The Economic and Labour Relations Review Vol. 22 No. 2, pp. 55–80

Minimum Labour Standards Enforcement in Australia: Caught in the Crossfire?

Miles Goodwin *
Glenda Maconachie *

Abstract

The complex transition from convict to free labour influenced state intervention in the employment relationship, and initiated the first minimum labour standards in Australia in 1828. Since then, two principal sets of tensions have affected the enforcement of such standards: tensions between government and employers, and tensions between the major political parties over industrial and economic issues. This article argues that these tensions have resulted in a sustained legacy affecting minimum labour standards' enforcement in Australia. The article outlines broad historical developments and contexts of minimum labour standards' enforcement in Australia since 1828, with more contemporary exploration focusing specifically on enforcement practices and policies in the Australian federal industrial relations jurisdiction. Current enforcement practices are an outcome of this volatile history, and past influences remain strong.

JEL codes: J810; J880; L590

Keywords

Enforcement regimes; enforcement strategies; labour standards; public policy; trade unions.

Introduction

In the 2009–10 financial year, the Australian minimum labour standards' (MLS) enforcement agency, the Fair Work Ombudsman (FWO) investigated 21,070 complaints resulting in $21,291,393 in unpaid/underpaid wages and entitlements recovered for employees (FWO 2010: 12). Additionally, it undertook 3 national and 34 regional campaigns in industries or areas with histories of non-compliance, recovering $4,267,828 for employees (FWO 2010: 22, 27). Combined with targeted audits, the total amount recovered was $26,195,656 (FWO 2010: 23). In the process, 53 civil penalty litigations were initiated against non-compliant employers, and $2,019,755 in court-awarded penalties obtained (FWO 2010: 12).

* Queensland University of Technology Business School

https://doi.org/10.1177/103530461102200204 Published online by Cambridge University Press

These figures suggest the existence of an active enforcement agency, using the full force of its powers to ensure compliance with the regulations it enforces. In comparison to many past enforcement efforts, these are positive and encouraging signs, but the agency is still relatively new and potentially captive to past cultures and influences.

This article explores the historical issues weighing on the current MLS enforcement agency, by considering six relatively distinct, albeit overlapping and inter-related, periods of regulatory development. The first two regulatory phases relate predominantly to the colonial era, prior to national federation in 1901, while the other four phases highlight developments during the twentieth and twenty-first centuries in the Australian federal industrial relations jurisdiction.[1] The article argues that enforcement and the agencies involved have been caught in the crossfire between two significant influences: tensions between government and employers, principally in the colonial era; and tensions between major political parties since the mid-twentieth century. Consequently, enforcement has ricocheted from extreme to extreme as external interests and forces drive the agenda. Variously experimental, innovative, strategic, reactive and inert, enforcement is now resurgent — reinvigorated, resourced and empowered, but can past influences, cultures and practices be overcome?

The colonial *Masters' and Servants' Acts* and the *Factories and Shops Act*s established the legitimacy of the state to intervene in areas previously governed by laissez-faire doctrines. Experimental and innovative, the adaptations of the early inspectorates to critical challenges cemented enforcement practices which still resonate in the twenty-first century. Federation led to collective representation within a framework of conciliation and arbitration tribunals, creating new industrial instruments conferring legally enforceable minimum wages and working conditions on employees. Importantly, unions, as parties to awards and agreements, were given enforcement powers. Eventually a dual enforcement system emerged, with both union and official agencies active. Dominant for around four decades of the twentieth century, this industrial relations (IR) framework was superseded with the emergence of enterprise bargaining processes in the mid-1980s.

The challenges of globalisation in the 1980s (Kirby and Creighton 2004: 135) promoted reforms which shifted the bargaining focus from the national and industry level of the centralised conciliation and arbitration system, to the enterprise level. From the mid-1990s, the collective nature of enterprise bargaining was challenged, with individual agreement-making being championed. The structural reforms of these periods tested the enforcement capabilities of both unions and agency to an unprecedented extent. The current phase is identified from late 2005, with several interlaced political agendas apparent. Increased individualisation of bargaining, reductions in union powers, a return to collective enterprise bargaining, and a further centralisation of federal government powers through the creation of a single national IR system were implemented. The latter being only partially successful, the process has resulted in a national IR system covering most private sector employees,[2] with state IR systems managing state and local government employees.[3] Legislated minimum employment standards

https://doi.org/10.1177/103530461102200204 Published online by Cambridge University Press

were introduced concurrently with this most recent shift, as was the creation of a specific agency to enforce the new national system and its regulations.

Such an exploration of the industrial, social and political context of MLS and their enforcement in Australia across three centuries affords a unique perspective on their development. While some individual periods and events have previously been examined, this study encapsulates and analyses the various pressures and responses that have shaped contemporary MLS enforcement practices.

'Enforcement' in this context means ensuring that those with specific obligations under labour regulations, statutes, contracts or industrial agreements and so forth, comply with them. Such enforcement may be formal or informal, and may be carried out by state agencies, trade unions, individuals or others with standing on an issue. Consistent with the regulatory enforcement literature, we view enforcement strategies as existing along a continuum between two general approaches. Agencies and officials using legalistic or sanction-oriented approaches (termed the *deterrence* model) are represented at one extreme and, at the other, those adopting a conciliatory or accommodative approach (termed the *compliance* model) (Hawkins and Thomas 1984). Further analysis of the compliance model has identified two separate 'soft' approaches — persuasive compliance and insistent compliance (Hutter 1989: 154–156).[4] It should be noted that as a result of labelling one model as 'the compliance model', the term 'compliance' is used in two senses. In accordance with the literature it is used as a model title to signal a particular (softer) approach to enforcement in contrast to the 'deterrence model' which is used to indicate a more legalistic sanction-oriented enforcement model. Secondly, 'compliance' is also used in its more natural sense which, in the context of this article, refers to regulatees' acting in accordance with regulatory requirements.

The development and implementation of MLS and their enforcement in Australia are inherently linked to social and industrial developments and crises, industrial relations regimes, and the historical strength of the labour movement. It is also linked to political regimes and ideologies, with MLS enforcement frequently a target (intended or otherwise) of governments' economic or industrial agendas. These issues are explored below.

Australian Minimum Labour Standards Enforcement: Development and Context

1820s–1870s: The Era of Masters' and Servants' Legislation and Individualised Regulation

The first *Masters' and Servants' Act* was introduced in 1828 in New South Wales (NSW). Enacted in the other colonies in later years, masters' and servants' Acts were influential in the employment relationship until the 1880s. This legislative period is significant not only for introducing the notion of enforceable responsibilities and entitlements of employers and employees, but because it occurred within a contractual regime not entirely dissimilar to that of individualised agreement-making of the twenty-first century.

https://doi.org/10.1177/103530461102200204 Published online by Cambridge University Press

By the 1820s, Australian employment regulation was a complex affair, with increased immigration of free settlers combining with a mix of released and serving convicts to form the labour force. Prior to 1828, a mixture of Imperial Masters' and Servants' Acts and contract law governed the work relationship. The passage of the NSW *Masters' and Servants' Act 1828* signalled the transition from a predominantly convict labour force to one increasingly comprised of 'free' labour (Quinlan 2004). The dominance of pastoral interests in the NSW Legislative Council (Wood 1933: 51–54) ensured that existing rural employment principles were incorporated into the legislation. In attempting to introduce similar legislation between 1837 and 1840, Tasmania, South Australia and Western Australia suffered rejection by the British Parliament for granting excessive powers to a single magistrate, being too broad in scope, and inequitable to employees (Rayner 1980: 34; Quinlan 2004).[5] Despite the British Parliament's diligence, Australian colonial Masters' and Servants' Acts had harsher penalties than their British counterparts, while covering more employees (Patmore 1991: 24).

