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**Mandate, Discretion, and Professionalisation in an Employment Standards
Enforcement Agency: An Antipodean Experience**

JOHN HOWE, TESS HARDY AND SEAN COONEY

In recent years, there has been a resurgence of scholarly interest in the operation and effect of labour inspectorates around the world. This article aims to contribute to this mounting comparative and socio-legal literature by considering the emergence of an active and high-profile enforcement agency in Australia—the Fair Work Ombudsman (FWO). Drawing on the experiences of inspectors and senior managers at the FWO, we examine the structure and mandate of the agency, as well as the discretion afforded to, and the professionalisation of, individual inspectors. While some have sought to draw a distinction between a rule-bound, specialised approach characteristic of certain Anglo-American countries and the so-called Franco-Iberian model, which places a greater emphasis on flexibility and pragmatism, we found that the FWO does not necessarily fit neatly within this dichotomy. Rather, we observe that as the FWO is a new institution, its mode of operation is in the process of evolution. At present it is pluralistic, in the sense that it exhibits a hierarchical, procedural approach in a drive to address concerns of consistency and accountability, while at the same time allowing, and sometimes encouraging, individuals to be experimental and adaptive.

INTRODUCTION

Many governments around the world engage in significant reforms to the way they enforce labour standards, often in response to popular concerns about income insecurity. These reforms frequently involve changes to the resourcing, operation, and legal regulation of labour inspectorates. They have led to an international revival of interest in labour inspectorates (see, e.g., Coslovsky 2011 [Brazil], Weil 2010 [United States]; Malmberg 2009 [Europe]; Piore and Schrank 2008 [Latin America]; Cooney 2007 [China]). The studies emerging as part of this revival focus on several aspects of labour inspection. These include the legal powers inspectors use to assist them in the detection of noncompliance and the enforcement strategies and sanctions available to labour inspectorates. This article aims to contribute to this literature by exploring the radical transformation of labour inspection in Australia.

Since 2006, there has been a shift away from a system that was largely reliant on trade union enforcement of wages, working hours, and leave entitlements through the industrial relations system, toward one with far greater emphasis on public enforcement through a national government agency (Hardy and Howe 2009; Lee 2006). This change arose through the creation of the Fair Work Ombudsman (FWO), an active and high-profile enforcement institution, with a team of Fair Work Inspectors (FW Inspectors) distributed around Australia.¹

Drawing on international comparisons and the general literature on enforcement, we examine the structure of the FWO and identify a number of policy choices that shape and limit the agency's operation. There are significant variations in the administration of labour law by public sector agencies in different countries (International Labour Organization 2011; Jatoba 2002; von Richtohofen 2002). A common comparison is between the so-called Franco-Iberian model and the Anglo-American approach:

Anglo-American administrators assume an adversarial position toward [the people they regulate] and therefore constitute law enforcement agents. ... They hope to deter non-compliance by raising the costs and risks of exposure. By way of contrast, Franco-Iberian administrators assume a tutelary posture toward [the people they regulate] and therefore resemble teachers rather than police officers or prosecutors. They hope to bring employers and workers into compliance with the law through a judicious combination of pedagogy, persuasion, and punishment. (Piore and Schrank 2008, 14 [citations omitted])

Some studies of labour inspectorates overseas are connected with theoretical and empirical understandings of how regulatory agencies operate. For example, it is argued that the Franco-Iberian model of labour inspection and enforcement is more conducive to regulators and inspectors operating as “sociological citizens” engaged in “relational regulation” (Piore 2011; Silbey 2011). Sociological citizens, an extension of Lipsky's concept of the “street-level bureaucrat” (Piore 2011; Lipsky 1980), “are pragmatic, experimental and adaptive, going beyond and outside the prescribed rules and processes with the goal, nonetheless, of actually achieving the ostensible public or organisational purpose” (Silbey 2011, 5 [emphasis in original] [citation omitted]). This approach contrasts with the archetypal hierarchical and rule-bound conception of bureaucracy, which allegedly characterises regulatory agencies in Anglo-American jurisdictions (Piore 2011; Silbey 2011; see also Frank 1984; Bardach and Kagan 1982).

By examining the FWO drawing on this comparative and socio-legal literature, we use the Franco-Iberian/Anglo-American models as reference points for discussion, viewing the perceived differences between jurisdictions as a way of identifying key choices for structuring inspectorates, and then determine how the Australian legislation and the internal policies of the FWO have responded to these choices. It appears to us from this literature that the *mandate* of inspectorates, the degree of *discretion* afforded to inspectors, and their level of *professionalisation* are among the key issues to be considered (see, e.g., Piore and Schrank 2008; Sparrow 2000; Hawkins and Thomas 1984). Our consideration of these issues in the Australian context utilizes qualitative research into the regulatory processes observed by the FWO. In particular, we rely on data collected from participant observation and in-depth, semistructured interviews with field-level FW Inspectors and senior management at the FWO.²

We argue that the FWO's approach to labour inspection and enforcement, while it can be elucidated by reference to the Franco-Iberian and Anglo-American models, is *sui generis*. This is a consequence of Australia's distinct institutional history in the area of work regulation and also of recent political and organisational choices. This is consistent with other studies, which find that, in practice, many regulatory agencies exhibit a combination of approaches. It is argued this plurality is desirable as it may “moderate the excesses and limitations of any singular approach” (Silbey 2011, 7; see also discussion of “integrated” approaches in Pires 2011b). The Australian parliament

(through its enactment of legislation structuring the FWO) and the FWO itself (through its internal organisational arrangements) have attempted to balance the values of accountability and control underpinning the Anglo-American model, with the flexibility and pragmatism of the Franco-Iberian approach. This has occurred as a result of evolving domestic policy choices rather than a deliberate decision to locate the Australian inspectorate between the two principal models. Our analysis also suggests that while labour inspectorates are embedded in specific legal and institutional contexts, their location on the spectrum of possible regulatory approaches is not fixed, but, given the right political conditions, can undergo a high degree of innovation and evolution.

First, we explain the emergence of the FWO as a significant regulatory agency in light of the history of labour standard setting and enforcement in Australia. Second, we consider debates about the relative merits of comprehensive and specialised mandates of labour inspectorates. Third, we examine the degree of decentralisation of decision making within the FWO inspectorate, in other words, the extent of discretion afforded to inspectors in making decisions about how and when to use their powers: the more discretion, the greater the likelihood of inspectors' capacity for "pragmatic adaptations" in line with the concept of the sociological citizen (Silbey 2011, 7).

The fourth section examines the level of professionalisation within inspectorates and, in particular, the FWO. As discussed below, qualification requirements, recruitment practices, and training processes are essential to ensuring that an inspectorate can engage in relational regulation in carrying out its responsibilities.

We conclude by considering the implications of our analysis.

THE REGULATORY CONTEXT OF THE FAIR WORK OMBUDSMAN

The employment rights and working conditions of the majority of Australian employees are regulated by the Fair Work Act 2009 (Cth) (FW Act) and the Fair Work Regulations 2009 (Cth). Under the legislation, the FWO is the government agency primarily responsible for securing compliance with these rights and standards. While some form of federal government agency has existed in this space since the 1930s, political circumstances from the mid-2000s have enabled a considerable departure from previously settled approaches to the enforcement of work standards in Australia.

