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**ENFORCING WORKPLACE RIGHTS:  
EVALUATING FAIR WORK REFORMS TO THE FEDERAL  
COMPLIANCE REGIME**

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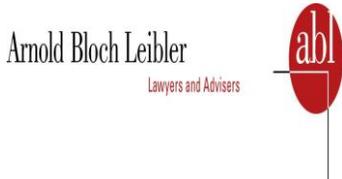


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# Enforcing Workplace Rights: Evaluating Fair Work Reforms to the Federal Compliance Regime

## INTRODUCTION

Since the inception of the federal conciliation and arbitration system in 1904, ensuring compliance with federal labour laws has always been a significant challenge. Empirical studies have found that despite the presence of awards, industrial agreements, unions, and a federal enforcement agency, 'employer evasion of employee entitlements has been significant, and sustained'.<sup>1</sup> The problem of non-compliance was amplified in 1990, when the federal enforcement agency moved from a routine inspection strategy, to a complaints based system, leading to significantly fewer inspections and detections of breaches.<sup>2</sup> The system's failures are attributable not only to the inspection strategy, but also the limited resources of the federal enforcement agency, and its weak prosecution policy of using 'prosecution as a last resort', which did little to deter contraventions.<sup>3</sup>

The reforms introduced by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) signalled a momentous shift in the value that government policy placed on a strong industrial compliance and enforcement regime. Federal enforcement agency funding became a government priority.<sup>4</sup> This resource increase was accompanied by a new more aggressive litigation policy, under which litigation is pursued when there is sufficient evidence to prosecute the case and the agency is of the view that civil proceedings are in the public interest. Under these changes, prosecutions increased substantially.<sup>5</sup>

This unprecedented emphasis on enforcement is a welcome development. As work forms such a significant part of people's lives, ensuring that workplace rights and

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<sup>1</sup> Miles Goodwin and Glenda Maconachie, 'Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategy and Outcomes 1952-95' (2007) 49(4) *Journal of Industrial Relations* 523, 523. See also, Miles Goodwin and Glenda Maconachie, *Enforcing Minimum Labour Standards in Australia from 2010: Correcting or Compounding Problems* (2009) Queensland University of Technology <<http://eprints.qut.edu.au/26979/>> at 15 September 2009; Miles Goodwin and Glenda Maconachie, 'Recouping Wage Underpayment: Increasingly Less Likely' (2006) 41(3) *Australian Journal of Social Issues* 328; Miles Goodwin, *The Great Wage Robbery: Enforcement of Minimum Labour Standards in Australia* (D Phil Theses, The University of New South Wales, 2003).

<sup>2</sup> Goodwin and Maconachie, 'Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategy and Outcomes 1952-95', above n 1, 532-3.

<sup>3</sup> Ibid 534-40.

<sup>4</sup> Upon the introduction of the reforms, the government initially committed \$141.5 million over 4 years towards workplace relations compliance, and, in 2007, it promised to provide the Workplace Ombudsman with a further \$60 million over 4 years to account for its increased responsibilities. See Tess Hardy, 'A Changing of the Guard: Enforcement of Workplace Relations Laws Since WorkChoices and Beyond' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and The Work Choices Legacy* (2009) 75, 75.

<sup>5</sup> The number of prosecutions commenced increased from 4 in 2005-6, the year WorkChoices commenced, to 53 in 2006-7, to 67 in 2007-8. See *ibid*, 84-5.

obligations are respected and adhered to is fundamental to the protection of the quality of people's livelihood. Furthermore, without a sound system of compliance, the power imbalance inherent in an employment relationship renders it highly susceptible to abuse, as previous experience within Australian labour relations has shown.<sup>6</sup>

This paper evaluates the reforms to the compliance regime introduced by the *Fair Work Act 2009* (Cth) from the perspective of a decentred understanding of regulation. Decentred understandings of regulation acknowledge that regulation is not simply rules, backed by sanctions, but comprises of various regulators, regulated actors, and regulatory techniques.<sup>7</sup> They also acknowledge that there are multiple perspectives from which regulation can be assessed.<sup>8</sup>

This paper argues that in comparison to the WorkChoices regime, the Fair Work reforms constitute significant improvements, both in terms of their potential to advance the regime's effectiveness in achieving its objectives, and to promote other values of workplace regulation, including efficiency, participatory democracy, and accountability. These enhancements stem from simplified legislation and awards, a wider range of court remedies, a wider small claims jurisdiction, new inspector standing to enforce safety net contractual entitlements, enhanced emphasis on educative and persuasive compliance techniques, and greater union powers.<sup>9</sup> They will be discussed in Part IV. The next part will consider a decentred understanding of regulation in greater depth.

## A DECENTRED UNDERSTANDING OF REGULATION

To erect a framework for evaluating the Fair Work reforms, this paper will draw upon the decentred understanding of regulation developed by regulatory scholar, Julia

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<sup>6</sup> The inherent inequality of bargaining power within an employment relationship was famously acknowledged by Kahn-Freund: 'The main object of labour law [is] to be countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship': Otto Kahn-Freund, *Labour and the Law* (1972) 8.

<sup>7</sup> John Howe, 'Deregulation' of Labour Relations in Australia: Towards Command and Control' (Working Paper No 34, Centre for Employment Law and Labour Relations Law, The University of Melbourne, 2005) 8.

<sup>8</sup> Ibid 11.

<sup>9</sup> A discussion of all aspects of the Fair Work compliance regime is beyond the scope of this paper. In particular, it will not discuss the issue of the independence of the Fair Work Ombudsman, or the regulation of alternative dispute resolution procedures. For a discussion of the issue of independence, see generally Hardy, above n 4, 92–3; Fair Work Ombudsman, *Litigation Policy of the Office of the Fair Work Ombudsman* (2009) [8] and [11.7] <<http://www.fwo.gov.au/Legal-info-and-action/Guidance-notes/Documents/GN-1-FWO-Litigation-Policy.pdf>> at 20 September 2009. For a discussion of alternative dispute resolution procedures, see generally Joellen Riley, 'From Industrial Arbitration to Workplace Mediation: Changing Approaches to Dispute Resolution' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and The Work Choices Legacy* (2009) 186, 199–205.

Black,<sup>10</sup> and the application of Black's regulatory model by labour law scholar, John Howe, in his analysis of the Australian labour relations system.<sup>11</sup>

Black has defined regulation as 'the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes'.<sup>12</sup> It is implicit in Black's conceptualisation of regulation, as simply the intentional activity of attempting to alter others' behaviour,<sup>13</sup> that regulation can encompass a broad range of behavioural modification techniques, involving various regulators and regulated actors. This decentred understanding of regulation shifts focus away from the state, and the traditional 'command and control' system of imposing strict legal rules, backed by sanctions.

