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Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards

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Abstract

While the extent of employer non-compliance with minimum employment standards has yet to be decisively determined in Australia, there is evidence to suggest that it is both prevalent and persistent. This article draws on the scholarship emerging from the regulatory studies field to explore the underlying impulses and issues that may have led to this compliance gap. It considers how a more pluralistic and decentred understanding of regulation may improve compliance. This understanding is then applied to examine the various ways in which the federal labour inspectorate — the Fair Work Ombudsman — has sought to supplement and strengthen its existing compliance and enforcement mechanisms by harnessing or 'enrolling' non-state stakeholders, such as employer associations, trade unions, top-level firms and key individuals.[1]

JEL Codes: J81; J88; L59

Keywords

Labour regulation; enforcement strategies; Fair Work Ombudsman; trade unions; employer associations.

Introduction

Trust not yourself; but your defects to know,
Make use of ev'ry friend — and ev'ry foe.
(Pope 1711)

While the sources and extent of employer non-compliance have not been conclusively identified or measured in Australia, there is evidence to suggest that minimum employment standards[2] are being regularly contravened, routinely ignored or both (Cockfield et al. 2011; Goodwin and Maconachie 2007). Despite the committed efforts of the federal labour inspectorate over the past five years,

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the extent of the compliance gap highlights the challenge of effectively addressing the complex and plural reasons driving employer non-compliance.

This article considers how the Australian federal labour inspectorate — the Fair Work Ombudsman (FWO) — has sought to harness or 'enrol' non-state stakeholders, such as employer associations, trade unions and others, in a bid to improve its regulatory effectiveness. One of the most striking examples of this shift is the way that the FWO has sought to expand the role of industry partners across the employer/employee divide in 'targeted campaigns' — compliance and enforcement programs which focus on a specific industry or region. At the same time, the FWO has also exploited the threat of litigation to enlist top firms and encourage key individuals to take active steps to address past regulatory failures and ensure future compliance.

Collaborative forms of regulation and governance are somewhat novel in other policy spheres, but are less so in the labour domain. The role of employee participation in the regulation of occupational health and safety is widely recognised (Walters and Frick 2000). Similarly, tripartite principles have long been a defining feature of the industrial relations frameworks of many countries, including Australia. Indeed, it is partly because of the essential place of unions within the conciliation and arbitration system that they have previously played a central role in setting standards and ensuring their implementation (Bennett 1994). It is thus unsurprising that the importance of collaborating with 'social partners' in labour inspection has been recognised at the international level for over half a century.[3] Nevertheless, there have been very few empirical studies of how labour inspectorates can productively engage with non-state stakeholders in relation to the implementation and enforcement of minimum employment standards (Gahan and Brosnan 2006: 145).

This introductory enquiry aims to illuminate the variations, possibilities and potential limitations of a more decentred and collaborative approach. It begins by drawing on the scholarship emerging from the regulatory studies field to provide a different perspective on the relationship between the state, law and society (Freiberg 2010; Parker and Braithwaite 2003). Regulatory scholars have highlighted the complexities posed by pluralistic compliance motivations and underlined some of the limitations of legal and bureaucratic regulatory models and regimes. In response to these shortcomings, they have pushed for more 'reflexive' or 'responsive' regulation which facilitates and supports the participation of interested parties in the regulatory process (Ayres and Braithwaite 1992; Black 2002a; Gunningham and Grabosky 1998). Next, the article considers how a more pluralistic understanding of regulation may better address the underlying issues and impulses driving employer non-compliance. This understanding is then applied to examine the emergence and evolution of regulatory enrolment in Australia. Finally, the article will touch on some of the promises and potential pitfalls of this new approach.

The analysis is part of a broader research project concerned with the activities and impact of the FWO. It draws on reviews of internal documents of the agency, such as the Operations Manual, which is used to guide and manage the work of the Fair Work Inspectors (FW Inspectors), as well as publicly available

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documents, such as annual reports, guidance notes, media releases and court cases. We have also undertaken 38 semi-structured interviews with FW Inspectors and managers within the FWO who are responsible for inspection, education and media activities.

Drivers of Employer Non-Compliance in Australia

The socio-legal literature suggests that business compliance may be driven, influenced and potentially undermined by a host of factors, only some of which can be controlled by the state. These include the design, source and awareness of the regulations; the resources, structure, mandate and strategies of the regulatory agency; the business relational distance to inspectors; sources of workforce resistance or pressure; the structure of the firms being regulated; compliance costs; and the regulatory environment generally, including the industry size and structure, the economic climate, and the role of third-party actors (Gunningham et al. 2005; Kagan et al. 2003). To further complicate matters, business motivations to comply are not necessarily distinct, often change in response to external forces, and may vary between firms, within firms, and even between and within individuals of such firms (Ayres and Braithwaite 1992; Braithwaite and Makkai 1994).

Winter and May (2001) have identified three general types of motivations for compliance, which they label 'calculated', 'normative' and 'social' respectively. 'Calculated motivations' largely reflect classical economic theories of deterrence (Ashenfelter and Smith 1979). These theories generally suggest that compliance depends largely on the likelihood of detection, as well as the speed, certainty and severity of sanctions imposed for contraventions.

'Normative motivations' are seen as founded on the internalised and ideological values of the regulated community. These values and therefore the level of normative commitment are seen to depend on two variables: the general moral principles which influence one's sense of civic duty to comply; and a more specific assessment of the legitimacy of the relevant regulation, in both a substantive and a procedural sense. If firms do not appreciate the basis or meaning of the regulation, this can entrench regulatory resistance and encourage opportunistic conduct (Kagan and Scholz 1984). The standing and credibility of the regulatory agency is also critical in this equation and can be undermined on the grounds of poor accountability or perceptions of unfairness (Braithwaite et al. 2007).

