Organisational Co-Enforcement in Australia: Trade Unions, Community Legal Centres and the Fair Work Ombudsman

*Eugene Schofield-Georgeson**

With largescale decline in union density and a shift away from collective bargaining towards 'enforcement', Community Legal Centres (CLCs) and the Fair Work Ombudsman (FWO) have emerged as relatively new actors within the Australian labour law enforcement space. Their emergence, particularly that of CLCs, raises the prospect of increased competition for trade union membership as well as tension between a transactional, individualising emphasis on 'servicing', and a traditional collectivist, 'organising' and bargaining model of trade unions. This article draws upon recent research from the US, UK and Australia, to propose 'co-enforcement' or collaboration between organisations that represent workers, rather than competition and further fragmentation. It does so by reporting on the results of qualitative research interviews with senior officials from government, industrial relations and civil society organisations, canvasing their views on possibilities and strategies for organisational co-enforcement. The results are analysed through the theoretical frame of 'servicing' and 'organising'.

Introduction

Over the past 50 years, the shift from an industry-wide system of collective bargaining towards an individual enforcement-based system of industrial relations, overseen by a centralised regulator has, for the most part, relegated trade unions to the industrial periphery.[1] As Australian trade union density declines to its lowest ebb since records began (14.3%),[2] Australian workers suffer epidemic proportions of wage theft,[3] sham contracting[4] and other violations of their most basic work entitlements.[5]

*Senior Lecturer, Faculty of Law, University of Technology Sydney. I thank the UTS Faculty of Law Migration and Labour Cluster (including Professor Joellen Riley Munton, Dr Michael Rawling and Associate Professor Laurie Berg) for its modest funding of this project, as well as casual research assistant, Alex Wright.

[1] T Hardy and J Howe, 'Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22 *AJLL* 306 at 324-9; E Schofield-Georgeson, 'The Emergence of Coercive Federal Australian Labour Law, 1901–2020' (2021) 6 *JIR* 00: <doi.org/10.1177/00221856211003921>; R Cooper and B Ellem, 'Cold Climate: Australian Unions, Policy and the State' (2017) 38 *CLLPJ* 415.

[2] Australian Bureau of Statistics, *Trade Union Membership, August* 2020 at < https://www.abs.gov.au/statistics/labour/earnings-and-work-hours/trade-union-membership/latest-release> (accessed 17 February 2022).

[3] An estimated one-third of Australian workers are underpaid: Select Committee on Wage Theft in South Australia, *Interim Report*, Parliament of South Australia, Adelaide, July 2020, at 6. These results have been replicated in similar studies across a variety of Australian jurisdictions.

[4] Australian Council of Trade Unions ('ACTU'), *ABN Abuse: The Rise of Sham Contracting,* ACTU, Melbourne, 2018, at 1.

[5] For example, through employer 'phoenixing' in order to avoid payment of outstanding wages and leave entitlements: PricewaterhouseCoopers, *The Economic Impacts of Potential Illegal Phoenix Activity Report*, at <https://www.ato.gov.au/General/The-fight-against-tax-crime/In-detail/The-economic-impacts-of-potential-illegal-phoenix-activity-report/> (accessed 17 February 2022). See also the non-payment of superannuation: Economic References Committee, *Superbad — Wage Theft and Non-Compliance of the Superannuation Guarantee*, Parliament of Australia, Canberra, 2017.

Meanwhile, the regulator (the Fair Work Ombudsman (FWO)) appears to have been missing in action[6] as other 'non-state actors'[7] and civil society organisations such as Community Legal Centres (CLCs), Legal Aid Commissions and pro bono law firms have been pushed beyond capacity under an increased volume of individual claims. Class action law firms and private litigators have also entered this 'enforcement mix'. Lacking here has been any largescale, industry or systemwide effort to co-ordinate the work of these actors to strategise, enforce and bargain a path towards a solution, engaging in practices of co-enforcement.[8] As this study discovered, a large part of the divide between actors hinges on ingrained cultural and organisational differences between them. Most acutely, the difference between cultures of 'servicing' and 'organising'.