Regarding the identity of regulators, Black's model acknowledges that non-state actors have the power to control and influence the behaviour of others, and thereby encourages consideration of the alternative dimensions that they can bring to complex regulatory systems. The salience of a decentred understanding of regulation for analysing the Australian labour relations system is underlined by the prominent regulatory role that trade unions play in enforcing employee entitlements.<sup>14</sup> It is also common for other actors to attempt to secure compliance with basic labour standards, including employees and employers, who commonly promulgate and enforce HR policies that mirror, and sometimes exceed, labour law obligations.<sup>15</sup>

With respect to regulatory techniques, there is a growing demand for *responsive regulation* to replace traditional command and control techniques.<sup>16</sup> Responsive regulation involves the use of 'indirect strategies in which [substantive] ends are induced, rather than commanded'.<sup>17</sup> This should not be taken to suggest that command and control techniques are redundant.<sup>18</sup> Indeed, as previous experience

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<sup>10</sup> See generally Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1; Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World' (2001) 54 *Current Legal Problems* 103; Julia Black, 'Proceduralizing Regulation: Part I' (2000) 20 *Oxford Journal of Legal Studies* 597.

<sup>11</sup> See Howe, above n 7.

<sup>12</sup> Black, 'Critical Reflections on Regulation', above n 10, 26.

<sup>13</sup> I hasten to add that Black does not conceive of regulation so broadly as to encompass any unsophisticated form of social ordering. Instead, for Black, regulation can only exist where certain control elements are present within social ordering activities, being standard-setting, information-gathering, and behavioural-modification: *ibid* 25–6.

<sup>14</sup> Howe, above n 7, 22. Trade unions also perform other functions within the regulatory system including developing national strategies to address business productivity and competitiveness: at 22. The significance of the role of Australian trade unions in recovering employee entitlements has declined over time due to falls in union density. During the 1950s, union density in Australia reached a high of over 60%. In 2007, union density was 19%. See generally Goodwin and Maconachie, 'Enforcing Minimum Labour Standards in Australia from 2010: Correcting or Compounding Problems', above n 1.

<sup>15</sup> Howe, above n 7, 18, 21.

<sup>16</sup> Black, 'Proceduralizing Regulation: Part I', above n 10, 598.

<sup>17</sup> *Ibid*.

<sup>18</sup> Howe, above n 7, 9–10.

within Australian industrial relations has demonstrated, the threat of formal sanctions for non-compliance is necessary to ensure that persuasive techniques are effective.<sup>19</sup>

Decentred understandings of regulation also appreciate that there are 'different perspectives from which regulatory regimes can be evaluated'.<sup>20</sup> It is generally accepted that effectiveness – that is, the successful modification of behaviour to achieve a regime's underlying goals – is a key criterion for any regulatory regime.<sup>21</sup> However, regulatory regimes should also account for other values.<sup>22</sup>

In addition to effectiveness, the next part discusses three key values of the Fair Work compliance regime: efficiency, participatory democracy, and accountability. It is not suggested that these are its only values. Nevertheless, they provide a useful basis for an evaluation its reforms.

## KEY VALUES OF THE FAIR WORK COMPLIANCE REGIME

### A *Effectiveness*

Identifying a regulatory regime's precise underlying goals can be a highly troublesome assignment resulting in nothing more than contentious opinion. This is particularly problematic in decentred regulatory systems, such as the Australian labour relations system, in which there are multiple regulators with different priorities. From the federal government's perspective, the overarching objects of the Fair Work regulatory regime are expressed in s 3 of the *Fair Work Act 2009* (Cth). They include providing:

- (1) 'a balanced framework for cooperative and productive workplace relations';<sup>23</sup> and
- (2) 'workplace relations laws that are fair to working Australians'.<sup>24</sup>

Although compliance and enforcement activities, which are the focus of this paper, only constitute one element of the broader regime,<sup>25</sup> they are ultimately directed towards achieving these overarching objects. Nevertheless, the compliance regime has its own sub-goals, which, if fulfilled, should facilitate the fulfilment of the regime's overarching objects. These sub-goals are encapsulated by the main two functions of

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<sup>19</sup> Ibid 10.

<sup>20</sup> Ibid 11.

<sup>21</sup> Ibid; Black identifies effectiveness as one of two principal forms of critique of regulation, the other form being a value-based critique, which considers whether regulation is directed at appropriate goals, and/or is pursued in accordance with certain values: Black, 'Critical Reflections on Regulation', above n 10, 27–8; Regulatory scholar Karen Yeung similarly defines effectiveness as the extent to which a regulatory scheme is successful in achieving its collective goal or goals: Karen Yeung, *Securing Compliance: A Principled Approach* (2004) 30.

<sup>22</sup> However, Black has acknowledged that determining which values are important for decentred regulatory practices is one of the most troubling questions of decentring analysis: Black, 'Critical Reflections on Regulation', above n 10, 28–9.

<sup>23</sup> See the introductory passage of s 3 of *Fair Work Act 2009* (Cth).

<sup>24</sup> *Fair Work Act 2009* (Cth) sub-s 3(a).

<sup>25</sup> Black suggests that there are three basic components to regulation: standard setting, monitoring, and enforcement: Black, 'Critical Reflections on Regulation', above n 10, 23. Of course, these three components are not completely independent of one another.

the Fair Work Ombudsman expressed in s 682 of the *Fair Work Act 2009* (Cth) – to promote:<sup>26</sup>

- (1) 'harmonious, productive and cooperative workplace relations';<sup>27</sup> and
- (2) 'compliance with this Act and fair work instruments'.<sup>28</sup>

While the second function reflects a general objective of any compliance regime, the first function is highly specific to the Fair Work context. It highlights that the Fair Work compliance regime exists within a broader regulatory system enriched with deeper regulatory aims. An effective compliance regime not only secures adherence to labour laws, but does so in a way that facilitates harmonious, productive and cooperative workplace relations.

Non-state regulators also bring their own legitimate goals to the system. In particular, trade unions have a special interest in ensuring that the system provides for effective representation and social justice outcomes, emphasising the protective function of labour regulation.<sup>29</sup> An assessment of the effectiveness of the compliance regime must consider how successfully it coordinates the concurrent pursuit of these alternative objectives and those expressed in the legislation.<sup>30</sup>

## B *Efficiency*

An efficient compliance regime minimises the price paid to achieve its goals.<sup>31</sup> Regulatory activity is unavoidably costly; regulators must incur expense to promote behavioural modification, and regulated actors must incur expense to comply with regulatory standards.

As a general rule, compliance regimes that rely on unilateral, inflexible, and formalistic techniques, such as court action, are more costly for regulators and regulated actors.<sup>32</sup> Hence, to promote efficiency, a compliance regime should employ techniques that are cooperative, flexible, and informal. However, the dominant

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<sup>26</sup> These two functions have been noted as constituting the broad function of the Fair Work Ombudsman: Explanatory Memorandum, *Fair Work Bill 2008* (Cth) 385.