Empirical research has suggested that the previous federal inspectorate (as well as the subnational state enforcement agencies) was relatively ineffective, particularly in the latter part of the twentieth century. This was due in part to underresourcing, a persuasive compliance approach to enforcement, and the reluctance of the courts to award significant penalties on the rare occasion that breaches were prosecuted (Goodwin and Maconachie 2007; Goodwin 2003). Moreover, owing to the crucial role of trade unions in the conciliation and arbitration systems characteristic of most Australian jurisdictions, it was unions, rather than the inspectorates, that were primarily responsible for securing compliance with the mostly industry or occupational-level standards established by that system (Hardy and Howe 2009; Bennett 1994).

This situation persisted for more than half a century. However, it has been radically upended in recent years as the Australian labour relations system has experienced substantial change in relation to the division between federal and state regulatory powers, the mode of generating work standards, and the means of enforcing those standards. The neoliberal “Work Choices” legislation of 2006, the Workplace Relations Amendment (Work Choices) Act 2006 (Cth), extended coverage of the federal system to all incorporated businesses previously within state jurisdictions. It severely curtailed the role of conciliation and arbitration and industry-level standards in favour of enterprise bargaining underpinned by a legislated safety net of five minimum conditions, including a minimum wage (see Forsyth and Stewart 2009). It also dramatically reduced the regulatory capabilities of unions, including in relation to the enforcement of working conditions.

One of the major reforms to come out of the Work Choices legislation was the move to enhance the resources and power of the federal labour inspectorate. While at first glance in tension with the neoliberal orientation of Work Choices, the federal inspectorate served the purpose of assuring the public, concerned that many employment conditions had been, or would be, stripped away by the legislation, that labour standards would be enforced. The first federal government initiative was to increase the resources of the existing inspectorate, the Office of Workplace Services within the federal labour department. Then, in 2007, the government transformed the inspectorate into a statutory agency called the Office of the Workplace Ombudsman (Hardy 2009, 85). Annual funding for labour inspection more than doubled between 2005 and 2007, from \$21 million to around \$50 million. These changes, when combined with significant increases in the penalties applicable to breaches of federal labour legislation in 2004, meant that, for the first time in the history of Australian labour regulation, there was a relatively well-resourced labour inspectorate at the federal level, covering the large majority of the Australian workforce and backed by relatively significant penalties for noncompliance (Hardy 2009; Hardy and Howe 2009).

The Howard Coalition government, which enacted the Work Choices legislation, subsequently lost power to the Rudd Labour government at the 2007 federal election, not least because of unrest over its labour law reforms. The Labour government moved to introduce new legislation, the FW Act, which came fully into force on January 1, 2010. The FW Act, while restoring some aspects of the pre-Work Choices regime in modified form, including a prominent role for industry based labour regulation, retained the previous government’s commitment to an improved labour inspectorate.

Most businesses and employees in Australia are now subject to the federal Fair Work system that includes a set of ten minimum statutory “National Employment Standards” (NES) dealing with matters such as leave and maximum working hours, “modern awards” containing terms such as pay levels and overtime rates that apply nationally for specific industries and occupations, a national minimum wage order for workers not covered by awards, and protection from unfair dismissal. Enterprise bargaining continues to operate as a mechanism by which, for the most part, unions and employers can negotiate enterprise-level collective agreements that supplement or are better than the terms and conditions in the NES and modern awards (see FW Act, §§ 55–57).

The FWO, the independent statutory agency replacing the Office of the Workplace Ombudsman, is responsible for a number of functions under the FW Act, including educating employers and employees about workplace rights and obligations ensuring compliance with workplace laws; taking action to determine compliance with minimum employment standards, rights, and obligations under the FW Act, and imposing sanctions or commencing court proceedings against employers, employees, or unions who breach the FW Act or instruments made under the Act (FW Act, § 682). Individual workers may lodge a complaint with the FWO if it relates to incorrect pay or breaches of the other standards and entitlements under the FW Act. The FWO then has discretion as to whether it should take any action in relation to that complaint.

The role of the FWO in enforcing minimum employment standards has become pivotal as traditional methods of enforcement have become less viable. While trade unions have regained some of the powers lost under the Work Choices reforms, and continue to carry out some “time and wages” enforcement activities, their representation of the workforce has not returned to its former level, and the legal system is still less favourable to the monitoring role of trade unions than it was in the twentieth century (Hardy and Howe 2009). While individual employees retain a legal right to bring proceedings against employers for breach of minimum employment entitlements, the financial costs of such action (which are much more significant than in jurisdictions such as the United States because of the nature of cost rules) act as a significant deterrent (Arup and Sutherland 2009). FW Inspectors appointed by the FWO are empowered to investigate and enforce compliance with relevant Commonwealth workplace laws and industrial instruments, such as the NES, modern awards and enterprise agreements.

Organisationally, the Office of the FWO consists of the Fair Work Ombudsman (essentially the CEO of the agency), a number of FW Inspectors appointed in accordance with the terms of the FW Act, and other staff assisting with the performance of workplace compliance and advisory functions set out in section 696 of the FW Act (see Hardy 2009).

The formal, statutory parameters described above place certain demands and responsibilities on the FWO but leave the FWO with broad discretion concerning how it is to meet these demands. In order to determine how the FWO carries out its functions and responds to its legislative mandate, we have carried out a systematic and empirical study of the internal functioning of the FWO. The importance of empirical examination of the internal functioning of complex organisations has long been recognised in both the organisational behaviour literature and socio-legal studies (see, for example, Lawrence and Lorsch 1967; and see references cited by Hutter 1997, 10). Our research, funded by the Australian Research Council, involved documentary analysis and comparative research, followed by fifty semistructured qualitative interviews with FW Inspectors (and former Inspectors) in capital cities and some regional areas, as well as with managerial staff at the FWO who have been responsible for the operational activities of the FWO. The interviewees were selected on the basis of their involvement in, or responsibility for, investigation of complaints or targeted campaigns directed at breaches of minimum standards pertaining to wages and working hours. In addition to selecting interviewees from different geographic areas, the authors endeavoured to select Inspectors with a different range of

experience. The FWO assisted in the selection of interviewees. Documentary analysis has included a review of both internal and publicly available FWO documentation, including the FWO Guidance Notes and the FWO Operations Manual, both of which are followed by FW Inspectors when carrying out inspection activities.

THE STRUCTURE OF REGULATORY MANDATES

The literature draws a distinction between two main types of labour inspection systems (see Pires 2011b; Piore and Schrank 2008; von Richthofen 2002).

The first is the “generalist” inspection system, in which inspectors are broadly responsible for monitoring occupational health and safety, conditions of work, and also individual or collective labour relations. In France and several other European and Latin American countries, labour inspectors are responsible for enforcing all areas covered by labour legislation (International Labour Organization [ILO] 2011, 62). For example, in France,³ the Labour Code (Code du travail) empowers inspectors to oversee the application of not only the wide-ranging content of the Code, but also of collective agreements (Code du travail, arts. L8112-1–L8112-4; see Kapp, Ramackers, and Terrier 2009, 49–54; Michel 2004, 23–26; for an account of the current number, organisation and activities of the French inspectorate, see Ministère du Travail, de l’Emploi et de la Santé 2011). Their jurisdiction includes not only labour standards such as pay and working time, but also workplace safety and health, discrimination and sexual harassment, apprenticeships and training and forms of contracting. They also exercise joint jurisdiction with other agencies, such as the police and customs officials over matters including the illegal use of foreign workers (Code du travail, art L8271-1).