This article is based on a form of 'action-research', documenting findings from an independent study of possibilities for ongoing co-enforcement of labour law between organisations that represent workers: trade unions, community legal centres (CLCs), the Fair Work Ombudsman (FWO), as well as community organisations and private law firms in New South Wales. Broadly speaking, 'co-enforcement' means co-operation between organisations, to better protect and improve pay and working conditions.[9] In an Australian context, efforts to harness collaborative organisational labour law enforcement have also been referred to as 'multi-stakeholder' co-enforcement initiatives.[10] And to be clear, co-enforcement is not necessarily contingent upon state involvement, particularly where the state is not vested with exclusive prosecutorial power in respect to labour violations within a given regulatory jurisdiction (as in Australia). Over the past two decades, co-enforcement projects have typically emerged as a form of redress to substantial regulatory failure, low union density and a lack of community legal capacity.[11] These are problems that mostly affect groups of 'vulnerable workers': precariously employed, migrant, low-paid or small business employees.[12] Examples of existing and small-scale Australian co-enforcement projects include the Cleaning Accountability Framework

[6] A claim repeated by numerous participants in this study, p 13 of this article.
[7] T Hardy, 'Watch This Space: Mapping the Actors Involved in the Implementation of Labour Standards Regulation in Australia', in J Howe, A Chapman and I Landau (Eds), *The Evolving Project of Labour Law*, Federation Press, Sydney, 2017, p 145.
[8] The 'Cleaning Accountability Framework ('CAF')' and 'Hospo Voice' campaigns are examples of small-scale co-enforcement initiatives operating within particular parts of specific industries (discussed further below).
[9] J Fine, 'Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed Where the State Alone Has Failed?' (2017) 45 *PAS* 359; J Fine et al, 'Introduction', in J Fine et al (Eds), *No One Size Fits All: Worker Organization, Policy and Movement in a New Economic Age*, Labor and Employment Relations Association, Illinois, 2018, p 1.
[10] M Rawling, S Kaine, E Josserand and M Boersma, 'Multi-Stakeholder Frameworks for Rectification of Non-Compliance in Cleaning Supply Chains: The Case of the Cleaning Accountability Framework' (2021) 49 *FLR* 438.
[11] V Narro and J Fine, 'Labor Unions/Worker Centre Relationships, Joint Efforts', in J Fine et al (Eds), *No One Size Fits All: Worker Organization, Policy and Movement in a New Economic Age*, Labor and Employment Relations Association, Illinois, 2018, p 67 at pp 67–90.
[12] Ibid.

(CAF)[13] and the WEstjustice Employment Law program in Footscray, Victoria.[14] Further afield, successful co-enforcement projects have taken-off in a variety of comparable liberal labour market jurisdictions, including in the United Kingdom and the United States, in California and Texas.[15] US co-enforcement projects have involved State-by-State campaigns between local worker centres (similar to CLCs, albeit without providing direct legal services),[16] trade unions and State regulators to organise migrant and low-paid workers in the car-washing and day labour industries. These campaigns have successfully required employers to comply with minimum wage laws and basic health and safety standards. The projects span a range of industries, focussing on low-paid work in the services sector: cleaning, day labour and retail. Indeed, in the face of the economic reorganisation of liberal labour markets since the 1970s, one industrial commentator has labelled co-enforcement 'the most significant of all (labour movement) strategies to emerge in the late 20th Century'.[17] Despite the success of co-enforcement projects in other jurisdictions and specifically within the cleaning industry,[18] organisations that represent workers in New South Wales (NSW) — Australia's largest industrial jurisdiction — are mostly failing to co-ordinate a collective and collaborative response to persistent regulatory failure and low union density. Accordingly, the research conducted for this article is part of a wider project seeking to establish a working system of co-enforcement between organisations that represent workers in Australia.[19]

[13] M Rawling et al, above n 10. In practice, the CAF involves collaboration between a union, a team of academics, the FWO, together with employers and building owners. Workers advise their union on regulatory breaches, which are reported to building owners or bodies corporate, who then supply chain pressure on employers to rectify the breach. The FWO places further pressure on the employer to rectify the breach by emphasising the consequences of non-compliance, in the form of sanctions.

[14] In this project, the Footscray Legal Centre, has branched-out beyond its conventional servicing and advocacy role as a CLC, and commenced a community educational role to train workplace organisers and activists in relation to their workplace rights. The program, known as 'WEstjustice', works predominantly with low-paid and migrant workers from the South-Western suburbs of Melbourne. Workers are trained in partnership with the Victorian Branch of the United Workers Union (UWU). 'WEstjustice' also refers to the employment law wing of the Footscray Legal Centre which retains its other servicing and advocacy functions. The Young Workers' Centre in Victoria is another example of a similar service.