The Acts had several objectives including restricting wage levels and worker mobility in tight labour markets (Cashen 1980; Quinlan 1998: 31),[6] and contained a range of mechanisms encouraging employee compliance (Davidson 1975: 124; Quinlan 2004).[7] The characteristics of the employment relationship in rural and regional areas, with the master usually providing board and lodging as part of the servants' remuneration, provided a form of social control. Employers used the regulations to enforce a subservient employment relationship (Walker 1988), with many of the Acts' provisions allowing an employee to be kept a virtual slave without remuneration.[8]

Initially weighted heavily in the employer's favour, from 1840 the NSW Act incrementally provided employees with their first real measures of redress. Provisions for wage recovery allowed claims of up to £30 (and £50 from 1857) to be brought directly against an employer through the Magistrates' Courts, and also permitted the servant to claim reasonable damages sustained from non-payment. Amendments in 1845 incorporated two further issues: one related to masters deliberately absenting themselves when the servants' wages were due, and the other related to payment by dishonoured cheque, draft, order or note, allowing servants to recover wages and reasonable damages. Other colonies followed suit (Goodwin 2003).

Nevertheless, enforcement of the Acts was of a distinctly 'class' character. Employer actions aimed at social control over employees were aided and abetted by the partiality of Justices, drawn from the 'landed' gentry (Walker 1988). Kercher's (1996: 170–171) exploration of the overall pattern of judicial decision-making in work relationship cases demonstrates that the courts were more likely to favour the employer over the employed.

From the late 1850s, Merritt (1982) and McQueen (1987) identify a sharp and sustained decline in employer-initiated actions under the Masters' and Servants' Acts and a corresponding rapid increase in employee-initiated enforcement actions. McQueen (1987: 93–94; 1992: 126–131) argues that changes to the composition of the Bench were critical to the growth of employee trust in

the courts. The 'squatter magistrate' was gradually replaced by legally trained police magistrates and, as provincial centres expanded, Justices of the Peace were increasingly 'townspeople',[9] perhaps improving employees' views about potential outcomes. In addition, McQueen (1992) also suggests the decline in employer-initiated actions resulted from the entry of labour into the political arena, the growth of unions, and changes in employment practices (particularly shorter contracts) combining to make the Masters' and Servants' legislation a less attractive tool. Merritt (1982: 79–83) identifies the educational effect of a mobile workforce, especially in respect of shearers and miners, as playing a role in increasing knowledge about employees' rights under the Acts. Miners in particular had gained considerable legal experience from the complexity of the goldfield employment systems that resulted in 'endless litigation'.

Initially draconian in nature, the Masters' and Servants' Acts were largely reflective of Australia's penal history, the powerful political and social influence of the pastoral industry, and early labour market realities. Social control and labour market control objectives operated in tandem. However, subsequent amendments gradually removed or reduced the most malevolent aspects, reflecting both changing demographics and political struggles within Australian society. Fry (cited in Merritt 1982) contends that master and servant legislation was essentially a dead letter for urban workers by the 1880s. The expansion of secondary industries and the corresponding growth in the urban workforce resulted in a shift toward wage labourers, with employer obligations limited to wage remuneration. The subsequent changed work processes, often resulting in 'sweated labour', combined with shifts in societal attitudes to pressure governments to broaden the regulation of the employment relationship.

The experience of the Masters' and Servants' Acts is important for two main reasons. *First*, modern employment law is heavily influenced by the masters' and servants' relationship. Fox (cited in Merritt 1982a: 58) suggests the needs of the industrial employer 'were met by infusing the employment contract with the traditional law of master and servant, thereby granting them a legal basis for the prerogative they demanded' to regulate the workforce in an industrial society. The result was an 'internally inconsistent' (Merritt 1982a: 58) construct where the notions inherent in contractual arrangements contradicted the infused elements of the master and servant relationship, creating the internal tensions of modern employment law.

Second, employer evasion of their employment relationship obligations under a contractual regime demonstrates that non-compliance was not simply a response to minimum labour standards being imposed by a third party. The master and servant period undermines arguments proposing that distortions of market forces cause or create non-compliance with regulated standards.

The next 'wave' of regulation, the Factories and Shops Acts, attempted to deal with these issues. Although initially concerned with physical working conditions in the growing urban environments, these Acts spread to include sweated labour issues. One key improvement over the masters' and servants' legislation was the creation of enforcement inspectorates.

https://doi.org/10.1177/103530461102200204 Published online by Cambridge University Press

1870s–1900s: Introduction of Factory and Shops Acts and Inspectors

The expansion of secondary industries in urban centres was initially unencumbered by employment or occupational health and safety regulations. With the fledgling union movement limited to select trades, unbridled competition allowed employers to drive wages down to subsistence levels in industries such as clothing manufacture, boot trades, and transport. Workers facing the worst circumstances were termed 'sweated labour', a process 'whereby groups of workers received remuneration so low that the hardest and longest duration of work secured only the barest existence, and one that harmed their health' (Quinlan, Mayhew and Bohle 2001: 509). As employment in these sectors grew the problems became more manifest, resulting in pressure on governments to address these excesses. A combination of media exposure of workplace exploitation[10] (especially in the clothing trades) and grass-roots activism sustained sufficient political pressure to force the introduction and expansion of factories and shops regulation. However, there was strong opposition to state regulation by business, and reforms required both the rise of labour parliamentarians and support from other members for enactment (Goodwin 2003).

Beginning with Victoria in 1873, *Factories and Shops Acts* were gradually introduced into the other colonies over the next 25 years as industry expanded. Contextually, this type of legislation was in its infancy worldwide, and the Australian colonies, particularly Victoria, were amongst the pioneers in the area (Quinlan and Goodwin 2005).[11] With limited experience to draw on, and a newly established social movement driving the reforms, the early factories and shops Acts reflected both compromise and indecision on the part of governments, as well as containing drafting inadequacies and oversights considered below.

These Acts initially applied to premises employing specified numbers of workers, limiting the hours worked by females and children, and providing minimum standards for temperature, ventilation, cleanliness and sanitation. Employers responded to the legislation by manipulating worker numbers, opening multiple small workplaces and using outworkers (Patmore 1991: 52–53) to avoid the regulations. Ultimately, limits on overtime worked by women and youths were introduced, and overtime payments and tea money (to purchase an evening meal) were included. However, it was not until the 1890 amendments to the *Victorian Factories and Shops Act* that two provisions fundamental to the enforcement of minimum labour standards occurred: the appointment of inspectors, and registration requirements for owners and occupiers of premises covered by the legislation.[12]

Extreme tensions between inspectorates and businesses over core minimum labour standards were highlighted in early Chief Inspectors' reports (Goodwin 2003). While some friction can be ascribed to business communities' adjusting to the expansion of state regulation, much was underpinned by a philosophical opposition to regulation. Not only did businesses fail to 'voluntarily' improve working conditions and wages in compliance with the legislation, they also exhibited a degree of opposition that was only defeated through a combination of vigilant enforcement activities, strong social agitation, and incremental improvements in the legislation. The history of Australian factories and shops legislation

contradicts contemporary arguments that working conditions in third world countries will 'naturally' improve over time without the need for implementing and enforcing minimum labour standards (see for example Krueger 2000).

The inspectorates of the three main colonies (Victoria, Queensland and NSW)[13] initially adopted a 'gently gently' approach, influenced by limited numbers of inspectors, jurisdictional overlaps with local health departments and councils, lack of information about premises and employment therein, limited inspectorial powers, and employers ill-advised about, or hostile, to the regulations (Goodwin 2003). Such an approach may be considered to exemplify a *weak* persuasive compliance strategy (Hutter 1988, 1989), with an educational approach dominant and prosecution precluded.

In time, reacting to continuing recalcitrant employer attitudes, legislative improvements and clarifications, societal pressures, increased agency responsibilities (particularly in respect of wages), increased personnel levels, and perhaps most importantly, the influence of new Chief Inspectors, the policies coalesced into either persuasive or insistent compliance strategies, although prosecutions were limited. With no written prosecution policy in evidence, individual inspectors were left to convince the Chief Inspector that a particular breach required prosecution. Ultimately prosecutions were approved by the Minister. Prosecutions were more likely to be approved for repeat offences, if warnings or improvement notices had been issued but ignored, or if the breach was considered to be 'very serious'.

