

Whatever happened to the Arbitration Inspectorate? The reconstruction of industrial enforcement in Australia

Margaret Lee

Socio Legal Research Centre, Griffith Business School

ABSTRACT

This paper explores how successive Howard Governments have reconstructed federal industrial relations enforcement agencies. It examines the structure, policies and activities of the three new federal agencies established since 1997. The analysis draws its frame from both regulation theory and Australia's historical experience of industrial enforcement agencies, and relies on documentary research forming part of a larger project on the construction of labour law remedies. The broad conclusion drawn is that the reconstruction has confined both the reach and effectiveness of government enforcement agencies in so far as employer breaches of industrial instruments are concerned. Further, two of the three new enforcement agencies focus almost entirely on alleged union rather than employer breaches of industrial instruments and the *Workplace Relations Act 1996* (Cth) (the WR Act). However, at this stage, these conclusions should be viewed as provisional, pending the outcomes of planned empirical research.

Introduction

With the passage of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) (WROLAA), the Howard Government embarked on a complete reconstruction of its federal award and agreement enforcement function. This paper provides an introductory analysis of the structure, policy and activities of the three federal industrial enforcement agencies that emerged from that process. My interest in enforcement agencies grew out of a bigger project on how the courts and the Australian Industrial Relations Commission construct labour law remedies under the WR Act, part of which concerned remedies for breach of industrial instruments. Analysis of a large body of enforcement case law revealed that actions against employers seeking penalties for breach of industrial instruments and/or recovery of wages are brought almost exclusively by employees or their unions. This finding raised the question of why government inspectors do not commence enforcement actions, which re-directed research towards government documentary sources. Although the former agencies (the Industrial Relations Bureau (the IRB) and the Arbitration Inspectorate) were never really in the limelight, information about their activities was widely available, including operations manuals, policy documents and the annual reports of both bodies. These sources provided extensive information about enforcement policies and agency activities, including the number of inspectors, the number and size of penalties recovered, and details of the number of claims made for unpaid entitlements. They also underpinned Bennett's trenchant critique of activities and policies of government agencies up to the early 1990s (Bennett, 1994). However, under the Howard Government, published information is sparse and scattered across several diverse sources, ranging from annual reports and other government reports to the Hansard of the Senate Legislation Committee on Employment, Workplace Relations and Education Estimates Hearings.

The analysis in this paper is based entirely on those documentary sources, representing the first step in a proposed empirically based research project on enforcement of federal industrial instruments. Despite the limitation as to research method, several conclusions about the policies and activities of the three new agencies can sensibly be drawn, at least provisionally, to inform the planned empirical research. The present paper first locates the federal government industrial enforcement agencies in their historical and conceptual contexts, goes on to examine each of the three government agencies established since 1997, finally presenting conclusions that arise from the analysis.

The conceptual and historical context: questions of structure and policy

Enforcement agencies are typically analysed from two viewpoints: the legal design of the agency and the political environment in which it operates, but as Bennett notes, only a fine line can be drawn between legal and political factors (1994:149). Regulation theorists have pointed out that the structure of enforcement agencies and the policies they adopt are crucial variables influencing the level of actual compliance, particularly in the context of the debate over the persuasion/punishment continuum and enforcement of occupational health and safety laws (see the discussion in Johnstone, 2004:401-427). Such insights rarely feature in scholarly discussions of industrial enforcement in Australia. Scholars tend to focus on the mechanics of the recovery of unpaid wages and determining the legal rules for setting the appropriate level of penalty in the event of an award or agreement breach (see for example, Creighton and Stewart, 2000:266-267).

One exception is Bennett (1994), the first labour law scholar to demonstrate that the structure and staffing of Australian industrial enforcement agencies, the nature of their enforcement policies and how these policies are put into action has an enormous role in determining the actual meaning and effect of legal rights contained in industrial instruments. Another is McCallum (1994), who referred to the award as a 'safety net full of holes' and award enforcement as 'an uncertain instrument of last resort'. McCallum was concerned with the inadequacy of the only statutory remedy for employer breach of an award (then a penalty of no more than \$1,000), and the non-availability of damages, particularly since by 1994 awards had come to contain much more than bare monetary entitlements. More than ten years later, McCallum's comments aptly describe present issues with enforcement of certified agreements (CAs). As CAs regulate the employment relationship in ever more detail, including for example, rights of consultation or even veto over workplace change and natural justice in termination procedures, only rarely can breach of non-monetary terms be effectively remedied by penalties alone.