Piore and Schrank argue that the wide latitude given to inspectors in generalist systems “allows them to weigh the various regulations against each other, as well as the total cost of the regulatory burden (goods, services and employment the enterprise provides) against the benefits of various enforcement strategies” (Piore and Schrank 2008, 6; see also Piore 2011). This broad mandate offers wide discretion as to what action should be taken, and evokes the concept of the sociological citizen discussed earlier (e.g., Piore 2011).

The second inspection system, the “specialised” system, is characterised by a number of departments each responsible for different types of labour protection. For example, it is common in many of these jurisdictions for the enforcement of “time and wages” to be separated from occupational health and safety regulation (see von Richthofen 2002, 146). In many jurisdictions, these specialist agencies are under the overall control of separate authorities or a single authority, as is the case in the United States and Germany.⁴ In the United States, the Wages and Hours Division (WHD) is separate from the Occupational Safety and Health Administration (OSHA), although both agencies are within the policy jurisdiction of the federal Department of Labor.

Malcolm Sparrow (2000, 232) suggests that dedicated units offer the advantage of providing “an incubator for fledgling problem-solving skills and a protective shield from competing demands.” While an agency must be versatile in its response to complex problems, this does not necessarily mean that individual agents must be equally versatile. Provided that the resources and activities of individual inspectors or multiple units can be adequately coordinated and utilised by the central risk control

operation, specialisation of this nature can enhance rather than damage an overall regulatory strategy (ibid., 234; see also ILO 2011, 62).

The specialist system is criticised on the basis that it encourages each regulation or type of regulation to be viewed in isolation, meaning “there is no single place or opportunity for the impact of the regulatory structure to be regularly evaluated as a whole, let alone weighed and taken into account” (Piore and Schrank 2008, 6; see also von Richthofen 2002, 146). Piore and Schrank (2008) suggest that specialisation by type of law focuses inspectors’ efforts on individual contraventions across different firms, rather than the full assortment of contraventions that may occur within the one firm. Specialisation may lead to multiple inspections by different inspectors, often with competing agendas, which is not only inefficient, but also may increase rather than reduce employer resistance to greater regulatory compliance (Piore and Schrank 2008; von Richthofen 2002).

An oversimplified binary specialist-generalist classification does not adequately reflect the hybrid forms that have emerged in various national settings. Within this continuum, there is a wide array of matters over which inspectors may potentially have jurisdiction. For example, an emerging role for labour inspectors across the globe is in monitoring equality and diversity in the workplace. Other areas of labour inspection include the enforcement of provisions concerning training, the form and content of employment contracts, workplace rules, labour disputes, collective agreements, unemployment insurance and illegal employment of migrant workers (ILO 2011, 72–80). Moreover, as discussed below, inspectorates with a broad mandate may nevertheless maintain some degree of specialisation by industry, sector or size of enterprise through internal organisation.

THE FWO MANDATE

Prior to the establishment of the Workplace Ombudsman in 2006, labour inspectorates in Australia largely followed the approach of specialised agencies with a division of power between “time and wages,” occupational health and safety (OHS) and, from the 1970s, antidiscrimination regulation (in the latter case, based on a tribunal model).

The differentiation between responsibility for time and wages, OHS, and discrimination was maintained with the creation of the Office of Workplace Services and later the Office of the Workplace Ombudsman. However, under the FW Act, the FWO was provided with significantly expanded powers over a range of labour matters. Although wages and conditions investigations are the main activity undertaken by the FWO, the remit of the agency is fairly broad in the sense that it is responsible for enforcing all relevant provisions of the FW Act and the FW Regulations. This includes matters such as discrimination (jurisdiction it shares with other state and federal bodies), sham contracting, unlawful industrial action, and freedom of association.

While the FWO’s mandate has expanded, leading to claims by the agency that it had become a “full service regulator” (FWO 2010a, 12), there are still some areas that fall outside its jurisdiction, in particular OHS regulation. Nevertheless, the broadening mandate of the FWO is substantial enough to create new tensions for the regulator. In taking on these additional responsibilities, the FWO faces a resourcing challenge. It

must try to maintain its activity levels in relation to its original mandate, while becoming active in relation to its new areas of responsibility. Inevitably, there are concerns within the agency that activity in new areas is at the expense of what some at the FWO consider to be its “core” areas of responsibility (Interview: FWI L).

In inspectorates with wide jurisdiction, there is often a degree of specialisation based on industry, sector, or size of the enterprise. For example, in France, while the inspectorate organises on geographic lines, there are specialist staff (with engineering or other relevant qualifications) engaged in relation to mines, power generation, and defence (Code du travail, arts. R8111-1–R8111-12). Further, the inspectorate divides into two classes—inspectors (*inspecteurs du travail*), which oversee leading enterprises, and controllers (*contrôleurs du travail*), which, under the supervision of inspectors, tend to focus on small and medium enterprises (SMEs) within a locality (Code du travail, art. L8112-5; see Kapp, Ramackers, and Terrier 2009).⁵ This distinction is helpful in at least two respects: first, it is an efficient way of managing finite resources in that controllers are less qualified and/or experienced than inspectors; and second, the challenges of inspecting SMEs, as compared to larger firms, are qualitatively different and, therefore, require distinct enforcement approaches and strategies (Piore and Schrank 2008). Other countries dedicate teams dealing with a persistent problem, such as child labour, although it suggests this also involves specialisation by type of law and therefore has the same disadvantages as discussed above (Pires 2011a).

The expansion of the FWO’s mandate has been one factor prompting new internal configurations of resources, together with attempts by the organisation to allocate its resources in the manner that will most efficiently address its priorities. One way that the FWO pursues internal specialisation is through the creation of sections within the agency with responsibility for different types of contraventions. For example, while wages, hours, and leave matters are handled by the Regional Services and Targeting Branch (RST), cases that involve some of the FWO’s newer areas of responsibility—such as sham contracting, discrimination, contravention of collective bargaining orders, industrial action, and union right of entry—are deemed to be “complex cases” and handled by the Complex Investigations and Innovation Branch (CII), which is staffed by more senior inspectors trained in taking witness statements, interviewing techniques, and investigation methodology.

Where a complex case also involves wages and conditions allegations, the matter has often been split between RST and CII. In practice, this has meant that two different inspectors may be charged with inspecting the same workplace. This potentially recreates the problems of narrow jurisdiction in a way that would not occur if the basis of specialisation were, for example, firm size. As one senior manager explained,

[I]f we get a complaint that comes through that has a wages issue and it has a general protections [i.e. discrimination] issue we’re splitting that and having an Inspector from both sides working on it. And arguably that’s not giving us a great outcome. (Interview: FWM O)

Moreover, internal specialisation based around the nature of the matter investigated risks creating expertise gaps in relation to cases falling between or outside functional boundaries. It is perhaps for these reasons, in part, that the FWO’s policy concerning these matters has now changed. Where a matter involves both “complex” issues and

potential contraventions of minimum employment standards, CII will assume sole responsibility for this matter.