<sup>27</sup> *Fair Work Act 2009* (Cth) sub-s 682(a)(i). This goal is consistent with the human resource management ('HRM') approach to dispute resolution in industrial relations. HRM asserts that the management of work relations as a cooperative endeavour: See Riley, above n 9, 187.

<sup>28</sup> *Fair Work Act 2009* (Cth) sub-s 682(a)(ii).

<sup>29</sup> See Howe, above n 6, 10–1.

<sup>30</sup> *Ibid* 11.

<sup>31</sup> Howe similarly describes efficiency as 'value for money': *ibid*. Yeung describes a decision as efficient if it generates the desired outcome at the lowest cost: Yeung, above n 21, 30.

<sup>32</sup> See Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2<sup>nd</sup> ed, 2002) 54. These formalistic techniques are also more likely to cause parties to bear other forms of costs such as time spent on compliance processes, and emotional costs. Mark Mourell and Craig Cameron identifies emotional costs and timeliness, albeit under the alternative title of efficiency, as elements of their conceptualisation of 'fairness': Mark Mourell and Craig Cameron, 'Neither Simple nor Fair: Restricting Legal Representation Before Fair Work Australia' (2009) 22 *Australian Journal of Labour Law* 51, 59. Yeung also identifies timeliness as a common regulatory goal: *ibid* 34–5.

purpose of any regulatory regime is to achieve its underlying goals.<sup>33</sup> Absent a credible threat of strong punitive sanctions, such 'persuasive' techniques are likely to be ineffective, as Australian labour relations' history has shown. Thus, in accordance with the growing consensus amongst regulatory theorists: the optimal enforcement strategy is to apply 'a judicious mix of deterrence and persuasive approaches being applied in an enforcement pyramid'.<sup>34</sup>

### C Participatory Democracy

An essential criterion of any successful regulatory regime is the extent to which it fosters participatory democracy<sup>35</sup> – that is, opportunities for affected actors to make a meaningful contribution to its direction and operation. The value within participatory democracy can be expressed at two levels.

First, it is valuable 'as a way of improving the effectiveness of a regulatory regime at achieving desired behavioural change and stated policy goals'.<sup>36</sup> Regulatory regimes exercising participatory democracy distribute power more evenly amongst interested actors, empowering more actors with the capacity to curb abuses of power by others.<sup>37</sup> Such actors are also likely to have the necessary motivation to act, driven by a sense of social responsibility that is inculcated through the regulatory dialogue that participative processes create.<sup>38</sup> Participatory democracy further promotes effectiveness by subjecting regulatory processes to continuous evaluation and feedback from multiple actors, each informed by their own legitimate values and priorities.<sup>39</sup> It thereby enhances the responsiveness of regulation to the needs of interested actors, and evolving circumstances.<sup>40</sup>

Second, participation has value in its own right as a measure of a regime's democratic character.<sup>41</sup> The case for widespread participation within a regime is especially compelling in the context of labour relations as a system, which has an immense influence on people's lives. Thus, it is essential that the labour relations system

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<sup>33</sup> Yeung, above n 21, 33.

<sup>34</sup> Liz Bluff and Richard Johnstone, 'Infringement Notices: Stimulus for Prevention or Trivialising Offences?' (2003) 19 *Journal of Occupational Health and Safety* 337, 338. The enforcement pyramid suggests that persuasive techniques, which lie at the bottom of the pyramid, should be applied in the first instance and account for most enforcement activity. If these techniques are ineffective, the regulator should move up the pyramid, imposing more formal and punitive sanctions. See also Hardy, above n 4, 77.

<sup>35</sup> Howe, above n 7, 9.

<sup>36</sup> *Ibid* 11.

<sup>37</sup> John Braithwaite, 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers' (1997) 47 *University of Toronto Law Journal* 305, 341–2.

<sup>38</sup> *Ibid*.

<sup>39</sup> See Howe, above n 7, 10–1.

<sup>40</sup> Sean Cooney, John Howe, and Jill Murray, 'Time and Money Under Workchoices: Understanding the New Workplace Relations Act as a Scheme of Regulation' (2006) 29(1) *University of New South Wales Law Journal* 215, 223–4.

<sup>41</sup> Howe, above n 7, 14.

provides ample opportunity for meaningful representation of the interests of all interested actors, particularly those with little economic or political power.<sup>42</sup>

#### D *Accountability*

Put simply, accountability is the duty to reveal, explain, and justify one's actions to some other person, group of persons, or body.<sup>43</sup> Regulatory regimes should have mechanisms in place to hold regulatory actors accountable for their actions.<sup>44</sup> Such mechanisms are important because they encourage actors to make responsible, rational and fair decisions in furtherance of the regime's goals and values.<sup>45</sup>

### **AN EVALUATION OF THE FAIR WORK REFORMS TO THE COMPLIANCE REGIME**

With these values in mind, this part will evaluate various aspects of the Fair Work reforms to the compliance regime, as outlined in the introduction.

#### A *Simplified Legislation and Awards*

The Fair Work reforms have dramatically simplified the main piece of federal industrial relations legislation, and the Australian awards system.

##### 1 *Simplified Legislation*

Relative to the *Workplace Relations Act 1996* (Cth) under WorkChoices, the *Fair Work Act 2009* (Cth) presents certain areas of employment law in a highly simplified manner, including statutory minimum employment standards, employees' general rights of protection against discrimination and wrongful treatment, and enforcement of civil remedy provisions.

Minimum employment standards are now concisely 'expressed in 63 well-drafted provisions compared with the more than 150 convoluted sections of the AFPCS'.<sup>46</sup> The new employees' general rights of protections provisions, all centrally located in Part 3-1 of the Act, constitute a 'radically streamlined set of "general protections"'.<sup>47</sup> They replace the freedom of association provisions in Part 16 of the *Workplace Relations*

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<sup>42</sup> Ibid 9.

<sup>43</sup> Colin Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38, 40.

<sup>44</sup> Howe, above n 7, 12.

<sup>45</sup> Scott, above n 43, 39. Although, Scott has acknowledged that the precise objectives lying behind the principle of accountability are 'ill-defined': at 39.

<sup>46</sup> See Jill Murray and Rosemary Owens, 'The Safety Net: Labour Standards in the New Era' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and The Work Choices Legacy* (2009) 44. The minimum employment standards under federal legislation are now known as the National Employment Standards: *Fair Work Act 2009* (Cth) pt 2.2. AFPCS is an acronym for Australian Fair Pay and Conditions Standard, the set of statutory minimum employment standards under WorkChoices.

<sup>47</sup> Andrew Stewart, 'A Question of Balance: Labor's New Vision For Workplace Regulation' (2009) 22 *Australian Journal of Labour Law* 3, 39.