Bennett's historical analysis demonstrates quite clearly that the role of the government agencies has 'depended heavily on the political complexion of the government (of the day)' (Bennett, 1994: 146). Governments have been effective in controlling the agencies partly because of their obscurity, and partly because their limited resources prevent them resisting government control. Conservative governments have either curtailed their activities or radically restructured them. Attempts in the 1930s and the 1950s to abolish the federal award inspectorate and transfer their activities to the States reflected the conservative view that the vast majority of employers were compliant, and that enforcement was a matter for the individual employees concerned. The first attempt to outsource foundered because the States wanted more money to undertake inspection activities than the government was prepared to pay, and the second because of effective opposition by the union movement. In 1977, the Fraser Government transferred the Arbitration Inspectorate to the newly established statutory corporation, the IRB, which also had the function of using penal provisions against unions taking industrial action. Indeed, Prime Minister Fraser believed that employers needed assistance to enforce the law against unions. Ultimately, the IRB suffered criticism from all parties, and the Hawke Labor Government abolished it in 1983 with the support of the Opposition, transferring the inspection function back to the Department of Industrial Relations (Bennett, 1994:145-149).

Preferred enforcement policies also differ according to the political colour of the government. The clear policy preference of conservative governments has always been to obtain voluntary compliance from employers by way of encouragement and persuasion strategies, with rare if any prosecutions for a penalty. Labor prefers a more active attempt by inspectors to recover moneys and to seek penalties to punish and deter. Regulation theorists suggest, again in the context of OHS law, that complete reliance on co-operation is likely to encourage law breaking, and that the best system is one where voluntary compliance is encouraged and assisted, but optimised by appropriate punishment and deterrence of recalcitrant law breakers (Johnstone, 2004). At the preventative level, targeted inspection of businesses in areas where non-compliance is thought likely to occur is more effective than regular inspection of all businesses. The conservative governments have tended to prefer the regular and routine inspection approach to enforcement, while Labor has preferred the targeted approach. Historically, these attitudes have been reflected in the actual policies of the enforcement agencies (Bennett, 1994:149-16-163). The following discussion reveals that the structure and policies of the new agencies are in most respects consistent with the usual conservative approach to enforcement.

The new agencies

As Bennett would predict, the Howard Government wasted no time after the commencement of the WR Act in reconstructing the enforcement framework to reflect the usual conservative attitude. In 1997, it contracted out as much of its award and CA enforcement activities as was possible to State conservative governments, abolished the Arbitration Inspectorate, restructured the enforcement responsibilities that remained its province and handed over their performance to the new Office of Workplace Services (the OWS). The OWS is a unit of the Department of Employment and Workplace Relations (DEWR), has its own budget and provides ‘inquiry and compliance’ services regarding the WR Act, federal awards and CAs. Further, and as we would also expect from Bennett’s work, this was all achieved without attracting public or scholarly comment. The new Office of the Employment Advocate (the OEA) was given the responsibility of dealing with specified breaches of the *Workplace Relations Act 1996* (Cth) and AWAs, as well as performing its functions in regard to the making and filing of AWAs. While the OEA’s activities regarding making and filing of AWAs have attracted analysis and comments, its enforcement functions have been mentioned virtually only in passing (eg, Lee, 2004). In October 2002, the Government added another agency, the Interim Building Industry Taskforce (IBIT), to address alleged widespread lawbreaking in the building industry reported by the Cole Commission. This Taskforce has met with much public comment, has since been made permanent (now the Building Industry Taskforce, or BIT) and its powers extended. The following sections analyse each agency in turn.