Three core issues emerged in all three inspectorates which significantly influenced their strategies (Goodwin 2003). The *first* related to employees giving evidence of employer breaches. In light of employers' practice of dismissing workers for such actions, employees were understandably reluctant to sacrifice their jobs. Policies were subsequently adopted to allow voluntary rectification of underpayments, precluding prosecution action. *Secondly*, judicial attitudes undermined the inspectorates' efforts, with particularly hostile actions in Victoria, but less openly antagonistic practices in Queensland and New South Wales. All three jurisdictions were faced with the imposition of small penalties on convicted employers. Compared to the effort required to gain conviction, the inspectorates viewed these penalties as providing encouragement to breach the Act rather than acting as a deterrent. The *third* inspectorial issue related to legislative limitations on underpayments. Inspectors could not force employers to pay wages arrears, nor were employees empowered to sue for wages due. Consequently inspectors were required to adopt persuasive techniques of bargaining and bluffing to secure employees' wages, with their only leverage being the threat of prosecution. As a successful prosecution did not ensure restitution of wages, inspectors put considerable effort into out-of-court settlements.

Several significant enforcement legacies derive from the factories and shops legislation: the introduction of inspectors and the development of systems for registration, records, and breach notices to enforce regulation. These represented considerable advancements over the Masters' and Servants' Acts. In addition to its practical assistance, the existence of inspectorates sent a strong symbolic message to employers that the state was determined to ensure regulatory compli-

ance. A further legacy, the use of 'voluntary compliance' as the primary means of recovering wages, became an embedded practice in future MLS enforcement.

Notwithstanding these improvements, it could be argued that the Acts did not fully meet the expectations of the social ideals upon which they were founded. Non-compliance with provisions remained widespread and sweating of labour continued despite the best efforts of inspectors. However, this period established both the right, and the responsibility of the state to intervene in the employment relationship to advance social justice and equity for its citizens. Further, within the Australian context, this led to the formation of conciliation and arbitration systems that institutionalised protective regulation through awards and determinations. This also led to the separation of MLS and OHS enforcement, which unlike in many European countries, has since been undertaken by government agencies in different jurisdictions. The next section focuses on the transition to conciliation and arbitration systems, focusing on the federal jurisdiction.

1906–1952: Early Arbitral Period with Unions as Regulatory Agencies

To understand the Australian IR system, its methods of setting wages and conditions of employment and their effect on minimum labour standards' enforcement, one must understand the division of powers created under the Australian Constitution. Australia is a federation, with a national/federal government, six state governments and two territory governments with their respective jurisdictions. These jurisdictions are delineated by the Australian Constitution, especially in terms of industrial relations. Deriving from a series of significant strikes with national impacts in the 1890s, the Australian Constitution split jurisdiction over IR between state and federal governments (Rowse 2004). The Industrial Power of the Constitution (section 51xxxv) empowers the federal government to make laws for the prevention and settlement of interstate disputes through conciliation and arbitration. Under this power the federal government can establish institutions of conciliation and arbitration, and provide them with broad operating principles. It has not been able to use legislation to control wages and conditions (other than for its own employees) or to control the decisions of the arbitrators (Department of Employment and Industrial Relations [DEIR] 1984: 12). This power allows the federal government to intercede where industrial action crosses state borders. Consequently, much of the power for legislating employment conditions (working hours, occupational health and safety, workers' compensation, etc) fell historically to state or territory governments. These governments used their legislative powers, but also created conciliation and arbitration tribunals to manage conflict in employment relations and facilitate collective bargaining.

The basis of the traditional IR system was the award[14] — a legally enforceable determination containing the terms and conditions of employment in a firm, industry or occupation. Created and certified through dispute resolution between unions and employer associations in the conciliation and arbitration tribunals, awards prescribed minimum enforceable wage rates and other employment conditions (such as leave entitlements, disciplinary processes, job classifications and so forth). Awards were created in both federal and state IR jurisdictions. The award system was largely based on notions of comparative

https://doi.org/10.1177/103530461102200204 Published online by Cambridge University Press

wage justice, with unions seeking to maintain traditional relativities between occupations in wage negotiations.

Despite awards and industrial agreements being made within the federal Conciliation and Arbitration system from 1906, monitoring and enforcement were neglected. As parties to awards, and with responsibilities to their members to ensure their conditions, unions provided the only form of enforcement for the bulk of the first 50 years of the system's operation. Initially this was not problematic, and Table 1 demonstrates the expansion of awards and agreements. The enforcement costs experienced by unions[15] led government deliberations in the late 1920s to decide against appointing 'an army of inspectors' to police all awards. Instead they adopted a dual system of enforcement, entrenching the union role (Australian Archives 1928a, 1928b). In the Australian context the role historically ascribed to unions approximates that of the official regulatory agency.

Table 1: Creation of awards and agreements 1906–1930

	1906	1909–1916	1921	1922–1930
Awards	1	48	190	340
Agreements	0	642	1488	276

Source: Macklin, Goodwin and Docherty (1993: 18–21)

Note: The figures relate to new awards/agreements made within the period — some replacing older versions, others completely new industrial instruments.

A single temporary inspector operated between 1934 and 1940. His role was to focus on white-collar awards, because these workers were poorly organised (Foenander 1937: 51), requiring unions to undertake essentially all enforcement activities.

1950–1987: Dual Enforcement — Unions and a Federal Enforcement Agency

The number of inspectors gradually increased, with the Arbitration Inspectorate being given permanent status as an agency in 1952, and inspectors becoming permanent public servants (Arbitration Inspectorate Manual 1954: foreword). Inspectors were required 'to make inspections, examinations, investigations, and enquiries' including interviewing relevant persons, to determine if the Act and its regulations, awards, and determinations were being observed (Arbitration Inspection Manual 1954: 7). This included an educative role of advising employers and employees of their rights and obligations.

Consistent with the four central principles of strategic enforcement — prioritisation, deterrence, sustainability, and systemic effects (Weil 2008: 354–356) — the Arbitration Inspectorate implemented a targeted, proactive inspection strategy. Underpinned by union enforcement presence, the inspectorate *prioritised* programmed inspections on the basis of organisational size, location, unionisation, age of awards, and complaints received. Smaller organisations were given priority as larger organisations were viewed as more likely to employ payroll/employment relations specialists, to be unionised and, being 'more established', aware of their obligations (Arbitration Inspection Manual 1954: 16–17). For similar reasons,

https://doi.org/10.1177/103530461102200204 Published online by Cambridge University Press

rural and provincial businesses took precedence over metropolitan workplaces, with the higher presence of State inspectorates and unions in metropolitan areas a key factor. Workplace unionisation and unions' enforcement role allowed the inspectorate's focus to shift to non-union sectors. Greater non-compliance was associated with new awards, so these were given pre-eminence (Arbitration Inspection Manual 1954: 8–15).

Deterrence was effected through an inspector 'doing the rounds', and aligned with early factories and shops inspectorates' experiences, the 'surprise' visit was a core aspect of the inspection strategy, with no warning being given that premises were about to be inspected (Arbitration Inspectorate Manual 1954: 20). *Sustainable* enforcement was targeted through a mix of programmed workplace inspections and complaint investigations. Inspections themselves were prioritised, with complaint investigations taking precedence. Once the merit of a complaint was determined, the workplace was included in the next round of programmed inspections, protecting complainant anonymity. Next line priorities were visiting establishments where there was a reasonable likelihood of non-compliance, workplaces not previously inspected, and lastly, previously visited compliant establishments (Arbitration Inspection Manual 1954: 17). Broader *systemic effects* were also intended through the educative and deterrent impacts of award or geographically based 'blitzes' when warranted.

Inspectors were expected to examine all aspects relating to hours and wages, but they had some discretion over whether to check all employee records or undertake a 'spot check' of vulnerable employees (Arbitration Inspection Manual 1954: 20–21). Such decisions were usually based on the number of employees at the establishment, and whether the employer had a history of non-compliance. If a spot check revealed a breach, then all records were checked. If the employer's records aroused the suspicions of an inspector, the guidelines encouraged the interviewing of employees to determine the accuracy of the records.

This proactive, strategic inspection strategy remained central to inspectorate activities until the late 1960s. Growing differences in ideologies between the two major political parties, particularly over economic and IR matters, began to affect significantly the resourcing and activities of the inspectorate for the remainder of this phase of MLS enforcement development. Initially government policies led to resource restrictions curtailing inspections almost entirely to capital-city metropolitan areas (Department of Industrial Relations [DIR] 1972). While programmed inspections continued, fewer workplaces were inspected, coverage declined (especially rural areas), and the inspections became less thorough (DIR 1972; interviews 1996). From 1973, increased resources[16] and a decentralisation policy under the Whitlam Labor government (see Table 2), allowed the inspectorate to return to its full inspection strategy. Subsequently the scope and frequency of rural and regional inspections increased to unprecedented levels, and numbers of premises inspected increased by 60 per cent over the previous year (DIR 1975). Inspection audits again became more detailed with all employee records being checked rather than a sample, and re-visits to ensure compliance became more common, as did prosecutions for non-compliance (DIR 1975).