*Act 1996* (Cth), and the separate remedies ‘scattered around that Act for coercion, misrepresentation, unlawful termination and much more besides’.<sup>48</sup>

All provisions relating to court enforcement of civil remedy provisions are now centrally located in Part 4-1 of the *Fair Work Act 2009* (Cth).<sup>49</sup> That part includes a comprehensive table that lists all civil remedy provisions.<sup>50</sup> In contrast, the *Workplace Relations Act 1996* (Cth) presented a highly complex scheme of civil remedies, which was ‘inherently difficult to navigate and leads to duplications and inconsistencies’.<sup>51</sup> While the WR Act also presents a table of civil remedy provisions, the table only listed certain core civil remedy provisions, referred to as *applicable provisions*.<sup>52</sup> There was no central directory of the other 100 plus civil remedy provisions interspersed throughout the Act.

It has been suggested that ‘the clearer and more consistent the regulatory system, the more prepared regulators are to impose sanctions for non-compliance’.<sup>53</sup> All regulators within the Fair Work regime will be encouraged to take enforcement action by the relative ease of identifying and understanding legislative provisions that may have been contravened.

Furthermore, to the extent that employers’ obligations under the National Employment Standards (NES) and under Part 3-1 of the new Act are relatively easy for employers to understand, the reforms encourage them to engage in voluntary compliance. The simplified legislation also enhances efficiency by reducing the cost to regulators of identifying contraventions, and the accountability of the Fair Work Ombudsman, trade unions, employer associations, and other representative bodies for acting upon workplace complaints. This is because it is easier for the broader community to identify possible contraventions of the legislation within the investigative jurisdiction of these bodies.

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<sup>48</sup> *Ibid.*

<sup>49</sup> Hardy, above n 4, 95.

<sup>50</sup> The table is set out in sub-s 539(2). For each provision, it also lists who has standing to enforce it, in which courts they may institute proceedings, and the maximum penalty applicable to a breach.

<sup>51</sup> Hardy, above n 4, 82. An example of inconsistency and duplication within the civil remedies scheme of the Act is given by the civil remedies available to employees for an employer’s breach of the AFPCS. Civil remedies can either be obtained under s 320 or s 719. However, those sections provide for different types of civil remedies. Section 320 empowers the court to make an order for damages or to stop the contravention or remedy its effects. Section 719 empowers the court to impose a civil penalty, and make an order for the recovery of an underpayment.

<sup>52</sup> *Workplace Relations Act 1996* (Cth) sub-s 718(1). For each applicable provision, the table also lists who has standing to enforce it. However, it does not identify which courts have jurisdiction, or the maximum penalty applicable to a contravention, although these matters are relatively easy to ascertain in ss 717, 719.

<sup>53</sup> Hardy, above n 4, 82. See also Julia Black, ‘Managing Discretion’ (Paper presented at the Australian Law Reform Commission Conference on Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001) 6.

## 2 Modern Awards

The award modernisation process has greatly simplified the awards system. One of the central objects of the process is that modern awards 'be simple to understand and easy to apply'.<sup>54</sup> The new modern awards system has achieved the government's desire to reduce the total number of awards in the workplace relations system by replacing existing federal awards and NAPSAs with non-overlapping modern awards that operate primarily along industry lines.<sup>55</sup> Furthermore, simplicity is facilitated by the requirement that the content of modern awards is restricted to ten specific subject matters.<sup>56</sup> For the same reasons as for simplified legislation, the simplicity of the modern award system will promote compliance with awards, efficient enforcement of awards, and regulator accountability.

### B Wider Range of Court Remedies

The range of remedies that courts can award in enforcement proceedings has been greatly expanded. If satisfied that a person has contravened, or proposes to contravene a civil remedy provision, the Federal Court or the Federal Magistrates Court can make any orders that they consider appropriate,<sup>57</sup> including orders for pecuniary penalties,<sup>58</sup> injunctions, compensation, or reinstatement of a person.<sup>59</sup>

Under WorkChoices, while a pecuniary penalty could be imposed for breach of any civil remedy provision, other remedies were not comprehensively available. For example, the court had no power to issue an injunction to restrain a proposed breach of an award or workplace agreement.<sup>60</sup> Thus, courts had no direct means of ensuring

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<sup>54</sup> Minister For Employment and Workplace Relations, *Request Under 576C(1) – Award Modernisation* (2008) Australian Industrial Relations Commission cl 1(a)

<[http://www.airc.gov.au/awardmod/download/award\\_modernisation\\_request.pdf](http://www.airc.gov.au/awardmod/download/award_modernisation_request.pdf)> at 18 September 2009. A simple and easy to understand modern award system is also expressed as a modern award objective in the new Act: *Fair Work Act 2009* (Cth) sub-s 134(1)(g).

<sup>55</sup> Ibid Cl 4. Note that the Minister's request, as amended in December 2008, exempted both federal enterprise awards and Notional Agreements Preserving State Awards ('NAPSAs') derived from state enterprise awards: See Stewart, above n 48, 20. NAPSAs were created under Part 3 of Schedule 8 of the *Workplace Relations Act 1996* (Cth) to preserve the effect of any state award that was binding on a federal system employer before WorkChoices was introduced on 27 March 2006. According to Fair Work Australia, the body that succeeded the Australian Industrial Relations Commission ('AIRC') which began the implementation of award modernisation, by the end of 2009, after a review of some 1500 awards, 122 industry and occupation modern awards had been created. These modern awards commenced on 1 January 2010: Fair Work Australia, *About Award Modernisation* (2010)

<<http://www.fwa.gov.au/index.cfm?pagename=awardsmodern>> at 2 October 2010.

<sup>56</sup> *Fair Work Act 2009* (Cth) s 139. See also Murray and Owens, above n 47, 53.

<sup>57</sup> *Fair Work Act 2009* (Cth) sub-s 545(1).

<sup>58</sup> *Fair Work Act 2009* (Cth) s 546. Like WorkChoices, the *Fair Work Act 2009* (Cth) specifies similarly high maximum pecuniary penalties for contraventions of civil remedy provisions. The increase in the maximum penalties introduced by WorkChoices has been interpreted by the judiciary as signaling that 'any light handed approach that might have been taken in the past ... should no longer be applicable': *Finance Sector Union v Commonwealth Bank of Australia* (2005) FCA 1847 at [72] (Merkel J).

<sup>59</sup> *Fair Work Act 2009* (Cth) sub-s 545(2).

<sup>60</sup> Hardy, above n 4, 83.

actual compliance with non-pecuniary obligations in awards or workplace agreements.<sup>61</sup> Further, the court could not order compensation for breach of an award or workplace agreement exceeding the amount of any underpayment,<sup>62</sup> nor could it order reinstatement of an employee, where the contravention involved a dismissal.