The OWS and services provided by the contracted States

STRUCTURE: Section 84(1) of the WR Act provides that there shall be “such inspectors as are necessary from time to time” to be appointed by the Minister (s 84(2)). Inspectors are given various duties and powers, such as the right to enter premises, inspect books, investigate complaints and breaches of industrial instruments (ss 86 and 87). They have power to sue for recovery of penalties for breach of terms of an award or CA (ss 178(5) and 178(5A)). Inspectors may also recover unpaid moneys as part of actions for penalties (s 178(6)). Employees are permitted to recover unpaid moneys in a court, or in the small claims procedure in a magistrate’s court (ss179, 179C). Like its predecessor, the WR Act is silent on enforcement policy, how the inspectors are to discharge their duties, their official title, how many there should be or how the government should structure their activities, but the Minister may issue directions concerning how the functions of inspectors are to be exercised or performed (s84(5)). Thus the government of the day has a very wide discretion in deciding the structure, policy and operations of enforcement agencies.

The OWS retains personal responsibility for inquiry and compliance activities in Victoria, New South Wales and in the Territories, while these functions are performed by state governments under the contracted arrangements in Queensland, Tasmania, South Australia and Western Australia. Its inquiry services are made up of a telephone inquiry service (Wageline) and an online inquiry service, (WageNet), both of which are run in cooperation with the States, and which provide information about wages and conditions under federal awards and agreements and the WR Act. Inquiries may also be made over the counter and in writing. OWS officers also investigate and pursue claims of breach of awards and CAs, but it does seem that this is limited to the recovery of unpaid moneys. The OWS also provides an ‘educative’ role, offering seminars, advice and so on about the WR Act and the agreement options it contains. Employees can also seek assistance in claims to recover unpaid amounts owing and ostensibly in prosecuting the employers concerned, but as discussed further below, the approach of the OWS is to seek voluntary compliance, and there are no cases at all where the OWS has sought a penalty against an employer for breach of an industrial instrument (DEWR, 2002-2003). This approach is subtly reflected in changes to nomenclature: persons appointed under s 84 performing the functions of inspectors now do so under the title of Advisers rather than Inspectors (OWS, 2004: clause 1.2), but more specifically in the OWS Policy Guide, discussed in the next section.

POLICY: The OWS publishes neither its inquiry and compliance policy nor details about unpaid moneys claims it resolves or litigates. The OWS Policy Guide is an internal document, and was not publicly available until it was provided in answer to a Labor Senator's question on notice W067-05 during Budget Senate Estimates Hearing in May 2004 (Hansard, 2004b:86). Even the value and terms of the contracts with the States were not released until May 2004, when Labor Senators requested information about them from the DEWR Secretary in Budget Estimates hearings, and only then after the Senators had engaged in some fairly robust questioning. The DEWR Secretary at first refused to provide them, saying that approval for release of the contracts was a matter for the Minister, but they were eventually included in a parcel of information provided on notice during the Estimates Hearings (Hansard, 2004b:86).

All the contracts with the States are identical, apart from the price, which was only revealed after questioning in the Senate Estimates Committee. A key provision of each contract is that the OWS Policy Guide must be observed in delivery of the compliance and inquiry services contracted. The clear focus in the OWS Policy Guide is to obtain voluntary compliance and completely avoid litigation, whether that litigation would be to recover moneys or to seek a penalty. Indeed, litigation by an OWS Advisor for breaches of an award or CA can only be initiated with the prior approval of senior executive management, after every other avenue is exhausted, including mediation to obtain voluntary compliance (OWS, 2004: clause 4.3). Prospective actions for penalties must be assessed against detailed criteria, including whether the breach was wilful, whether it is serious, the strength of the case, the cost of litigation and whether the employee can take their own private action or do so through a union or another organisation. These provisions are similar to the former Arbitration Inspectorate's policy discussed by Bennett (2004:157-158).

The OWS undertakes targeted compliance activities which may be conducted by phone, letter and workplace visits (DEWR, 2002-2003). This is a departure from the former approach under conservative governments to undertake regular if infrequent visits of all workplaces, but one which is likely to be a more efficient use of resources. Targeting decisions are made on the basis of the number of complaints received, the seriousness of the problem, the cost of a campaign and its likely outcomes (OWS, 2004: clause 4.2). Figures in Table 4 of the *Benchmarking of Commonwealth and State Workplace Relations Inquiry and Compliance Services Annual Report* (DEWR, 2000-2001) support a DEWR officer's statement to the Senate Estimates Committee that the OWS resolves 90% of claims by way of the voluntary compliance procedures (Hansard, 2004a:151-152). The same table in the two earlier benchmarking reports shows a similar proportion of claims settled by voluntary compliance. If an offer of settlement is made, the decision whether to accept the settlement is for the claimant to make. The Advisor only provides information to assist the claimant in the decision making process, including costs of proceeding in court and the likelihood of success (OWS, 2004: clause 4). Details of actual settlements are not recorded.

