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ORIGINAL ARTICLE

When the states led wage enforcement: Can the Commonwealth match them?

Eugene Schofield-Georgeson

University of Technology Sydney, Sydney, NSW, Australia
Email: eugene.schofield-georgeson@gmail.com

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Abstract

This longitudinal and empirical study compares Australian labour enforcement, predominantly between the New South Wales (NSW) and Commonwealth jurisdictions. It documents the volume of enforcement litigation, inspection and arrears recovery within an Australian state for the first time. These enforcement activities are then compared to equivalent Commonwealth labour enforcement over time, with a particular focus on the activities of the federal inspectorate since the Commonwealth takeover of industrial relations in 2005. This comparison enables three significant claims. First, that contemporary labour enforcement activities have not kept pace with those conducted by inspectorates in the early to mid-twentieth century, most of which were performed by the States. Second, that enforcement has always been a significant part of the Australian industrial relations landscape, reinforcing the conciliation and arbitration system, particularly within the States. And third, those high levels of regulation and labour enforcement played a role in reducing social inequality throughout the mid-twentieth century.

Keywords: wage theft; wage underpayment; enforcement history; wage inspectorate; wage regulation; trade union enforcement; industrial relations; labour law; wage arrears; labour history

This empirical historical study presents groundbreaking evidence of Australian wages and entitlements enforcement over a century. To date, historical research into enforcement of underpayment claims has focussed only on the comparatively meagre activities of the Commonwealth or federal labour inspectorate, to the exclusion of State jurisdictions. This has led industrial relations and legal scholars to repeatedly under-estimate the significance of wage enforcement, particularly by the state, over time. Failure to comprehend the full extent of labour enforcement, which mostly took place in the Australian states, has fostered an assumption that for the first two thirds of the twentieth Century, wage enforcement was mostly unnecessary due to the power and ingenuity of industry-wide or sectoral bargaining, reinforced by high union density.

This study, by contrast, has uncovered a large trove of historical data that disputes this narrative. Located within the industrial jurisdiction of New South Wales (NSW) from 1911 onwards, the data reveals that a sizeable volume of investigation and litigation, or enforcement activity, was conducted by a state labour inspectorate. It suggests that wage enforcement was scarce at a federal level, mainly because enforcement was conducted, at an astonishingly high volume, by the States. The States, not the Commonwealth, maintained the dominant enforcement institutions, coupled with enforcement by trade

unions in target industries, particularly retail. The data is graphed and documented here in a variety of ways, comparing numbers of underpayment litigation and arrears collection over time. Crucially, this evidence compels rethinking assumptions about the value of enforcement.

The data supports three significant claims regarding Australian labour enforcement over time. The first is institutional. It relates to the comparative enforcement activities of the current federal inspectorate or Fair Work Ombudsman (FWO). Here, it is claimed that the enforcement activities of the FWO have not kept pace with those of state regulators in the early to mid-twentieth century. As the institution responsible for labour enforcement in the States since the federal takeover of industrial relations in 2005, the federal inspectorate has failed to uphold its regulatory responsibilities in accordance with the standards and expectations set by inspectorates in the States in the twentieth century. Whether this is due to lack of resourcing or institutional failure is not the subject of this article.

The second claim is structural. It relates to the relationship between enforcement and collective bargaining in Australian industrial relations. This claim addresses the notion that labour law enforcement is the new and individualising 'poor cousin' of the former golden-age system of bargaining under conciliation and arbitration. Such a view assumes that enforcement has replaced bargaining. While bargaining has obviously declined under the weight of neoliberal reform, the evidence presented here shows that enforcement has always been present and was in fact stronger during the early to mid-twentieth century than it is now. The more correct view is that both bargaining *and* enforcement have declined. As shown here, enforcement shared a crucial relationship with the conciliation and arbitration system, buttressing it and ensuring that its high standards were maintained. In turn, this demonstrates that individual enforcement or the 'servicing' of atomised workers need not be at odds with collective bargaining or 'organising' models of industrial relations. Historically, the two have shared a symbiotic relationship, reinforcing each other.

The third claim operates at the level of economic history. It is that low rates of wage underpayment, corresponding with low levels of social inequality, such as that seen in mid-twentieth century Australia, are attributable not only to the power of industry-wide bargaining and high union density, as scholars have suggested to date. Rather, these comparatively high standards of living are also attributable to the role played by stronger and centralised regulatory institutions, such as wage enforcement by the state.

This article reviews the literature relevant to each of these three claims. It then describes the legal apparatus used to recover and prosecute underpayments – legislation, courts, inspectorates and trade unions that comprised NSW industrial enforcement throughout the period. This information foregrounds the longitudinal enforcement data, documented in the following section of the paper. The data is presented through four key charts: (i) General and Inspectorate Underpayment Litigation in NSW: Commenced and Proven; (ii) General Underpayment Litigation Commenced in NSW and the Commonwealth; (iii) Underpayment Litigation Commenced by NSW Trade Unions, the NSW Inspectorate; and the Commonwealth Inspectorate; and (iv) the Ratio of Arrears collected by NSW and Commonwealth Inspectorates. The data is analysed in the final section of the article.

A couple of qualifications are due here. Given the volume and breadth of longitudinal data analysed in this project, historical context is sparse. Sources that examine this context in detail, albeit to the exclusion of labour enforcement, include Ray Markey's histories of the NSW labour movement in the twentieth century as well as other classics of Australian labour history (Markey 1988, 1994; Patmore 1991). Also to be noted is that the archive drawn upon for this study, although rich with vital and untapped material, is patchy. Its patchiness is political. In the early period of the NSW Inspectorate

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record-keeping was fastidious. As NSW Labor Premier James McGowen proclaimed in 1911, the new 'Investigation Office' would 'entertain a purpose beyond that of' its 'specific duties'. He 'hoped ... to provide through the Investigation Officer a centre of public intelligence with regard to industrial law generally, and the effects of awards' such that 'the office became a well-recognised source of information open to all inquirers' (NSW Industrial Gazette (hereafter 'IG') 1912, 699). But from 1939, wartime efficiency measures reduced the detail of Government record-keeping. Detailed record-keeping ceased altogether in 1966, upon the election of the NSW Liberal Party Government of Robert Askin and his Minister for Labour and Industry, future Premier Eric Willis. The author has compiled statistical data from 1967 until the late 1970s through comprehensive archival research, examining Industrial Magistrate's bench books and files – many of which were missing, including those from the bustling NSW industrial jurisdiction of Newcastle. Bare statistical reporting on case numbers recommenced under the Wran Labor Government from the late 1970s. However, for some years during the 1990s and 2000s, statistical detail either simply does not exist or is based on an estimate provided by an annual report. In respect to Commonwealth data, the jurisdictions covered here do not account for a small set of underpayment claims pursued in the Fair Work Commission (as opposed to the Federal Circuit or Magistrate's Court). Accordingly, the amount of underpayment recovery proceedings in NSW from the late 1960s until the early 2000s, as well as those in Commonwealth jurisdictions after Work Choices, are likely to be higher than stated here.