The wider suite of available remedies under the Fair Work regime provides increased incentives for employees, employers, and their representatives to pursue enforcement proceedings. Moreover, the removal of limitations on the award of coercive remedies enables courts to provide for actual compliance with the Act, and industrial instruments. It may also encourage regulators to focus greater resources on achieving preventative compliance.<sup>63</sup> This strategy would be considerably more effective and efficient to the extent that it resolves non-compliance issues early before they have the chance to grow, affecting more people, and on a larger scale. Finally, from the perspective of wrongdoers, the new remedial powers increase the ‘size of the deterrent “stick”’, thereby encouraging voluntary compliance.<sup>64</sup>

### C Wider Small Claims Jurisdiction

An employee’s right to invoke the small claims procedure in proceedings commenced to enforce an employer’s obligation to pay the employee has been widened extensively.<sup>65</sup> The right has been expanded in three major respects. First, the maximum claim that can be entertained by a court exercising the small claims jurisdiction has been doubled from \$10,000 to \$20,000.<sup>66</sup> Second, the small claims procedure can apply to claims for breaches of any civil remedy provision,<sup>67</sup> not just breaches of certain civil remedy provisions, as was the case under WorkChoices.<sup>68</sup> Third, an employee can now bring a claim for breach of a safety net contractual entitlement within the small claims jurisdiction. A safety net contractual entitlement is any entitlement under a contract of employment, that relates to a subject matter

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<sup>61</sup> Margaret Lee, ‘Regulating Enforcement of Workers Entitlements in Australia: The New Dimension of Individualisation’ (2006) 17(1) *Labour and Industry* 42, 46. Such terms may impose obligations to ‘consult with employees, redundancy procedures, procedures for investigating performance, promotion procedures, shift change procedures, and provision of benefits such as training and education’: at 46.

<sup>62</sup> Except in relation to a breach of an Individual Transitional Employment Agreement (‘ITEA’) or Australian Workplace Agreement (‘AWA’): Hardy, above n 4, 84. The power to make an order for recovery of an underpayment was provided by *Workplace Relations Act 1996* (Cth) sub-s 719(6).

<sup>63</sup> Hardy, above n 4, 95. Importantly, the new Act provides persons with standing to bring claims in respect of proposed contraventions of civil remedy provisions: *Fair Work Act 2009* (Cth) sub-s 539(2).

<sup>64</sup> Hardy, above n 4, 97.

<sup>65</sup> This right also extends to inspectors and trade unions who have commenced such proceedings on behalf of an employee: *Fair Work Act 2009* (Cth) sub-s 539(1)(a).

<sup>66</sup> *Fair Work Act 2009* (Cth) sub-s 548(2)(a). An amount higher than \$20,000 may be prescribed by regulation: sub-s 548(2)(b).

<sup>67</sup> *Fair Work Act 2009* (Cth) sub-s 548(1)(a).

<sup>68</sup> The small claims procedure was limited to claims for breaches of an applicable provision, an Individual Transitional Employment Agreement, and other civil remedy provisions as specified throughout the Act: *Workplace Relations Act 1996* (Cth) sub-s 724(a).

covered by the NES, or that may be covered by modern awards.<sup>69</sup> Given the breadth of these subject matters, it is likely that such entitlements are rife throughout most employment contracts. Thus, this third change will significantly expand the small claims jurisdiction.<sup>70</sup>

The small claims procedure is relatively inexpensive as legal representation is prohibited without leave of the court.<sup>71</sup> This saving of costs, coupled with the informality of the procedure,<sup>72</sup> renders it highly accessible to claimants. Furthermore, the procedure promises claimants a fair decision making forum by allowing access to ‘an impartial decision-maker, who is independent of the parties, [and] has knowledge of the relevant substantive rights and principles of procedural fairness’.<sup>73</sup>

The expansion of the small claims jurisdiction not only promotes compliance, but furthers the protective function of labour law by encouraging employees to commence enforcement proceedings in circumstances where the cost of ordinary proceedings would have been prohibitive.<sup>74</sup> It also reduces the regulatory burden on the Fair Work Ombudsman, who can focus on investigating complaints that attract the greatest public interest.<sup>75</sup>

It is arguable that the wider small claims jurisdiction will be detrimental to the regime’s efficiency. There has been considerable commentary suggesting that litigants in person (‘LIPs’) experience great difficulty in competently preparing and presenting their cases, increasing demands placed on decision makers and administrative staff.<sup>76</sup> However, there are several reasons why LIPs under the present small claims system are unlikely to create substantial public costs.

First, it is restricted to claims relating to ‘plain vanilla’ payment obligations, which are less likely to involve complex legal issues requiring legal expertise to understand. Second, the recent case of *Hughes v Mainrange Corporation Pty Ltd*<sup>77</sup> indicates that, where a complex legal issue does arise, the court can grant leave to the parties to be legally represented solely for the purposes of contending that issue, thereby achieving

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<sup>69</sup> *Fair Work Act 2009* (Cth) s 12. The subject matters covered by the NES and that may be covered modern awards are set out in sub-ss 61(2), 139(1).

<sup>70</sup> In addition to these three changes, a claimant can now bring small claims proceedings in the Federal Magistrates Court, not just a state magistrate’s court as was the case under *WorkChoices: Fair Work Act 2009* (Cth) sub-s 548(1)(a).

<sup>71</sup> *Fair Work Act 2009* (Cth) sub-s 548(5).

<sup>72</sup> *Fair Work Act 2009* (Cth) sub-s 548(3).

<sup>73</sup> Riley, above n 9, 204.

<sup>74</sup> However, as the small claims jurisdiction is restricted to claims for orders relating to employers’ payment obligations, it fails to promote compliance with non-pecuniary obligations.

<sup>75</sup> The litigation policy of the Fair Work Ombudsman acknowledges that the Fair Work Ombudsman may refer a matter to the small claims procedure as an alternative to commencing litigation: *Fair Work Ombudsman*, above n 9, [13.5].

<sup>76</sup> For a good summary of this literature, see Mourell and Cameron, above n 32, 67–8. See also Justice Geoffrey Giudice, ‘What Should We Expect From Our Industrial Tribunals’ (2008) 21 *Australian Journal of Labour Law* 237, 241.

<sup>77</sup> [2009] FMCA 1025 (Unreported, Federal Magistrate Lucev, 9 October 2009).

an efficient compromise between public and legal costs. Third, the procedure's informality provides the courts with the flexibility to assume an inquisitorial role to deal with LIP issues 'efficiently and expeditiously'.<sup>78</sup>

In any event, any efficiency concerns surrounding the wider small claims jurisdiction are outweighed by the countervailing concern for enhancing the regime's effectiveness.

#### D *Inspector Standing to Enforce Safety Net Contractual Entitlements*

An inspector can now apply to a court to enforce an employee's safety net contractual entitlement, but only where the inspector also applies in relation to a breach, or proposed breach, of the NES, or a fair work instrument<sup>79</sup> that relates to the employee.

