Act, ss. 146 and 186(6).

<sup>46</sup> According to President Ross, two-thirds of applications lodged in 1998/1999 were the result of collective disputes; this had fallen to less than 40 per cent by 2011/2012. See 'New FWC help for self-represented parties', *Workplace Express*, 6 May 2013. Similar trends have been observed in the UK. For example, in 1975, the Advisory, Conciliation and Arbitration Service (ACAS) received 2,564 requests for collective conciliation. In 2010/2011, this number had dropped to 1,054. In the same time period, the number of individual conciliation cases had substantially increased from 29,100 cases in 1975 to 74,620 cases in 2010/2011. See Nicole Busby and Morag McDermont, 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings' (2012) 41(2) *ILJ* 166.

<sup>47</sup> See e.g. *Fairall v St George & Sutherland Community College* [2012] FWA 8847.

<sup>48</sup> For example, an applicant seeking a remedy under the unfair dismissal provisions must generally be able to establish that their employment was terminated at the initiative of the employer, that the termination was harsh, unjust, or unreasonable, and that they can otherwise meet the other relevant thresholds, including that their annual salary falls below the relevant salary limit.

<sup>49</sup> A number of provisions in Part 3-1 of the FW Act deal with situations where one person has taken 'adverse action' against another person because: (a) they have exercised a 'workplace right' (e.g. a right, amongst

complaints received by the FWO are, however, concerned with underpayments of wages.<sup>50</sup> While the bulk of the complaints made to the FWO come from former employees,<sup>51</sup> the agency is also able to deal with, and encourages, complaints from existing employees. The FWO can receive complaints for up to six years following an alleged contravention, there is no applicable salary cap, and the FWO is authorized to deal with 'safety net contractual entitlements'.<sup>52</sup> Finally, accessing the dispute resolution services, and other assistance of the FWO, is free. In light of this, it is not surprising that employees, especially those without union support or the financial resources to engage private legal representation,<sup>53</sup> are increasingly turning to the FWO when seeking an institutional vehicle for voice.<sup>54</sup>

### **The Fair Work Ombudsman and Employee Voice**

The FW Act charges the FWO with responsibility to encourage and ensure compliance with national workplace laws through education initiatives, producing best practices guides and by monitoring, investigating, and enforcing workplace laws. There are very few legislative restrictions on how the agency should achieve these statutory objectives and fulfil its statutory mandate. The way in which voice is harnessed (or not) is therefore

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others, to make a complaint or inquiry to a person or body that has the capacity to seek compliance with a workplace law, such as an inspector or trade union); (b) of their membership or non-membership of an industrial association; or (c) because of their engaging or not engaging in certain industrial activities.

<sup>50</sup> Complaints relating to wages made up 63 per cent of the total complaints received by the FWO. See Australian National Audit Office, 'Delivery of Workplace Relations Services by the Office of the Fair Work Ombudsman' (Audit Report No 14, 2012–13), 74.

<sup>51</sup> A similar pattern can be observed in other common law countries. For example, Taras reports that well over 90 per cent of employment-related complaints received by the Canadian federal and provincial employment standards hotlines come from former employees. See Daphne Taras, 'Reconciling Differences Differently: Employee Voice in Public Policymaking and Workplace Policy' (2007) 28 *CLLPJ* 167, 175.

<sup>52</sup> Section 12 of the FW Act defines 'safety net contractual entitlements' to mean entitlements under an employment contract that relate to any matter also covered by the National Employment Standards or by a modern award. This may include contractual entitlements to pay or leave that are more generous than the 'safety net' prescribed by legislation or the applicable modern award.

<sup>53</sup> Self-help remedies are particularly difficult to access in Australia given that legal costs are not generally recoverable in this jurisdiction: FW Act, s. 570. For further discussion of the way in which costs orders may affect access to justice, see Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32(3) *University of New South Wales Law Journal* 699.

<sup>54</sup> This is illustrated by the fact that the FWO received 26,366 complaints in 2011/2012. In this same year, the FWC received 18,957 applications under the provisions relating to unfair dismissal (14,027), general protections (2,901), and dispute resolution (2,029). The last figure does not include dispute resolution applications which relate to bargaining disputes or applications for informal assistance relating to agreements and industrial action. See Fair Work Ombudsman, *Annual Report 2011–2012*, 16; and Fair Work Commission, *Annual Report 2011–2012*.

less about legal frameworks and more about internal decision-making processes and external environmental factors.

Since 2006—the year Work Choices commenced and the federal labour inspectorate rose to prominence—there has been a discernible shift in the emphasis placed on education and advice and the inclination to use litigation and other coercive sanctions. For example, in the immediate wake of Work Choices, the labour inspectorate was keen to develop a reputation as being a strong and effective regulator. They set out to achieve this objective by adopting an aggressive litigation strategy and deploying a savvy use of media—an approach potentially buttressed by broad political commitment to the regulatory agency at the time.

More recently, however, the FWO's enforcement functions and powers have been downplayed, while its role in promoting voluntary resolution through advice, education, and mediation has been accentuated. While civil remedy litigation remains 'one of the compliance tools available to the Fair Work Ombudsman', litigation activities are generally seen as 'the last resort of a broader compliance system'.<sup>55</sup> This recent move towards 'softer' or more persuasive approaches appears to be driven by a number of different factors.<sup>56</sup>

For a start, the political, economic, and social environment in which the FWO has been operating has been a challenging one. There has been a change of government following a hotly contested election which centred on workplace relations issues; there has been a major financial crisis which has had significant flow-on effects for particular industries, such as manufacturing and retail; and finally, the FWO has had to contend with the inherent complexities associated with any new regulatory regime. In particular, the renewed emphasis on cooperative mechanisms may be a response to the apparent perception in some pockets of the regulated community that the FWO was being too aggressive in its pursuit of non-complying employers, especially at a time when there had been significant legislative change and the application of instruments remained unsettled.<sup>57</sup>

The lobbying from business potentially gained greater traction in light of the fact that the Fair Work reforms are generally geared towards promoting conciliatory rather than

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<sup>55</sup> Fair Work Ombudsman, *Annual Report 2009–2010*.

<sup>56</sup> For further discussion of the shift in this litigation strategy, see Tess Hardy, John Howe, and Sean Cooney, 'Less Energetic, but More Enlightened? Exploring the Fair Work Ombudsman's Use of Litigation in Regulatory Enforcement' (2013) 35(3) *Sydney Law Review* (Sydney LR) 565.