Table 2: Federal inspectorate staffing levels 1934–1983

Region	1934	1950	1952	1964	1965	1967	1969	1972	1973	1975	1976	1977
NSW			8	12	12	12	17	17	17	31	26(2)	25
Vic			6	9	9	9	13	13	13	26	24(1)	24
Qld			2	3	3	4	6	6	6	15	13(1)	13
SA			3	5	5	5	6	7	7	15	14(1)	12(1)
WA			1	2	2	2	4	4	4	7	5(1)	4
Tas			1	2	2	2	3	4	4	5	5	5
ACT			0	0	1	1	2	2	2	3	3	3
NT			0	0	0	0	1	2	3	1	3	3
Total	**1**	**18**	**21**	**33**	**34**	**35**	**52**	**55**	**56**	**103**	**93(6)**	**89(1)**

Source: Arbitration Inspectorate Annual Reports.

Note: For the years 1934–1973, the figures include trainee inspectors, inspectors, senior inspectors and inspectors-in-charge. From 1975 the main figure includes inspectors, senior inspectors and inspectors-in-charge, with trainee inspector numbers in brackets.

These changes were ultimately short-lived, as economic recession again resulted in resource constraints towards the end of 1975, affecting enforcement. Rather than thorough inspections, an 'audit' approach focusing on pay and leave entitlements for each employee eventuated. Further resource constraints, including a staffing and wages freeze (Juddery 1980: 247), under the Fraser government, affected rural and regional Australia most, but with metropolitan inspections also curtailed. Routine inspections were limited to investigating complaints (DIR 1976: 7; interviews 1996). The replacement in 1978 of the Arbitration Inspectorate with a new statutory authority, the Industrial Relations Bureau (IRB), had several significant impacts on enforcement. *First*, with continued resourcing constraints the sampling approach intensified (IRB Annual report 1979: 23), and cursory checks became the norm. *Second*, new complaint handling procedures required inspectors to 'encourage' employees to solve the problem with their employer, either directly or through their union, before lodging a complaint. Only when the complaint remained unresolved, or the complainant refused to confront the employer, would the IRB investigate (IRB Annual Report 1982: 7). *Third*, the IRB's perceived use by the government as an 'industrial policeman' (Bennett 1994: 148) to enforce broader IR regulations created tensions, undermining enforcement activities.

Table 3: Federal inspectorate staffing levels 1978–1984

Region	1978	1979	1980	1981	1982	1983	1984
NSW	23	22	25	25	26	28	24
Vic	21	19	19	22	22	22	21
Qld	13	10	10	12	10	13	11
Sa	11	10	11	9	11	11	12
WA	4	5	7	6	6	5	4
Tas	6	6	5	6	4	7	7
Act	4	6	6	6	5	5	6
NT	3	4	5	7	7	6	6
Total	**85**	**82**	**88**	**93**	**91**	**97**	**91**

Source: Annual Reports of Industrial Relations Bureau (1978-83); Annual Report of Arbitration Inspectorate (1984).

Note: Figures do not include executive staff.

https://doi.org/10.1177/103530461102200204 Published online by Cambridge University Press

Prosecution policies adopted by the inspectorate were influenced by similar political interference as inspection strategies (Maconachie and Goodwin 2011). Underpinned by a preference for compliance to be voluntary, the agency largely adopted a 'prosecution as a last resort' strategy. Prosecution recommendations were subject to lengthy deliberation processes, involving multiple layers of departmental hierarchy as well as legal consultations. Minor modifications eventuated during the Whitlam government period in the 1970s, with a stronger enforcement approach (consistent with Hutter's [1989] 'insistent compliance' strategy) in evidence. Devolved decision-making unshackled the prosecution process, and with informal pressure from the Minister to initiate prosecutions, actions in this area increased significantly (Maconachie and Goodwin 2011).

Like changes to inspection strategies, this was transitory, with the Fraser government heeding employer opposition to these tactics. A review of enforcement policies was undertaken, and prosecutions were frozen for the duration. The new policy was to reject all prosecutions except the most extreme cases. The focus was to be on 'prevention of a breach … as opposed to dealing with a breach after it has occurred' (IRB 1978: 9). Voluntary rectification was again central to inspectorate activities, consistent with the IRB's mission to build 'co-operative, cordial and non-adversary' relations with employers (IRB 1981: 1).

The key factor in this regulatory period is the enforcement role of unions. Single-handedly enforcing awards and agreements for most of the first 50 years of the conciliation and arbitration system, they were initially complemented by the inspectorate which made strong progress towards developing proactive enforcement strategies. However, government resource restrictions on the agency intervened, once again leaving unions to shoulder the bulk of the enforcement load from the late 1960s, with the exception of a short period in the 1970s.

Having a dual enforcement system allowed governments to be less active, provide fewer resources and assume that the enforcement system operated without substantial problems. However, MLS' enforcement even under the centralised wage-fixation system was not without problems. Employer non-compliance throughout the period was significant and sustained (Goodwin and Maconachie 2007, 2010a). Shifts in inspection strategy from regular, comprehensive, targeted workplace inspections to 'sampling' approaches imposed by government resource restrictions and policy changes lessened the probability of employer non-compliance being detected. Further moves to complaints-based strategies, where only once a complaint was made *might* an investigation be undertaken, destroyed complainant anonymity (a key issue raised by nineteenth century factories and shops inspectors), and further increased the probability of employer non-compliance (Goodwin and Maconachie 2008a). Employees' lack of knowledge about entitlements and the possibility for employer retribution both have the potential to lessen complaints (Goodwin and Maconachie 2008b), making a complaints-based system problematic. Resource restrictions also increased the vulnerability of rural workers to exploitation, with inspections cut. Political agendas and ideologies undermined all aspects of the strategic enforcement process, most importantly removing the deterrent effect of an inspector 'doing the rounds'.

As Hardy and Howe (2009: 318) have argued, the dual enforcement system during this period cannot be described as a 'partnership' between the unions and the inspectorate. The complementary roles begun in the 1930s rapidly became unbalanced, and with the exception of a short period, the agency was 'relatively small, significantly under-resourced and therefore largely ineffectual' (Hardy and Howe 2009: 315), leaving unions to carry out the bulk of enforcement activity through until the mid-1980s. However, the ability to fulfil that role was dependent upon both high union density and legislative provisions that allowed for, *inter alia*, union right of entry to workplaces for inspection purposes, and a right to inspect employment records of both members *and* non-members. From the mid-1980s, significant reforms in the Australian IR framework, combined with social and structural changes, reduced the capacity of unions to undertake their enforcement role. The inspectorate was also mostly side-lined by the reform process (Goodwin 2003), leaving the enforcement arena essentially undefended.

1987–2005: Enterprise Bargaining Sidelines Enforcement Agency and Unions

The award system dominated until the mid-1980s, when collective bargaining at workplace level (enterprise bargaining) was introduced. Central to the Hawke Labor government's economic reform program, enterprise bargaining initially focused on improving productivity (Hancock and Richardson 2004: 196–197), flexibility and competitiveness of Australian workplaces to better respond to emerging global markets (Kirby and Creighton 2004: 135). A period of 'managed decentralism' (McDonald and Rimmer 1989), with the federal IR tribunal controlling the parameters of bargaining, was followed by full-scale enterprise bargaining from 1991. Awards continued to underpin the system, providing a safety net for low-paid workers as well as the basis for enterprise-based negotiations.

Under centralisation, award conditions had generally remained stable for long periods and variations were relatively rare, allowing inspectors to gain a thorough understanding of the main awards and clauses most likely to be breached. Furthermore, official wage increases generally resulted from well-publicised decisions of the Industrial Relations Commission, and awards were varied accordingly. Decentralisation had important consequences for enforcement. As enterprise bargaining expanded, wages and conditions between workplaces previously covered by the same award or agreement differed markedly. Staying abreast of the changes required significantly more time and resources, reducing the time available for inspections. Simultaneously, an increase in complaints resulting from employee uncertainty in the shift to enterprise bargaining led to complaint investigation of only the complainant's records, not *all* employees' records (Maconachie and Goodwin 2006).