[15] Fine, 'Enforcing Labor Standards in Partnership with Civil Society', above n 9; C Heckscher and C Carre, 'Strength in Networks: Employment Rights Organizations and the Problem of Co-Ordination' (2006) 44 *BJIR* 605. See further vol 44 *BJIR* for more content on this topic.

[16] US Worker Centres provide legal advice, training, education and organise groups of workers. They also have a particular focus on low-paid and migrant workers (most of whom are non-unionised). Since 2006, US worker centres and the US peak union body, the AFL-CIO, have signed partnership agreements to ensure that local union chapters work with worker centres to provide support, training and funding to organiser programs. In return, a key focus of worker centre education programs is to direct and encourage workers to join unions.

[17] J A McCartin, 'Innovative Union Strategies and the Struggle to Reinvent Collective Bargaining', in J Fine et al (Eds), *No One Size Fits All: Worker Organization, Policy and Movement in a New Economic Age*, Labor and Employment Relations Association, Illinois, 2018, p 161, at p 171.

[18] S Kaine and M Rawling, 'Strategic 'Co-enforcement' in Supply Chains: The Case of the Cleaning Accountability Framework' (2019) 19 *AJLL* 305.

[19] Funding has limited the scope of this article to investigate possibilities for co-enforcement only in New South Wales, Australia's largest industrial jurisdiction. Nevertheless, participants from other jurisdictions were interviewed for this project.

This objective of this article is twofold: first, to explain why organisations that represent workers in Australia have mostly failed to collaborate; and second, to enquire into and propose how they might do so. The initial research findings, presented here, argue that to date, organisational failure to collaborate in the enforcement space is due mainly to differences between organisational cultures of 'servicing' and 'organising'. This point is established by analysing these organisational differences, as discussed by interview participants. This material has been organised by reference to a scholarly co-enforcement literature proposing that articulation of such differences is a key pre-condition to achieving a co-enforcement initiative.[20] The failure to collaborate is covered in the first part of this article entitled, 'Understanding Barriers to Co-Enforcement'. In addressing the second objective of this article — how organisations might collaborate — the article reports on the openness of participant organisations to various practical 'co-enforcement' strategies. Here, it is argued that successful co-enforcement collaboration requires a mix of both 'servicing' and 'organising' activities. These findings are made in the second part of the article entitled, 'Possibilities for Co-Enforcement'. Before delving into these findings, the article documents its research methods, addresses the existing literature and maps the actors in the current enforcement space.

Methods

As prefaced, this study proposed two research questions related to the possibilities for co-enforcement between organisations that represent workers in Australia: i) why do these organisations mostly fail to collaborate?; and ii) how might they collaborate? To answer these questions, this study deployed standard qualitative research methods in the social sciences,[21] conducting 21 detailed research interviews[22] with a range of participants from trade unions, CLCs, the FWO, community organisations and law firms, predominantly in New South Wales. Formulation of the interview questions was guided by existing social research regarding pre-conditions and strategies for co-enforcement (discussed in the following literature review). The existing research, however, involves highly discrete and specific organisations and/or industries, or else has been conducted in international contexts. Accordingly, the existing research is either not easily replicable, or not adequately tested in a local Australian setting, necessitating this particular qualitative action-research project.

[20] Fine, 'Enforcing Labor Standards in Partnership with Civil Society' , above n 9; M Amengual and J Fine, 'Co-Enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States' (2017) 11 *Regul Gov* 129, at p 132 and p 138.
[21] A Bryman, *Social Research Methods*, 5th edn, Oxford University Press, Oxford, 2016, at pp 465–99, 569-600.
[22] This project received ethics approval from the University of Technology of Sydney (UTS) Human Research Ethics Committee (ETH20-5464). Names of participants in this study have been de-identified and all data is stored securely. All interviews were recorded and transcribed. Quotes by interviewees cited in this article have been extracted from the interview transcriptions.