The literature

There are broadly two key approaches to labour enforcement in the literature: *historical* and *organisational*. The historical approach examines Australian enforcement at a federal level over time, predominantly focussing on enforcement activities by federal labour inspectorates since their commencement in the mid-1930s (Bennett 1994; Goodwin and Maconachie 2007, 2011, Goodwin 2003). Other contributions to this approach have examined the role played by trade unions, labourist judges and policy in federal Australian enforcement over time (Flanagan and Clibborn 2023; Hardy and Howe 2009; Lee 2006; Quinlan and Sheldon 2011; Schofield-Georgeson 2022a).

The organisational approach, by contrast, predominantly focuses on the enforcement activities of the Fair Work Ombudsman (FWO) or federal inspectorate, since the re-invigoration of federal enforcement in 2006 (Hardy and Howe 2017; Hardy et al 2013, 566, 581; Landau et al 2014). This approach emphasises how contemporary politics and legislation, as well as departmental policy, inspection and litigation strategy, affect various types of regulatory outcomes in the realm of labour enforcement.

The historical approach is arguably more critical, where its method enables comparison and observation of clear political patterns, derived from longitudinal data and economic history. Yet this is not to dismiss the organisational approach, which is arguably more impactful than the historical approach because its methods necessarily involve researchers working *with* the federal inspectorate. This approach has seen researchers learn from their embeddedness to assist with trialling and advising on regulatory strategy. Both approaches make insights that have been crucial to the development of the research in this article.

This historical literature provides a range of useful schematics with which to analyse enforcement. Bennett, for example, examined award enforcement by the federal wage inspectorate throughout the late 1970s and 1980s (Bennett 1994, 145–164). Her study focused on enforcement processes such as inspection and prosecution policy and its consequences for cooperation with the inspectorate by employers and unions, as well as remedial action taken by the inspectorate in the form of fines, arrears collected, and

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deterrent strategy. Enforcement was contextualised against a background of inspectorate powers, funding and political interference. Bennett (1994, 164) concluded that enforcement agencies are largely political constructions whose efficacy reflects the perspective of a reigning government and the political hue of their enabling legislation.

In the mid-2000s, Goodwin and Maconachie largely replicated Bennett's approach but arrived at a different conclusion. They found that governments of all persuasions fund or defund and dictate inspectorate policy based on other, non-ideological reasons, such as political convenience (Goodwin and Maconachie 2007, 534–541). They nevertheless added an intricate and multi-dimensional analysis of federal wage enforcement processes (Goodwin and Maconachie (2007)). In their first and most comprehensive article on the subject, Goodwin and Maconachie (2007) explored the operations of the federal inspectorate between 1952 and 1995, charting employer evasion of entitlements and its relationship to shifting enforcement practices. This study also provided the most comprehensive description of the federal legislative and institutional enforcement framework. It examined three specific aspects of inspectorate strategy: (i) inspections; (ii) prosecutions; and (iii) monetary recovery. As to inspections, Goodwin and Maconachie concluded that a transition from 'routine', in-person inspections to complaint-based, 'quick and cursory' telephone checks diminished breach detection over time. As for the official 'last resort' prosecution policy, they described how it fluctuated between a weak persuasive compliance model and a strong insistence compliance model (Goodwin and Maconachie, 2007, 535). And with respect to monetary recovery, they show how it was used as a substitute for prosecution from the 1980s onwards. Their methods were largely quantitative, drawing upon departmental statistics to establish numbers of award inspections, monetary complaints, prosecutions, charges laid, convictions, penalties and arrears recovered. These methods and types of data (where available) have been replicated in this study. Where possible, qualitative data regarding inspectorate policy and strategy has also been sought, although this information is nearly non-existent, with little archival material on the subject and only snippets of fading memory from a small handful of long-retired practitioners in the jurisdiction.

Nevertheless, the historical literature has focused exclusively on the enforcement of wages and entitlements under federal awards by a federal wage inspectorate. The author knows of no other research regarding modern State wage enforcement by an inspectorate and trade unions.[1] Extrapolating from their work in the federal jurisdiction, Goodwin and Maconachie claimed that 'from 1906, monitoring and enforcement were neglected' and that 'unions provided the only form of enforcement for the bulk of the first 50 years of the ... operation' of the Conciliation and Arbitration system with 'the role historically ascribed to unions approximat(ing) that of the official regulatory agency' (Goodwin and Maconachie 2011, 63). This claim has been repeated most recently by Flanagan and Clibborn (2023, 344, 354). Relying on this notion, Australian industrial relations and legal scholars have repeated the claim that minimum standards enforcement wage is either unproblematic or of little interest (Bennett 1994, 145; Isaac and McCallum 1989, 308). And general histories of the State industrial jurisdiction have neglected the subject (Markey 1988, 1994; Patmore 1991). To be fair to industrial scholars, the picture of the federal inspectorate that emerges from the historical enforcement literature is that of a relatively small-scale operation. This has led to an alternative claim that collective bargaining, rather than enforcement, was solely responsible for the relatively high standards of living and lower rates of social inequality enjoyed by Australian workers throughout the mid-twentieth century (Flanagan and Clibborn 2023, 354; Isaac 2018; Senate Economics References Committee (hereafter 'SERC') 2022, 22; Schofield-Georgeson 2022a, 70).

While the federal inspectorate was comparatively insignificant during this period, the findings of this study suggest that inspectorates within the states *were* significant features of the conciliation and arbitration system, broadly defined, from the early twentieth

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century. Fresh evidence presented here ascribes much more industrial muscle to State inspectorates than has hitherto been understood, elevating the importance of industrial inspectorates to enforcing the outcomes of bargaining, agreement-making and standard-setting. As shown below, throughout the twentieth century, a majority of underpaid Australian wages were recovered by State inspectorates in State industrial jurisdictions, *not* at the federal level. If the example of NSW is extrapolated to other Australian states over the same period, a picture of labour enforcement on a massive scale begins to emerge – at least by comparison with the efforts of the current federal regulator (FWO).