<sup>57</sup> Nicholas Wilson, 'Update from the Fair Work Ombudsman' (Speech to Industrial Relations Summit, 5 March 2012).

adversarial approaches to the resolution of workplace relations disputes. As set out previously, the regulatory framework in Australia was historically organized around the idea that the interests of employers and employees were fundamentally in conflict.<sup>58</sup> In contrast to the interest-based premise of the conciliation and arbitration system, the contemporary legislative framework expressly provides that a key function of the FWO is 'to promote harmonious, productive and cooperative workplace relations'.<sup>59</sup> While the concept of workplace partnerships is most commonly associated with standard-setting and bargaining, or promoted by HRM advocates interested in high performance work systems, this powerful discourse of cooperation and collaboration has important implications for compliance and enforcement practices, and partly explains the FWO's current approach to employee voice.

One of the most significant factors behind the FWO's change in approach, however, has been a drop in agency resourcing.<sup>60</sup> The recent decrease in agency funds has been partly justified on the basis of an assumption that the need for assistance would subside once the Fair Work system was more fully established. This assumption is somewhat misplaced, however, given that it does not properly account for the fact that in providing assistance to workers who had been largely left without recourse, the FWO has effectively generated a demand for its services which is unlikely to abate any time soon.<sup>61</sup>

Moreover, this substantial increase in complaints makes it more challenging for the FWO to meet managerial demands for efficiency which is manifest in the agency's key performance indicators (KPIs). While quantitative KPIs may encourage timeliness and responsiveness,<sup>62</sup> there is a danger that these numerical targets may cultivate a 'culture of efficiency'<sup>63</sup> where the success of inspectorate work is judged by meeting quotas to

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<sup>58</sup> Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration, 1890-1914* (Oxford University Press, 1989).

<sup>59</sup> FW Act, s. 682.

<sup>60</sup> 'Budget 2013: More Dollars for FWC, Less for FWBC', *Workplace Express*, 14 May 2013.

<sup>61</sup> In 2011/2012, the FWO recorded the receipt of 26,366 complaints, which represents an increase of 20 per cent from the 21,980 complaints received during 2010/2011. There was a slight decrease in the last financial year where the FWO recorded the receipt of 24,678 complaints. See Fair Work Ombudsman, *Annual Report 2012/2013*.

<sup>62</sup> Responsiveness is one of the five principles of the FWO Customer Charter. In particular, the Charter states: 'We aim to offer the best possible service and are continually looking to improve upon our performance. In addition to treating customers with dignity and respect, we are also committed to the following delivery timeframes: we will resolve 80% of complaints in 90 days; the Fair Work Infoline will resolve 80% of matters at the first contact; the Fair Work Infoline will be available 99% of the time during advertised hours; our website will be available 99% of the time.' See Fair Work Ombudsman, Customer Service Charter, 23 April 2013.

<sup>63</sup> Mary Gellatly, John Grundy, Kiran Mirchandani, J. Adam Perry, Mark Thomas, and Leah Vosko, "'Modernising' Employment Standards? Administrative Efficiency and the Production of the Illegitimate Claimant in Ontario, Canada' (2011) 22(2) *Economic and Labour Relations Review* (ELRR) 81, 96.

reduce or eliminate complaint backlogs, even where doing so may compromise investigative integrity or procedural fairness. Further, some have argued that time-sensitive KPIs generally discourage state-based enforcement in favour of a light-touch, self-regulatory approach.<sup>64</sup> Indeed, the adoption of informal dispute resolution processes effectively allows the FWO to better preserve resources and avoid the key disadvantages of litigation, including the formal and technical procedures for filing and presenting evidence, as well as the delay and expense associated with obtaining and enforcing court orders. As Riley points out:

The interest of governments in reducing public expenditure on court and tribunal systems, and in responding to lobbying to relieve the cost of these rights to business enterprises, goes some way towards explaining the pressure on governments to consider [alternative dispute resolution] as a means for resolving individual workplace disputes. (It is not all about concern for access to justice for ordinary workers, after all).<sup>65</sup>

This shift in the dominant compliance and enforcement approach of the inspectorate from a formal, litigious model to a more informal, dispute resolution approach has important implications for worker voice. The next section will explore the FWO's new compliance strategy and consider the extent to which the inspectorate is capable of providing a new channel for voice. In particular, it will assess whether the inspectorate is (or should be) performing some of the key regulatory functions performed by traditional institutional actors, including trade unions and the federal industrial tribunal.

### **The FWO's New Compliance Strategy**

From the start of 2013, the FWO publicly moved away from the traditional compliance and enforcement model of its predecessors—which generally involved undertaking a detailed investigation of every workplace complaint that was lodged with the agency. In its place, the FWO has sought to implement a 'strategic enforcement' model—a term coined by David Weil based on his research into the US Department of Labour.<sup>66</sup> The key features of this model, as applied by the Australian regulator, were explained by a senior manager the FWO as follows:

This strategic approach seeks to resolve matters at a workplace level between the parties. In turn, the FWO is able to focus our efforts where they are most needed. Our experience under this model was that the vast majority of employers sought to do the right thing,

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<sup>64</sup> Mary Gellatly et al., "'Modernising' Employment Standards', 96.

<sup>65</sup> Riley (n 40) 238.

<sup>66</sup> David Weil, *Improving Compliance Through Strategic Enforcement* (Report for US Department of Labour, 2010).

and that matters were resolved more often than not, through assistance and education rather than through the use of statutory powers and a detailed linear investigation. This same experience tells us that each case is not the same and they do not all require the same deployment of resources, or use of statutory powers, to achieve a quality outcome.<sup>67</sup>

This new regulatory strategy has resulted in a number of significant changes in the way that compliance is promoted and contraventions are detected. It has also transformed the method by which employee complaints are processed and resolved by the agency.<sup>68</sup> Each of these regulatory functions will be considered in turn later in the chapter.

### *How does the FWO promote compliance and detect contraventions?*

All new employees now receive a Fair Work Information Statement upon commencement of employment, although this document contains only the most basic information about the Australian workplace relations system.<sup>69</sup> As documented earlier, the pace of legislative change in Australia has meant that while the current system provides for a comprehensive set of protective standards, it is inherently complex. To address this problem, the FWO is expressly empowered to promote compliance with the FW Act. In line with this statutory objective, the inspectorate ‘has invested significantly in the development of educative resources and programs that seek to resolve potential workplace issues before a complaint form is even filled out’.<sup>70</sup>

For example, the FWO operates a Fair Work Infoline—a telephone information service which can provide personalized assistance to the caller.<sup>71</sup> The website of the FWO is also comprehensive. It contains links not only to modern awards, but a plain English explanation of rights and obligations under the workplace relations laws. On the website, employees can also access an online calculator called PayCheck Plus—which is an important tool in helping employees identify whether they have been underpaid. More

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<sup>67</sup> Michael Campbell, ‘The FWO’s Approach to Compliance and Enforcement’ (Speech to Ai Group National PIR Group Conference, 6 May 2013).