'Social motivations' to comply are based on a quest for the respect and approval of others that are viewed as important to either individuals or their business. This category is arguably most relevant to the regulatory role played by non-state actors. It is distinct from normative motivations to the extent that a 'regulated person complies to earn the approval of others even though those values may not have been internalised' (Winter and May 2001: 678). These significant others can include not only the regulatory agency itself, but competitors, trade unions, community organisations, the media, consumers and employees. In other words, compliance behaviour is associated with a firm's 'social licence' to operate — that is, those demands or expectations emerging from community groups, NGOs and other elements of civil society that are likely to shape

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corporate decision making (Gunningham et al. 2003). In this context, informal sanctions, such as disapproval, adverse publicity and ostracism, can be a significant driver of business compliance, especially among larger firms (Bardach and Kagan 1982; Gunningham et al. 2005). The use of seemingly 'soft' sanctions can provide a 'fear factor' for reputation-sensitive firms or those who have experienced a 'regulatory crisis' (Parker 2002). In contrast, the social motivations of small and medium-sized firms have been found to be more heavily influenced by supply chain pressures, the attitude and activities of superior contractors, and the relevant regulatory agency (Fairman and Yapp 2005; Gunningham et al. 2005).

Additional Factors Affecting Compliance

Motivations to comply, while critical, depend on two preconditions — namely, knowledge or awareness of the relevant regulation; and the capacity to comply. There are several reasons why knowledge of the rules on the part of regulated firms cannot be assumed. The regulation may be too new, too complex or not adequately publicised (Winter and May 2001). Capacity to comply depends on a range of factors, including information, expertise, financial resources, authority and legitimacy (Black 2002b, 2003). While a regulated firm may feel compelled to comply on a normative basis, or be subject to some form of social pressure to comply, compliance will ultimately not occur unless the entity also has sufficient capacity to achieve this objective. Where the costs of compliance outweigh the benefits of production, this may lead to competitive disadvantages and perpetuate communication and compliance gaps, such as through increased subcontracting — a trend which is well-documented in the OHS sphere (Johnstone and Quinlan 2006; Quinlan 1998). The size of the firm and the industry structure have also been found to be highly influential. In particular, the capacity and motivations to comply may be compromised in small businesses by a lack of expertise, competitive pressures and cost concerns (Haines 1997).

The Promises and Pitfalls of Regulatory Enrolment

Ayres and Braithwaite's (1992) influential theory on responsive regulation suggests that the state regulatory agency should seek to appeal to the plural motivations for compliance through the use of varied and multifaceted regulatory enforcement and compliance strategies. One key element of responsive regulation is to harness or 'enrol' a variety of non-state actors in the regulatory process (Black 2002b, 2003; Hutter and Jones 2007).

The idea of regulatory enrolment has emerged in response to a more 'decentred' understanding of regulation which suggests that the state must learn to steer rather than to row (Ayres and Braithwaite 1992; Osborne and Gaebler 1993). In particular, Black (2002b) argues for a regulatory approach which is hybrid (combines state and non-state actors); multifaceted (uses various regulatory strategies, on either an overlapping or a sequential basis); and indirect (state efforts should be focused on influencing, coordinating and balancing interactions between actors and systems). Similarly, others have called for a compliance and enforcement approach which is more reflexive and participatory — where the state strives to influence, facilitate and constrain external regulatory forces

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through the formation of 'collaborations', 'partnerships', 'webs' or 'networks' (de Burca and Scott 2006; Gunningham and Grabosky 1998; Lobel 2004). Drawing on this regulatory literature, as well as a number of more specific studies of labour standards regulation (Estlund 2010; Fine and Gordon 2010; Weil 2010), this section considers various ways in which collaborative or decentred techniques can potentially enhance the regulatory reach of the FWO.

A clearer understanding of what regulatory functions are or should be devolved to non-state actors depends on a deeper understanding of what regulation involves in functional terms. Black (2003) suggests that the regulation of behaviour requires the ongoing and dynamic performance of three key functions: the setting of standards or policy objectives; the gathering of information regarding compliance commitment; and the modifying of non-compliant behaviour. The way in which collaboration or regulatory enrolment can contribute to each of these functions is considered below.

First, the co-production of regulation can work to reduce the gap between the regulator's intentions and the regulatee's norms, with positive compliance effects. Joint and cooperative standard-setting can make regulation more politically palatable and enhance its democratic value. Collaboration with non-state stakeholders can also provide a crucial feedback loop on the way a rule operates in practice (Freeman 1998). By increasing the knowledge and understanding of the reasons behind the regulation, the rule is more easily implemented and enforced (Ayres and Braithwaite 1992). Further, collaborative initiatives can have the effect of legitimising the involvement of non-state stakeholders, which may lead to the perception that the participant is responsible for the outcomes of the regulatory regime (Freeman 1998: 30).

In many respects, the making of awards and collective agreements under the traditional conciliation and arbitration system provides a strong example of the benefits of co-regulation. Both employers and employees (or their representatives) are involved in the making of the regulation, and both have an interest in ensuring that the hard-won benefits are ultimately realised in practice (Isaac 1989). In light of the increasing reliance on state-made standards in some sectors, it is arguable that any alternative opportunities for the co-production of regulation — whether that is through the making of guidelines, codes of practice or other workplace policies — remain important, particularly in reinforcing normative motivations (Buchanan and Callus 1993).