Organisational enforcement approaches, by contrast, have emphasised the efficacy of the current regulator and its reinvigoration in the post-Work Choices era (Hardy and Howe 2017; Hardy et al 2013; Landau et al 2014). Following the work of regulation and labour enforcement theorists (Ayres and Braithwaite 1992; Baldwin and Black 2008; Gunningham 2007), organisational enforcement researchers have documented a strategic regulatory 'mix' of compliance and deterrence measures, based on the now familiar enforcement 'pyramid' prescribing escalating severity for repeat or egregious regulatory breaches (Hardy and Howe 2017; Hardy et al 2013;). Deterrent measures such as prosecution and litigation are reserved for the worst offenders, while compliance measures such as enforceable undertakings, investigations and industry campaigns comprise the overwhelming majority of the FWO's work (Hardy and Howe 2017; Hardy et al 2013; Landau et al 2014). Enforcement scholars have demonstrated a significant increase in FWO litigation – from six prosecutions between 2005 and 2006, to the adoption of an internal policy to litigate between 50 and 60 matters per annum – which appears to have been sustained since 2006 (Hardy et al 2013, 566, 581). Problematically, however, this amount of litigation has been celebrated as 'the most energetic and possibly best-resourced award enforcement agency that we've ever had' (Vice President of Fair Work Australia, Graeme Watson, quoted in Hardy, Howe and Cooney, 2013, 566–567). While likely the best resourced, the data in this article casts doubt on the 'energetic' nature of the current inspectorate's approach to enforcement – litigation in particular.

In addition, the organisational literature has confirmed a waning trend in trade union underpayment litigation (Hardy and Howe 2009). This is predominantly due to declining union density, restricted rights of entry, and anti-union legislation as well as a more powerful and better resourced government inspectorate (Landau et al 2014, 9). Union officials have also perceived themselves to be operating within an increasingly litigious environment (Landau et al 2014, 40–42). Conversely, however, the data provided here confirms a steep decline in union underpayment litigation from a significant volume of union prosecutions in the State jurisdiction in the mid-twentieth century. It would appear that the current federal underpayment jurisdiction is far *less* litigious, despite an increase in industrial legislation designed to regulate trade unions – likely giving trade unionists the impression of shifting to increased litigiousness (Schofield-Georgeson 2022b).

Regulation theorists such as Braithwaite have sometimes treated the disappearance of comprehensive regulation, represented by the former state industrial jurisdiction, as a mere 'shift' in regulatory approaches, toward a 'smarter', 'leaner' and 'mix' of considerably more lenient sanctions (Braithwaite 2005, 1–2; Gunningham et al 1998, 42–47; Hawkins 2002). As Braithwaite observed, direct regulation gave way to a form of regulation in which markets and private ordering, self-regulation and corporate governance took precedence over direct state intervention (2005, 1–2). However, as three recent major public inquiries have found, the relative disappearance of direct regulation such as investigation, litigation and prosecution has resulted in regulatory failure and its reinstatement is sorely needed (Banking Royal Commission 2019, 207–210; Price-Gouging Inquiry 2024, 10; SERC 2022).[2] The demise of direct regulation has broadly coincided with, or even precipitated, widespread corporate fraud, price-gouging, underpayment of workers and 'wage theft' (SERC 2022). Indeed, as regulatory theorists concede, without direct regulation such as

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prosecution and litigation, 'less coercive policies at the lower end of the (enforcement) pyramid lose their credibility' (Gunningham 2007, 389). Clearly, regulators will never be resourced to prosecute every breach. However, the data presented here regarding the activities of the former state inspectorate provides a useful comparator, indicating a need to increase prosecution and litigation within the 'responsive regulatory mix' (Baldwin and Black, 2008; Weil 2008) deployed by the current wage inspectorate.

NSW wage enforcement: institutions and law over time

Australian labour inspectorates date back to the 1830s when authorities established under the *Factory Act 1833* (UK) were replicated in NSW, dealing mostly with health and safety, working hours and child labour (Quinlan and Sheldon 2011, 12–14). A combination of 'light touch' regulation and a paucity of inspectors and prosecutions rendered inspection a legal nicety (Quinlan and Sheldon 2011). The commencement of systematic and direct labour inspection coincided with large-scale state intervention in the labour market through the conciliation and arbitration systems enacted by the Australian colonies in the 1890s. In 1896, the NSW Department of Labour and Industry oversaw the administration of a variety of new industrial legislation (*Agreements Validating Act 1902* (NSW); *Trades Hall and Literary Institute Act 1893* (NSW)(56 Vic., No.10); *Apprentices Act 1894* (NSW)(57 Vic., No. 22); *Factories and Shops Act 1896* (NSW)(60 Vic., No. 37); *Conciliation and Arbitration Act 1899* (NSW)(62 Vic., No. 3); *Early Closing Act 1899* (NSW)(62., No. 38)), but none yet expressly provided for the prosecution or recovery of underpayment at work.

An increase in strike activity in NSW in 1907, together with a large-scale industrial disturbance at BHP in Broken Hill (Markey 1994, 103–104), saw the conservative Wade State Government hastily enact coercive industrial legislation in the form of the *Industrial Disputes Act 1908 (NSW).* As Markey (1994, 104) put it, Wade was 'a lawyer who had previously represented coalowners' and 'charged the miners with conspiracy'. The Act ensured that leaders of striking unions were quickly gaoled. However, coercive labour legislation enacted against labour may sometimes contain the seeds of protective labour legislation to be used against capital (Schofield-Georgeson 2022a). Accordingly, the *Industrial Disputes Act* contained limited provisions enabling recovery of money payable under awards, in addition to quasi-criminal penalties for breaching orders and awards made by the Court under the Act (NSW Hansard 1908, 85–89). It also provided for a new industrial magistrate's court to make such orders, along with an inspectorate to enforce them. Labor MPs proposed more expansive powers for the inspectorate (NSW Hansard 1908, 85–89)[3] but these would ultimately wait until 1912, when they were eventually enacted by the Labor McGowen Government under its *Industrial Arbitration Act 1912 (NSW).*

No wage inspectors were appointed under the *Industrial Disputes Act*, until Labor won Government in 1910. Shortly after, in May 1911, the Department of Labour and Industry created an 'Investigation Office', staffed by a single inspector. 'By the end of the year 1911', the Office reported, 'the demand for inspectorial services had increased to such proportions that it was deemed advisable to appoint a larger staff' (IG 1912, 690–691). Five further specialist inspectors were appointed before the staff of the Chief Inspector of Factories (tasked with policing the *Factories and Shops Act*) and Early Closing Acts Inspectorate were merged into the Investigation Office. A total of 27 inspectors worked across NSW with one permanently stationed in Newcastle. The size of the NSW Investigation Office in 1912 is roughly comparable to that of the federal inspectorate in the mid-1960s (Department of Labour and National Service 1964).

The Investigation Office was specifically tasked with investigating, recovering and prosecuting overwhelmingly monetary breaches of awards and obligations imposed by the Act. Investigation was initiated by complaint and routine inspection. The inspectorate

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worked closely with trade unions, in many cases prosecuting matters on their behalf. As the Investigation Office put it, 'cases of facts submitted by secretaries of unions as *justifying prosecution without official inspection* were also to be reviewed, and accepted for departmental action at the discretion of the Investigation Officer' (emphasis added) (IG 1912, 690). And by 1918, around half of all underpayment matters litigated by the inspectorate were received from trade union secretaries in this manner (IG 1918, 113). Another core function was to require 'first time' and small-scale offending employers to repay money and enter into enforceable undertakings instead of prosecution (IG 1918, 113–118). The inspectorate was clearly applying the logic of proportionality to enforcement, nearly a century before regulation theory. In so doing, the Inspectorate 'mixed' strategies of compliance and 'suasion' with a strong dose of deterrence – indicated by the sheer volume of matters litigated (discussed below).