<sup>68</sup> For completeness, it is noted that the FWO also has jurisdiction to receive complaints from a range of people, including employers. Employer complaints may be received in relation to an alleged breach of provisions relating to freedom of association and/or unlawful industrial action. It is also possible that, in unusual circumstances, the dispute resolution process will apply to a matter which was initially identified as part of an audit undertaken by the FW Inspectors.

<sup>69</sup> See FW Act, ss. 124–125. The Fair Work Ombudsman is responsible for preparing the Fair Work Information Statement, which is currently two pages long and contains the barest details about each of the prescribed rights and entitlements.

<sup>70</sup> See Campbell (n 67).

<sup>71</sup> Interpretation and other support services are also available for complainants who have difficulty understanding English or have a hearing or speech impairment.

recently, the FWO has begun to offer a tailored email alert service to notify employees when there are any relevant changes to the modern award that covers their employment.<sup>72</sup>

In addition to these self-help mechanisms, the FWO has also undertaken to proactively educate employees through a number of campaigns and outreach programmes. Indeed, contrary to the dominant detection methods of past labour inspectorates, the FWO is more sensitive to the fact that some industries have higher rates of vulnerable workers which make it more prone to employer contraventions. In line with the strategic enforcement model, the FWO has increasingly placed a greater emphasis on proactive detection measures and more collaborative methods to capture less visible problems.

To this end, the FWO has frequently sought to enrol other institutions or intermediaries in order to strengthen its outreach activities and overcome some of the collective action problems identified earlier.<sup>73</sup> Trade unions are ideally qualified to participate in these collaborative strategies, however, their meagre presence in key sectors means that the FWO is increasingly looking beyond traditional labour market intermediaries. In particular, the FWO is progressively collaborating with a range of non-government organizations, including migrant resource networks, ethnic business groups, community legal centres, training providers, and others as critical contact points for both awareness-raising and whistleblowing. This expansive form of collaboration is particularly important in industries where there are a high number of vulnerable employees and workplaces are less likely to be unionized or affiliated.<sup>74</sup> The FWO also provides both direct and indirect support and assistance to community groups through funding grants and by encouraging firms to commit to paying a specified sum to community legal centres as part of enforceable undertakings.<sup>75</sup> However, the level of regulatory engagement with these

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<sup>72</sup> For example, when the minimum pay increases as a result of the annual wage review undertaken by the FWC.

<sup>73</sup> See Tess Hardy, 'Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards' (2011) 22(3) ELRR 117.

<sup>74</sup> For instance, as part of the Cleaning Services Campaign and following a suggestion from the relevant union, the FWO sought to address the alleged exploitation of international students by translating information about workplace rights and disseminating it through twenty-two university cafes. More importantly, it sought to enrol the assistance of university student associations, private colleges and English schools through an associated email campaign. Fair Work Ombudsman, *Annual Report 2010–11*, 28. Further, in 2011, the FWO established the 'Barefoot Tutors' programme which is designed to disseminate information within the culturally and linguistically diverse (CALD) community. As part of this programme, the FWO enrolls community leaders to educate members of the relevant ethnic communities in their own language about workplace rights and entitlements. See Fair Work Ombudsman, *Annual Report 2011–2012*.

<sup>75</sup> An enforceable undertaking is a statutory agreement which can be made between the FWO and an alleged wrongdoer which sets out a number of promises or commitments intended to rectify past contraventions and encourage future compliance. Failure to meet these commitments can lead to the enforcement of the undertaking in court. See Tess Hardy and John Howe, 'Too Soft or Too Severe?'

additional groups and networks remains in a state of development and the presence of such groups is patchy. Indeed, in comparison to the long history of community activism in the US, and the emerging regulatory role of NGOs in the UK,<sup>76</sup> worker advocate groups in Australia are far less developed and much less active.<sup>77</sup>

The absence of a non-state actor which has the necessary regulatory capacity to protect employee voice and influence compliance outcomes is a key problem in employment standards regulation and a fundamental weakness of these collaborative strategies. Without deeper and more meaningful engagement with these third party intermediaries, or greater attention and energy directed towards proactive detection, it is likely that the inherent structural barriers militating against complaints will mean that even the best informed workers may still remain quiet.

#### *How are complaints processed and resolved by the FWO?*

Notwithstanding the agency's renewed focus on proactive models of detection, the majority of the FWO's activities are still consumed with registering and resolving employee complaints. In most instances, and as a first step, the FWO encourages the complainant to directly raise the relevant issues of concern with the employer in a bid to try to resolve those issues without the need for external intervention. If this direct method fails to achieve the desired outcome or is deemed to be inappropriate, the FWO may then make an initial assessment about the most effective and efficient way in which to respond to the complaint.

First, if the matter is outside the FWO's jurisdiction or otherwise has no merit, the complaint will be closed immediately.<sup>78</sup> In all other cases, a team of experienced FW Inspectors evaluates the matter using a fixed set of criteria to determine the level of resources and assistance to devote to resolving the complaint. In particular, the FW Inspector will generally consider the nature of the complaint (i.e. whether it is a 'routine' or 'complex' matter), the characteristics of the complainant (i.e. whether the employee

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Enforceable Undertakings and the Regulatory Dilemma Facing the Fair Work Ombudsman' (2013) Federal Law Review (forthcoming).

<sup>76</sup> For example, Oxfam in the UK is increasingly active in agitating for workplace relations reform in the domestic context. See e.g. Oxfam, 'Turning the Tide: How to Best Protect Workers Employed by Gangmasters—Five years After Morecambe Bay' (Oxfam Briefing Paper, 31 July 2009). In comparison, the Australian arm of Oxfam is generally concerned with campaigning for improved workers' rights in developing countries, but not in Australia itself.

<sup>77</sup> Grant Michelson, Suzanne Jamieson, and John Burgess, 'Filling the Void: Emerging Actors in Australian Industrial Relations' (2009) 13(1) Journal of Economic and Social Policy 1, 12.