Second, once a rule is formed, collaboration with non-state stakeholders can aid in its implementation and enforcement. As 'governments are not omnipotent' (Gunningham and Grabosky 1998: 409), involving non-state stakeholders can provide key information and enhance the monitoring capacity of the state, both of which can aid in the detection of contraventions. The enforcement burden is also eased by shifting some of the costs associated with these activities. Enforcement strategies which rely solely or primarily on complaints to aid detection can be problematic. In particular, research undertaken in relation to labour standards enforcement in the United States has found that the level of complaints does not necessarily correlate with the level of contraventions in any given industry (Weil and Pyles 2005). Further, following complaints may not be efficient in that

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it does not always uncover the most serious contraventions against vulnerable workers or successfully lead to long-term compliance (Weil 2011). In contrast to a complaints-based strategy, a more collaborative approach may allow the regulatory agency to access more detailed and accurate information about the power and dynamics of and between various actors in a particular industry. This can enable the agency to better tailor its proactive regulatory activities to the contours of each specific sector and to channel its limited resources to those companies which are most recalcitrant or to those workers who are most in need of outside assistance. This can enhance the deterrence effects of interventions and better address calculated motivations of employers (Fine and Gordon 2010; Weil 2005).

Regulated firms and their representatives hold specialist knowledge and expertise and more detailed access to business information, which can be particularly critical in situations where governments are struggling to detect violations due to the number, diversity and instability of the workplaces. Collaborative, as compared to confrontational, enforcement can further increase the willingness of firms to cooperate and share information with the agency (Lobel 2006). It has been argued that in respect of largely 'reactive' regulators, the role of third parties grows in importance, 'since they are able to act as a kind of "fire alarm"'(Nielsen and Parker 2008: 312). Indeed, where there are high numbers of vulnerable or illegal workers, organised, institutional representation of employees may serve to compensate for the fact that employees cannot effectively play the role of whistleblower (Estlund 2010: 144; Walters and Frick 2000). They can do this by reducing or internalising the costs of exercising individual rights conferred to workers, including information-related costs, as well as those associated with employer retaliation and possible job loss (Weil and Pyles 2005).

An alternative form of regulatory enrolment, and one which can boost the information-gathering powers of the state, is where an independent professional undertakes an audit on behalf of the firm and/or regulatory agency. Such audits can provide a systematic, documented and objective window into the operations and compliance behaviours of the firm. As the expense of the audit is generally borne by the firm itself, it alleviates the monitoring costs of the regulator (Gunningham and Johnstone 1999).

Non-state stakeholders have the capacity not only to monitor and measure compliance behaviour, but also to modify such behaviour if it is failing to meet the stakeholders' expectations. A focus on sanctions, one that has been partly perpetuated by the enduring popularity of the 'enforcement pyramid' devised by Ayres and Braithwaite, can inadvertently encourage assumptions that the state is in the ultimate position of power to determine and deploy the most appropriate regulatory instrument to maintain social order (Black 2003). However, this does not adequately account for the fact that non-state stakeholders have different and overlapping relationships with the regulated community and therefore different sources of influence. These differences can mean that non-state stakeholders can potentially activate the full range of motivations and overcome some of the key barriers to compliance (Black 2003; Nielsen and Parker 2008). For instance, in relation to employers who are motivated to comply, but lack knowledge, trade unions, employer associations and community organisations often perform a gen-

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eral educative function through outreach activities such as informational visits or training. Non-state actors can also address calculated and social motivations by imposing sanctions different from those utilised by the state, including shame, moral persuasion, protest, and withdrawal of friendly and cooperative relations. In this vein, some claim that the 'additional benefits of broadening the regulatory net to include third parties are that a multiplicity of regulatory signals have the potential to be mutually reinforcing, and that, in many cases, surrogate regulators are far more exacting than direct government intervention' (Gunningham and Grabosky 1998: 389). This is perhaps illustrated most strongly by the fact that unions in Australia were able to use industrial pressure and dispute resolution processes to induce compliance, often to great effect (Hardy and Howe 2009).

While many of the actors in labour market regulation are familiar and can be readily identified, others, such as influential individuals within the firm (so-called gatekeepers), may not be so easily recognised. Gatekeepers are generally described as those individuals who hold a key position or possess critical resources that a regulated firm requires. Auditors, legal counsel and human resources professionals are examples of possible gatekeepers in this context. A gatekeeper strategy is based on the idea that the motivations to comply of these powerful individuals may differ from that of the firm (Kraakman 1986). If the interests of gatekeepers and the state converge, these individuals can be effectively harnessed by the state to positively influence the behaviour of the firm (Black 2003).

Finally, involvement of non-state actors in regulatory processes may guard against regulatory capture (Ayres and Braithwaite 1992). In such cases, collaboration can have the perverse effect of masking cooption and legitimising exclusion. The presence of pressure groups, such as unions, employer associations, community organisations or consumer groups, is important insofar as these groups often have different agendas and ideas about how the state should or should not intervene in the labour market. These groups not only expose the labour inspectorate to increased public scrutiny, but may also 'function to steer the agency away from the extremes of punitive coercion and cooperative capture' (Bennett 1994: 161; Weil 1991).

While it is apparent that collaboration has the potential to offer a range of regulatory benefits, research undertaken in other policy spheres has shown that there are many potential pitfalls — particularly where conflicting interests and power imbalances are not effectively managed (Baccaro and Papadakis 2009). One key risk with a collaborative approach is that it may be commandeered by a more powerful party who distorts the regulatory process or outcome. Fine and Gordon (2010: 561) argue that to reap the full benefits of collaborative regulatory strategies, they must be formalised, sustained, vigorous and sufficiently resourced. The formalisation of the collaboration is important to ensure that the stakeholders are clear as to the scope of the collaboration, the relevant objectives and commitments, and the distribution of resources. This also makes the collaboration less vulnerable to changes in agency leadership or shifts in political interests. The requirements that collaborative arrangements are both ongoing and robust are seen as critical for ensuring that there is sufficient time for the relationship to build to a point where the views and activities of non-state actors are fully

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integrated into the work of the agency and not merely symbolic or consultative. A lack of substantive and meaningful involvement can undermine incentives to participate in future regulatory initiatives (Ansell and Gash 2008; Gray 1989).