This is a significant power, as safety net contractual entitlements are likely to be rife throughout most contracts of employment.<sup>80</sup> The condition that there be a concurrent claim to enforce the NES or a fair work instrument is unlikely to be a major practical limitation upon an inspectors' jurisdiction to enforce these entitlements. Generally speaking, breaches of such entitlements will also constitute breaches of the NES or modern awards, given that such entitlements must, by definition, cover the same subject matters, and impose obligations on employers that exceed those under the NES or awards to be valid.<sup>81</sup>

Under WorkChoices, employees who were victims of breaches of their contractual entitlements were left in the precarious position of having no option but to independently pursue contractual remedies through the expensive and time consuming court system.<sup>82</sup> Under the new regime, the mere threat of an inspector initiating proceedings to enforce safety net contractual entitlements will often be sufficient to induce employers to rectify alleged breaches. If not, litigation can be pursued to force compliance.

Further, the condition that an inspector brings a concurrent claim for breach of the Act or fair work instrument indicates that enforcement of private contractual bargains is clearly not a government priority. In the government's view, it is only appropriate to intervene where that would 'streamline and simplify enforcement'.<sup>83</sup>

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<sup>78</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth) 331.

<sup>79</sup> Excluding FWA orders, unless it is a national minimum wage order or an equal remuneration order: *Fair Work Act 2009* (Cth) sub-ss 54(3)(e)-(f).

<sup>80</sup> See above Part IV(C).

<sup>81</sup> This is in accordance with the doctrine of contract law that illegal terms are void and unenforceable. Although, as noted by the High Court in *Byrne v Australian Airlines* (1995) 185 CLR 410, a breach of contract is not automatically a breach of an award as well: Andrew Stewart, *Stewart's Guide to Employment Law* (2<sup>nd</sup> ed, 2009) 93.

<sup>82</sup> Cooney, Howe, and Murray, above n 40, 221.

<sup>83</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth) 327.

That is a sensible policy. Closing the Fair Work Ombudsman's doors to complaints concerning breaches of safety net contractual entitlements *per se* ensures that it focuses on pursuing the protective function of securing basic employee entitlements that arise under the NES and fair work instruments.

### E *Cooperative and Educative Compliance Techniques*

A key improvement upon the WorkChoices regime is the greater emphasis that the new regime places on achieving compliance through cooperative and educative techniques.

This is a welcome development in view of the mountainous social barriers to compliance that presently exist within Australian industrial relations, including limited knowledge of labour laws, and pervasive cultures of non-compliance. Knowledge of labour laws is particularly porous amongst employees and small business employers, who typically do not employ human resource managers or other personnel with expertise in this field. This problem is compounded by the complexity of Australian labour law, which is characterised by multi-layered sources of workplace regulation.<sup>84</sup>

Ignorance of the law prevents regulated actors from pursuing voluntary compliance, and regulators from acting to enforce employment law obligations. For instance, it has been found that employees often refrain from complaining about breaches of their legal rights because they fear reprisal, including dismissal.<sup>85</sup> It is likely that such fears would be assuaged if employees were confident in the knowledge that they are legally protected against dismissal for seeking to exercise a workplace right.<sup>86</sup>

The enforcement regime must also confront powerful cultures of non-compliance within the Australian system. An excellent example is the ongoing growth in extended working hours, most of it unpaid.<sup>87</sup> There are various reasons why employees choose not to refuse working extended hours including commitment to the job, supervisory pressure, and fears about the possible impact on jobs, promotion, and training.<sup>88</sup> All of

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<sup>84</sup> See generally Joel Fetter and Richard Mitchell, 'Legal Complexity of Workplace Regulation and its Impact upon Functional Flexibility in Australian Workplaces' (2004) 17 *Australian Journal of Labour Law* 276.

<sup>85</sup> Margaret Lee, above n 62, 46-7.

<sup>86</sup> Indeed, under the new Act, employees who seek to exercise a workplace right are protected from a wide range of discrimination and wrongful conduct: *Fair Work Act 2009* (Cth) ss 340, 342.

<sup>87</sup> Barbara Pocock, *The Work/Life Collision* (2003) 132. It has been estimated that up to two-thirds of all overtime worked in Australia is unpaid: Ian Campbell, 'Snatching at the Wind? Unpaid Overtime and Trade Unions in Australia' (2002) 10(2) *International Journal of Employment Studies* 109. Indeed, this cultural problem is particularly pronounced within certain industries, for example, the legal profession: See generally Ian Campbell, "'The Elephant in the Room': Working Time Patterns of Solicitors in Private Practice in Melbourne' (Working Paper No 43, Centre for Employment Law and Labour Relations Law, The University of Melbourne, 2008).

<sup>88</sup> Pocock, above n 88, 133. Under the NES, employees have a right to refuse hours additional to the maximum weekly hours of 38 if those additional hours are unreasonable: *Fair Work Act 2009* (Cth) sub-s 62(2). Although, whether additional hours are unreasonable can be a complex question, as

these reasons culminate in the entrenchment of the belief: 'it is just expected'.<sup>89</sup> Thus, to successfully achieve compliance, changes to the compliance regime have to 'go beyond industrial machinery'.<sup>90</sup> Educative and persuasive techniques are necessary to induce long-term change in the knowledge and attitudes of employers and employees.

The Fair Work reforms have supported the use of such techniques in two main respects. First, they have introduced a new enforcement strategy that is geared towards promoting harmonious, productive and cooperative workplace relations. Second, the Fair Work Ombudsman now has the legislative power to accept enforceable undertakings from wrongdoers instead of pursuing enforcement proceedings.<sup>91</sup>

### 1 *New Enforcement Strategy*

At the root of this new strategy is the new legislative function of the federal enforcement agency to promote 'harmonious, productive and cooperative workplace relations'.<sup>92</sup> This new function has the potential to influence enforcement activities at specific and general levels.

At the specific level, the Fair Work Ombudsman now has responsibility for several novel initiatives to educate employees, employers, and their associations. This includes the preparation and publication of a Fair Work Information Statement that employers must provide new employees under the NES.<sup>93</sup> The statement provides employees with general information about the NES, awards, agreement making, the role of Fair Work Australia ('FWA') and the Fair Work Ombudsman, and other aspects of the regime.

Another Fair Work initiative includes the publication of best practice guides, which suggest best practice initiatives for small and medium businesses to implement.<sup>94</sup> In addition, educative measures that existed under WorkChoices have been retained, including the running of regular education campaigns, targeting particular industries or employees, and responding to enquiries about the regime.

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highlighted by the long list of factors that must be taken into account when determining the answer: *Fair Work Act 2009* (Cth) sub-s 62(3).

<sup>89</sup> Ibid 134.

<sup>90</sup> Ibid 156.

<sup>91</sup> *Fair Work Act 2009* (Cth) s 715. The Fair Work Ombudsman could previously accept enforceable undertakings in exercise of its general power to enter into contracts. The Fair Work Ombudsman also has a new power to issue compliance notices under s 716 of the *Fair Work Act 2009* (Cth).