<sup>78</sup> Approximately 10 per cent of all matters are closed on this basis. See Campbell (n 67).

falls within a vulnerable category),<sup>79</sup> and the compliance history of the relevant employer. For example, if the complainant is highly paid, is not otherwise vulnerable, and the contravention relates to a 'routine' matter, such as an alleged underpayment, the FWO may actively encourage the employee to access self-help remedies (such as initiating a small claims proceeding).<sup>80</sup>

Alternatively, the FWO may request the complainant to participate in the 'assisted voluntary resolution' (AVR) process administered by FW Inspectors. If these options are not suitable or are refused,<sup>81</sup> the matter may be referred straight to FWO's internal mediation service. In comparison, if at the initial assessment stage, the matter is deemed to be more serious and 'complex', then voluntary resolution mechanisms may be skipped in favour of a more formal investigation process. Generally, the FWO is aiming to undertake a detailed investigation in only a minority of cases.

Following this initial assessment, most complaints are referred to the AVR team. The AVR process generally involves a FW Inspector contacting both the employer and the employee separately by telephone in order to work through the issues and discuss potential solutions prior to the matter proceeding to mediation. As part of this preliminary process, the FW Inspector seeks to help both sides become better informed about the nature of the complaint and their respective rights and responsibilities under federal workplace laws.<sup>82</sup> While the FW Inspector may seek to verify particular claims through a review of relevant documents, the Inspector does not generally conduct field visits, undertake any detailed underpayment calculations, or dictate the terms of any resolution. Rather, the stated objective of the transformed AVR process is to provide a quick and accessible forum for 'meaningful customer engagement' and for parties to arrive at a 'mutually acceptable' outcome.

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<sup>79</sup> The FWO Litigation Policy describes a 'vulnerable worker' as including: young people, trainees, apprentices, people with a physical or mental disability or literacy difficulties, recent immigrants and people from non-English speaking backgrounds, the long-term unemployed and those re-entering the workforce, outworkers, people with carer responsibilities, indigenous Australians, employees in precarious employment (e.g. casual employees) and people residing in regions with limited employment opportunities and/or with financial and social restraints on their ability to relocate to places where there might be greater job opportunities. See Fair Work Ombudsman, *Guidance Note 1—Litigation Policy*, 20 July 2011.

<sup>80</sup> FW Act, s. 548.

<sup>81</sup> AVR is deemed to be unsuitable if the allegation or complaint is: confidential; from an overseas worker employed in Australia under a visa; related to unpaid trial work or unpaid work experience; involves complex matters, such as discrimination, industrial action or right of entry; involves an employer with a history of non-compliance; is of a particularly serious nature; and/or the assessor, using their discretion, decides AVR is not appropriate or in the public interest.

<sup>82</sup> Fair Work Ombudsman, 'Before mediation', <<http://www.fairwork.gov.au/complaints/the-complaints-process/pages/before-mediation.aspx>> accessed 13 May 2013.

While the AVR Inspector is able to escalate complaints to the Compliance branch for formal investigation, the majority of complaints that are not resolved via AVR are later referred to mediation. It seems that the agency generally believes that '[w]ith the exception of deliberate and systemic noncompliance, most matters are suitable for referral to mediation'.<sup>83</sup> Mediation is conducted over the telephone by an accredited FWO Mediator<sup>84</sup> on an informal, voluntary, and confidential basis. A key distinction between AVR and mediation is that the former is conducted without any extensive enquiry into whether an agreed resolution reflects the underlying legal obligations, while the latter is said to only succeed 'if both parties make an informed decision and agreement within the boundaries of what is lawfully owed to the employee'.<sup>85</sup> As required, the mediator may allow the parties to speak with a 'technical liaison officer' within the FWO who can provide more precise advice about the relevant legal issues.

However, the FWO Mediation Charter also makes clear that the FWO Mediator is independent and 'does not act as a judge, provide legal advice, make a determination on who is right or wrong or impose decisions on the parties'.<sup>86</sup> In line with this Charter, the FWO Mediator does not generally assist parties in calculating the extent of any underpayment or quantifying the loss, rather the mediation process is principally designed to help employers and employees find 'mutually acceptable' or 'flexible' solutions to workplace issues, and provide parties with a sense of ownership by allowing them to 'control the outcome'.<sup>87</sup>

Where a party refuses to participate in mediation, or the matter fails to settle, the complaint is then likely to be referred to the 'Resolution' team. In this team, senior FW Inspectors conduct a condensed investigation process which may (or may not) lead to rectification of any underpayment and the imposition of administrative sanctions, such as penalty infringement notices (i.e. a fine) or compliance notices (i.e. a formal direction to take certain remedial steps enforceable in court). Alternatively, the FWO may end its involvement at this point. In these circumstances, the complainant may then be left to take their own action, such as lodging a small claims proceeding in a relevant court.

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<sup>83</sup> Fair Work Ombudsman, *Annual Report 2011–2012*, 77.

<sup>84</sup> FWO Mediators are trained in line with National Alternative Dispute Resolution Advisory Council (NADRAC) requirements and follow the Australian National Mediator Practice Standards. Fair Work Ombudsman, 'Mediation', <<http://www.fairwork.gov.au/complaints/the-complaints-process/pages/mediation.aspx>> accessed 13 May 2013.

<sup>85</sup> Campbell (n 67).

<sup>86</sup> Fair Work Ombudsman, 'FWO Mediation Charter', <<http://www.fairwork.gov.au/Complaints1/FWO-Mediation-Charter.doc>>, 13 March 2013.

<sup>87</sup> Fair Work Ombudsman 'Mediation' (n 86).

## **Amplifying or Muting Employee Voice?**

The internal complaints management and dispute resolution process of the labour inspectorate has largely avoided scrutiny in the past given that it is far less visible than some of the other compliance activities undertaken by the FWO, such as targeted campaigns and enforcement litigation. Further, the widespread use of mediation by the FWO is still relatively novel. However, given that a majority of complaints are said or predicted to 'be resolved before or during mediation',<sup>88</sup> it is critical to understand the benefits and drawbacks of this new process and what this may mean for employee voice in particular and employer compliance more generally.