Over time this practice was further refined so that only the *actual* complaint was checked rather than the complainant's full records (DIR 1992, 1993; interviews 1996). Such methods no longer provided complainant confidentiality, exposing the complainant to victimisation. The use of routine inspections returned once the backlog of complaints was reduced, but never resumed prominence. By about 1994, the majority of complaints were 'investigated' by telephone, not

workplace visits. This procedure was confirmed in new directives (Australia 1989) which removed any reference to the inspection of workplaces and concentrated solely on an educative approach. To a large extent, this enforcement strategy reflected the fact that, except for a short period related to a superannuation enforcement blitz in 1991/92, staffing levels remained lower (under 100 staff) than those achieved under the Whitlam government in the 1970s (103 staff).

Table 4: Inspectorate staffing levels 1985–1995

Region	1985	1986	1987	1988	1989	1991	1992	1995
NSW	25	28	23	30	22	n/a	n/a	n/a
Vic	21	26	21	20	19	n/a	n/a	n/a
Qld	14	14	12	13	14	n/a	n/a	n/a
SA	9	12	12	12	9	n/a	n/a	n/a
WA	5	6	6	3	4	n/a	n/a	n/a
Tas	6	7	6	7	7	n/a	n/a	n/a
ACT	6	6	5	*	-	n/a	n/a	n/a
NT	9	8	9	8	6	n/a	n/a	n/a
Total	**95**	**107#**	**94**	**93**	**81**	**110**	**100**	**86**

Source: Arbitration Inspectorate Annual Reports (1985–1989); Department of Industrial Relations [DIR] Annual Reports (1990–95).

Notes:
* In 1988, the ACT office was amalgamated with the NSW State office.
# In 1986, a reclassification of inspectors' positions (with higher wages) resulted in increased recruitment. The increase was not sustained as once the inspectorate was amalgamated into the DIR, inspector numbers dropped for multiple reasons.

Hardy (2009: 25) identifies these changes as part of the gradual reconstruction of the traditional enforcement model from 1996. The agency was replaced by two separate but related agencies: one, the Office of the Employment Advocate (OEA) focused on matters associated with newly introduced individual statutory agreements (Australian Workplace Agreements [AWAs]), while the Office of Workplace Services (OWS) undertook 'regular' enforcement. Lee (2005: 344) identifies the agencies as pursuing 'the same policy imperatives: to seek voluntary compliance from employers, not to seek remedial penalties against miscreant employers, and to disguise the extent of employer lawbreaking.' Further, departmental annual reports suggest that the OWS was more concerned with promoting the perceived advantages of AWAs to employers than enforcing MLS (Department of Employment and Workplace Relations [DEWR] 1997–2000). Combined with lagging funding, Lee (2005: 345) concludes that enforcement activities of the federal inspectorate continued to languish during the early years of the Howard government, with the burden of enforcing employer compliance being effectively shifted to unions and individual workers.

In 1997, the Howard Coalition government contracted out much of the award and agreement enforcement activities to State governments (Lee 2005), specifying that federal compliance and inquiry service policies be followed (Lee 2005). The approach to enforcement was reflected in changes to titles, with inspectors becoming 'Advisors'. One significant change was the use of small claims courts for wage recovery under $10,000. Claimants generally had to take

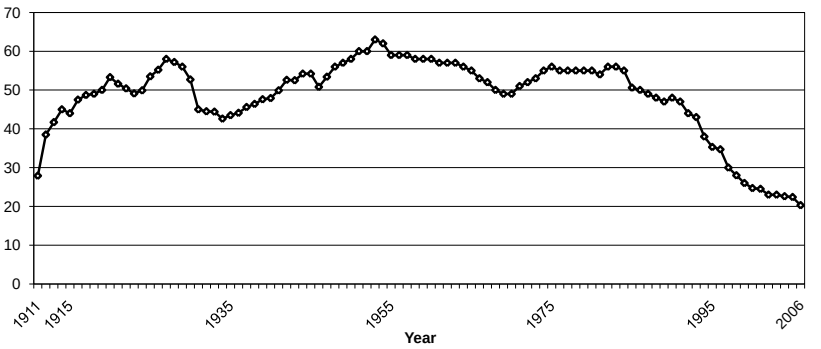
https://doi.org/10.1177/103530461102200204 Published online by Cambridge University Press

action themselves rather than the inspectorate pursuing claims on their behalf (Office of Workplace Services 2004, clause 5.3). Of 299 complaints received in 2002–03, 296 were resolved through small claims action by workers 'going it alone' (DEWR 2003).

With the agency's implementation of a complaints-based approach, unions' enforcement role became more critical. However, the shifts to a decentralised IR system weighed heavily on unions, reducing their ability to 'pick up the enforcement slack'. Two specific matters affected unions' ability to undertake their crucial role: negotiation on an enterprise by enterprise basis was more time and resource intensive than making multi-employer awards; and falls in union density limited the extent of their influence.

Declining union membership is illustrated in Figure 1, highlighting trends in union density between 1911 and 2006.

Figure 1: Trade union density, Australia, 1911–2006 (per cent)



Source: 1911–1996 Peetz (1998: 26); 1997–2006 ABS Cat. No. 6310.0.

By the end of the twentieth century, both enforcement 'prongs' were foundering. The experience of decentralisation was intensified by a range of factors increasingly affecting the already stretched resources of both the agency and unions. Increased individualism in the employment relationship (Peetz 2006), increasingly precarious types of employment (Quinlan, Mayhew and Bohle 2001), and the decline of highly-unionised industries (Forsyth and Sunderland 2006) contributed to reduced union membership levels, while these same factors exacerbated agency activities. Additionally, reduced right of entry powers under the *Workplace Relations Act 1996* hampered unions' ability to monitor and enforce compliance (Hardy and Howe 2009: 324). Fewer protections in respect of employment termination (Ellem 2007; Forsyth 2007) also contributed to enforcement difficulties by increasing employee susceptibility to employer retribution for complaining. Each factor made enforcement more complex, and combined with more limited union coverage, had disastrous implications for minimum labour standards' enforcement in Australia. By the late 1990s, the ground was largely undefended.

https://doi.org/10.1177/103530461102200204 Published online by Cambridge University Press

2005 to Present: The Ascendancy of the Federal Enforcement Agency?

The sixth regulatory period may be perceived as beginning in late 2005, with a shift not only from collective bargaining to a small number of legislated minimum standards, but also with the creation of a national IR system, largely replacing state systems. The Industrial Power of the constitution, influential for much of the twentieth century and underpinning the operation of state and federal IR systems, was usurped by the Corporations Power (section 51xx). Using the Corporations Power[17] and a political majority in both houses of Parliament, the Howard government introduced sweeping changes to employment conditions and IR processes with its *Workplace Relations Amendment (Work Choices) Act 2005*.

The Work Choices amendments took effect on 27 March 2006 amid considerable social and industrial opposition. Amongst other things, these changes initiated the first federal minimum wage, legislated maximum ordinary working hours per week, and for the first time since 1907 allowed employers to lawfully undercut award wages and conditions using new AWA 'flexibilities' and employer Greenfield agreements (Stewart 2008).

In the face of rising criticisms over the Work Choices changes (Australian Broadcasting Commission 2007), and to counteract perceptions of political interference with the enforcement agency, the OWS was restructured as an Executive Agency[18] (Australia 2006). The new 'independent' OWS was endowed with $97 million in additional funding over four years, and inspectors' powers to investigate and enforce employees' rights were strengthened (Andrews 2006). Partially in response to the above criticisms, but also associated with the take-over by the federal IR system of many incorporated enterprises previously under state jurisdiction, personnel increased and the office network expanded from 4 offices to 26 locations across Australia (Workplace Ombudsman 2007: 7). Prosecution action increased, with 35 prosecutions undertaken in the 2006–07 year, equalling all prosecutions undertaken between 1996/97 and 2005/06 (DEWR 1996–2007).