In 1912, the *Industrial Arbitration Act* adopted and expanded two key provisions from the *Industrial Disputes Act 1908,* regarding 'breach of an award' (s50) and 'recovery of wages' (s49). Over the ensuing century, both provisions became the statutory workhorses of the underpayment jurisdiction. Payments were pursued against errant or stubborn employers under s49, while dishonest and unreasonable employers were prosecuted under s50. Section 50 breaches captured conduct that was broader than underpayment, but monetary breaches were the subject of around 95% of such prosecutions.

In the late 1930s, a post-depression revival of the NSW economy was met by an upsurge in industrial action (Markey 1993, 203). The conservative United Australia Party State Government of Alexander Mair responded by overhauling the NSW industrial framework. The *Industrial Arbitration Act 1940*, contained tough new measures, punishing striking workers with imprisonment and increasing fines on trade unions and workers tenfold. Wage 'recovery' and 'breach of award' were shifted to sections 92 and 93 of the new Act. The Act was replicated by the conservative Dunstan Government in Victoria (Victorian Government, 1941, 207). Meanwhile, the work of the inspectorate continued unimpeded, despite an apparent shift in inspectorate policy, focussed more on compliance and arrears recovery than prosecution. Numbers of prosecutions nevertheless remained high by contemporary Australian standards.

In 1991, the neoliberal Greiner Government dramatically reformed recovery and breach legislation in its *Industrial Relations Act 1991 (NSW)*. The new recovery and breach provisions, under ss151–156 (recovery) and s166 (breach) of the Act were described by the President of the NSW Industrial Relations described as 'legalistic' and technical (*NSWIRC* 1992, 9–10). Prosecutions and recoveries drastically declined throughout the 1990s, likely due to structural labour market reform and new public management approaches to departmental organisation, rather than the immediate result of the Greiner legislation. Indeed, the Greiner Government's recovery and breach provisions remained mostly unchanged by the Labor Carr Government in its *Industrial Relations Act 1996 (NSW)*. They were nonetheless shifted to ss365–369 (recovery) and s357 (breach) of the Act, where they remain. Following the Commonwealth takeover of industrial relations in 2006, State recovery and breach provisions fell into disuse and the role of the state inspectorate devolved to the Commonwealth (the FWO).

Courts

From 1912, most NSW underpayment litigation was heard and decided by the Chief Industrial Magistrate's Court, established by the Labour McGowen Government's *Industrial Arbitration Act 1912.* The Court's jurisdiction over unpaid wages and entitlements was concurrent with general jurisdiction over wages maintained by stipendiary magistrates under the *Master and Servant Acts,* common law and the federal *Conciliation and Arbitration*

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Act 1904. Industrial Magistrate Court jurisdiction remained mostly unchanged until the 1990s.

During the 1990s, the jurisdiction declined to a trickle of matters as underpayment claims were brought mostly by unrepresented litigants in the Small Claims jurisdiction of the NSW Local Court (NSW Local Court 1995, 2000). The work of the industrial jurisdiction nevertheless resumed in 2000, with the Annual Report recording a 'return to the upward trend in the work of the jurisdiction' (NSW Local Court 2000, 23). In 2006, the Commonwealth takeover removed most matters from the jurisdiction. With the death of the Chief Industrial Magistrate in 2011, industrial jurisdiction was conferred on all NSW magistrates who continue to hear a negligible number of underpayment matters under the State Act.

NSW labour inspectorate data

This project collated four key datasets from available material associated with the Investigation Office of the NSW Department of Labour and Industry and NSW Chief Industrial Magistrate. These are: (i) a tally of underpayment claims (commenced and proven) heard by the NSW Industrial Magistrate's Court between 1912 and 1960; (ii) a comparison of the volume of underpayment litigation commenced in NSW and the Commonwealth between 1912 and 2022; (iii) a comparison of the volume of underpayment litigation conducted by the NSW Investigation Office, Commonwealth Inspectorate and NSW trade unions between 1912 and 2022; and (iv) a comparison of arrears collected by the NSW Investigation Office and the Commonwealth Inspectorate between 1912 and 2022.

(i) General and Inspectorate Underpayment Claims and Convictions

This chart in Figure 1 records underpayment litigation in NSW from 1912 to 1960. It is collated from the most accurate and complete set of monthly statistical data reported by the Investigations Office and Industrial Magistrate's Court (IG 1912–1960). The chart plots four variables: (i) all underpayment litigation commenced in the jurisdiction, including breach of award matters; (ii) underpayment litigation commenced by the inspectorate, including breach matters; (iii) all recovery litigation found proven or resulting in conviction; (iv) underpayment litigation, commenced by the inspectorate, found proven or resulting in conviction. It is important to note that underpayment litigation commenced by the inspectorate is a sub-category of 'all underpayment litigation'. It is not additional.

One of the most striking and original features of this graph (and others in this study) is its longitudinal scope. It reveals that all underpayment litigation conducted by the inspectorate, unions and individual workers, generally followed a similar trajectory, occurring in peaks and troughs over time. Such similarities between the volume of inspectorate and general underpayment litigation demonstrate empirically that for much of the twentieth century, wage enforcement was guided by underlying social and economic conditions. Rather than being manipulated for any particular ideological purpose, inspectorate prosecution policy in this period appears to have been moulded more by labour market conditions. This trend confirms Goodwin and Maconachie's observation of the federal inspectorate until the late 1990s: that the work of the inspectorate, while open to manipulation by governments for immediate political gain, has mostly been performed independently of government (Goodwin and Maconachie 2007, 534–541).

Another salient feature of this chart is the high volume of matters litigated by the inspectorate. Indeed, the almost feverish volume of litigation and arrears collection (discussed below) until the 1990s, is one of the standout features of this research. No less important is the close contour between inspectorate litigation and proven or successful

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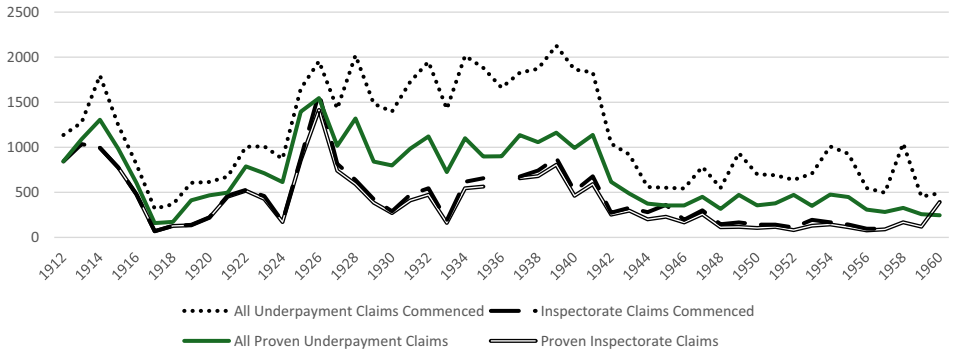

Figure 1. General and Inspectorate Underpayment litigation in NSW: Commenced and Proven.

claims. This contour suggests that inspectorate litigation was more successful than underpayment litigation commenced by trade unions and individual litigants. Such success is likely the result of a 'last resort' prosecution policy (referred to above), as well as careful selection of litigation matters. The fact that union and individual claims met with more mixed success also shows that the jurisdiction was not a particularly 'easy' or biased one in favour of employees. Accordingly, the NSW Investigation Office appears to have combined high rates of litigation with high rates of success.