The new complaints resolution process of the FWO is, in many respects, similar to the traditional enforcement strategy of trade unions—insofar that both are geared towards quick and informal resolution of complaints. However, in providing an alternative channel for employee voice, there is a real question about the extent to which the FWO can achieve the benefits of trade union enforcement identified earlier. For example, can it be said that the FWO has effectively empowered employees, enhanced access to justice, and improved compliance?<sup>89</sup> Is it possible for the FWO to maintain neutrality and independence and still deliver fair outcomes, particularly where the dispute involves potential contraventions of basic legal rights and relates to those who otherwise lack agency and representation?<sup>90</sup> Finally, in privatizing individual disputes, can the FWO deliver the collective benefits associated with trade union compliance practices and processes?

The first obvious difference between the approach of the FWO and that of trade unions arises in relation to its complaint registration process. As noted earlier, before an employee even lodges a complaint with the FWO, the FWO generally encourages the employee to raise the issue directly with the employer. In some respects, this preliminary step simply reflects the 'model dispute resolution process' already referred to and the approach commonly taken by unions—that is, to try to resolve the problem at the workplace level.<sup>91</sup>

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88 Fair Work Ombudsman 'Mediation'. Of the 26,574 complaints finalised by the FWO in 2012–13, more than 65 per cent were resolved through AVR and/or mediation. See Fair Work Ombudsman, *Annual Report 2012/2013*, 24.

<sup>89</sup> See Commonwealth Ombudsman, 'Better Practice to Complaint Handling' (April 2009).

<sup>90</sup> Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2002) 42.

<sup>91</sup> For example, the first provision of the model dispute resolution clause for modern awards states: 'In the event of a dispute about a matter under this award, or a dispute in relation to the NES, in the first instance the parties must attempt to resolve the matter at the workplace by discussions between the employee or

The problem is that without access to a labour market intermediary, encouraging a complainant to first raise their concerns with their employer has the effect of pushing ‘responsibility for the process back onto the parties and into workplaces but without the democratic and collective elements of socialised systems’.<sup>92</sup> While this step is not mandatory, encouraging self-enforcement of rights can affect the accessibility of dispute resolution procedures.<sup>93</sup> Part of the reason that complaints are made after the employment ends and one of the drivers for seeking out the assistance of a government agency in the first place, is because there may be no active or powerful employee advocates available. Rather than leading to complaints being made by existing employees, it may have the opposite effect—that is, vulnerable workers, particularly those in precarious work, may be more inclined to wait until their employment ends to minimize the risk (and potential loss) associated with employer retaliation.

The accessibility of these processes is also limited by the FWO’s general reluctance to accept confidential complaints.<sup>94</sup> Further, in many cases, each affected individual may be required to lodge a separate complaint, even where the alleged contraventions are not necessarily confined to one worker, but rather affect many other employees at the same workplace. While the FWO’s policy on these matters may be driven by resourcing pressures and the practical problems of accessing the necessary employment records without revealing the complainant’s identity, these difficulties must be balanced against some of the broader problems associated with complaint investigations. In particular, by confining the investigation to the resolution of an individual complaint (or by discouraging confidential complaints), the FWO’s ability to identify and address more serious or systemic contraventions is likely to be constrained.<sup>95</sup> While it is true that complaints ‘often happen because of poor communication and people not having the right

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employees concerned and the relevant supervisor. If such discussions do not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner by discussions between the employee or employees concerned and more senior levels of management as appropriate.’

<sup>92</sup> This has been quite a prominent theme in the UK context, especially under the now defunct Employment Act 2002—which placed a primacy on ‘dispute resolution’ as a normative ideal. It was an ideal that had predictably damaging effects on worker interests. For further discussion, see Trevor Colling, ‘No Claim, No Pain? The Privatisation of Dispute Resolution in Britain’ (2004) 25 *EID* 555, 571–2; Hepple and Morris (n 40).

<sup>93</sup> Cf the situation in Ontario, Canada—for further discussion, see Gellatly et al. (n 63) 91.

<sup>94</sup> While complaints are able to be lodged on a confidential basis or by a third party, such as a union representative, the FW Inspectors generally encourage and sometimes require that the identity of the complainant and the details of the complaint be disclosed to the employer. If the complainant refuses to agree to this request, the FW Inspector may suggest that the worker make the complaint after their employment ends reminding them that they have six years in which to do so. This is very different from the confidential nature of the complaints procedure which can be used in relation to the National Minimum Wage in the UK. See Department of Business Skills and Innovation, ‘National Minimum Wage Compliance Strategy’ (March 2010).

<sup>95</sup> David Weil, ‘A Strategic Approach to Labour Inspection’ (2008) 147 *International Labour Review* 349, 361.

information’,<sup>96</sup> sometimes complaints signal the need for a very different compliance and enforcement approach, namely one based on detection and deterrence.

Another potential weakness—and one that is more challenging for the FWO to overcome—is that to lodge a complaint with the regulator, the employee (or their representative) must identify and articulate the relevant claims in the complaint form. This is not a straightforward task in the current regulatory environment. Additional obstacles arise for workers who may have literacy or numeracy difficulties or who are unfamiliar with the Australian workplace relations system.<sup>97</sup> Notwithstanding the FWO’s sophisticated education tools and extensive communication activities,<sup>98</sup> to lodge a complaint and actively participate in its resolution, workers must not only possess information about the minimum employment standards, they must also acquire ‘knowledge about how to apply abstract legal rights to their specific conditions [and] the ability to gather evidence to prove their case’.<sup>99</sup>

As noted earlier, the education and empowerment of employees was one of the important regulatory functions performed by trade unions and one of the reasons for improved compliance rates in unionized firms. In comparison, when a worker is seeking to make a complaint to the regulator, a FW Inspector will not generally assist a complainant to identify relevant entitlements, except to refer them to the general Fair Work Infoline. This may be, in part, because of a reluctance to compromise the agency’s position of neutrality and independence. Further, adding rather than reducing the claims set out on the complaint form may serve to hinder rather than assist the agency in achieving its objective of a speedy and mutually acceptable resolution. In practical terms, if a worker fails to comprehensively identify and set out all the relevant entitlements in dispute in the complaint form, these entitlements are more likely to be lost. This is because the AVR and mediation processes are generally conducted on the basis of resolving only those issues which are set out in this originating document, particularly

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<sup>96</sup> Fair Work Ombudsman, ‘Before Mediation’ (n 86).

<sup>97</sup> This problem was recently illustrated in the case of *Warrell v Walton* [2013] FCA 291 (4 April 2013), where the applicant—who was described as having ‘difficulties with reading and writing and is brain damaged’—mistakenly lodged an unfair dismissal application with the FWO rather than the Commission. As a result of this error, his application was not filed with the Commission until after the relevant statutory time period had expired.