Continued concerns over worker exploitation through the new AWAs prompted the introduction of a 'fairness test' in May 2007 (Stewart 2008). A new statutory authority, the Workplace Ombudsman, replaced the OWS as the enforcement agency. The WO's role was to 'provide additional protection for employees and … take on a greater role in ensuring that employers comply with their legal obligations … [and] … investigate and prosecute employers who break the law' (O'Neill and Neilson 2007: 16). This represented a substantial hardening of the enforcement and prosecution policies implemented by the OWS, and during 2007–08, the WO recovered over $11.1 million in entitlements and initiated 67 prosecutions (WO 2008: 12–26).

Despite government attempts to improve public perceptions about Work Choices, these IR reforms were principally responsible for the Howard government losing office in November 2007. The incoming government introduced new legislation, the *Fair Work Act 2009*, replaced the WO with the Fair Work Ombudsman (FWO) on 1 July 2009, and undertook further reforms towards

creating a national IR system. While still only partially successful, with Western Australia not referring its IR powers to the federal government, the federal system has again expanded creating a broader workplace community requiring enforcement. See Table 5 below for comparative staffing profiles for this process.

Table 5: Inspectorate staffing levels 2005–2010

	2005	2006	2007	2008	2009	2010
Total — all categories except senior executive staff	70	177	286 (220+ inspectors)	406 (310+ inspectors	800 (approx)	957 Including 230 Fair Work Advisers (on-line and phone advice) + unknown number of inspectors

Source: Workplace Ombudsman Annual Reports (2007, 2008); Fair Work Ombudsman Annual report (2010).

Note: 2009 figure relates to amalgamation of Workplace Authority and Workplace Ombudsman personnel. Only approximate figures are provided as staffing profiles by gender and classification level rather than job title are used in reports.

Consistent with actions begun in mid-2006, the FWO continues to take a tougher stance against employer non-compliance. FWO litigation policy states that individual underpayments of more than $5000 would *usually* trigger litigation processes, while prosecution *may* be considered for amounts less than $5000 if the vulnerability of workers or other factors suggested this was appropriate (FWO 2009: 27). Litigation has been more frequently used, and the agency appears to be adopting some aspects of 'responsive regulation' (Ayers and Braithwaite 1992; Baldwin and Black 2008) with a range of enforcement instruments at hand. Responsive regulation provides a framework within which enforcement bodies may 'react appropriately and effectively, with a mix of "persuasive", reforming and "deterrent" sanctions' (Johnstone and Parker 2010: 6) to the various responses of organisations to regulation and its enforcement. However, we have previously criticised their activities for remaining largely persuasive compliance-based (Maconachie and Goodwin 2010a). The 'voluntary compliance' concept, embedded by the factories and shops inspectorates in response to employer opposition to early regulation and poorly designed legislation, still dominates enforcement strategies and practices. The use of such 'softly softly', educative approaches, along with extensive consultation with employer groups, in particular, is understandable amidst the turmoil that restructuring the IR system and its enforcement mechanisms has created. It is also aligned with new, express objectives to undertake a promotional function (Fair Work Act s 682(1)(a)).

In contrast to the expansion of the inspectorate's size, funding and powers during this most recent developmental period, the unions' role was further significantly restricted under Work Choices. This made it more difficult for officials to meet with union members, to discuss workplace issues with non-members, or to police workplace standards (Ellem 2007: 22). A federal permit to enter workplaces, even for occupational health and safety reasons, was required, plus 24 hours' notice to the occupier of the premises. If the union required entry to investigate breaches of industrial instruments, the official had to serve an entry notice on the employer outlining the particulars of the suspected breach. If the

breach related to an AWA, a written request from the member to the union to investigate the breach also had to be provided. Once on the premises, the official could only inspect and make copies of records relevant to *that* suspected breach (Hardy 2009). Unions were hindered further by being allowed to access only the records of their members, rather than all employees at the workplace (Barnes 2006: 373).

The Fair Work Act retained most of the 'restrictive framework for the exercise of entry rights' (Hardy and Howe 2009: 327), but relaxed some aspects. While a permit, and notice, are still required to enter workplaces to investigate suspected breaches, the union no longer has to be a party to an award or agreement to gain such entry, requiring only that they have a member in the workplace who might be affected by such a breach (Fair Work Act s 481).

Unions were re-energised under these political challenges to their survival and traditional role, and garnered high levels of social support. While still battling to rebuild their density, unions again have an express role to play in the enforcement system (Hardy and Howe 2009: 331). The agency is for the first time since inception assuming the greater proportion of the enforcement burden.

Conclusion

Initially designed with social and labour market control motives, the masters' and servants' Acts provided little in the way of minimum labour standards and even less enforcement. However, as the more repressive provisions were incrementally repealed and wage recovery provisions improved, employee actions to enforce their legal entitlements increased. Occurring within an individualised employment context, analysis of the masters' and servants' Acts demonstrates widespread employer non-compliance even though the Acts were biased in employers' favour.

During the last two decades of the nineteenth century, a combination of political, industrial, demographic and social transformation led to public agitation for protective regulation to curb the excesses of unfettered capitalism. Despite strong employer opposition and modest beginnings, factories and shops legislation gradually expanded in scope and coverage. By the end of the nineteenth century, all colonies had relatively comprehensive regulation covering both health and safety and minimum labour standards. The expansion beyond the original objective of curbing sweating was a product of a maturing labour movement, and continued public support for mechanisms that balanced the interests of industrial parties and the broader community by ensuring fair wages and conditions, preferably without damaging strikes.

A product of these interactions was the establishment of three pivotal protective regulatory elements: the establishment of the responsibility of the state to regulate the employment relationship in a just society; the codification of employee entitlements in legally enforceable instruments being publicly accepted; and the creation of an enforcement agency charged with enforcing compliance on behalf of employees. Although far from ideal, these were seminal achievements that advanced employee rights.

The development of the Australian conciliation and arbitration system was influenced by the first two of these protective regulatory elements. Although originally based on the need for a system to prevent and settle industrial disputes, the social protections provided by the federal system soon surpassed those achieved through the factories and shops Acts. Coverage quickly became widespread and the resultant awards contained a raft of conditions. The vast majority of non-managerial employees became covered by awards that provided a wide range of regulatory protections beyond basic wages and hours.

From an enforcement perspective however, the failure to incorporate the third of the regulatory elements, an enforcement agency, into the *Conciliation and Arbitration Act 1904* undermined the effectiveness of the federal system. The negative implications of this oversight were partially mitigated by trade unions being entrusted with enforcement responsibilities. Nonetheless, this deficiency contributed to a legacy of under-funding and under-valuing the enforcement agency.

Political agendas in the mid 1980s and mid 1990s significantly affected enforcement activities. Economic and industrial reforms gained the ascendancy in the 1980s, with the inspectorate effectively side-lined while unions were enmeshed with enterprise bargaining. The intensive reform processes left MLS enforcement largely untended. With de-unionisation and individualisation high on the political agenda in the 1990s the enforcement agency's activities were diverted to promote new individualised AWAs and the development of cooperative and harmonious IR under the *Workplace Relations Act 1996*. Official prosecution and inspection strategies stagnated, while unions fought to survive in the hostile environment. These pressures intensified in 2005 with the Howard government's Work Choices reforms.

Ironically, it was these reforms, perceived by many as harsh and draconian industrial relations policies (for example Group of Academics 2005; McCallum 2007), 'generating a wave of negative publicity' (Hardy and Howe 2009: 321), which ultimately led to a reinvigorated MLS enforcement agency. Significant changes to, and increased expenditure for the agency were motivated in part by the shift to a national workplace relations system, and by the government demonstrating 'its commitment to the "protected by law" slogan used to promote the new legislative regime' (Hardy and Howe 2009: 321). However, overarching both of these motives was a looming election. A change in government resulted in the enacting of the *Fair Work Act 2009,* reducing some of the more perverse aspects of the previous legislation. The higher profile of the enforcement agency has been retained, along with additional funding to facilitate shifts to a more complete national IR system.