Perhaps the most significant aspects of the OWS policy is that even if voluntary compliance methods fail, the OWS Advisers will rarely embark upon litigation to recover moneys owing. Amounts under \$10,000 must generally be recovered by the claimant themselves in the small claims jurisdiction (OWS, 2004: Clause 5.3). In answer to Senate Question W211-04 in writing, the OWS stated that the investigating officer provides relevant information to claimants wishing to take a small claims action (Hansard, 2003). Of the seven prosecutions pursued by the OWS in 2002-2003, only three concerned amounts of less than \$10,000 (Hansard, 2004b: 87). Indeed the DEWR 2002-2003 *Annual Report* states that while there were 299 litigation actions of unresolved complaints, 296 were small claims actions initiated by the employee themselves. Similarly, the Benchmarking Report 2000-2001 shows that 264 complainants had to proceed to the small claims jurisdiction in that year. Further, all these sources show that neither the OWS itself nor the contracted states commenced any remedial actions to recover penalties in either year. This issue is dealt with in detail in the next section.

BUDGET AND COMPLIANCE CASELOAD: As at 19 February, 2004, there were 91 OWS inspectors/Advisers (Hansard, 2004a:152). The estimated budget for OWS in 2003-2004 is about \$20.5 million (DEWR, 2004). The budget includes the value of the contracts with the states. These values in 2002-2003 are as follows: Queensland, \$1.001 million; SA, \$429,000; Tasmania, \$192,500; Western Australia, \$230,000 (Hansard, 2003: Question W212-04). Of these figures, only the estimated budget for OWS was made public on a voluntary basis.

The DEWR *Annual Reports* provide only highly aggregated figures regarding the OWS compliance and inquiry services. The 2002-2003 Report shows that in that year, the OWS handled 5,555 complaint cases, and of those, breaches were established in 3,552. A total of only 2230 claimants received payments. The total recovered by the OWS, inclusive of targeted activities, was \$5.2 million. The equivalent totals in the states where compliance is undertaken under contract were \$898,000, \$700,000, \$379,000 and almost \$900,000 respectively (DEWR, 2002-2003, Tables 27 and 28). Neither DEWR nor the OWS categorise complaints according to the amounts of money claimed, but it seems likely that almost all claims are for amounts less than \$10,000. A broad idea of the spread of claims can be gleaned from information the OWS provided on notice to the Senate Estimates Committee regarding the number of claimants it assisted other than by prosecution (Hansard, 2003; Question W216-04). The latter figures showed that of 1,282 complaints in the September quarter, 2003 regarding underpayment or non-payment of wages, 379 were assisted by the OWS other than by way of prosecution. Well over half involved recovery of less than \$1,000, almost all concerned less than \$5,000, and none were for amounts greater than \$10,000. Again, none of the 1,282 complaints resulted in prosecution of the employer for a penalty (Hansard, 2003: Question W213-04).

The recovery of just over \$6 million in unpaid moneys by way of voluntary compliance after the breach is brought to the employer's notice for the whole of the federal system must be placed in the broader context of how much is recovered by unions for their members. On the whole, though, unions do not publish such details and in most cases do not even keep records of the total amounts they recover for their members. In practice, unions routinely recover unpaid wages without recourse to the courts, as well as mounting recovery actions on behalf of the employee concerned if needed, or acting as their advisor in small claims actions. In 2004, the Finance Sector Union reported that it had represented 5262 members and recovered \$11.8 million in "settlements" Australia wide in 2002-2003 (Finance Sector Union, 2004). These figures probably collapse recovered wages with other entitlements, such as compensation for unfair dismissal, but nevertheless they give some indication of employer non-compliance with industrial law and industrial instruments. Finally, as noted above, a review of case law shows that remedial actions for employer breach of collective industrial instruments are taken exclusively by unions and employees, an issue examined further in research yet to be published. The enforcement policy and activities of the OEA are quite different from those of the OWA.