<sup>98</sup> For a recent discussion of the various educational initiatives undertaken by the FWO, see Australian National Audit Office, ‘Delivery of Workplace Relations Services by the Office of the Fair Work Ombudsman’ (Audit Report No 14, 2012/2013).

<sup>99</sup> Gellatly et al. (n 63) 91.

now that a copy of this document is provided directly to the employer.<sup>100</sup> For vulnerable workers, without easy access to an employee advocate or specialist advice, the current complaints registration process may fall into the trap identified by Vosko, that is, it requires the 'precariously employed to play the protagonist [and this] works against the exercise of voice'.<sup>101</sup>

One of the important perceived benefits of the FWO's dispute resolution pathway is efficiency. On the one hand, the efficiency of dispute resolution and adjudication processes is an important element of ensuring access to justice. On the other hand, a focus on efficiency may reflect the 'pragmatic rationalities of managerialism'<sup>102</sup> and an overarching desire to reduce agency costs. The significance placed on efficiency is captured by a common mantra applied internally within the FWO, that is: 'justice delayed is justice denied'.<sup>103</sup> The emphasis on this phrase, and its potential to influence the processes and outcomes delivered by the agency, raises a very real question, however, about the extent to which efficiency benefits the complainant and the nature of the 'justice' being achieved when minimum employment entitlements are at risk of being negotiated away through private dispute resolution or mediation.<sup>104</sup> In this respect, Abel cautions that:

[i]nformal institutions deprive grievants of substantive rights. They are anti-normative and urge parties to compromise; although this appears to be even-handed, it works to the detriment of the party advancing the claim—typically the individual grievant.<sup>105</sup>

As noted earlier, informal dispute resolution is not a new mechanism for resolving workplace disputes in Australia. Rather, it was a defining characteristic of the conciliation and arbitration system. However, this traditional system of dispute resolution was premised on inherent adversarialism between established, collective interests and the methods were generally compulsory and coercive. These peculiar features served to guard against the issues identified by Abel earlier—for instance, even where unions were

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<sup>100</sup> For example, workers may not realize that they may be entitled to redundancy pay, annual leave loading, or superannuation under the relevant industrial instrument and are unlikely to be informed of such once they have lodged a complaint form.

<sup>101</sup> Leah Vosko, "'Rights without Remedies": Enforcing Employment Standards in Ontario by Maximising Voice among Workers in Precarious Jobs' (Paper prepared for Voices at Work, North American Workshop, Toronto, 16–17 March 2012), forthcoming (2013) 50(4) Osgoode Hall Law Journal.

<sup>102</sup> Busby and McDermont (n 46) 181.

<sup>103</sup> This statement appears to be derived from comments made by the former British Prime Minister William Gladstone. See United Kingdom House of Commons, Parliamentary Debates, 16 March 1868.

<sup>104</sup> Riley (n 40).

<sup>105</sup> Richard Abel, *The Politics of Informal Justice* (Academic Press, 1982), as cited in Mary Anne Noone, 'ADR, Public Interest Law and Access to Justice: The Need for Vigilance' (2011) 37 Monash ULR 57.

acting on behalf of individual members, they were often serving collective interests, and were generally better placed to resist employer pressure to make concessions.

In contrast, the dispute resolution processes adopted by the FWO largely reflects the principles of high trust HRM theory (and the ideological slant of the FW legislation) which tends to emphasize the potential for such processes to lead to cooperative, win-win solutions.<sup>106</sup> While it is true that informal dispute resolution processes, such as conciliation and mediation, can be quick, inexpensive, flexible, and responsive, it also carries some particular risks and 'disputes over the recognition of workplace rights manifest this risk'.<sup>107</sup> For example, in a bid to meet time-based KPIs, FWO staff conducting AVR and/or mediation may be inclined to seek a quick settlement rather than a fair solution which may require calculation of entitlements—a lengthy and time-consuming process. Indeed, on the basis of their research of the conciliation process conducted by ACAS, which is similar in many ways to the dispute resolution pathway adopted by the FWO, Busby and McDermont warn that quantitative performance targets may lead to a situation where:

[d]isputes become figures; the identities of parties that should be listened to and brought together are lost. The dispute is crystallised into one issue: the negotiation of a financial compensation package which is seen as the most likely route to a positive result. The highly complex legal issues and related remedies disappear from the dispute...[with the result that] managerialism further strengthens a move away from the language of rights, this time towards the language of the possible...<sup>108</sup>

Indeed, this observation raises a more fundamental question about dispute resolution in this context, that is, whether 'flexible' solutions are an appropriate response to the potential contravention of minimum employment standards. The nature of these rights, and the quantification of the loss suffered as a result of these types of contravention, are often fundamentally different from the compromise necessary to resolve bargaining disputes. Riley argues that:

[i]f rights have been considered to be so important that they require enactment in a statute, it does not make sense to allow parties effectively to contract out of those rights when put under pressure in private and confidential negotiation with the very person who refused to recognise the right.<sup>109</sup>

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<sup>106</sup> Riley (n 40) 237.

<sup>107</sup> Riley, 237.

<sup>108</sup> Busby and McDermont (n 46) 182.

<sup>109</sup> Riley (n 37).

These risks are perhaps most pronounced, and concerning, where there is a power imbalance between the parties. In this context, power can not only be manifested in outward threats, acts of aggression, force, or pressure, but can also be derived from superior education, language or literacy skills, from being of a higher social status, or from belonging to a dominant race or ethnic group. Power can also be affected by a person's ability to access critical information, financial resources, or expertise, such as legal advice.<sup>110</sup> More subtly, a power imbalance may arise from the fact that workers may be conditioned to internalize an employer's point of view and therefore not be able to necessarily 'articulate more fundamental challenges to the structural constraints under which they work, are paid and otherwise treated in the workplace'.<sup>111</sup> Indeed, an employee/employer relationship is often seen as a paradigm of inequality.<sup>112</sup>

Adopting a dispute resolution process which is founded on the implicit assumption that all parties are equal and should be treated the same, when this is clearly not the case, may compound underlying inequalities and perpetuate further injustice.<sup>113</sup> Rather than ensuring fair outcomes, mediator neutrality may mean pressures to settle fall more heavily on the party with the most to lose, namely the individual complainant.<sup>114</sup> Questions have been raised about 'whether impartiality/neutrality is possible or even desirable as a goal'<sup>115</sup> in the context of resolving disputes over workplace rights. The potential for these power differentials underlines the importance of identifying, as early and comprehensively as possible, whether the relevant complainant is 'vulnerable' and therefore whether that person should be screened out of AVR and/or mediation or provided with additional assistance in order to more fully and fairly participate in these processes.<sup>116</sup>

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<sup>110</sup> Bernadine Van Gramberg, *Managing Workplace Conflict* (Federation Press, 2006) 80. Gaze and Hunter (n 53) 699, observe, in the context of discrimination complaints, that individual or small business respondents are often better resourced, often have access to legal advice via an employer organization and, in the case of incorporated companies, can claim the relevant legal fees as a tax deduction.