'Action-research'[23] is a method by which the researcher intervenes to propose or create new phenomena in order to study its effects.[24] In this way, the research project at hand attempted to forge new organisational alliances to improve labour law enforcement. Some of the widely accepted benefits of action research, particularly in respect to social and legal services, are that it enables the creation and rigorous testing of new forms of social practice.[25] While it permits broad phenomenological conclusions, its limitations include the possibility that conclusions are context dependent, affected by the specificity of the participants, researcher, time and place.[26]

Participant organisations in this study were represented by managing staff as well as rank-and-file employees at the coalface of interactions with other organisations. Representing trade unions were senior and rank-and-file officials from two large unions that broadly represent workers from a range of low-paid service industries (in both NSW and Victoria), as well as a senior official from a trade union peak body. Representing CLCs were senior managers and rank-and-file lawyers from four legal centres across Sydney as well as senior managers from a community legal centre peak body. Interviews were also conducted with two senior executive directors of enforcement at the FWO, a lead organiser from a major community organisation, a senior pro bono lawyer from a large private law firm, as well as a former director of a key Victorian co-enforcement CLC, which can be identified as 'WEstjustice'. Over the course of this project, it became clear that the regulator would not be an appropriate partner for a co-enforcement initiative.

The Literature

This study is informed by two key streams of scholarship. First, is a practical literature that has evolved alongside various co-enforcement projects trialled in the US, UK and Australia.[27] In each of these liberal labour market jurisdictions,[28] these projects have corresponded with unique forms of regulatory failure on the part of the State and its labour inspectorates.[29] This scholarship, whose key proponents include activist-commentators such as Fine et al[30] (in the US) and Kaine and Rawling[31] (in Australia), is primarily observational. It affords 'hands-on' insight into practices and techniques for

[23] K Lewin, 'Action Research and Minority Problems' (1947) 2 JSI 34.
[24] D Coghlan, *Doing Action Research in your Organisation*, 5th edn, SAGE, London, 2019.
[25] C Eden and C Huxham, 'Action Research for the Study of Organizations' in S R Clegg and C Hardy (Eds), *Studying Organization: Theory and Method*, SAGE, London, 1999, p 526 at pp 526–8.
[26] Coghlan, above n 24, at pp 15–35.
[27] Fine, 'Enforcing Labor Standards in Partnership with Civil Society', 'above n 9; Narro and Fine, above n 11; Heckscher and Carre, above n 14; Rawling, Kaine, Josserand and Boersma, above n 10; Amengual and Fine, above n 20.
[28] R Mitchell and C Arup, 'Labour Law and Labour Market Regulation', in C Arup et al (Eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, Federation Press, Sydney, 2006, p 3 at p 5.
[29] Amengual and Fine, above n 20, at 130.
[30] Fine, 'Introduction', above n 9.
[31] Kaine and Rawling, above n 18.

co-enforcement projects and strategies. Incidentally, this research provides a scholarly account of why organisations fail to collaborate under specific contextual circumstances. Fine,[32] for instance, lists and discusses the following practices and techniques as 'pre-conditions' for co-enforcement:

i) that stakeholder organisations recognise each other's unique or 'non-substitutable capabilities', rather than competing or attempting to substitute for one another;[33]
ii) that co-enforcement works best when focussed within a specific industry ('sectoral targeting');[34]
iii) that the collaboration receives strong political support;[35]
iv) an openness to formalise co-enforcement relationships between organisations (conventionally by showing willingness to enter into an agreement or memorandum of understanding outlining the duties and responsibilities of each organisation vis-à-vis each other).[36]

These practical pre-conditions provided a logical starting-point, structuring the interview questions in this research to assess their presence in a NSW context and hence, possibilities for co-enforcement between organisations that represent workers in NSW (as well as the current failure of these organisations to do so). These 'pre-conditions' also form the basis of some of the subheadings throughout this article. While indicative of the willingness and ability of participants to collaborate, the evidence gathered in this study suggested that all four preconditions should not be treated as either exhaustive, nor entirely determinative of the potential for co-enforcement between organisations. In particular, points (ii) ('sectoral targeting') and (iii) ('strong political support') became peripheral issues in this study, addressed briefly below.