Office of the employment advocate

The OEA states that it gives advice and can investigate complaints about breaches of:

- The coercion and duress provisions in relation to CAs and AWAs;
- Freedom of Association provisions;
- Right of entry for union officials into workplaces;
- Strike pay; and
- The National Code of Practice for the construction industry (OEA, 2004).

Information about the OEA's enforcement activities is sparse. However, the focus is on alleged breaches of the WR Act by unions, and unlike the OWS approach to non-compliant employers, the OEA favours court proceedings seeking penalties against unions. In 2001-02, it received a total of 868 complaints, but in 2002-2003, only 212 complaints. The decline is said to be due to the establishment of IBIT (OEA, 2004:32). In 2002-2003, the OEA commenced two new actions against unions, and successfully finalised four other cases. Two of the finalised cases were in the Federal Court concerned the CFMEU, and two in the Industrial relations Commission were applications to remove objectionable provisions from CAs because they gave preference in some way to union members. Section 83BB(1)(e) of the WR Act also gives the OEA exclusive power to investigate 'alleged breaches of AWAs, alleged contraventions of Part VID and any other complaints relating to AWAs'. Although there were 171 AWA 'complaints' in 2002-2003, there were no recorded AWA enforcement cases against employers, and no discussion of the nature of the complaints or how they were settled in any public OEA document. The OEA's annual budget in 2002-2003 was around \$17 million, but it is uncertain how much was designated for compliance activities compared to AWA related functions. Of the three agencies, the activities and policy of the OEA require the most additional research. The position with respect to the BIT is much clearer.

The building industry taskforce

It is perhaps ironic that legislation increasing the penalties for breach of awards and agreements emerged from the ashes of the *Building and Construction Industry Improvement Bill 2003*, a Bill that sought to subject building unions to extremely close control and scrutiny, and severe legal sanctions. It put the recommendations of the Cole Royal Commission into the Building and Construction Industry into statutory form (Australian Parliamentary Library, 2003). The Bill included provision for a separate monitoring and regulatory body in the industry and provisions expanding the definition of industrial action, restricting the rights of building unions and widening their legal culpability for the conduct of officers and members, outlawing pattern bargaining, widening freedom of association provisions, ousting the availability of state law, improving safety and strengthening compliance by way of higher penalties and greater access to damages. It suffered trenchant criticism from employers in the building industry, the union movement, industrial relations commentators and labour law scholars, but was supported by peak employer organisations such as the Australian Industry Group. The Senate rejected the Bill, with the Democrats saying it could not be “saved” by amendment. However, the Democrats were prepared to support legislation which increased penalties in the WR Act, including those for breach of the coercion and freedom of association provisions, and of awards and agreements. The resultant *Codifying Contempt Offences Act 2004* (Cth) tripled the penalty for breach of a term of an award to \$16,500 for bodies corporate and for breach of a term of a CA to \$33,000 for bodies corporate. It also disqualifies officials from holding office in a union if they are convicted of a criminal offence but their sentence is suspended, gives protection to union employees who “blow the whistle” on their employer and gives wider powers to BIT to collect evidence and require persons to provide information.

The BIT takes a pro-active approach to its “enforcement” responsibilities, at least in regard to taking actions against unions. The Cole Commission suggested the formation of IBIT as an interim step to the implementation of all its recommendations and was established administratively on 1 October 2002 as a distinct unit within DEWR. Announcing its establishment, the Minister for Workplace Relations said it would ‘investigate anyone, union official, contractor or subcontractor, reasonably suspected of operating in this industry in breach of the law and will refer suitable cases for prosecution’ (Abbott, 2002). BIT’s ‘Charter’ states that it ‘investigates and refers for appropriate prosecution, breaches of Commonwealth industrial, criminal and civil laws on building and construction sites’ and has prime responsibility for:

- Application of provisions in the WR Act relating to freedom of association, coercion in agreement making (but not duress), right of entry and strike pay;
- Requests for assistance from the parties in the industry;
- Alleged breaches of industrial relations provisions of the National Code of Conduct for Building and Construction;
- Cases referred by the Cole Commission;
- Alleged breaches of awards and agreements;
- Advice and assistance on the application of the WR Act, federal awards and agreements and related legislation; and
- Assessing matters and if appropriate referring them to other Commonwealth or State bodies...(BIT, 2004a).