<sup>111</sup> Bogg and Novitz (n 10) 335.

<sup>112</sup> Anna Chapman, 'Discrimination Complaint-Handling in NSW: The Paradox of Informal Dispute Resolution' (2000) 22 Sydney LR 321, 348.

<sup>113</sup> Chapman, 'Discrimination Complaint-Handling in NSW', 344.

<sup>114</sup> Gaze and Hunter (n 53) 700. In addition, Busby and McDermont (n 46) at 179 have found, in their study of ACAS conciliations, that feelings of powerlessness are the result, in part, of the perceived impartiality of the conciliator.

<sup>115</sup> Busby and McDermont (n 46) 180.

<sup>116</sup> In practice, however, it is difficult for FW Inspectors to make a thorough assessment of whether the worker is 'vulnerable' and what assistance may be required to adequately assist the person in resolving the complaint given that the current FWO Complaint Form seeks very limited information about the complainant's background and potential needs.

The Australian National Mediator Standards, to which the FWO publicly subscribes, recognize that some disputes may not be appropriate for mediation because of potential power issues. It is arguable that this caution applies with equal, if not greater force to AVR given that this preliminary process does not have the same level of procedural safeguards as mediation. For example, the FWO Mediation Charter expressly states that the mediation will be suspended or terminated if ‘parties seek to misuse the mediation or reach an agreement that the mediator believes is unconscionable or illegal’.<sup>117</sup>

In addition to introducing clear and transparent criteria about when AVR and/or mediation is (and is not) appropriate, another way in which to address potential power imbalances is to ensure the mediation process is conducted in a procedurally fair manner. For example, it may be desirable in some circumstances for the FW Inspector or FWO Mediator to actively encourage participants to obtain independent professional advice or information both before and during AVR and mediation, so that they fully comprehend their legal entitlements and remedial options. For example, as part of the initial registration process, the FWO may consider providing all vulnerable workers with information about unions, generalist or specialist community legal centres, and other relevant legal services, and are referred to these services where appropriate.<sup>118</sup> The FWC’s new pro bono representation programme provides an instructive model in this respect.<sup>119</sup> Providing vulnerable workers with greater access to legal representation may mean complainants have a better sense of the strengths (and flaws of their case), which may not only enable complainants to resist undue settlement pressure,<sup>120</sup> but also work to deter weak cases from proceeding.<sup>121</sup>

A final way to ensure that alternative dispute resolution does not lead to an erosion of legislated workplace rights is to provide parties with ready access to an independent decision-maker for determination of those rights. Indeed, even if one accepts that

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<sup>117</sup> Fair Work Ombudsman, ‘FWO Mediation Charter’ (n 86).

<sup>118</sup> Law Reform Committee, ‘Inquiry into Alternative Dispute Resolution and Restorative Justice’ (Parliament of Victoria, 2009) 87.

<sup>119</sup> This programme is designed to match eligible self-represented applicants appearing before the Commission with pro bono legal services provided by private employment law firms. The pro bono programme was designed to improve access to justice and ensure that self-represented applicants could adequately deal with complex legal issues. See ‘New FWC help for self-represented parties’, Workplace Express, 6 May 2013.

<sup>120</sup> There is recent case law relating to unfair dismissal applications which suggests that procedural fairness can be compromised by a stronger party having access to legal representation when the weaker party does not. See *Warrell v Walton* [2013] FCA 291 (4 April 2013); *Azzopardi v Serco Sodexo Defence Services Pty Limited* [2013] FWC 3405 (29 May 2013).

<sup>121</sup> *Gaze and Hunter* (n 53) 723.

voluntary resolution is generally preferable to litigation, and cooperation should be favoured over confrontation, it has been argued that:

an adversarial system, grounded upon a rights based paradigm, in turn founded upon the rule of law, must remain in place, at least in some form, as a viable dispute resolution mechanism...Ultimately the collaborative paradigm falters if not grounded upon an absolute.<sup>122</sup>

Neither the FWC nor the FWO have the authorization or constitutional power to finally determine disputes about the application of minimum employment standards; rather this jurisdiction is exclusively reserved for the courts. Although the FWC is arguably in a stronger position to guard against some of the risks identified earlier. For a start, the dispute resolution processes undertaken in the Commission generally occurs in the 'shadow' of FWC arbitration.<sup>123</sup> Further, in exercising its arbitral powers, the FW Act expressly provides that the Commission must not make a decision that is inconsistent with the FW Act, a modern award, or an enterprise agreement that applies to the parties.<sup>124</sup> As noted earlier, recourse to the Commission, and the residual threat of arbitration, was an important part of the traditional trade union compliance strategy. This is reflected by the FWO's guide on effective dispute resolution which describes a 'best practice dispute resolution process' as one that provides the Commission 'the necessary discretion and power to ensure settlement of the dispute if the dispute remains unresolved after the early stages of the dispute resolution procedure have been attempted'.<sup>125</sup>

Lack of easy access to an independent decision-maker empowered to determine the relevant rights is one of the challenges facing complainants who participate in assisted voluntary resolution and/or mediation undertaken by the FWO. In this context, the alternative dispute resolution processes are undertaken in the shadow of a formal investigation, the threat of administrative sanctions, and ultimately enforcement

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<sup>122</sup> J. S. Wolfe, 'Across the Ripple of Time: The Future for Alternative (or, is it "Appropriate?") Dispute Resolution' (2001) 36 *Tulsa Law Journal* 785, 794, as cited in Julian Gruin, 'The Rule of Law, Adjudication and Hard Cases: The Effect of Alternative Dispute Resolution on the Doctrine of Precedent' (2008) 19 *ADRJ* 206, 211.