The FWO also has specialised units based on the size of the regulated business. In 2009–10, a Small Business Education Unit was established within the FWO that develops education tools specifically tailored for small business, including template letters and record keeping documents as well as best practice guides. As distinct from the French model, the Small Business Education Unit is not staffed by persons with inspection powers (like the “controllers” in France), but rather general staff focused on tailoring education tools for SMEs. In the same period, the FWO set up a specialist team known as the National Employer Branch dedicated to providing education and assistance to large national enterprises and franchise operations. The aim of this initiative is twofold: first, to identify compliance issues facing large employers; and second, to work proactively with these companies to implement voluntarily compliant processes and systems (FWO 2011a). In the future, the FWO has indicated that this program will expand to strategically focus on procurement decisions by large firms and government agencies so as to consider compliance amongst the contractor workforce of these firms and agencies.

Unlike France, where industry specialisation is necessary because of the health and safety functions of the inspectorate, the FWO has resisted further internal specialisation by industry or sector, except to the extent that the agency’s targeted detection and education campaigns tend to have an industry focus. By way of explanation, the work of the inspectors who focus on the enforcement of minimum employment conditions is divided between two teams. The first and largest responds to individual employee complaints, the second, and more strategic team, includes those inspectors who devise and implement “targeted campaigns”—education and compliance audits that focus on an industry, region, or issue flagged as a concern.

Senior staff at the FWO recognise that there are advantages and disadvantages to specialisation along industry lines; the FW Inspectors we interviewed, who worked in teams responding to complaints, expressed satisfaction that this led them to work in a range of different industries, depending on the origin of the complaint. However, some were attracted to specialisation:

I think actually there could be some value in having specialised industries, because they’d get to know the instruments specific to that industry, and you would have some experts. It’s not to say that they wouldn’t be capable of going outside of that industry, it would just give people an expert to go to if they needed questions in those instruments. Given that we work with so many, you can never be across all of them. So I think to specialise, there probably would be some value in that for a select group of people. (Interview: FWI J)

The above quote makes reference to the fact, noted earlier of the Australian system, that a number of minimum terms and conditions of employment have been established through the “modern award” system. This means that there are separate and specific minimum employment standards set for each industry and/or occupation. This stands in contrast to many other regulatory systems based on the enforcement of standards, which are universal to the workforce, and is relevant in weighing up the advantages and disadvantages of specialisation.

However, one Fair Work Manager we interviewed expressed concern that while specialisation by industry might have its advantages in terms of developing expertise in industry specific standards and familiarity with stakeholders (“you can really get your head around a particular legislation. You can actually build up the relationships with the key people in the industry”), it required resourcing levels that were not feasible for the FWO (Interview: FWM K). Another manager felt that the FWO was

on a trajectory where we’re creating more specialist and siloed structures. That’s not going to make us a more efficient or effective organisation in that the more specialist areas you have the less flexibility you’ve got in dealing with changes in workload and changes in what’s coming through. So I think we need to make sure that we’re getting a good balance between the more generalist roles and specialists. I’m not necessarily convinced that specialist industry teams are the way to go. (Interview: FWM O)

In summary, then, while the FWO has a broad and growing mandate, much larger than, for example, the wage and hours inspectorate in the United States; it is still not a comprehensive labour regulation agency in the sense of being responsible for aspects of work such as OHS and dispute resolution, such as in France. There are some virtues in this approach given that the regulation of minimum employment standards in Australia is, on its own, highly complicated—the coexistence of statutory minimum standards, industry and occupational level modern awards, and enterprise agreements is a case in point. However, there are some drawbacks. In particular, the limited collaboration between the various government agencies responsible for other types of labour standards, as well as relevant business regulations, means that there is a risk of duplication and inefficiencies. We learned that interagency interactions are limited to information sharing, and the level on which this takes place varies widely and often occurs on an ad hoc basis.

The responses of interviewees suggest that the internal organisation of the FWO is a matter of ongoing debate and review. The FWO is not, at least for the moment, locked into a model, and there remains significant scope for experimentation and restructuring.⁶

DECENTRALISATION: DISCRETION AND CONSISTENCY

A central theme of empirical and theoretical analyses of regulatory bureaucracies has been the extent to which field-level officers are “rule-bound” by legislation and internal regulation designed to achieve consistency and accountability in decision making, or alternatively are free to exercise discretion—to make choices concerning the enforcement tools and approaches employed in performance of their functions. The former approach is often associated with Anglo-American regulatory systems, which are generally characterised as having “centralised” systems of enforcement, where field-level officers must consult with central or regional officials before making decisions about enforcement actions (Hutter 1997; Rowan-Robinson, Watchman, and Barker 1990; Hawkins and Thomas 1984). The latter approach has been associated more with decentralised or localised systems, such as in Franco-Iberian model (Sparrow 2000; Bardach and Kagan 1982), although, in France, there has been a recent move towards more centralised authority (Kapp, Ramackers, and Terrier 2009).⁷

The ability of regulators to exercise discretion is particularly significant in the case of field-level inspectors, given the desire of regulatory bureaucracies to control discretion as a means of ensuring that policy “is transmitted down through the organisation and implemented at street level” (Hawkins and Thomas 1984, 19). As Sparrow (2000) has noted, there is no such thing as a regulator who is devoid of discretion, so the issue is more about the extent to which, over what matters and on what basis they exercise that discretion.

How much discretion field-level agents or inspectors exercise depends only on how much they are permitted to use their own judgment in making these branch-point determinations [points at which violations can be routed along different paths or toward different dispositions], as opposed to using detailed criteria pre-specified in policy or procedure. Whether the discretion is *centralised* (encapsulated in policy) or *decentralised* (allowing use of field-level judgment), the question is the same: Which way should this one go? (Ibid., 242 [emphasis added])

In comparing labour enforcement jurisdictions, it is necessary to note a key difference in relation to the power of inspectors to impose penalties. In systems such as the United States and Australia, the labour inspectors are, for the most part, unauthorised to impose sanctions themselves, but must instead make application to the courts, where “to win, an agency must meet demanding standards of proof and legal certainty required by the judiciary” (Bardach and Kagan 1982, 33).

This is in contrast to the position in France and similar countries, where inspectors and controllers have broad individual powers to issue “*process-verbaux*.” These initiate penal proceedings through a statement of facts and prescribe sanctions that are definitive in the absence of proof to the contrary (Code du travail, art. L8113-7; see also Kapp, Ramackers, and Terrier 2009; Michel 2004).⁸

Scholars debate the advantages and disadvantages of wide discretion. Piore and Schrank (2008), suggest that the Franco-Iberian model of labour inspection with its high levels of inspector discretion is superior to more bureaucratic inspection systems in several respects. Broad discretion enables investigators to bring firms into compliance, over time. It allows for far more flexibility and the ability to accommodate economic and technical variables. For example, the labour code can be enforced strictly in large enterprises and less so in smaller firms, or it can be adapted to the exigencies of individual employers or industries. Moreover, “the inspector is in a position to weigh the total regulatory burden and to make tradeoffs among different aspects of the labour code in a way which is not possible in the US system; that is, to balance the benefits of enforcement in terms of social protection against the cost of enforcement in terms of employment and output” (ibid., 10–11).