Indeed, similar to the complex and varied factors which drive employer behaviour, the willingness and capacity of non-state actors to engage in regulatory processes is also likely to depend on their respective ideologies, interests, expertise and resources. In order to positively influence compliance behaviour, third parties must have not only a relevant incentive to actively participate in the regulatory process, but also a 'licence to operate' — which is often dependent on their own legal, economic and social context (Gunningham et al. 2003). Nielsen and Parker (2008: 340) have argued that if an enforcement agency, such as the FWO, 'wants third parties to play out their capacity to monitor and enforce regulation, then that agency should do something to facilitate third parties' influence'. This might mean that non-state stakeholders are provided with technical or financial assistance, or that they gain access to data about a firm's compliance behaviour so as to boost their information capacity and therefore their ability to influence (Nielsen and Parker 2008; Weil 2011). Disclosure and transparency may also assist in addressing one of the key weaknesses of enlisting the assistance of a third party auditor — namely, bias and a lack of independence (Gunningham and Johnstone 1999).

While the success of regulatory enrolment is not guaranteed, this overview suggests that collaborative regulatory approaches can offer a number of advantages over more traditional compliance and enforcement methods. Indeed, the insights offered by regulatory studies have potentially grown in relevance in light of the shifts towards a more 'centred' command and control model in Australia (Howe 2006) — a shift which is evidenced not only by the increasing juridification of labour standards, but also by the growing presence of government regulatory agencies in this sphere, such as the FWO and the Australian Building and Construction Commission.

Regulatory Enrolment in the Context of Minimum Labour Standards in Australia

To situate the FWO's recent experiments in regulatory enrolment within a broader historical and theoretical context, this section begins by considering the emergence and evolution of minimum labour standards enforcement in Australia. It then provides a general outline of the scope, power and strategies of the FWO. The final section considers the various ways in which the FWO has more recently sought to strengthen its regulatory powers and position through harnessing or collaborating with non-state actors.

The Emergence and Evolution of Regulatory Enrolment in Australia

In the not-so-distant past, the workplace relations framework in Australia was founded on a distinctive system of compulsory conciliation and arbitration. This highly centralised and collectivised framework placed unions at the centre of the regulatory system in both standard-setting and implementation. At the same time, the federal labour inspectorate largely remained in the shadows and collaboration with unions and employer associations was limited (Hardy and Howe 2009).

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This is not surprising, given that the conciliation and arbitration system was structured on the premise that the relationship between the state, employer and employee associations was more adversarial than cooperative (Bray and Macneil 2011).

As has been well-documented, the collective framework which largely defined the first century of industrial relations in Australia was subsequently displaced from 1996 by a deliberate drive towards a more individualistic agenda. Under the rubric of 'deregulation', the Howard Liberal government introduced individual statutory agreements. It also moved to legislatively entrench a core set of minimum employment standards and further marginalise the regulatory role of unions (Ellem et al. 2005). At the same time, a close relationship developed between the relevant regulatory agencies and particular employer associations, with the latter being charged with responsibility to raise awareness about the new regulatory agenda, among other things (Lee 2006).[4]

These underlying shifts were brought into sharp focus in the wake of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Work Choices). The broader changes to the dominant standard-setting mechanisms, together with an unprecedented level of funding provided to the labour inspectorate, meant that the dynamics between the federal regulator, employer associations and unions underwent a significant reconfiguration. The meteoric rise of the federal labour inspectorate, both in stature and in profile, was not without controversy. Unions, in particular, appeared to perceive the rejuvenated labour inspectorate 'as part of legislation that they didn't like' (Interview with FW Inspector 2010). Instead of being the primary enforcers of the products of bargaining, unions were increasingly sidelined by the federal labour inspectorate (Creighton 2011). Work Choices also placed further limits on union rights of entry (Fenwick and Howe 2009).

Since then, the current Labor government has sought to rescind the most extreme measures taken by its predecessor and restore the central place of collective bargaining. Basic working conditions continue to be secured by legislation and supplemented by 'modern awards', although the latter are no longer the direct product of negotiation between industrial actors and their capacity to initiate 'disputes' or apply for variations is much curtailed under the current system (Creighton 2011). Most relevantly for these purposes, the *Fair Work Act 2009* (Cth) (FW Act) established the Office of the FWO, which has also sought to navigate a different regulatory path.

The Scope, Powers and Strategies of the FWO

The Office of the FWO is a statutory authority that derives its power from the FW Act and the *Fair Work Regulations 2009* (Cth). In contrast to the adversarial premise of the conciliation and arbitration system, this new legislative framework expressly provides that a key function of the FWO is 'to promote harmonious, productive and cooperative workplace relations' (FW Act s 682). The FW Act also charges the FWO with responsibility to encourage and ensure compliance with national workplace laws through education initiatives and by monitoring, investigating and enforcing workplace laws.

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The FWO seeks to fulfil its mandate in a variety of ways. While the FWO primarily relies on employee complaints to direct much of its compliance and inspection activity, this is supplemented by proactive targeted campaigns and referrals from various actors and agencies (Cooney et al. 2011). Where a contravention is detected and voluntary compliance cannot be achieved, FW Inspectors may seek civil penalties in the court or impose an array of alternative sanctions, such as penalty infringement notices or 'enforceable undertakings' — legally enforceable agreements that generally commit a firm to remedy past contraventions and take steps to ensure future compliance.