(ii) Underpayment Litigation Over Time in NSW and the Commonwealth

Figure 2 compares *all* underpayment litigation commenced in both the NSW and Commonwealth industrial jurisdictions. To be clear, it does not merely count underpayment litigation commenced by the inspectorate, but also that of unions and private litigants. It depicts a stark contrast in the volume of matters heard in NSW compared to the federal jurisdiction.[4] This, in turn, demonstrates that the focus on federal underpayment litigation in the historical enforcement literature has 'missed the forest for the trees'. Clearly, the overwhelming majority of Australian underpayment litigation has been conducted by the States, not the Commonwealth. This discovery suggests that any longitudinal view of Australian labour enforcement must consider the high volume of underpayment matters prosecuted in state jurisdictions, alongside federal enforcement.

Problematically, outside of New South Wales, other Australian States do not appear to have kept official statistics recording industrial prosecutions in any level of detail.[5] The *Victorian Year Book* from 1925 to 1926 recalls that, 'the interests of the factory worker as regards wages ... now receive a large amount of attention. Government inspectors prosecute employers wherever underpayment is found' (Victorian Government 1926, 355). Calculating the volume of all State underpayment litigation throughout the twentieth century would require collating data from court records in State jurisdictions outside NSW – an extremely time-consuming exercise. And, as in NSW, in other States there were few references to the activities of the State industrial jurisdiction toward the end of the twentieth century.

There is a gap in the Commonwealth data on the graph from the late 1990s to mid-2000s. This gap denotes the abolition of the federal Arbitration Inspectorate by the Howard Government in 1997. During this time, the work of the federal inspectorate was outsourced to four State inspectorates. Their work was overseen by a new federal Office of Workplace Services (OWS).[6] It remains unclear whether federal underpayment matters were litigated or where they were heard during this time. Data from these sources remains unknown until the annual reporting year 2005–2006 when the OWS litigated six matters.

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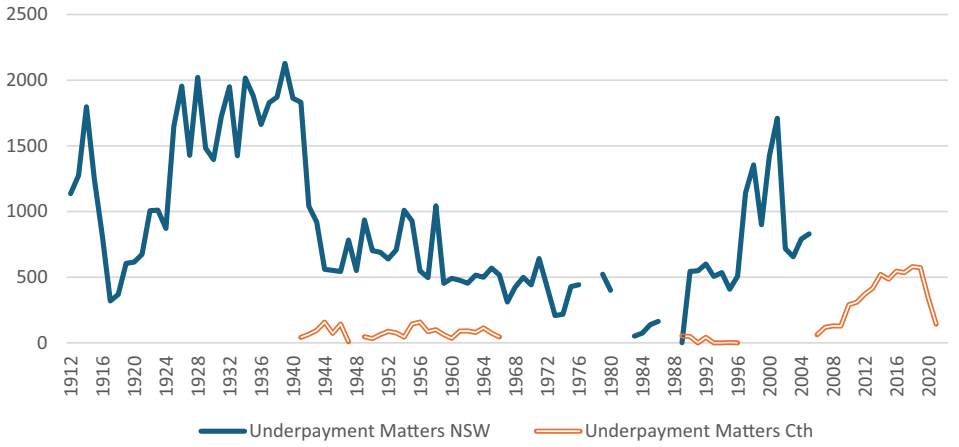

Figure 2. General Underpayment litigation: NSW and the Commonwealth.

(iii) NSW, Commonwealth and Union Underpayment Prosecutions

Goodwin and Maconachie and others have documented the dominant role played by trade unions in prosecuting underpayment claims in the federal jurisdiction before the establishment of a federal inspectorate in the early to mid-twentieth century (2011, 63; Bennett 1994, 136–144; Bray and MacNeil 2011; Hardy and Howe 2009). Figure 3, below, demonstrates that trade unions played a similar role in NSW throughout the same period, prosecuting more matters than the NSW inspectorate. Importantly, the volume of trade union underpayment litigation documented below is exclusive of a similarly high volume of union claims brought in the federal jurisdiction over the same period. But unlike union activity in the federal jurisdiction, Figure 3 demonstrates that trade union litigation was supported by a high volume of litigation brought by the State inspectorate. This reflects the close relationship between unions and the NSW Investigation Office, described in the State inspectorate's founding articles (IG 1912, 690). Enforcement litigation by the federal inspectorate, by contrast, was always comparatively minimal in number.

Data delineating NSW inspectorate from trade union litigation is unavailable for a significant span from the late 1950s to the late 1980s. Nevertheless, the volume of all NSW underpayment litigation (outlined in Figure 2 above) demonstrates that the work of both

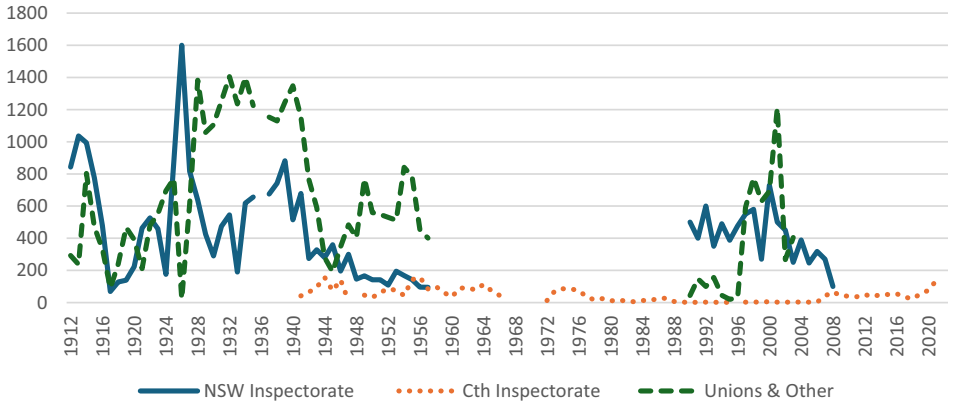

Figure 3. Underpayment litigation Commenced by NSW Trade Unions; the NSW Inspectorate; and the Commonwealth Inspectorate.