However, other scholars of labour inspection do not favour a system characterised by high levels of inspector discretion suggesting that it makes securing consistent and equitable outcomes difficult. Von Richthofen (2002, 118) points out that while “employers value the use of a certain amount of discretion in the inspector’s role, as distinct from simple mechanical enforcement, they are ... greatly perturbed if it appears that their competitors are being treated more leniently.”

Nonetheless, as Pires has argued (2011a, 45) even in systems where inspectors’ powers are circumscribed, “discretion is pervasive and possibly indispensable.” In all systems, questions arise about why some inspectors have a “fear of discretion,”

confining themselves to the narrow boundaries of their formal mandate and strict implementation of the law as written, and in other cases, adopting “innovative strategies, working collaboratively with other organisations ... to solve complex business and regulatory problems” (ibid., 43–44). Pires (2011a) suggests that organisational approaches to managing the discretion and performance of inspectors are one factor to be considered, citing the example of the influence of the “New Public Management” (NPM) paradigm of public sector administration with its emphasis on setting performance targets or “KPIs” (key performance indicators). He argues that this emphasis on quantitative outcomes inherently restricts bureaucratic discretion to pursue broader public policy goals by, for example, exploring alternative ways to solve problems (2011a, 46).

Of course, a high level of discretion also leaves open the potential for inspectors to make arbitrary or capricious decisions (Piore and Schrank 2008), or to be accused of “regulatory capture” (Gunningham 2007, 105–08). Such behaviour is not easily identified or remedied given that the performance of inspectors cannot be readily assessed by reference to quantitative data such as the number of inspections undertaken or prosecutions commenced. Rather, inspectors with the capacity to act as sociological citizens require “a very different system of management that relies much more heavily on professionalism, training, and case audits” (Schrank and Piore 2007, 11).

DISCRETION AT THE FAIR WORK OMBUDSMAN

In Australia, the FW Act provides that FW Inspectors have certain “compliance powers” that may be exercised for “compliance purposes,” which include determining whether the FW Act and instruments made under that Act are being, or have been, complied with (FW Act, § 706). These compliance powers are predominantly concerned with *investigation*—gaining access to workplaces and information—and only include limited power to impose administrative *sanctions* for breach of the minimum employment standards.

Nevertheless, inspectors’ powers in relation to administrative sanctions are by no means negligible. According to the FW Act, FW Inspectors may issue a notice to produce documents, breach of which gives rise to a penalty, and if an inspector reasonably believes that a person has contravened the record keeping and pay slip obligations in the FW Act, the inspector may issue a penalty infringement notice (PIN) (FW Regulations, cl. 4.04). A PIN is similar to an on-the-spot fine. In addition, FW Inspectors can issue a compliance notice where the inspector reasonably believes that a person has contravened one of the minimum employment standards under the FW Act. A compliance notice will require a person to take specified action to remedy the contravention, and then to produce reasonable evidence of compliance with the notice. In addition to these powers, inspectors will also play a role in identifying cases of noncompliance, which require the use of other sanctions available to the FWO, such as enforceable undertakings⁹ or court action seeking remedies of the breach of minimum entitlements and the imposition of penalties.

How much discretion do FW Inspectors have in carrying out their functions and exercising these powers? By way of background, since 2006, the federal agency has significantly expanded—from 220 inspectors in 2006–07, to the most recent count of

approximately 420 inspectors (including 234 FW Inspectors employed by state partner offices) (FWO 2010a).¹⁰ The FWO has sought to establish a significant regional presence through a network of fifty-three offices throughout Australia located in a number of regional centres and capital cities of all states and territories (ibid.). A key goal of the FWO and its predecessor agencies has been to achieve consistency across these different regional branches and state-based inspectorates that are subject to partnership agreements with the FWO.

Accountability is also a critical value of the FWO and reflects the political pressures faced by the agency. In the immediate aftermath of Work Choices, the activities of the regulator were mired in controversy. In particular, the agency's involvement in a number of high-profile and hotly contested cases led to accusations that one of its predecessor agencies, the Office of Workplace Services, was politically motivated and acting as the Howard Coalition Government's "secret police" (Hardy and Howe 2011, 127).

In light of the agency's rather harrowing experiences in the wake of Work Choices, it is not surprising that the FWO now places a heavy emphasis on the importance of independence, transparency, and accountability. More recently, a review by the Commonwealth Ombudsman (which reviews the functioning of federal agencies such as the FWO) has had the effect of testing various accountability measures the FWO has since put in place (Commonwealth Ombudsman 2010).

In part, the FWO has sought to achieve consistency and accountability across the agency through a rule-based approach to the management of the discretion of field-level inspectors, with the development of an internal Operations Manual and the issuing of various Guidance Notes, which are publicly available on the FWO's web site. Some of these Guidance Notes directly concern how the function and powers of FW Inspectors are to be exercised, such as *Guidance Note 8: Investigative Process of the Fair Work Ombudsman* (FWO 2010b).

As Guidance Note 8 explains, FW Inspectors are expected to carry out each investigation within an "investigative framework":

The processes involved in each investigation are executed (or not executed) at the discretion and control of the FWO and the Fair Work Inspector. Given the individual nature of investigations, each attaches a different approach to its conduct. Fair Work Inspectors exercise judgement and discretion in dealing with all matters. While the FWO encourages national consistency in decision making, discretion rests with the Fair Work Inspector to make the most appropriate decisions to deal with the factors and circumstances before them. (ibid., cl. 4.6[b])

The key to the FWO's management of inspector discretion is the Operations Manual, which contains the agency's detailed directions and internal guidelines concerning investigation processes.¹¹ The manual sets out the necessary steps that must be taken prior to taking any enforcement action. As one manager explained,

The reason for the manual is to establish consistency and process and it also provides a tool for transparency. ... You need that consistency. As a federal regulator, the person in Bunbury [Western Australia] should be treated the same as a person in Cairns [Queensland]. The manual is meant to be a set of tools and guidelines for application to reach certain critical decision points. It's not meant to take away the discretion of an inspector in amending slightly

the processes in the manual. However, the manual is also there to hold people to account for key decision steps—when to close and not close a particular matter. It has those two elements. So it's the consistency but also accountability processes. (Interview: FWM J)

The FWO's general organisational principles and performance management system are other ways that direct inspector discretion. One of the most fundamental key performance indicators (KPI) requires inspectors to complete 80 percent of investigations into complaints concerned with minimum employment standards within ninety days of receipt. This KPI, amongst others, places a potentially significant constraint on FW Inspector discretion. As Pires (2011a) has warned, KPIs may provide an incentive to inspectors to undertake tasks in a manner that easily converts into statistics concerning outcomes but does not necessarily advance the substantive objectives of the agency.

In addition to performance management processes, FW Inspectors are subject to relatively close supervision through regular meetings and periodic file reviews with team leaders, normally a senior FW Inspector who is responsible for a "team" of four to eight inspectors, where the management of cases and use of enforcement tools is discussed. Inspectors reported that most decisions, such as a finding of noncompliance, are at least approved by a team leader.