<sup>92</sup> *Fair Work Act 2009* (Cth) sub-s 682(1)(a)(i). Cf *Workplace Relations Act 1996* (Cth) s 166B.

<sup>93</sup> *Fair Work Act 2009* (Cth) ss 124–5.

<sup>94</sup> There are presently 11 guides in total. Indeed, best practice guide number 1 entitled 'Work and Family', addresses issues of extended working hours. It suggests reasons why achieving a better balance between work and family is beneficial to the workplace, and suggests initiatives that can be implemented to achieve this balance: Fair Work Ombudsman, *Best Practice Guide 01: Work and Family* (2009)

< <http://www.fwo.gov.au/Best-Practice-Guides/Pages/default.aspx#work%20and%20family>> at 27 September 2009.

At the general level, the new function has great potential to infuse within the office of the Fair Work Ombudsman, a sharper focus on using educative and persuasive techniques to resolve workplace disputes. Indeed, the Fair Work Ombudsman's official litigation policy now indicates a preference for resolving complaints by 'FWO mediation' where that is in the interests of harmonious, productive and cooperative workplace relations.<sup>95</sup>

Moreover, to the extent that the Fair Work Ombudsman's focus on working with parties to achieve harmonious, productive and cooperative workplace relations is explicitly communicated to the community, this approach is more likely to be reciprocated by parties to a dispute, thereby increasing the chances of a successful resolution.<sup>96</sup>

The new emphasis on education and cooperation will significantly improve the regime's chances of inducing positive change in actors' knowledge and attitudes, thereby promoting long-term compliance. It will also promote other values of the regime including harmonious, productive and cooperative workplace relations, efficiency, and participatory democracy, particularly from the perspective of wrongdoers who are afforded opportunities to engage in meaningful dialogue with regulators to shape their compliance obligations.

## *2 Enforceable Undertakings*

If the Fair Work Ombudsman reasonably believes that a person has contravened a civil remedy provision, he or she may, in lieu of commencing proceedings, accept an enforceable undertaking from that person.<sup>97</sup> There are no restrictions upon what terms enforceable undertakings may include.

The highly flexible nature of enforceable undertakings renders them an excellent tool for expanding wrongdoers' knowledge of labour laws and changing their attitudes towards compliance. Enforceable undertakings can address knowledge issues by imposing obligations upon organisational managers to undertake education,

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<sup>95</sup> Fair Work Ombudsman, above n 9, [13.6]. Importantly, its litigation policy continues to indicate a genuine threat of litigation, supporting the effectiveness of these persuasive techniques. Litigation will still be pursued where there is sufficient evidence to commence proceedings and it is in the public interest: at [7.3].

<sup>96</sup> Indeed, it appears that communicating this message is a central concern of the Fair Work Ombudsman. For example, the welcoming statement of the home page of the Fair Work Ombudsman's website used to state: 'the role of the Fair Work Ombudsman is to work with employees, employers, contractors and the community to promote harmonious, productive and cooperative workplaces': Fair Work Ombudsman (2009) <<http://www.fwo.gov.au/Pages/default.aspx>> at 27 September 2009. This message is still communicated by the Fair Work Ombudsman through its regular online media releases which predominantly report on outcomes in matters in which it has been involved: Fair Work Ombudsman, *Media Releases* <<http://www.fairwork.gov.au/media-centre/media-releases/Pages/default.aspx>> at 2 October 2010. It also communicates the message on its "about us" webpage: Fair Work Ombudsman, *About Us* <<http://www.fairwork.gov.au/about-us/pages/default.aspx>> at 2 October 2010.

<sup>97</sup> *Fair Work Act 2009* (Cth) s 715.

addressing the area of law that was contravened.<sup>98</sup> In respect of changing attitudes, the need for employers to participate in developing and negotiating terms of enforceable undertakings can engender a new sense of organisational commitment to compliance.<sup>99</sup> This may be supported by formal commitments within the undertaking itself, which are enforceable by court action,<sup>100</sup> to avoid similar contraventions in the future, or to implement work systems that facilitate future compliance.<sup>101</sup>

The flexibility of enforceable undertakings also makes them highly useful for promoting other values of the compliance regime. They can be tailored to achieve restorative justice outcomes, whereby the offender not only assumes responsibility for repairing the harm caused to victims, but implements systems to prevent future contraventions and makes broader contributions to the community in order to make amends.<sup>102</sup> Indeed, according to the Fair Work Ombudsman's litigation policy, enforceable undertakings must include an admission of contravention, and an undertaking to remedy the contravention.<sup>103</sup> They may also include apologies, and financial contributions to social justice organisations.<sup>104</sup> The achievement of restorative justice is consistent with the social justice values of the system, and restores trust within workplace relationships that is integral to harmonious, productive and cooperative workplace relations.

Negotiating and accepting enforceable undertakings is also a relatively efficient means of achieving compliance,<sup>105</sup> and promotes participatory democracy in so far as employers may make a meaningful contribution to this process.

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<sup>98</sup> For example, two enforceable undertakings which were recently accepted by the federal enforcement agency included such commitments: *Undertaking from Starr & Co Pty Ltd* (2008) Fair Work Ombudsman cl 1(b) <<http://www.fwo.gov.au/Legal-info-and-action/Documents/UndertakingsPDF/Undertaking-from-Starrs-and-Co-Pty-Ltd.pdf>> at 30 September 2009; *Undertaking from Ozone Manufacturing Pty Ltd* (2009) Fair Work Ombudsman cl 1(c) <<http://www.fwo.gov.au/Legal-info-and-action/Documents/UndertakingsPDF/Undertaking-from-Ozone-Manufacturing-Pty-Ltd.pdf>> at 30 September 2009.

<sup>99</sup> Richard Johnstone and Michelle King, 'A Responsive Sanction to Promote Systemic Compliance? Enforceable Undertakings in Occupational Health and Safety Regulation' (2008) 21 *Australian Journal of Labour Law* 280, 283–4.

<sup>100</sup> *Fair Work Act 2009* (Cth) sub-s 716(6)-(7).

<sup>101</sup> Johnstone and King, above n 100, 283–4. Indeed, commitments to ensure future compliance with workplace laws were incorporated within three enforceable undertakings recently accepted by the federal enforcement agency: *Undertaking from Starr & Co Pty Ltd*, above n 99, cl 1(c); *Undertaking from Pilbara Iron Company (Services) Pty Ltd* (2009) Fair Work Ombudsman cl 1(e), (g) <[http://www.fwo.gov.au/Legal-info-and-action/Documents/UndertakingsPDF/Undertaking-from-Pilbara-Iron-Company-\(Services\)-Pty-Ltd.pdf](http://www.fwo.gov.au/Legal-info-and-action/Documents/UndertakingsPDF/Undertaking-from-Pilbara-Iron-Company-(Services)-Pty-Ltd.pdf)> at 30 September 2009; *Undertaking from Ozone Manufacturing Pty Ltd*, above n 99, cl 1(b), (d). The possibility of including commitments to implement work systems in enforceable undertakings is noted in the Fair Work Ombudsman's litigation policy: Fair Work Ombudsman, above n 9, [13.4].