The enforcement agency has also been reinvigorated under different political agendas in recent years. It has more power, more staffing, more resources, and clear political support to fulfil its enforcement role. While demonstrating a greater use of litigation as both deterrent and punishment, the agency still seems otherwise trapped in a persuasive compliance approach to enforcement. Perhaps a legacy of the volatility of recent years and the novelty of the national IR system, the adoption of the persuasive compliance approach might also be perceived to

be a legacy of years of the agency being a political pawn, alternately favoured and then discarded as political agendas were played out. It might equally be considered a legacy of policies adopted by earlier enforcement agencies in the nineteenth century, and retained through culture and management practices.

For the moment the union role is diminished but remains intact and important, again allowing the agency to concentrate predominantly on non-unionised sectors. The agency has taken control of enforcement of MLS for the first time in the history of employment regulations in Australia, but this dominance remains susceptible to political whim.

Notes

1. MLS enforcement in state jurisdictions has both similarities and differences to the developments discussed here in the federal jurisdiction. Further investigation of these differences is required.
2. Western Australia's state IR system retains coverage of private sector employees in non-incorporated organisations.
3. Minor differences exist from state to state over coverage of local government employees.
4. The persuasive compliance approach adopts a range of informal tactics such as education and various forms of persuasion to establish conformity with the regulations. Underpinning the strategy is the idea that conformity is an opened ended, long-term proposition requiring a high degree of patience and understanding on the part of the enforcement official. While sharing this general approach, the insistent compliance strategy is less sympathetic towards violators and adopts clearly defined tolerance limits. Officials employ a similar range of tactics to gain conformity but expect relatively quick responses to requests, and will initiate legal action if the violator chooses to remain recalcitrant.
5. Tasmania's Masters and Servants legislation passed in 1840, with South and Western Australia laws passed in 1841 (Cashen 1980: 30).
6. Absconding and failure to appear created labour problems so the NSW Act introduced a compulsory discharge scheme in 1845. This provision, requiring employees to obtain a discharge certificate to be shown to prospective employers was subsequently added to Acts in other colonies.
7. These included a misconduct offence (including insolence and morality issues) the penalty for which included forfeiture of wages and a possible gaol term.
8. For actions causing loss, spoilage or destruction of property, employees had to repay double the value of the property lost or damaged , effectively indenturing them to the employer for longer periods of time. These clauses were later amended to 'reasonable compensation'.
9. Justices of the Peace had previously been land owners, creating a conflict of interest when the issue under consideration related to the Master and Servants Acts.
10. Newspaper editorials drew attention to the sweating of factory employees (for example *The Age* 8 January 1881), especially of apprentice labour (*The*

https://doi.org/10.1177/103530461102200204 Published online by Cambridge University Press

Age 18 February 1882: 5). See Quinlan and Goodwin (2005) for the shop workers' plight.

11. While the initial act was essentially identical to the British Act, by 1885 the Victorian Act had mandated shop closing times and retail work hours (Quinlan and Goodwin 2005), and by 1896 wages boards had been introduced. The payment of 'tea money', for the purchase of a meal when working overtime, was also innovative.
12. Other colonies, in introducing comparable legislation with similar objectives and contents, included inspectorates as a matter of course: Tasmania (1884), South Australia (1894), Queensland (1896), New South Wales (1896), Western Australia (1897).
13. The experience in these three colonies is representative of influences and resistance in other colonies.
14. The process of making awards changed in the late twentieth century and again in the twenty-first century. This award creation process relates to the period under discussion.
15. The costs were predominantly monetary, associated with staff time spent on monitoring awards, handling complaints and work arising from breaches. In a 14 November 1928 report to Attorney-General Latham, the Principal Industrial Registrar, Steward, argues that as it costs the Victorian branch of the clothing trade union 38 pounds per week to enforce one award this 'affords some indication of the number of inspectors which will be requisite to effectively police all awards of the Court' (Australian Archives 1928a).
16. Staffing levels are being used as a proxy for resources as staff costs were a major component of the inspectorate's budget, and can be compared over time with relative ease. Other resources such as funds for vehicles, training and rural inspections were also important, but less itemised in documents.
17. The Corporations Power had been used to introduce enterprise bargaining but these Howard government amendments made it the dominant constitutional power for IR.
18. An Australian public sector construct, Executive Agencies fall between government departments and statutory authorities in terms of independence. While still reporting to the Minister they provide more flexibility than 'normal' public sector arrangements.

References

Andrews, K. (2006) *MP Media Release 074/06*, 3 April, Canberra.

Arbitration Inspectorate (1954) *Arbitration Inspectorate Manual*, Australian Government Publishing Service, Canberra.

Arbitration Inspectorate (1984–1989) *Annual Reports,* Australian Government Publishing Service, Canberra.

Australia (1989) *Commonwealth Gazette*, 8 March.

Australia (2006) *Commonwealth Gazette*, No. S 42, 17 March 2006.

Australian Archives (1928a) Report from Steward, Principal Industrial Registrar to Attorney General Latham, 14 November. Series A432/86 Item 29/479.

Australian Archives (1928b) Letter from Garran, Secretary, Attorney-General's Department to C. J. Munden issuing Attorney-General Latham's instructions, 25 August, Series A432/86 Item 29/479.

Australian Broadcasting Commission (2007) 'More than 55pc of Australians oppose Work Choices: Poll', available: http://abc.net.au/news/newsitems/200703/s1881101.htm [accessed 10 March 2011].

Ayers, I. and Braithwaite, J. (1992) *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York.

Baldwin, R and Black, J (2008) 'Really responsive regulation', *Modern Law Review,* 71(1), pp. 59–94.

Barnes, A (2006) 'Trade unionism in 2005', *Journal of Industrial Relations*, 48(3), pp. 369–384.

Bennett, L. (1994) *Making Labour Law in Australia: Industrial Relations, Politics and Law*, The Law Book Company Ltd, North Ryde.

Cashen, J. (1980) 'Masters and servants in early South Australia', *The Push from the Bush*, 6, pp. 23–31.

Davidson, A. (1975) 'A skeleton in the cupboard: Master and servant legislation and the industrial torts in Tasmania', *University of Tasmania Law Review*, 5, pp. 123–146.

Department of Industrial Relations (1972–1995) *Annual Reports,* Australian Government Publishing Service, Canberra.

Department of Employment and Industrial Relations (1984) *Submission to the Committee of Review into Australian Industrial Relations Law and Systems* (the Hancock Committee), Australian Government Publishing Service, Canberra.

Department of Employment and Workplace Relations (1997–2007) *Annual Reports,* Australian Government Publishing Service, Canberra.

Ellem, B. (2007) More work, less choice: The impact of national labour re-regulation on low-paid women workers in the Australian Capital Territory, Work and Organisational Studies and Women and Work Research Group: University of Sydney.

Fair Work Ombudsman (2009) Available: http://www.fwo.gov.au/Legal-info-and-action/Guidance-notes/Documents/GN-1-FWO-Litigation-Policy.pdf [accessed 10 March 2011].

Fair Work Ombudsman (2010) Annual Report 2009–10, available: http://www.fairwork.gov.au/Publications/Annual%20report/Fair-work-Ombudsman-Annual-Report-2009-10.pdf [accessed 10 March 2011].

Foenander, O. (1937) *Towards Industrial Peace in Australia: A Series of Essays in the History of the Commonwealth Court of Conciliation and Arbitration*, Melbourne University Press, Melbourne.

Forsyth, A. (2007) *Freedom to Fire: Economic Dismissals under Work Choices*, Report for the Victorian Office of the Workplace Rights Advocate, Monash University, August.

Forsyth, A. and Sunderland, C. (2006) 'From "uncharted seas" to "stormy waters": How will unions fare under the Work Choices legislation?', *Economic and Labour Relations Review,* 16(2), pp. 215–236.

Goodwin, M. (2003) The Great Wage Robbery: Enforcement of Minimum Labour Standards in Australia, unpublished PhD thesis, School of Industrial Relations and Organisational Behaviour, The University of New South Wales.

Goodwin, M. and Maconachie, G. (2007) 'Unpaid entitlement recovery in the federal industrial relations system: Strategy and outcomes 1952–95', *Journal of Industrial Relations*, 49(4), pp. 523–544.

Goodwin, M. and Maconachie, G. (2008a) Victimisation, inspection and workers' entitlements: Lessons not learnt?, Paper presented at the Asia-Pacific Economic and Business History Conference, Melbourne, 13–15 February.