On the other hand, the FW Inspectors we spoke to were of the view that they had sufficient discretion in carrying out the "day to day" investigative aspects of their role. In particular, decisions on the course of action to take in order to manage the investigation are largely within the inspector's discretion, depending on their level of experience (Interview: FWI T). This discretion extends to decisions about whether to make site visits, undertake unannounced inspections, or issue a notice to produce documents. Moreover, in many cases where further action in the form of sanctions does not appear necessary or appropriate, inspectors resolve complaints in consultation with team leaders and senior managers, following processes set out in the Operations Manual. Consistent with the claimed benefits of the Franco-Iberian model, in certain cases, inspectors do balance the benefits of enforcement against the costs to business, for example, where there is a danger that a business may go into liquidation leaving complainants out of pocket.

Case conferences, a meeting to assess the progress of an investigation and to discuss further actions, can also be held at any time during the investigative process by the FW Inspector. These meetings, attended by the inspector's team leader or manager, as well as a number of the FWO's management staff (including a director, executive director, and legal officer), are designed to review and discuss difficult, contentious, or novel cases.

Most inspectors viewed the Operations Manual as a useful resource (in particular for inspectors who were new to the FWO) rather than a constraint on discretion. A number of responses were consistent with the following observation made by one inspector we interviewed:

The Operations Manual is a guide for assistance, more than a prescriptive "you must do." ... As long as it's shown why you did something, the reasons that you did it and you have approval to go that certain way, then we've always been an organisation where we've had a level of discretion. (Interview: FWI N)

Some expressed the view that a procedural, “structured” approach setting out the steps to be followed in an investigation was helpful in dealing with recalcitrant employers, such as repeat offenders. However, these inspectors felt proceduralisation was less helpful where an informal, cooperative approach was likely to bring about compliance (Interview: FWI Q). This suggests that the FWO’s procedures can restrict inspectors’ capacity to be pragmatic and adaptive in exercising certain functions, thus limiting their ability to act as sociological citizens.

Most inspectors we interviewed recognised that there was a sound rationale for the proceduralisation introduced by the Operations Manual, in particular the need for greater consistency and accountability within the organisation. However, many observed that investigations were more time consuming as a result. In particular, a number of inspectors expressed concern that in 2009 and 2010 expectations were to follow the manual too rigidly: “when we follow the manual and the processes as a tick or flick we actually lose a lot of that relational discretionary side of the processes” (Interview: FWI R). As a result of concerns expressed internally, inspectors reported that the FWO had given them more latitude in relation to the manual from late 2010 or early 2011.

While FW Inspectors have some latitude in managing the investigation process, they have considerably less discretion in determining the appropriate response in cases where investigations reveal noncompliance with minimum employment standards, that is, in relation to sanctioning. The FWO’s procedures require higher approval for formal action so that in the case of contravention letters, compliance notices, and letters of caution, amongst other sanctions, approval of at least an assistant director, and usually a state director is required as well (Interview: FWI J). Such approval is sought after the inspector discusses the matter with the team leader, a director and someone from the executive director level (see FWO 2009b; Interview: FWM 3). In relation to litigation, the internal recommendation refers to a subcommittee called the Strategic Litigation Committee, which decides whether to forward the matter to solicitors so that they can obtain external legal advice (Interview: FWM Q; see FWO 2009a). If this advice supports the taking of formal action, a final step involves obtaining the consent of senior management—which is “fairly tightly held” (FWO 2009a).

The requirement for certain decisions to be cleared with senior officers is a process designed to centralise decision making, particularly in relation to Sparrow’s “branch point” determinations. The FWO managers we interviewed emphasised that the agency had deliberately put in place a number of “checkpoints,” or “hoops to jump through” (Interview: FWM Q) for FW Inspectors, particularly in relation to more serious compliance tools.

The degree of centralisation of decision making at the FWO, in relation to sanctions and the drive to ensure that there is consistent and accurate decision making, seems to qualify the agency’s stated intention to maintain high levels of discretion for frontline inspectors (Australian Parliament 2010). Some inspectors emphasised that while their team leaders and local managers allowed them a fair degree of discretion in making decisions, this did not necessarily extend to senior management. It also seems that while inspectors are able to recommend the taking of certain actions to remedy

noncompliance, they are not responsible for making the ultimate determination as to which (if any) sanction is appropriate. Rather, this decision rests with a select number of senior managers. While understanding the need for consistency and accountability, in some cases inspectors expressed frustration at the extent to which centralised approval processes curtailed their discretion, particularly in relation to more significant decisions such as when to pursue, or not to pursue, a matter.

For example, a number of inspectors expressed dissatisfaction at the difficulty in gaining approval to use statutory enforcement powers, such as enforceable undertakings, compliance notices, and litigation in circumstances where the inspectors felt the use of such powers was justifiable both on the grounds of the available evidence and by the principles of the FWO's policy. These inspectors felt that the alignment of a case with the FWO's strategic policy was given greater credence than the merits of the case. For example, one inspector commented,

[T]here's certain hot things at periods of time that they really want to put some litigation forward on, but given the sort of amount of internal checks that go on before a matter that was initially put up for litigation actually gets to that litigation phase, a lot of time has passed and it may not be flavour of the month anymore. It's like well just tell me upfront and I won't go to all the trouble of what is effectively wasted work in the end. So there's a fair amount of that. Then there's a bit of oh, it's not the perfect case, so we don't want to take it. (Interview: FWI E)

On the other hand, some inspectors expressed the view that the failure to use some of the newer powers, such as compliance notices, was due to the FWO's organisational culture being slow to adapt to their availability. In other words, it suggests that because inspectors and managers were not used to compliance notices, they did not readily consider or use them.

These findings are consistent with Hawkins' observation that the "decision-making frame" of inspectors and senior management with regard to prosecution of those in breach of regulation may vary significantly (2002, 199). The concerns that some FW Inspectors expressed are indicative of the highly centralised decision making structure at the FWO. One explanation for this is that, despite the increase in funding compared to its predecessor agencies, the FWO faces resourcing constraints particularly when it comes to the significant expense of litigation. Senior management of the FWO necessarily take into account broader strategic goals in the allocation of resources, whereas inspectors are concerned only with the merits of the matter immediately under investigation (Interview: FWL F).

In sum, although the FWO's inspection practices are extensively proceduralised, we did not get the sense that this was a "rule-bound" agency obsessed with "going by the book" (Bardach and Kagan 1982). While the potential is there for the FWO's internal rules and processes to engender "fear of discretion" (Pires 2011a)—one FW Inspector we interviewed suggested that the extensive internal review processes allowed many inspectors to defer all decisions to more senior staff—most of the inspectors we interviewed did not see the FWO rules and processes in this way, at least in relation to the conduct of each investigation.

That said, the agency certainly maintains a highly centralised decision making structure in relation to the imposition of sanctions, which restricts the discretion of

inspectors to escalate enforcement action in cases of noncompliance. This was a source of frustration for many inspectors. However, our study revealed a relatively robust culture of discussion and debate over decision making within the FWO. The inspectors have a say in decisions concerning the taking of further action against noncompliant employers, and most feel able to express strong opinions, even if ultimately they disagree with the outcome of discussions.

The centralisation of decision making at the FWO, particularly in relation to the use of sanctions, signifies that the inspectorate takes considerable care in choosing which matters to escalate. This filtering of cases for further action, to some extent necessitated by limited resources, means that only a small percentage of violations attract formal sanctions. In many cases, other solutions arrive for businesses found to be in breach of the law. The implication is that it is difficult to characterise the FWO as depending on sanctioning of violations, identified as a characteristic of the U.S. approach (see Piore 2011).