<sup>102</sup> Johnstone and King, above n 100, 283–4. See also Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002) 43–61.

<sup>103</sup> Fair Work Ombudsman, above n 9, [13.4].

<sup>104</sup> Such commitments were included in an enforceable undertaking recently accepted by the Fair Work Ombudsman: *Undertaking from Pilbara Iron Company (Services) Pty Ltd*, above n 102, cl 1(a), (c)–(d).

<sup>105</sup> Although, given the legally binding nature of these undertakings, lawyers will ordinarily need to be involved in drafting enforceable undertakings.

However, it is important to note that, despite the theoretical possibilities, the practical utility of this new power will depend upon how frequently enforceable undertakings will be invoked by the Fair Work Ombudsman.

#### F *Greater Trade Union Powers*

Perhaps the most significant aspect of the Fair Work reforms is the enhancement of trade union powers. The reforms enhance trade union's standing in enforcement proceedings, and promise to elicit renewed growth in trade union membership.

Trade unions now have significantly wider standing to commence proceedings on behalf of employees. Under WorkChoices, they could only commence proceedings relating to a contravention of the AFPCS or collective agreement where the contravention affected one of their members.<sup>106</sup> Also, trade unions could not commence proceedings relating to a contravention of an award unless the respondent employer employed a member.<sup>107</sup> Under Fair Work, restrictions on trade unions' standing are not as wide. Trade unions have standing where the contravention affects an employee, and they are entitled to represent that employee's industrial interests.<sup>108</sup> Hence, there is no need for a nexus between the contravention and a member of the trade union.

However, the practical utility of these new standing rights is severely limited because trade unions still only have the right to enter workplaces to investigate suspected breaches that affect their members.<sup>109</sup> Thus, they have no direct means of gathering evidence from workplaces to support civil proceedings for contraventions that affect non-members.

Nevertheless, the reforms should enhance the role of trade unions in securing compliance by eliciting growth in union membership. Such growth will be stimulated by the wider role that trade unions are likely to play in collective bargaining. Under the new regime, a registered union will, by default, be the bargaining representative of their members in collective agreement negotiations.<sup>110</sup> Furthermore, the incidence of collective bargaining will likely increase. This is because a majority of employees who will be covered by a proposed single-enterprise agreement can now effectively force their employer to collectively bargain by obtaining a majority support determination

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<sup>106</sup> *Workplace Relations Act 1996* (Cth) sub-ss 718(1), (6).

<sup>107</sup> *Workplace Relations Act 1996* (Cth) sub-s 718(1).

<sup>108</sup> *Fair Work Act 2009* (Cth) sub-s 540(2).

<sup>109</sup> *Fair Work Act 2009* (Cth) s 481.

<sup>110</sup> *Fair Work Act 2009* (Cth) sub-s 176(1)(b). An employee can elect to appoint another person as the employee's bargaining representative: *Fair Work Act 2009* (Cth) sub-s 176(1)(c).

from FWA.<sup>111</sup> Upon the issue of this determination, the employer must bargain in good faith.<sup>112</sup>

Growth in membership will also be facilitated by the new power of trade unions to enter workplaces to hold discussions with non-union members,<sup>113</sup> replacing the WorkChoices system whereby unions could be “locked out” of a workplace by the expedient of the employer entering into a non-union agreement’.<sup>114</sup>

Most importantly, membership growth will no longer be stymied by the powerful ideological messages implicit within the WorkChoices regime, which de-legitimised the role of trade unions in labour regulation.<sup>115</sup> Indeed, recent reports have already indicated resurgence in union membership since the new reforms were introduced.<sup>116</sup> As union membership is important to the recovery of employee entitlements,<sup>117</sup> such membership increases will promote employer compliance.

Growth in union membership is also of immense value to the promotion of participatory democracy, especially from the perspective of workers with little economic or social power. This is because trade unions are deliberative forums in themselves,<sup>118</sup> which arguably provide the only outlet through which the interests of marginalised workers can be effectively represented.

Finally, a strong union presence is vital to holding the government accountable to the community for advancing wider social values espoused by trade unions, such as egalitarianism and redistributive justice, which underlie the system’s protective functions.<sup>119</sup>

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<sup>111</sup> *Fair Work Act 2009* (Cth) s 236. The determination must be sought by a bargaining representative of an employee.

<sup>112</sup> The good faith bargaining requirements imposed upon bargaining representatives of employees and employers are set out in s 228 of the *Fair Work Act 2009* (Cth). FWA can make a bargaining order to enforce these good faith bargaining requirements where a majority support determination is in place: *Fair Work Act 2009* (Cth) sub-s 230(2)(b).

<sup>113</sup> *Fair Work Act 2009* (Cth) s 484.

<sup>114</sup> Stewart, above n 82, 163; *Workplace Relations Act 1996* (Cth) s 760.

<sup>115</sup> Howe, above n 7, 33. Indeed, as Howe observes, these messages were reinforced by other regulatory initiatives of the Howard Government including the *Building Construction Industry Improvement Bill 2003* (Cth), which sought to replace the regulatory role of trade unions in this industry with a state-centred ‘command and control’ system of regulation: at 33.

<sup>116</sup> Ewin Hannan, ‘Union Membership Boost Under Kevin Rudd’, *The Australian*, 14 September 2009; Ben Schneiders, ‘Union Membership on the up as Hard Times Bite’, *The Age* (Melbourne), 18 April 2009; Chris Zappone, ‘Australian Union Membership on the Rise’, *Sydney Morning Herald* (Sydney), 17 April 2009. Indeed, in Hannan’s article, Leon Carter, a national secretary of the Financial Services Union noted that there is a different ‘climate out there’ relative to WorkChoices which was directed at ‘demonising unions and union membership’.

<sup>117</sup> Margaret Lee, above n 62, 47.

<sup>118</sup> Howe, above n 7, 22.

<sup>119</sup> *Ibid.*

## CONCLUSION

Drawing upon a decentred understanding of regulation, this paper has sought to illustrate that the reforms introduced by the *Fair Work Act 2009* (Cth) constitute significant improvements to the compliance regime. The Fair Work compliance regime comprises of a range of values beyond simply securing compliance with federal labour laws, including promoting harmonious, cooperative and productive work relations, protecting employees from abuses of employer power, efficiency, participatory democracy and accountability. Broadly speaking, the Fair Work reforms are likely to advance all of these values by introducing simplified legislation and awards, empowering regulators with greater legal powers, encouraging increased use of educative and cooperative compliance techniques, and enhancing the role of trade unions within the compliance regime.

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