Goodwin, M. and Maconachie, G. (2008b) 'Political influence and the enforcement of minimum labour standards in the Australian federal industrial relations jurisdiction', in P. Stanton and S. Young (eds) *Workers, Corporations, and Community: Facing Choices for a Sustainable Future*, Vol. 1 Refereed Papers, Proceedings of 22nd AIRAANZ Conference, La Trobe University, Melbourne, 6–8 February, available: http://www.mngt.waikato.ac.nz/departments/Strategy%20and%20Human%20Resource%20Management/airaanz/proceedings/melbourne2008/ref/M.%20Goodwin,%20G.%20Maconachie.pdf [accessed 1 July 2011].

Group of 150 Australian Industrial Relations, Labour Market and Legal Academics (2005) Research evidence about the effects of the 'Work Choices' Bill, *A Submission to the Inquiry into the Workplace Relations Amendment (Work Choices) Bill 2005*, November.

Hancock, K. and Richardson, S. (2004) 'Economic and social effects', in J. Isaac and S. Macintyre (eds) *The New Province for Law and Order; 100 Years of Australian Industrial Conciliation and Arbitration*, Cambridge University Press, Cambridge, pp. 139–154.

Hardy, T. (2009) 'A changing of the guard: Enforcement of workplace relations laws Since Work Choices and beyond', in A. Forsyth and A. Stewart (eds) *Fair Work: The New Workplace Laws and the Work Choices Legacy*, The Federation Press, Sydney, pp. 75–98.

Hardy, T. and Howe, J. (2009) 'Partners in enforcement? The new balance between government and trade union enforcement of employment standards in Australia', *Australian Journal of Labour Law*, 22(3), pp. 306–336.

Hawkins, K. and Thomas, J. (1984) 'The enforcement process in regulatory bureaucracies', in K Hawkins and J Thomas (eds) *Enforcing Regulation*, Kluwer-Nijhoff, Boston, pp. 67–96.

Hutter, B. (1988) *The Reasonable Arm of the Law: The Law Enforcement Procedures of Environment Health Officers*, Clarendon Press, Oxford.

Hutter, B. (1989) 'Variations in Regulatory Enforcement Styles', *Law and Policy*, 11(2), pp. 153–174.

Industrial Relations Bureau (1978–1983) *Annual Reports*, Australian Government Publishing Service, Canberra.

Interviews (1996) conducted September–November 1996 with 10 former inspectors and senior inspectors, with an average of 14.5 years experience each.

Johnstone, R. and Parker, C. (2010) Enforceable undertakings in action — Report of a roundtable discussion with australian regulators, Working Paper 71, National Research Centre for OHS Regulation, ANU, Canberra, February.

Juddery, B. (1980) *White Collar Power: A History of the ACOA*, George Allen and Unwin, Sydney.

Kercher, B. (1996) *Debt, Seduction and Other Disasters: the Birth of Civil Law in Convict New South Wales*, The Federation Press, Sydney.

Kirby, M. and Creighton, B. (2004) 'The law of conciliation and arbitration', in J. Isaac and S. Macintyre (eds) *The New Province for Law and Order; 100 Years of Australian industrial Conciliation and Arbitration*, Cambridge University Press, Cambridge, pp. 98–138.

Krueger, A. (2000) 'Anti-trade zealots are off-track', *Australian Financial Review*, 11 October, p. 43.

Lee, M. (2005) 'Whatever happened to the arbitration inspectorate? The reconstruction of industrial enforcement in Australia', in M. Baird, R. Cooper and M. Westcott (eds) *Reworking Work*, 19th Conference of the Association of Industrial Relations Academics of Australia and New Zealand(AIRAANZ), University of Sydney, February, pp. 341–342.

McCallum, R. (2007) 'Australian labour law after the Work Choices avalanche: Developing an employment law for our children.' *Journal of Industrial Relations*, 49(3), pp. 436–454.

McDonald, T. and Rimmer, M. (1989) 'Award restructuring and wages policy', *Growth*, 37, pp. 111–134.

Macklin, R., Goodwin, M. and Docherty, J. (1993) 'Workplace bargaining structures and processes in Australia' in D. Peetz, A. Preston and J. Docherty (eds) *Workplace Bargaining in the International Context*, Australian Government Publishing Service, Canberra, pp. 3–70.

Maconachie, G. and Goodwin, M. (2006) 'Recouping wage underpayment: increasingly less likely?', *Australian Journal of Social Issues*, 41(3), pp. 327–342.

Maconachie, G. and Goodwin, M. (2010a) 'Employer evasion of workers' entitlements 1986–1995: Why, what and whose?', *Journal of Industrial Relations*, 52(4), pp. 419–439.

Maconachie, G. and Goodwin, M. (2010b) 'Transforming the inspection blitz: Targeted campaigns and the Ombudsman', *Labour and Industry,* 21(1), pp. 369–389.

Maconachie, G. and Goodwin, M. (2011) 'Does institutional location protect from political influence? The case of a minimum labour standards enforcement agency in Australia,' *Australian Journal of Political Science*, 46(1), pp. 105–119.

McQueen, R. (1987) 'Master and servants legislation in the 19th Century Australian colonies', *Law and History in Australia*, 4, pp. 78–110.

McQueen, R. (1992) 'Master and servant legislation as "social control": The role of law in labour relations on the Darling Downs 1860–1870 — A Review Article', *Law in Context*, 10(1), pp. 123–139.

Merritt, A. (1982) 'Forgotten militants: Use of the New South Wales Masters and Servants Acts by and against female employees 1845–1930', *Law and History in Australia,* 1, pp. 54–104.

Merritt, A. (1982a) 'The historical role of law in the regulation of employment', *Australian Journal of Law and Society*, 1(1), pp. 56–86.

Office of Workplace Services (2004) *OWS Policy Guide* (DEWR: Canberra), clause 5.3.

O'Neill, S. and Neilsen, M. A. (2008) Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, *Bills Digest no. 72, 2007–08*, 8 March.

Patmore, G. (1991) *Australian Labour History*, Longman Cheshire, Melbourne.

Peetz, D. (1998) *Unions in a Contrary World*, Cambridge University Press, Melbourne.

Peetz, D. (2006) *Brave New Work Place — How Individual Contracts are Changing our Jobs*, Allen and Unwin, Crows Nest, NSW.

Quinlan, M. (1998) 'Labour market restructuring in industrialised societies: An overview', *Economics and Labour Relations Review*, 9, pp. 1–30.

Quinlan, M. (2004) 'Australia 1977–1902: A "working man's paradise"?' in P. Craven and D. Hay (eds) *Masters, Servants, and Magistrates in Britain and the Empire 1562–1955*, University of North Carolina Press., pp. 219–250.

Quinlan, M and Goodwin, M (2005) 'Combating the tyranny of flexibility: Shop assistants and the struggle to regulate closing hours in the Australian colony of Victoria, 1880–1900', *Social History*, 30(3), pp. 342–365.

Quinlan, M., Mayhew, C. and Bohle, P. (2001) 'The global expansion of precarious employment, work disorganisation, and consequences for occupational Health: Placing the debate in a comparative context', *International Journal of Health Services*, 31(3), pp. 507–536.

Rayner, T. (1980) 'Master and servant in the New Norfolk Magistrates' Court 1838', *The Push from the Bush*, 6, pp. 34–41.

Rowse, T. (2004) 'Elusive middle ground: A political history', in J. Isaac and S. Macintyre (eds) *The New Province for Law and Order: 100 years of Australian Industrial Conciliation and Arbitration*, Cambridge University Press, Cambridge, pp. 17–54.

Stewart, A. (2008) *Stewart's Guide to Employment Law*, Federation Press, Sydney.

Walker, J. (1988) *Jondaryan Station*, University of Queensland Press, St Lucia.

Weil, D. (2008) 'A strategic approach to labour inspection', *International Labour Review*, 147(4), pp. 349–375.

Wood, F. (1933) *The Constitutional Development of Australia*, George G. Harrap and Co. Ltd., Sydney.

Workplace Ombudsman (various) *Annual Reports* (2007, 2008) Canberra.

Workplace Ombudsman (2008) *Submission of the Office of the Workplace Ombudsman to AIRC Award Modernisation Process*, 6 June.