As noted earlier, the federal labour inspectorate in Australia has been well funded in the past five years, at least in relative terms. This influx of resources initially led to a boost in its inspectorate workforce, a shift in its enforcement strategy, and a spike in prosecutions (Hardy 2009). Notwithstanding these advances, the FWO has acknowledged that the agency continues to face compliance and enforcement challenges on several fronts (Wilson 2011b). For instance, it is clear that the risk of being investigated and successfully sanctioned remains fairly low.[5] Another major compliance obstacle is the complexity of the current regulatory framework — including, in particular, the introduction of modern awards and transitional provisions, which 'has resulted in reactions by some employers of confusion, ignorance and avoidance' (Todd 2011: 359). FW Inspectors also noted the difficulty of identifying and assisting vulnerable workers and the problems with obtaining evidence and bringing prosecutions against rogue employers who steadfastly refuse to cooperate (Interviews with FW Inspectors 2010 and 2011).

These problems are made worse by the various changes to work practices and employment arrangements which have taken place in the past decade or so. For instance, the growth in small workplaces means that detection is more difficult and resource-intensive. Even where contraventions can be identified, fragmented working arrangements serve to convolute chains of ownership and cloud lines of accountability (Johnstone and Quinlan 2006; Weil 2011). Small businesses may not have maintained adequate employment records (which weakens the evidentiary basis on which to bring enforcement litigation), or may be bankrupt or have a limited asset base (which reduces the likelihood of successfully recovering underpayments and penalties). A number of these obstructions have recently been identified and acknowledged by the Fair Work Ombudsman, who commented that in order to improve compliance and enforcement, the agency needs to 'find ways to provide better information and more effective community based deterrence so as to influence the duty-holders before errors occur' (Wilson 2011b). One prominent way in which the FWO has sought to achieve this objective, and strengthen underlying motivations to comply, is through the regulatory enrolment of non-state actors.

Regulatory Enrolment by the FWO

In light of the regulatory challenges facing the FWO, one manager commented that we have 'to look at smart ways of working together with industry, because we can't do it all' (Interview with FW Manager 2011). Since the commencement of the Fair Work reforms, stakeholder engagement is increasingly treated

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by the FWO 'with an enormous degree of importance' (Interview with FW Manager 2011). For the past year in particular, the federal labour inspectorate has actively sought to build strong and sustainable relationships with employer groups, unions and other stakeholders. It has also begun to appreciate the importance of engaging top-level companies and critical individuals within firms with the power to positively shape compliance behaviour beyond the individual workplace. While this shift may have been partly prompted by changing political winds, it seems that these experiments are also a sign of a maturing and reflexive regulatory agency.

The FWO has sought to enrol non-state actors in a variety of ways — from collaborative targeted campaigns in the hospitality, horticulture, cleaning and retail industries which involved the active participation of 'industry partners' in the development and delivery of educational materials, to proactive compliance and monitoring deeds in the fast food industry. In addition, litigation and sanctions have been used more creatively. FW Inspectors have increasingly relied on the accessory liability provisions in the FW Act, which allow for enforcement proceedings to be brought against a person 'involved' in a contravention in order to target gatekeepers within the firm (FW Act s 550). The threat of litigation has also been used to leverage companies into enforceable undertakings which have effectively eased the monitoring and enforcement burden of the FWO.

These initiatives, among others, will be discussed in more detail below. Drawing on the preceding discussion concerned with collaboration and regulatory enrolment, the various initiatives have been grouped around the three key regulatory functions: setting standards; gathering information; and modifying behaviour.

Setting Standards

While the opportunities for the production of co-regulation are arguably more limited under the Fair Work framework given that modern awards effectively elevate state-made norms at the expense of bargained outcomes, all is not lost. Beyond the conciliation and arbitration system and outside the classical collective bargaining framework, there remains an opportunity to influence the making of rules and norms via the FWO. Similar in some ways to the participatory nature of test case proceedings under the previous regulatory system (Isaac 1989; Murray 2005), the FWO routinely seeks the views of unions, employer associations and community groups in relation to the interpretation of new regulation, the development of educational materials and guidelines, and the appropriateness or otherwise of the relevant standard. Such an approach is not only important in political and democratic terms, it is also critical in strengthening normative motivations to comply, given that it may create and consolidate trust and legitimacy in the regulator. As one inspector put it, consultation is important to ensure that everyone is singing 'from a common songbook' (Interview with FW Inspector 2011). The FWO has also strived to address earlier concerns about accountability and consistency in order to ensure procedural fairness and build normative commitment (Hardy and Howe 2011).

One of the most striking examples of the shift towards increased collaborative standard-setting took place as part of the Horticulture Industry Shared

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Compliance Program (HISC Program), which was initiated by the FWO in 2010. The HISC Program was pioneering insofar that it was the first time that the FWO had facilitated collaborative dialogue involving more than one industry partner and across the employer–employee divide. A key objective of the HISC Program was the joint development of employer and employee guides to the new modern award for horticulture. We were informed that it was a challenge to reach agreement on the terms of the guides, particularly as the 'industry partners' — including the National Farmers' Federation, the Ai Group and the Australian Workers' Union — had a pre-history of antagonism and conflict (Interview with FW Manager 2011). The discussion and negotiation that took place in respect of the multi-branded guides, however, represent an important example of co-regulation and consensus decision-making. Important feedback loops were also used to develop the self-audit checklists to make sure that they could be readily understood by industry participants, thereby making the information collected more accurate and reliable.

As noted earlier, the joint development of co-regulation can increase the perceived legitimacy of the regulation. This was supported by one of the employer representatives involved in the HISC Program, who observed that the endorsement of the guides by the FWO and the industry partners would mean that employers perceived the information as having come from a 'trustworthy source' (FWO 2009). The regulatory literature also suggests that if stakeholders are involved in developing regulation, they are more likely to assume responsibility for its effective implementation. Again, this seems to have held true in that employer associations involved in the HISC Program played an active part in disseminating the information to their members via seminars.