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unions and the NSW Investigations Office remained high, compared to the efforts of the Commonwealth throughout this period. These figures suggest that the work of the NSW inspectorate continued at a similar pace until the impact of structural labour market reform in the mid-1980s.

Around 95% of private or 'non-inspectorate' underpayment claims were brought by a trade union in the relevant industry. This is documented by detailed records tabling complaints to the inspectorate and Industrial Magistrate's Court by industry, published throughout the early twentieth century (e.g., IG 1912, 713).[7] Detailed record-keeping was abandoned a few years into the work of the Investigation Office, although complaints tabled by industry were maintained until the 1960s. Contemporary inspectorates could learn much from the level of detail and categories of data maintained by the NSW Inspectorate between 1912 and the early 1950s. From the 1960s to the 1980s, data relating to the identity of litigants has been sourced from court files (NSW State Records).[8]

The same data also names defendants. In this respect, it shows that employers within particular industries were more inclined to underpayment. These included the clothing and garment industry, butchering, farriers (blacksmithing) and retail sector (shop assistants).[9] Underpayment complaints by the clothing, meat and retail unions were the most sustained throughout the twentieth century. In this respect, little appears to have changed, particularly in the retail sector.

High levels of union prosecutions are attributable to a range of factors. First and foremost was high union density throughout the period (Markey 1994, 565–568), enabling members easy access to union officials who were well-resourced to address complaints expeditiously and responsively. Second and relatedly, was general state support for trade unions, manifest in a range of laws and institutions. These included rights of entry in awards and statute and standing to recover wages and penalties (e.g., *Industrial Arbitration Act 1940* (NSW), s 129 (union rights of entry), s94(union rights to recover wages/penalty for breach).[10] The power of unions to recover penalties or request a 'moiety' appears to have been used to great effect by unions in NSW throughout the period. A bundle of well-selected underpayment matters could prove rewarding for the prosecuting union, much like the operation of a debt collection agency. Despite the existence of moiety provisions in contemporary legislation (*Fair Work Act 2009* (Cth), s546(3)), union rights of entry remain tightly restricted under present industrial laws, and union enforcement has declined. Other factors associated with this decline have been said to involve a general shift in trade union governance from 'servicing' *and* 'organising', towards merely organising union members – a transition that took place under resourcing constraints as density declined from the 1990s (Landau and Howe 2016; Schofield-Georgeson 2022b, 55, 64–68).

There are three spikes in State Inspectorate activity throughout the early twentieth century. These align with the implementation and consolidation of the Investigation office under the Labour McGowen Government in 1912, as well as each electoral term of the Lang Labour Government in NSW in 1926 and late 1930s. While litigation ebbed and flowed during these terms – occurring at high levels under conservative governments (e.g., the term of the Greiner Government in the late 1980s and early 1990s) – the spikes augment Goodwin and Maconachie's claim that enforcement is contingent upon political convenience. Bennett's claim about the ideological underpinnings of enforcement is made markedly clear by the steep decline in litigation from the outset of the neoliberal Howard-era.

Figure 3 also contains the first archival statistical data regarding Commonwealth prosecutions before the 1960s.[11] As depicted, Commonwealth prosecutions remained low throughout the entire period, relative to the State system. The increase in prosecutions under the Whitlam Government, briefly continued under the Liberal Party Government of Malcolm Fraser, has been the cause of some celebration in the work of Goodwin and Maconachie (2007, 527). However, the new data presented here shows that there was a

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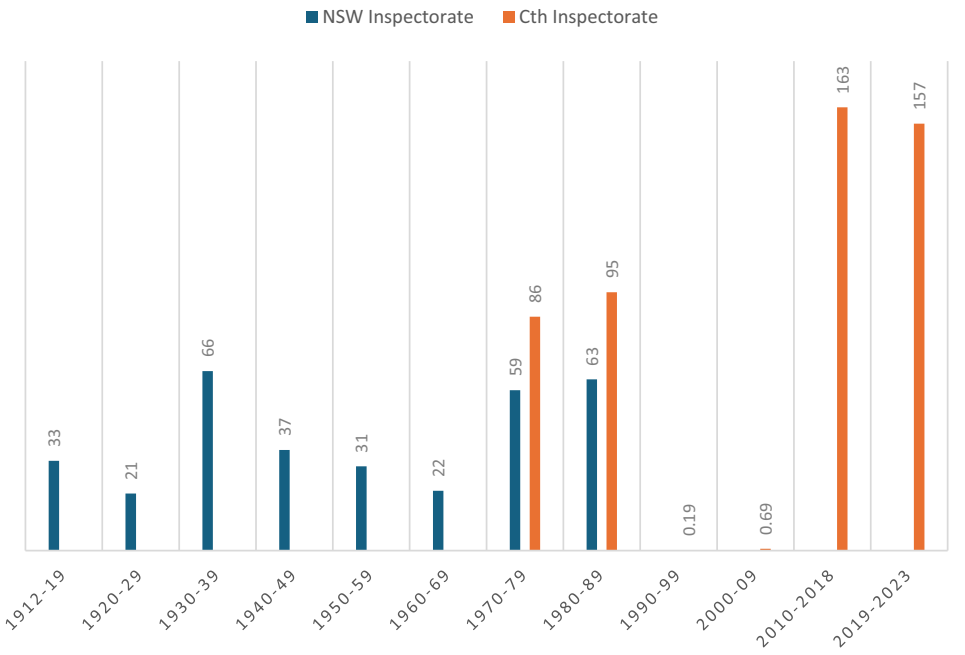

Figure 4. Ratio of Arrears Collected by Inspectorates.

slightly larger number of prosecutions during the term of the federal Chifley Labour Government in the mid-to-late 1940s.

(iv) Arrears collected by NSW and Commonwealth Inspectorates over time

Figure 4 compares the amount of arrears collected by the NSW and Commonwealth inspectorates over time. The numbers on the chart are not dollar amounts. To merely present dollar amounts would be meaningless, due to dramatic fluctuations in inflation, annual wages and growth in the size of the target workforce over time. Accordingly, the numbers represented by each column in this chart express arrears as a rationalised ratio. This number accounts for three variables within each jurisdiction: (i) number of workers; (ii) average annual wages;[12] and (iii) inflation (with all dollar/imperial amounts adjusted for inflation as at 2021)[13]. On one side of the ratio is the amount of arrears collected by the inspectorate in each period, divided by the annual average wage in each jurisdiction throughout the period. Both amounts have been adjusted for inflation. On the other is the amount of arrears collected by the inspectorate in each period (adjusted for inflation), divided by the average size of the workforce in each jurisdiction throughout the period. The final ratio has been rationalised to a single number. This is the number that appears above each column in the chart.[14] The final adjusted ratio of arrears collected by the NSW and Cth inspectorates provides a fair and accurate comparison of wage recovery efforts over time.