<sup>123</sup> For example, s. 739(4) of the FW Act provides that: '[i]f, in accordance with the [dispute resolution term set out in the enterprise agreement, contract of employment or other written agreement], the parties have agreed that FWC may arbitrate (however described) the dispute, the FWC may do so.' A note to this section adds: 'FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).' MacDermott and Riley (n 44).

<sup>124</sup> FW Act, s. 739(5).

<sup>125</sup> Fair Work Ombudsman, 'Best Practice Guide 10—Effective Dispute Resolution', <<http://www.fairwork.gov.au/BestPracticeGuides/10-Effective-dispute-resolution.pdf>> accessed 10 May 2013.

litigation through the courts. While the FWO has an option to refer all relevant complaints from existing employees to the FWC for dispute resolution (and possibly arbitration),<sup>126</sup> most complainants will be barred from this course as their employment has already come to an end at the time of making their complaint. For these workers, the lack of access to arbitration, combined with the fear of having to fend for themselves, may mean that complainants engaging in the FWO's dispute resolution processes are potentially under more pressure to surrender their legislated rights in order to avoid the evidentiary problems, costs, uncertainty and stress which often plague investigations and enforcement litigation.<sup>127</sup>

A final criticism made regarding alternative dispute resolution in the literature is their confidential nature. On the one hand, confidentiality is seen as an essential part of informal dispute resolution processes. A primary attraction for many employers is that the confidential nature of most dispute resolution process minimizes reputational damage and the potential 'spill-over effect' (i.e. where settling one matter elicits similar claims from others.) From the perspective of employees, confidentiality may help preserve their dignity throughout the process. The inherent secrecy of such settlements, however, presents a dilemma for public regulators, such as the FWO.<sup>128</sup> Indeed, a critical benefit of institutional representation and enforcement through union channels is the fact that the benefits arising from successful resolution of an individual complaint are not confined to one member, but generally extend to other workers who may have been similarly affected in the relevant workplace or sector.

While the FWO dispute resolution model may be quick and cost-effective in solving individual complaints, the privatization of the deliberations and outcomes means that these processes may do little in terms of developing and legitimizing norms of workplace practice beyond the individual employer.<sup>129</sup> They diminish the diffusion of best practice and fail to develop jurisprudence about how the rights should be interpreted and applied.<sup>130</sup> Private settlements also tend to 'limit the exemplary power of the law; that is the extent to which justice is *seen to be done*'<sup>131</sup> and therefore fail to enhance specific or general deterrence of future contraventions. This can lead to a sense that there is a low

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<sup>126</sup> FW Act, s. 739. An added benefit of this approach is that a party who unreasonably refuses to participate in the dispute resolution process before the FWC may be liable for costs if enforcement proceedings are later issued in relation to the same facts: FW Act, s. 570(2)(c).

<sup>127</sup> Arup and Sutherland (n 27); and Therese MacDermott and Joellen Riley, 'ADR and Industrial Tribunals: Innovations and Challenges in Resolving Individual Workplace Grievances' (2012) 38(2) Monash ULR 82, 98.

<sup>128</sup> Riley (n 37).

<sup>129</sup> Riley (n 37).

<sup>130</sup> Riley (n 40) 240.

<sup>131</sup> Colling (n 92) 573.

probability of detection and sanction which can have the effect of emboldening employers and silencing workers.<sup>132</sup>

One way in which to ease the tension between publicity and confidentiality is for the FWO to publish—in a de-identified form—illustrative case studies and reports on issues which have arisen in the context of AVR or mediation which are in the public interest.<sup>133</sup> Routinely recording the outcomes of dispute resolution is also a useful way for the inspectorate to identify repeat players and map some of the more systemic drivers of non-compliance. This can work to ensure that the FWO's proactive or coercive activities, including workplace audits and litigation, are properly targeted. Tracking and integrating the FWO's various compliance activities is important to ensure that dispute resolution by the agency goes beyond mere customer service and does more than just help the immediate worker involved.<sup>134</sup>

## Conclusion

The foundation of employment regulation in Australia has irreversibly shifted in the past century. The overarching changes to the legislative framework, combined with underlying developments in the labour market, have weakened the position and power of trade unions to make and enforce workplace norms on behalf of workers. Regulation of minimum employment standards in Australia and various advanced economies elsewhere can now be described as 'a system which institutionalises conflicts into individual, justiciable disputes'.<sup>135</sup> This has prompted a search for alternative actors that can assist employees to understand, exercise, and enforce their rights in the workplace. Out of this representational vacuum has emerged a somewhat unlikely candidate in Australia, namely the federal labour inspectorate.

Although statutory protections in Australia are relatively comprehensive, the increased vulnerability of workers, and the absence of trade unions in many small enterprises, has meant that many workers are 'unwilling or unable to invoke their statutory protections as individuals'.<sup>136</sup> To address this issue, the FWO has taken various steps to improve employee awareness, knowledge, and capability through targeted campaigns, collaboration with unions and community organizations, and innovative use of old and new media. Arguably, one measure of its success is the fact that the number of employee

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<sup>132</sup> Taras (n 51) 185.

<sup>133</sup> Law Reform Committee (n 119) 84.

<sup>134</sup> Weil (n 66) 77.

<sup>135</sup> B. Simpson, 'British Labour Relations in the 1980s: Learning to Live with the Law' (1986) 59 *Modern Law Review* 769, 809.

<sup>136</sup> Gunningham (n 12) 354.

complaints continues to be substantial. However, the escalation of employee complaints at a time of contracting resourcing creates a separate challenge for the FWO—how to preserve precious funding and achieve agency KPIs, while still ensuring that employee voice is protected and promoted.

To meet this challenge, the FWO has recently redesigned its complaint management and dispute resolution processes on the basis of a model of strategic enforcement. The prioritization of complaints makes sense from a resources perspective. The focus on voluntary resolution is also largely consistent with idealized models of regulatory enforcement. Moreover, an emphasis on dispute resolution reflects historical trends in industrial relations and more recent developments in the legal system generally. However, implementation of these new processes is not without risk. In particular, privatizing and individualizing workplace disputes about minimum employment standards can have the effect of masking ‘the vastly unequal power dynamics embedded within the relationship between employer and worker’.<sup>137</sup> Making vulnerable workers effectively responsible for securing their own employment rights is especially problematic. It is therefore incumbent upon the FWO to ensure that in encouraging quick and ‘mutually acceptable’ solutions, it does not compromise procedural or substantive fairness or undermine its broader objective of promoting and enforcing compliance with minimum employment standards.

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<sup>137</sup> Gellatly et al. (n 63) 99.