Gathering Information

As noted earlier, it is not clear that relying on complaints to inform inspection activity best assists those vulnerable workers who do not or cannot speak up (Cooney et al. 2011; Goodwin and Maconachie 2008). More recently, the FWO has turned to more collaborative methods to capture 'the complaints that we don't see' (Interview with FW Manager 2011). In particular, Weil has argued that a collaborative approach is particularly important where there is a multiplicity of small businesses, where such businesses are geographically dispersed, or where there are high numbers of vulnerable workers, particularly illegal or foreign workers (Weil 2005). In such situations, the regulator has a tough task simply trying to identify the relevant employers, let alone ensure that they are all compliant (Gunningham and Grabosky 1998: 409). These difficulties are illustrated by a case brought by the FWO earlier this year. As part of these proceedings, the FWO has alleged that three companies owe more than $120,000 in underpayments to four Filipino nationals who were working and living on oil rigs off Western Australia. The vulnerability and isolation of these workers meant that this issue would have remained hidden had it not been for the presence of Maritime Union of Australia and Australian Workers' Union (MUA–AWU) Offshore Alliance delegates who acted as the whistleblower — by initially identifying the problem and then referring it to the FWO for further investigation (Workplace Express 2011b).

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In addition, the FWO regularly consults unions, employer groups and community organisations prior to the commencement of national targeted campaigns because, as one manager put it, 'we shouldn't be so arrogant to presume that we know what industry needs' (Interview with FW Manager 2011). These same stakeholders have also proved to be an important source of more specific evidence about employers of concern. Industry partners are often a rich source of information about how the industry operates and how the FWO should approach the compliance and enforcement problem for maximum effect. For instance, the recent National Cleaning Services Campaign was initiated not only because of the number of susceptible workers in the sector, but also because of concerted and persistent pressure from employer associations and unions. In particular, the Building Services Contractors' Association of Australia was keen to collaborate with the FWO because of concerns about reports of some contractors undercutting the prices of competitors by up to 20 per cent. United Voice, the relevant union in the cleaning sector, also expressed concerns about the potential exploitation of vulnerable workers and the proliferation of sham contracting practices. In undertaking the Cleaning Services Campaign, FW Inspectors found that union concerns about sham contracting practices were accurate and the industry was consequently flagged as 'high risk' in terms of such practices (FWO 2009–11b, Cleaning Services Campaign Final Report 2011). Widening the network in this way clearly enhances the monitoring power of the state and, in doing so, strengthens calculated motivations to comply, given that the risk of being detected is arguably increased.

The targeted campaigns themselves provide a further opportunity for the sharing of information. For example, the collective forum and deliberative process held as part of the HISC Program afforded the FWO key insights into the dynamics and pressures facing employers and employees in this specific sector. For instance, after an employer association suggested that one-to-one meetings with horticulture growers would be of greater utility than seminar programs, 250 'educational visits' of this nature were undertaken (FWO 2009–11b, HISC Program Final Report 2010). Further, in the National Hospitality Campaign, FW Inspectors found that their relationship with the Australian Hotels Association (AHA) assisted them in gathering appropriate employment records. The AHA was also helpful in ensuring that its members correctly assessed their compliance and promptly rectified any identified contravention, which allowed the FWO to direct its attention to those firms engaging in exploitative practices or resisting compliance (FWO 2009–11b, Hospitality Campaign Final Report 2009).

Another innovative way that the FWO has sought to enhance its detection functions is by enrolling powerful corporate entities and well-known franchises, such as McDonalds, in systematic pay packet audits (FWO 2011). For instance, the 'proactive compliance deed' struck between the FWO and McDonalds requires the company to conduct a self-audit to confirm, among other matters, that employee payments are in order. In essence, the enrolment of the head franchisor under the auspices of the compliance deed has permitted significant monitoring costs to be shifted to a company which is not only well-resourced,

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but also in a powerful position of influence in terms of triggering social motivations to comply. As noted earlier, small businesses, which are most prone to contraventions, are also most exposed to the attitude and activities of superior contractors. Enrolling principal franchisors and supply chain heads in this way is therefore critical to ensuring compliance throughout the broader business network. This initiative also touches on one of the important strengths of regulatory enrolment — namely, the ability to use informal methods to disapprove of poor compliance behaviour, while simultaneously providing incentives to improve. Indeed, the FWO has noted that this arrangement may serve 'as a model for other companies, large and small, who want to be seen as a great place to work' (FWO 2009–11a, Annual Report 2010–11: 46). The success of these initiatives has no doubt been supported by the FWO's strategic use of media to better engage with other sources of influence, including consumers and prospective employees.[6]

In a similar way, the FWO has leveraged the threat of litigation so as to encourage alleged wrongdoers to voluntarily agree to enforceable undertakings which deal with the monitoring of compliance. Past undertakings have included commitments by the relevant company to audit past practices, engage an independent monitor, and self-report to the FWO in respect of future compliance, and also to maintain a whistleblower hotline for employees to raise concerns about potential underpayments (FWO 2009–11c, Enforceable Undertakings 2010–11). These initiatives appear to support the idea introduced earlier that a 'regulatory crisis' (Parker 2002), such as the threat of major reputational damage or exposure to significant penalties, may trigger or reinforce social motivations to comply. It also underlines the fact that 'softer' sanctions, such as shame or adverse publicity, can prompt significant changes in compliance behaviour, particularly among larger firms.