We can conclude that while the statutory framework for the FWO allows considerable scope for the adoption of either a Franco-Iberian or an Anglo-American approach to discretion, the FWO has, as matters presently stand, adopted an operational approach that relates degree of centralisation to the seriousness and expense of the statutory power sought to be deployed. It is possible to imagine variations to the current approach either towards allowing greater capacity for decentralised use of statutory powers (especially in relation to sanctioning), or conversely, tighter control over even lower-level powers (especially in relation to investigations). These variations will obviously be affected by matters such as the degree of staff professionalisation, pressures on resource allocation, and internal and external political decisions.

PROFESSIONALISATION

Qualification requirements, recruitment practices, and training processes are relevant mechanisms of quality control and are, therefore, a critical part of building any effective regulator (see, e.g., Sparrow 2000; Kagan 1984). They are also critical to the accountability of the regulator for its actions (see Hardy and Howe 2011). In particular, given the discussion of discretion in the previous section, professionalisation “implies the grant of a certain amount of discretion to the practitioner, to use his or her own judgment, rooted in expertise and experience, to determine what would be the best in the particular case” (Kagan 1984, 57). In other words, professionalisation can be an alternative to the use of rules and close supervision as a mechanism of quality control and accountability. It is a serious factor in determining the organisational culture and approach of a regulatory agency, in particular in considering the ability of inspectors to act as sociological citizens exercising relational regulation (Piore 2011; Piore and Schrank 2008; Frank 1984).

The competency, skills, and professionalisation of labour inspectors have been identified as “[o]ne of the essential elements of an adequate system of labour inspection” (Jatoba 2002, 19). In many countries, candidates must hold a university degree to apply for inspector positions (Schrank and Piore 2007). In France, for example, external applicants for inspector positions must hold a bachelors degree or equivalent and pass an examination (Kapp, Ramackers, and Terrier 2009). In Canada and Chile, prospective inspectors are admitted on the basis of competitive exams and

required to undertake rigorous and ongoing training programs (Jatoba 2002), which may include theoretical and practical training in specific areas (ILO 2011). Investments in training, particularly as part of the induction process, are a characteristic of the most high-performing inspectorates (von Richthofen 2002).

Moreover, many countries have dedicated training institutes for their inspectors. For example, inspectors in France undertake eighteen months of formal training (including coursework and placements) by a dedicated institution (Ministère du Travail, de l'Emploi et de la Santé 2011). In Denmark and the United Kingdom, an internal training department is responsible for developing, providing and funding training to inspectors. In both models, training is delivered in accordance with a comprehensive training policy, which is updated on a periodic basis (von Richthofen 2002). In addition, given the broader mandates of many European inspectorates, inspectors are often responsible for OHS compliance as well as other minimum employment standards. The argument for increasing training and specialisation is stronger in respect of OHS given the need for technical expertise in understanding safety in industrial processes and work-related health risks.

As discussed in the previous sections, inspectors in the Australian system are subject to greater levels of scrutiny and control by more senior members of the FWO than is the case in countries such as France. In addition, Australian inspectors do not have responsibility for OHS regulation. Given these considerations, the level of qualifications and training required of inspectors in countries is not necessarily as critical for those working in Australia. Conversely, if Australian inspectors were better qualified and provided with enhanced training, they could exercise more discretion without the need for the current level of supervision.

PROFESSIONALISATION OF FW INSPECTORS

The FW Act says little about the qualifications required of FW Inspectors, requiring only that the Fair Work Ombudsman “is satisfied that the person is of good character” (FW Act, § 700 [2]). In practice, the FWO does not appear to recruit FW Inspectors on the basis of any formal qualifications they may have. While some inspectors we interviewed had a relevant tertiary degree, such as an industrial relations qualification, many did not. A significant number of FW Inspectors we interviewed were appointed from within the organisation, largely from the telephone advisory service, or hired on the basis of previous investigative experience, such as with the Australian Taxation Office or the police force.

One manager told us there was no particular background that led to better inspectors, and it “was good to have a mix because of that spread of experiences” (Interview: FWM O). Other managers and inspectors reported a conscious effort to improve recruitment and to move away from the “ex-police skill set.” This shift became more pressing after the FWO took over the broader educative functions previously carried out by a different agency (Interview: FWM R; see also Interview: FWI I).

The FWO is making concerted efforts to build the skills, knowledge, and competency of the inspectors it recruits. This appears to be partly driven by a desire to ensure that inspectors are displaying the “key behaviours” required in their position, which include being “courageous, impartial, proactive and professional” (FWO 2010a, 50).

It also seems to be part of a broader strategy to establish a career development framework, but it has, at least until recently, tended to be directed at a building a range of operational competencies and familiarity with legislation, not at broad analytical skills characteristic of higher education degree courses.

When the Office of Workplace Services first expanded and then rebadged as the Workplace Ombudsman, training commenced via an induction process and a “buddy” system, whereby new inspectors were assigned to work with a more experienced inspector who acted as a supervisor and mentor. Since then, the FWO and its predecessor agencies have taken steps to develop more sophisticated induction and training programs, while maintaining on-the-job training opportunities, including the buddy system.

Throughout the course of their employment, there are various internal training opportunities made available to inspectors, including short technical briefings and more comprehensive skills training such as in negotiation or dispute management. Technical training has been particularly relevant since July 2009, given the implementation of the new Fair Work system (FWO 2010a). In addition to providing training regarding state referral systems and modern awards, FW Inspectors and advisers also handle enquiries relating to workplace discrimination. As noted earlier, a new process has also been put in place that allows difficult or complex matters to be escalated to specialist areas and the resolutions are later shared with general staff via regular information bulletins and updated training (ibid.).

Recently, the FWO has taken steps to develop and seek accreditation for more formal training opportunities, in particular the Certificate IV and Diploma in Government (Workplace Relations), which it has developed in partnership with Government Skills Australia. This is a qualification focused on the regulatory system to be enforced by the inspectors and developed specifically for the FWO staff. It is in addition to the long-standing Certificate IV in Government Inspections, which provides training in investigatory techniques and processes but which, in the past, has not been specific to the FWO.

In a recent review of the exercise of coercive information-gathering powers by the FWO, the Commonwealth Ombudsman found the initial training, combined with the refresher training offered periodically to staff, was “sound” and noted the new qualifications with encouragement (Australian Parliament 2010, 13). Most inspectors, satisfied with the increased training opportunities and the level of professionalisation of their roles, expressed it was on-the-job training and the opportunity to gain investigation experience that was the most valuable to their professional development. Some managers and inspectors felt there was still progress to be made in the development of greater degrees of competency testing at entry level and in the development of a more structured training program leading to an officer appointment as a FW Inspector (e.g., Interview: FWM Q). This appears to have led to the establishment and development of a “Professionalisation Project” that commenced in 2011. The primary purpose of this project was to implement “a broader FWO strategy to ensure we are building capability in people and culture through developing technical and professional skills and thus ensuring the FWO is able to deliver effective compliance activities” (Communication from FWM S).