From the early 1980s, the Federal inspectorate began to prioritise the collection of arrears over litigation and prosecution (Goodwin and Maconachie 2007, 528–532).[15] Arrears collection is now the mainstay of the current wage inspectorate – the Fair Work Ombudsman (FWO) (FWO 2009–2022; Goodwin and Maconachie 2011, 55, 77; Hardy and Howe 2009, 315–318).[16] Since 2021, the FWO has boasted of a dizzyingly high volume of arrears recouped by its inspectors, recovering in excess of a billion dollars over two years

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(*Workplace Express* (hereafter '*WE*') 2023). This is illustrated by the last two columns on the chart above. Most of these recovered underpayments have been self reported by a handful of large employers such as Woolworths and universities (*WE* 2022; FWO 2022). This compliance-centred approach is set to continue returning hundreds of millions to Australian workers on an annual basis (*WE* 2022a; FWO 2022). Significant arrears have also been recouped through a comparatively small volume of litigation commenced against a number of large employers (*WE* 2022b). In 2022, the FWO initiated 137 cases and finalised 393 (FWO 2022). It is clear that 'strategic enforcement' is underway.

Yet these results are less significant when compared to the amount of arrears collected by a single state inspectorate in the mid-twentieth century. The arrears data collated here shows that the FWO has failed to keep pace with the amount of arrears collected by the NSW inspectorate in the mid-twentieth century, across its federal remit (covering all eight state and territory industrial jurisdictions). Had it done so, we might expect that the amount of arrears recovered would be around 50% higher than recent efforts. Indeed, given the current crisis of underpayment or 'wage theft' (SERC 2022), it is surprising that the work of the inspectorate should be so comparatively modest.

The high volume of arrears collected by the NSW Inspectorate, together with a comparatively high volume of breach of award prosecutions, show that by today's standards, this pioneering regulatory agency was a highly sophisticated enforcement body. The volume of arrears collected by the NSW regulator suggests that arrears recovery sat at the bottom of a sliding scale of increasing punishment (Braithwaite 2000, 14). In today's enforcement parlance, we might say that the Investigation Office administered a complex and 'really responsive' regulatory 'mix' of punishments and interventions against employers (Baldwin and Black 2008). Yet the Investigations Office pre-dates regulatory discourse. Its modernist approach appears to have simply applied the enlightenment principle of 'proportionality' to the process of enforcement. The demise of the Investigations Office is, of course, owed to targeted policies of neoliberal *de*regulation that have charged its approach with labels such as, 'command and control' – an inflexible, Marxist–Leninist system providing no incentive for regulatees to change or comply (Sunstein 2002, 8, 19, 133, 139, 167). As explained throughout this paper, however, the NSW inspectorate's approach varied little from contemporary enforcement practice, aside from enabling it to do more work.

A crucial point raised by the data in Figure 4, as well as across each of the datasets compiled in this article, is the vast amount of direct and active regulatory enforcement undertaken by the State inspectorate throughout the mid- twentieth century. Amounts of arrears recovered and litigation commenced – the volume of work performed by labour inspectorates, such as that regularly reported by the FWO – is only meaningful when compared to a metric, such as the scale of wage theft, or the historical efforts by inspectorates. This study provides the latter. From this perspective, the 'end of inspection' in the mid-1990s, has undergone a partial recovery, with the establishment of the FWO in the mid-2000s. As a highly resourced operation, the FWO has done its best work in recovering arrears. However, when compared to the work of a single state inspectorate in the mid-twentieth century, the activities of the current federal inspectorate, now responsible for nationwide labour enforcement, are somewhat underwhelming.

Finally, economic history is a useful tool to contextualise the comparative lack of contemporary enforcement and its social outcomes over time. Figure 5 is the unmistakable 'U-shaped' graph of social inequality throughout the twentieth and early 21-st centuries, known as the Gini co-efficient (famously resurrected in the work of Thomas Picketty 2014; Ortiz-Ospina, 2018). To be clear, it shows that rates of social inequality were at their lowest ebb in the mid-twentieth century. As some labour lawyers have recently argued, this data may also be read as mapping the outcomes of economic and labour policy over time (McGaughey 2016, 8; Schofield-Georgeson 2022a). In this light, the rigorous approach to

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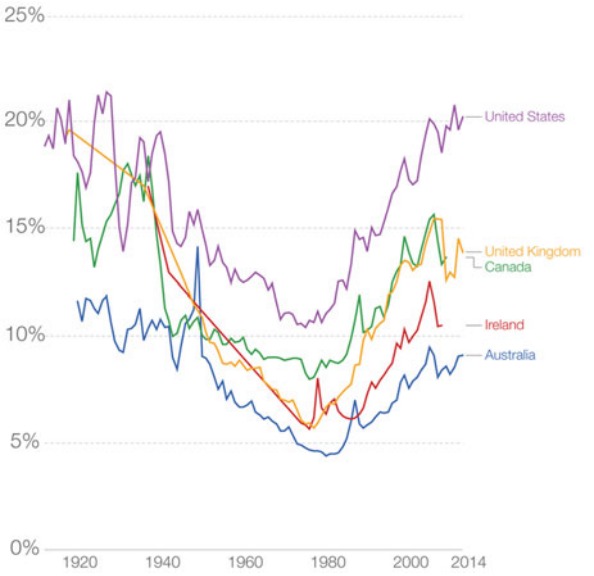

Figure 5. Share of income going to the top 1% in English-speaking countries since 1900.

labour enforcement adopted by strong regulatory institutions like the NSW labour inspectorate during the mid-century, coincided with and buttressed low social inequality throughout this period. State labour enforcement was supported by peak union density, while itself reinforcing labour movement power in the mid-twentieth century (Schofield-Georgeson 2022a). This regulatory symbiosis between the state and trade unions strengthened enforcement because it encouraged unions to participate as 'equal partners' in enforcement (Hardy and Howe 2009), litigating underpayment claims. In the late twentieth and early twenty-first centuries, this approach was targeted by neoliberal policies of deregulation. It has become difficult to replicate following the subsequent decline of the labour movement.

As significantly, the foundations of this approach were laid in the early twentieth century by a State Labour Government, reflecting a prevailing consensus regarding the necessity of state intervention in industrial relations (Macintyre 1989; Quinlan 1989). Consensus had arrived in the States two decades beforehand, following the industrial unrest of the 1890s, culminating in conciliation and arbitration. It delivered what the data clearly shows was one of the most successful regulatory interventions in the history of protective Australian labour law.