Modifying Behaviour

Stakeholder networks are also being used by the FWO to more widely disseminate information which builds on the education and outreach services provided by the state. The industry partners that have been enrolled in the targeted campaigns are generally encouraged to promote the relevant guides and educational materials through their websites, membership mail-outs, seminars, webinars and other activities. The awareness-raising capacity of stakeholders is particularly important in industries — such as horticulture — which, at least prior to 2006, have largely been neglected by the labour inspectorate (Goodwin and Maconachie 2011).

Another prominent example of where the FWO has sought to enlist the resources and support of the employer associations is the Shared Industry Assistance Project. As part of this project, the FWO provided grants to a select number of employer associations to develop and deliver education materials to assist employers and employees with the transition to modern awards. In the view of the FWO, extensive input and involvement from employer associations were important to ensure that 'the resources are practical, user-friendly and meet the needs of employers, particularly those running small businesses'

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(FWO 2009–11a, Annual Report 2010–11: 15). This initiative is significant in that small businesses generally have limited access to the expertise and advisory services ordinarily offered by employer associations. This lack of access often makes it more difficult to meet a necessary precondition of compliance — namely, knowledge of the regulation and appreciation of how it applies in practice. The FWO sees the role played by business groups as important 'precisely because their offering is greater and more personalised than government agencies can ever offer' (Wilson 2011a). This comment shows not only an appreciation of the limits of the state, but also a deep recognition of the different and unique skills and capabilities of non-state actors.

While the ILO convention envisages collaboration only with the 'social partners', regulatory theory suggests that the state should seek to engage with relevant stakeholders at all different levels and positions within the labour market. In this respect, it is noteworthy that the FWO is increasingly utilising migrant resource networks, ethnic business groups, community legal centres, training providers and others as critical contact points for both awareness-raising and whistleblowing. This expansive form of collaboration is particularly important in industries where there is a high number of vulnerable employees and workplaces are less likely to be unionised or affiliated. For instance, the FWO actively sought to address the exploitation of international students by translating information about workplace rights and disseminating it through 22 university cafes. It also sought to enrol the assistance of university student associations, private colleges and English schools through an associated email campaign (FWO 2009–11a, Annual Report 2010–11: 28). The FWO appears to recognise the importance of these groups insofar that it provides both direct and indirect support and assistance to community groups through funding grants and by encouraging firms to commit to paying a specified sum to community legal centres as part of enforceable undertakings (FWO 2009–11c, Enforceable Undertakings 2010–11). However, the level of regulatory engagement with these additional groups and networks appears to be in a state of development. Collaborative initiatives emerging from the United States are instructive in this respect, given that they have been grappling with critically low unionisation levels for some time (Estlund 2010; Fine and Gordon 2010; Weil 2005).

Another option which is slowly gaining traction within the FWO is to enrol other key actors in the regulatory system — namely, companies along and at the top of the supply chain which may be in strong positions to influence compliance behaviour because of branding, franchising or strong market power. Proactive compliance deeds and enforceable undertakings are one such example. Another is the establishment of the National Employer Branch (NEB) in 2010. The NEB is responsible for developing and operating the National Employer Program, which is run on a free and voluntary basis and normally involves a 'National Employer Advisor' undertaking a review of the relevant policies and practices of large, national employers and developing a tailored improvement program where required. In 2010–11, the FWO supported 31 national firms that together employ approximately 209,000 workers (FWO 2009–11a, Annual Report 2010–11: 16).

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The assigned Advisor also works directly with a central contact within the business to ensure that compliance is achieved in a consistent and efficient way. This program is not only designed to manage resources in a way that maximises compliance, but also provides the FWO with an opportunity to strengthen social motivations to comply. First, it allows the FWO to develop relationships with individuals who may act as gatekeepers within the firm. Second, it establishes shared expectations about compliance.

That said, more formal sanctions, including litigation or the threat of such, are also being used to capture the attention of gatekeepers, such as senior managers, lawyers, consultants and human resources professionals. Earlier this year, the FWO successfully prosecuted a human resources manager who received a personal fine of approximately $4000 for his involvement in sham contracting practices (*Fair Work Ombudsman v Centennial Financial Services Pty Ltd & Others* [2011] FMCA 459). Nicholas Wilson, the current Fair Work Ombudsman, subsequently referred to this case at an employer association conference to underline not only the importance of the role played by senior management and advisors in devising employment arrangements and making procurement decisions, but also their potential liability should contraventions occur on their watch (Wilson 2011a). This is consistent with the earlier discussion, which suggests that aligning the personal or professional concerns of key individuals with those of the regulator can have the effect of positively influencing the internal practices of the firm.

The Challenges of Regulatory Enrolment

While regulatory enrolment offers a host of different benefits, such initiatives are not without their own set of challenges. Although the relationship between the federal labour inspectorate and unions has improved since the dark days of Work Choices, it continues to be somewhat fractious, given that the regulator is responsible for upholding the industrial action provisions of the FW Act. Indeed, it is arguable that the FWO's responsibility to enforce the industrial action provisions against unions compromises its ability to enforce minimum employment standards and, to this extent, places it in a precarious position in respect of its international obligations.[7] In contrast, and not surprisingly given their previous interactions during the Howard government, the relationship between the regulator and employer associations is perceived by those within the FWO as being more constructive and congenial (Interviews with various FW Inspectors 2010 and 2011; Cooper et al. 2009; Lee 2006). That said, the relationship can also be strained by certain actions of the FWO, such as unannounced inspections, unfavourable interpretations of rules and regulations, or where the FWO is seen to pose competition to employer associations.