In summary, although not requiring the same level of professionalisation as inspectorates in France and some other jurisdictions, the FWO has recognised the importance of developing the skills and expertise of its frontline staff. While this training may eventually enhance the capacity of FW Inspectors to operate with greater discretion and autonomy, the FWO's immediate motivation has been to improve the competency and effectiveness of its inspectors.

CONCLUSION

This article has explained how the Australian system of labour inspection transformed, and how the newly created agency, the FWO, responds to the various choices available to it concerning mandate and specialisation, discretion, and professionalisation. We have explored these choices by reference to two prominent international models of labour inspection.

On the question of mandate, we revealed the FWO has a relatively broad mandate, certainly by comparison with Australia's previous tendency to follow the Anglo-American tradition of creating specialised agencies by type of labour standards. However, unlike some of the Franco-Iberian systems, the FWO has chosen to structure its investigation functions according to type of breach rather than allowing inspectors to address compliance with multiple regulations by firm or industry. This is not to suggest that the FWO has failed to consider, for example, industry specialisation. However, it has chosen specialisation by legal category in order to maintain the interest and engagement of inspectors and because of accountability for performance—it is easier to set and achieve targets in relation to a narrower set of goals. Time and wages matters are more in the nature of bright-line standards in relation to which it is possible to determine compliance or contravention than, for example, some OHS duties or discrimination obligations.

Balancing the need for discretion with the drive for consistency is one of the fundamental challenges facing labour inspectorates across the world. In this respect, professionalisation and specialisation are critical to achieving this balance and ultimately to the legitimacy of inspectorates. We have observed that the FWO has consciously placed a strong emphasis on consistency and accountability through the internal structure of the inspectorate, the adherence to the FWO Operations Manual and the establishment of decision-making processes which require consultation with senior staff, especially in relation to sanctions. This is largely a product of the FWO's regulatory, political, and financial context, with the shift from a federal system with shared responsibility for labour inspection to a largely national system making consistency a priority. It is also closely related to the degree of professionalisation expected of labour inspectors. Nevertheless, the FWO has also sought to make it clear that inspectors do have discretion within these parameters, particularly in relation to investigation procedures. To reinforce this, the FWO is seeking to build the skills and competencies of its inspectors through its professionalisation program, albeit not at an advanced degree level.

It is apparent that FW Inspectors do not operate as sociological citizens to the degree that, for example, the French inspectors do. Without a broad mandate, inspectors are not able to assess the various regulatory challenges facing firms and weigh the costs of compliance against possible enforcement options. Moreover, as Silbey (2011, 7)

has argued recently: “sociological citizens experience a sense of freedom to try things, experiment, and intervene in organisations and arrangements where others would hesitate. They do not ask permission to do the things they do.” The centralised nature of decision making at the FWO concerning enforcement tools is evidence that this is not the case for FW Inspectors, at least when it comes to responding to contraventions through the use of sanctions.

However, this is not to deny the considerable scope for, and exercise of, discretion by labour inspectors in the Australian system. To begin with, the constraints on discretion are organisational rather than statutory and can potentially be relaxed if FWO senior leadership so desires. We have also emphasised that the FW Inspectors we interviewed denied that they were “rulebound.” It is also apparent that there are many “regulatory conversations” (Black 1998) within the agency. That is, although on one view there appears to be a hierarchical, centralised process of decision making over crucial issues, it is also apparent that FW Inspectors engage in constant dialogue with their superiors about the conduct of investigations and the escalation of enforcement action. Even if the inspectors do not always get the outcome they are seeking, they at least have a voice in the regulatory process. This would seem to at least be consistent with some elements of the sociological citizen ideal.

We conclude with a note of caution regarding the application of international models or “ideal types” in analysing labour inspectorates. In our view, while the issues about the various models of labour inspection are useful for framing discussion over the appropriate design and approach of labour inspectorates, we would make two observations. First, as all scholars in the area recognise, many systems do not conform to one model or the other, and display features of both. The term “hybrid” is useful here, provided it does not imply that such systems result only from the interactions between the models or from conscious choices to adopt a combination of features. In Australia’s case, the current characteristics of the inspectorate stem from organic development following the resetting of the system in the mid-2000s.

Second, the characteristics of a system are not necessarily fixed. In some political contexts—and Australia in the mid-2000s provides an example—fundamental changes can occur, even where the law has been relatively stable for a considerable period. Moreover, we have also seen that legislation, while controlling mandate, may leave the leadership of an inspectorate considerable scope to shape its internal operations and the nature of the workforce. This means the extent of base-level discretion and professionalisation can vary over time.

We suggest our study shows the value of providing a thick description of the evolution of labour inspectorates, their legislative framework, and their operation in practice. While the international models assist in generating this description, they do not obviate the need for close diachronic analysis of the laws and operational practices of an agency.

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INTERVIEWS

Communication from Fair Work Manager S.

Interview: Fair Work Inspector E.
Interview: Fair Work Inspector I.
Interview: Fair Work Inspector J.
Interview: Fair Work Inspector L.
Interview: Fair Work Inspector M.
Interview: Fair Work Inspector N.
Interview: Fair Work Inspector P.
Interview: Fair Work Inspector Q.
Interview: Fair Work Inspector R.
Interview: Fair Work Inspector T.
Interview: Fair Work Manager 3.
Interview: Fair Work Manager J.
Interview: Fair Work Manager K.
Interview: Fair Work Manager O.
Interview: Fair Work Manager Q.
Interview: Fair Work Manager R.
Interview: Fair Work Manager S.
Interview: FW Legal Officer F.

NOTES

¹ The FWO (and its predecessor agencies) have now recovered more than \$140 million in underpaid wages for more than 100,000 employees (see FWO 2011).

² This research is funded by the Australian Research Council (LP09990298, ‘New Initiatives in Enforcing Employment Standards: Assessing the Effectiveness of Federal Government Compliance Strategies’). Further detail concerning our methodology is provided in the second section of the article.

³ The system for supervising compliance with labour law is set out in part 8 of the Code du travail.

⁴ Although Pires (2011b) classifies these jurisdictions into a third category of labour inspection system, the integrated system; we have chosen to include these jurisdictions as a subset of the “specialised” category.

⁵ In 2010, there were 775 inspectors and 1,482 controllers (Ministère du Travail, de l’Emploi et de la Santé 2011).

⁶ Indeed, the FWO implemented a further restructure of the organization in August 2012, as a result of significant budget cuts.

⁷ This has partly been in order to comply with ILO Convention 81 (see Ministère de l’Emploi, de la Cohésion Sociale et du Logement 2006).

⁸ There were 6,656 issued in 2010 (Ministère du Travail, de l’Emploi et de la Santé 2011).

⁹ The enforceable undertaking is essentially an agreement enforceable in court between an individual or firm that is alleged to have contravened the FW Act and (in this context) the FWO. The agreement specifies actions that the person or business will take—such as the adoption of new compliance processes—or refrain from taking. It is an alternative to more formal and punitive administrative, civil, or criminal sanctions.

¹⁰ Care should be taken in comparing the number of labour inspectors between jurisdictions, even when a per capita approach is taken. This is because of the variations in mandate across different jurisdictions. For example, a count of labour inspectors in France, such as that provided above, would include inspectors responsible for OHS regulation as well as time and wages matters.

¹¹ The FW Act (§§ 704-705) provides that the FWO can give both general and particular directions to FW Inspectors concerning their functions and powers.