Conclusion

The example of the NSW Industrial Inspectorate over time demonstrates a trinity of revealing lessons for industrial enforcement in the present. The first applies at the institutional level. It shows the possibility of establishing a modestly funded inspectorate that combines a high volume of prosecution with a high volume of investigation and arrears collection, sustained over time. In other words, it demonstrates the successful mix of enforcement strategies involving both compliance and deterrence – a mix that has so frequently eluded regulatory agencies in the neoliberal period. The second lesson operates at a structural industrial level. It shows the possibility for the State to fund and facilitate an effective inspectorate and industrial magistracy *at the same time* as bankrolling and

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administering a full-bodied system of industrywide conciliation and arbitration over an extended period. The third lesson operates at the level of economic and industrial history. As a contribution to the longitudinal study of labour regulation and wealth inequality, it adds more evidence to a rising tide of studies showing that stronger and more direct regulatory enforcement shares a broad correlation with a more equal society. It is important to add that this evidence is but a thumbnail sketch of the enforcement work undertaken by one Australian State labour inspectorate over the course of the twentieth century. Future industrial scholars and historians might consider collating a more accurate data set by accounting for the work of other State inspectorates over the same period

It is nearly two decades since the replacement of state inspectorates by a single federal inspectorate. As demonstrated here, by way of comparison, the federal regulator has not kept pace with the volume of litigation and arrears collected by the NSW labour inspectorate during the mid-twentieth century. If the federal takeover of industrial relations, accomplished since WorkChoices, is to remain fair and equitable, particularly in a time of acute underpayment of wages or 'wage theft', then it is clear that the federal inspectorate must at least achieve parity with mid-twentieth century levels of labour regulation.

Notes

1 Colonial historical sources abound, see for instance those dealing with Master and Servant prosecutions, seafarers, indentured labour and Factory Act inspection in the 19th century: eg Michael Quinlan, 'Australia 1788–1900: A workingman's paradise?' 219–250, in Doug Hay and Paul Craven, *Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955* (University of North Carolina Press, 2004). Eugene Schofield-Georgeson, *By What Authority?: Criminal law in Colonial NSW, 1788–1861* (Australian Scholarly Publishing, 2018). Adrienne Merritt, 'The Historical Role of Law in the Regulation of Employment – Abstentionist or Interventionist?' (1982) 1(1) *Australian Journal of Law & Society* 56. It should be noted that John Howe and Ingrid Landau have studied, "Light Touch' Labour Regulation by State Governments in Australia' (2007) 31(2) *MULR* 31, in the Work Choices-era.

2 Recommendation 1.1 of the recent Price-Gouging Inquiry was that 'the Australian Government should use its power to require the ACCC to conduct more price and market investigations'. Meanwhile, almost all recommendations of the SERC's Wage Theft Inquiry were geared towards increasing investigation and litigation.

3 See for instance, George Beeby MP.

4 Data for this chart was derived from the following sources: NSW Industrial Gazette, 1912–1966; NSW Industrial Magistrates Court Bench Books, 1967–1983; Industrial Relations Commission of New South Wales Annual Report, 1971–1988; NSW Local Court Annual Report, 1990–2012; the collected works of Goodwin and Maconochie. There were significant gaps in the available data for both NSW and the Commonwealth over the period charted. It is important to qualify that while general data for the number of Commonwealth matters between 2005–2018 and NSW 1990–2003 were available, no annual figures existed. Accordingly, the annual figures inserted into the chart here are estimates informed by longer-term statistical data, as well as court records from the NSW Industrial Magistrate's Court. Data collection from within these voluminous records was an incredibly time-consuming exercise.

5 State Archives outside of NSW do appear to retain boxes of Industrial Magistrate's records. However, it does not appear that these records have been collated as an official statistical record, as in the NSW *Industrial Gazette* for the period 1912–1966.

6 These were, Queensland, Tasmania, South Australia and Western Australia: Margaret Lee, 'Whatever happened to the Arbitration Inspectorate? The reconstruction of industrial enforcement in Australia', in Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ), *Reworking Work: Proceedings of the 19th Conference of the AIRAANZ*, 2005, 339, 341–343.

7 See, for example, 'Records of Court', *NSW Industrial Gazette*, December 1912, 713.

8 Industrial Magistrates Court Papers, NRS-5506, 1965-74 (3/13514-748).

9 Industrial Magistrate's Court records from the period 1912 to 1966 are contained within the *NSW Industrial Gazette*.

10 Equivalent federal provisions were found under the *Conciliation and Arbitration Act 1904,* s44; Landau et al, 9.

11 The Commonwealth inspectorate's lost annual reports from this period are replicated in the NSW Industrial Gazette between the 1930s and 1960s.

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12 Data on workforce size and average annual wages within each jurisdiction was sourced from State and Federal *Year Books* and, from the 1970s, the Australian Bureau of Statistics.

13 Using the Reserve Bank of Australia (RBA) Inflation Calculators: https://www.rba.gov.au/calculator/ (from 1966 onwards); https://www.rba.gov.au/calculator/annualPreDecimal.html (from 1912 to 1965).

14 e.g. in 1914, the NSW inspectorate collected £5,293 in arrears. When inflation (I) is applied using the RBA calculator, this amount, in 2021 equals $659,0854. To be expressed in relative terms to average annual wages, 659,054 is divided by average annual wages in 1914, £132 12s or $16,500 (in 2021). The result is 39.91, which may be rounded off to 40. The amount of arrears collected may then be said to equal 40 times the average annual wage in 1914 (expressed by the ratio 40: 1). To account for workforce population, arrears of 659,054 are divided by the annual population of the NSW workforce in 1914 (676,000). The result is 0.97, rounded off to a ratio of 1:1 (the equivalent of $1 per worker). The amount of arrears relative to both the average annual wage and the workforce involves further dividing the ratio of arrears to average annual wage (40) by the ratio of arrears per worker (1). The result is 40 times the average annual wage for every worker in the jurisdiction – 40: 1.

In 2009, by contrast, the Federal inspectorate collected $26 million in arrears. When inflation (I) is applied using the RBA calculator, this amount, in 2021 equals $33.2 million. To be expressed in relative terms to average annual wages, 33,200,000 is divided by average annual wages in 2009, $62,551 ($48,907 x I). The result is 530.76, which may be rounded off to 531. The amount of arrears collected may then be said to equal 531 times the average annual wage in 2009 (expressed by the ratio 531: 1). To account for workforce population, arrears of 33,200,000 are divided by the annual population of the Commonwealth workforce in 2009 (10,800,000). The result is 3.07, rounded off to a ratio of 3:1 (the equivalent of $3 per worker). The amount of arrears relative to both the average annual wage and the workforce involves further dividing the ratio of arrears to average annual wage (531) by the ratio of arrears per worker (3). The result is 177 times the average annual wage for every worker in the jurisdiction – 177: 1.

This can be expressed using the following formula:

$$R(I, W, P) = A(I) \div A(I)\ W(I)P$$

Where 'R' equals the ratio of arrears to average annual wage; 'A' equals arrears; 'I' equals inflation; 'W' equals the average annual wage in the jurisdiction; 'P' equals the workforce population (Australian Bureau of Statistics, 2005–2022).

15 Goodwin and Maconachie (2007: 528–532).

16 Arrears recovery is consistently a key focus of FWO annual reporting.

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Dr Eugene Schofield-Georgeson is a Senior Lecturer at the University of Technology Sydney, Faculty of Law.

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