IBIT’s 2004 report declared that it provides advisory, compliance and educative services to the industry (Hadgkiss, 2004:1). The report had a distinctly anti-union flavour, casting the CFMEU as a villain so ruthless that contractors and sub-contractors alike were completely intimidated by its behaviour. It stated that the CFMEU was overtly hostile to Taskforce investigators and included reproductions of union posters labelling the inspectors ‘goons’ who were ‘after your union wages and conditions’ and advising members to ‘Tell em Nothin, Take em No-Where, Drop em half way’ and ‘Shed up, and don’t go back to work until Abbott’s rats have left the site’ (Hadgkiss, 2004:6-7). IBIT reported that two-thirds of complaints were about union activity (Hadgkiss, 2004: iv), and that widespread unlawful activity by the CFMEU continued in the industry, including activity of a criminal nature. It did not report on the one third of complaints about employers, or about any unlawful activities by employers. By turns delighted with and disgusted by the 2004 Report, Kevin Andrews, the new Minister for Employment and Workplace Relations, made IBIT permanent in March 2004 (Andrews, 2004).

BIT officers actively police industrial relations in the building industry. In the period October 2002 to 26 August, 2004, the Taskforce received 2,052 matters on its telephone Hotline, “resolving” almost half within three days. It undertook 296 investigations, referred “22 briefs of evidence” to external agencies, placed 12 matters before the courts and made 2223 site visits (BIT, 2004). The annual budget assigned to the Taskforce in 2002-2003 was \$8.9 million. There are 47 taskforce officers, 20 of whom were seconded from the Office of the Employment Advocate, and all of whom have the powers both of inspectors and of authorised officers under the WR Act, but these officers do not take up any recovery of wages cases at all.

BIT does not provide reports on the extent of employer breaches because its activities are structured to ensure employer non-compliance does not come within its “remit”. The Director, Nigel Hadgkiss, admitted after close questioning in a Senate Estimate Hearing that BIT does not investigate any allegations against employers for failing to pay wages or entitlements, breaches of safety, tax avoidance, avoidance by “phoenix” companies of paying subcontractors and the use of illegal immigrant workers. These breaches have been a major concern of building unions, but they are not, according to Mr Hadgkiss, within what he called BIT’s “remit”, a disingenuous suggestion given the published responsibilities of the Taskforce. Alleged employer breaches are referred to other agencies: to the OWS, the Tax Office, the police, the ACCC, the Director of Public Prosecutions and ASIC (Hansard, 2004a: 172-181). What happens to these complaints is, at present at least, unknown. Indeed, all BIT’s prosecutions are against unions, save one taken against an employer for paying wages for a period of industrial action in contravention of s 187AA. Like the OEA, BIT’s prosecutes unions mainly for alleged breach of the coercion and freedom of association provisions, but also for breach of disputes procedures in CAs. The three-fold increase in penalties mentioned above is likely to have a disproportionate effect on unions compared to employers who breach awards and agreements.

Conclusion

The analysis in this paper builds on Bennett’s groundbreaking work in the early 1990s, and has incorporated more recent advances in regulatory theory, particularly regarding enforcement of occupational health and safety law. Several important conclusions can be drawn. From a theoretical perspective, there is no question that the Howard Government’s reconstruction of industrial enforcement in the Australian federal system reflects a return to the usual conservative enforcement policy and practice first identified by Bennett in 1994. Further, the structure, policies and activities of the new agencies support the claims made by regulatory theorists discussed in an earlier section of the paper. The Arbitration Inspectorate has been replaced with three separate but related agencies, all of which pursue the same policy imperatives: to seek voluntary compliance from employers, not to seek remedial penalties against miscreant employers, and to disguise the extent of employer law breaking. The OWS in particular operates in ways that have effectively shifted the burden of enforcing employer compliance with awards and agreements to individual employees and unions. The two newer agencies, the OEA and the BIT have used their comparatively substantial budgets to focus almost exclusively on union compliance with the WR Act. They have pursued these enforcement activities with grim vigour, including litigation in the Federal Court to recover penalties and injunctive remedies. These conclusions flow quite logically from the research performed so far. Nevertheless, further research of an empirical nature is needed to progress the research on which this paper is based to its next logical phase.

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