A second concern relates to the rigorousness of the FWO's engagement with certain non-state actors, such as unions. While there is a wide body of literature suggesting that an absence of employee voice or participation may seriously

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compromise enforcement outcomes, the importance of this element and the need for institutional representation do not appear to have been fully recognised or exploited by the FWO. For example, as part of the HISC Program, the union was not involved in any monitoring or enforcement activity and the auditing undertaken by the FWO was largely undertaken outside of the main picking season, when many of the businesses no longer had any employees. As a result of this factor, among others, approximately half of the businesses initially identified by the FWO were found to be unsuitable for audit purposes. This approach stands in contrast to some of the promising collaborative experiments being undertaken in the United States which reflect a deeper engagement with workers and their representatives (Fine and Gordon 2010).

A further and related problem is that while unions may have the relevant inspection powers and standing, they may not have sufficient incentives or capacity to become more involved in regulatory processes. We were informed by a number of FW Inspectors that it was common for unions to refer matters to the FWO because they did not have the resources or powers to pursue them or because they could not utilise their statutory inspection powers, such as where the complainant wishes to remain anonymous (Wilson 2011a). In the HISC Program, it seems that while the AWU was initially willing to undertake seminars and educational visits, due to a misunderstanding about the availability of funding it did not ultimately undertake these activities. In light of the 'ruinously low' union presence in the agriculture industry (Peetz 2005: 18), it seems that the union's engagement was little more than symbolic in this respect. To address this issue, the agency may need to consider more closely the regulatory capacity of the various actors it seeks to engage and what additional steps it can and should take to facilitate their involvement and influence.

Indeed, it seems that while the FWO has started to actively work with labour market intermediaries, such as unions and community organisations, it would be beneficial to secure and expand these relationships, particularly where union presence is weak. As noted earlier, collaborative initiatives work best where there is a 'sustained, professional and integrated approach to education and information, especially one that is coordinated with other elements of a comprehensive compliance strategy' (Arthurs 2006). The benefits of a more sustained approach are evident from the fruitful and continuing relationship between the FWO and the AHA, which has now been formalised under a Memorandum of Understanding (MOU). Unfortunately, no other MOUs have been concluded between the FWO and other non-state stakeholders. Formalisation of the relationship not only may serve to minimise confusion or disagreement about the scope, objectives and roles relating to a particular initiative, it can also increase the strength of the industry partners' 'licence to operate'. In this respect, it is promising to note that better management of stakeholder engagement is currently under consideration by senior managers (Interview with FW Manager 2011).

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Conclusion

Since the making of the ILO conventions on labour inspection, changes to the labour market have been considerable and far-reaching. While the FWO is relatively well-resourced and has been innovative and active on many fronts, stemming employer non-compliance is proving to be a challenge. There has been growing recognition on the part of the FWO of the depth of the problem it faces and the limits of its influence in combating it. This situation may have contributed to the shift towards greater collaboration — that is, to improve compliance the FWO must engage with both friends and foes.

This preliminary consideration of the FWO's approach to collaboration and regulatory enrolment shows that there have been increased efforts to build constructive dialogue with non-state actors from all levels of the labour market and both sides of the political divide. The FWO has openly committed to greater engagement and consultation with industry and worker organisations. So far, one of the most pronounced manifestations of the FWO's reconfiguration towards increased collaboration is the participation of a range of different stakeholders in targeted campaigns. Preliminary analysis of this initiative, among others such as the Shared Industry Assistance Project and the National Employer Program, has highlighted that collaboration has the potential to enhance the regulatory reach of the labour inspectorate. Through enrolling non-state actors, the FWO has also been able to better tailor its detection and enforcement approach to ensure that it is responsive to the key drivers of employer non-compliance in each industry. While these initiatives are promising, some potential pitfalls exist. In this respect, it seems that much remains to be done in terms of mapping the relevant actors, assessing their regulatory capacity, and charting the key processes in order to gain a better understanding of how to best match institutional and governance frameworks with the particular compliance and enforcement problem.

Notes

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2. In this article, the term 'minimum employment standards' should generally be read as referring to those standards which regulate minimum wages and other basic employment conditions, such as maximum working hours and leave entitlements, as set by the *Fair Work Act 2009* (Cth), the *Fair Work Regulations 2009* (Cth) and/or modern awards.
3. Article 5 of the Labour Inspection Convention 1947 (No. 81) provides that the competent authority shall make appropriate arrangements to promote 'collaboration between officials of the labour inspectorate and employers and workers or their organisations'. A similar provision appears in Art. 13 of the Labour Inspection (Agriculture) Convention 1969 (No. 129), which has not yet been ratified by Australia.

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4. At this time, two separate agencies undertook the advisory and inspectorate functions respectively. The Office of the Employment Advocate (later renamed the Workplace Authority) was responsible for advice, education and some agreement-making functions. It was this agency which mainly collaborated with employer associations. At the same time, labour inspection services were undertaken by the Office of Workplace Services (later renamed the Workplace Ombudsman). As part of the Fair Work reforms, these two agencies were merged into one, which now uses the moniker of the Office of the Fair Work Ombudsman.
5. The level of enforcement litigation has now stabilised at approximately 50–60 matters per year. In the last financial year, this meant that just over 1 per cent of complaints would lead to legal action being taken by the FWO. See FWO 2009–11a, Annual Report 2010–11; Wilson 2011b.
6. In the 2010–11 financial year, the FWO issued 341 media releases, which resulted in 1290 print articles, more than 65 hours of radio, and over 20 hours of television coverage. See FWO 2009–11a, Annual Report 2010–11: vi.
7. In particular, Art. 3(1) of the ILO Convention No. 81 states that one of the primary functions of the system of labour inspection is to 'secure the enforcement of the legal provisions relating to the conditions of work and the protection of workers'. Article 3(2) clarifies that while other functions may be assigned to the inspectorate, 'they must not interfere with the discharge of its primary duties'.

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