In respect to sectoral targeting, the shift towards union amalgamation in Australia across low-paid industries or sectors (predominantly through the National Union of Workers), as well as the broad operation of CLCs on behalf of workers from across the same low-paid sectors, has blurred traditional sectoral divisions, readily facillitating sectoral targeting between organisations. As for the pre-condition involving political support, a currently hostile federal political environment meant that the state regulator (the FWO) was reluctant to collaborate, while other participants expressed a preference to distance themselves from the regulator for reciprocal reasons. Rather, where civil society organisations (unions and CLCs) were enthusiastic to collaborate with each other, they mostly discussed their own

[32] Fine, 'Enforcing Labor Standards in Partnership with Civil Society', above n 9, at 364–6.
[33] Ibid.
[34] Ibid, at 366.
[35] Ibid, at 367.
[36] Fine, 'Enforcing Labor Standards in Partnership with Civil Society', above n 9; Narro and Fine, above n 11; Amengual and Fine, above n 20 at 138; A Fung and EO Wright, 'Deepening Democracy: Innovations in Empowered Participatory Governance' (2001) 29 *PAS* 5; *Deepening Democracy: Innovations in Empowered Participatory Governance*: *The Real Utopias Project IV*, Verso, New York, 2003; C Ansell and A Gash, 'Collaborative Governance in Theory and Practice' (2008) 18 J PART 543.

'non-substitutable capabilities', differentiating themselves from other organisations, as well as any 'possibilities for co-enforcement' (points (i) recognising differences; and (iv) formalising practical strategies) that might follow. These issues have therefore been selected as focal points for this article. They forthrightly answer the research questions posed in this article, explaining participants' failure to collaborate to date by coming to terms with organisational differences, as well as their willingness to do so in future by describing what form their co-operation might take.

The recognition of 'non-substitutable capabilities' is a thorny issue that is traversed at length in this article. As the strategically neutral use of this term within the US literature suggests, organisations such as worker centres and trade unions are merely 'different' and 'unique'.[37] A more critical approach, however, resonating with what this research found to be palpable hostility between organisations in this space, analyses these 'capabilities' as aligned with specific material and political interests. Crucially, this approach views these differences or capabilities as respectively involving individual vis-à-vis collective approaches to the enforcement of labour law. Such an approach frames these apparently distinctive and non-substitutable capabilities through a lens of organisational cultures involving 'servicing' and 'organising'. While the term 'non-substitutable capabilities' has been retained, the frame of 'servicing' and 'organising' offers an additional layer of theorisation and explanation. Understanding organisational differences in this way, further highlights the imperative of collaboration between diverse organisations that represent workers in a way that reckons with, explains and proposes to stem the ongoing fragmentation between organisations within a broad-spectrum labour movement.

The terms 'servicing' and 'organising' are the subject of the second, theoretical stream of scholarship through which Fine's pre-conditions to co-enforcement have been analysed and modified in this article. It should be pointed-out that these terms have not been applied in a co-enforcement context before. Rather, proponents of this approach such as Colling[38] (in the UK), Crosby[39] and Landau and Howe[40] (in Australia), have applied these terms to categorise and explain distinct practices within industrial organisations that maintain separate institutional histories which, in turn, generate particular outcomes in the present. These commentators have worked exclusively with trade unions to theorise the consolidation and growth of trade union power and influence. Nevertheless, these terms are distinctly useful in the present context because they accurately describe the dominant organisational activities and cultures of the two key participant organisations in this study: CLCs and trade unions.

[37] Fine, 'Introduction', above n 9, pp 8-13; Narro and Fine, above n 11.
[38] T Colling, 'What Space for Unions on the Floor of Rights? Trade Unions and the Enforcement of Statutory Individual Employment Rights' (2006) 35 *Indus LJ* 140; T Colling, *Trade Union Roles in Making Employment Rights Effective*, in L Dickens (Ed), *Making Enforcement Rights Effective: Issues of Enforcement and* Compliance, 2012, p 183 at p 183.
[39] M Crosby, *Power at Work: Rebuilding the Australian Union Movement*, Federation Press, Annandale, 2005, pp 80–3, 106.
[40] I Landau and J Howe, 'Trade Union Ambivalence Toward Enforcement of Employment Standards as an Organizing Strategy' (2016) 17 *TIL* 201, at 210–15.

In this respect, the term 'servicing' refers to the provision of legal services, often performed on a 'one-off' basis for individual union members.[41] Legal service provision is, by its nature, transactional; contingent upon membership and the payment of fees or dues as well as its association with the traditional role of lawyers who provide an individual service in return for a contractual retainer. On its own, servicing has the effect of atomising or individualising its recipients. As the work of Howe and Landau explains, unions maintain only a limited engagement with servicing activities.[42] In this article, the term 'servicing' is extended to explain the dominant organisational relations between CLCs and their clients.

By contrast, the term 'organising' involves trade unions organising workers to bargain collectively for enduring social and industrial change.[43] Historically, this has been the dominant social role of trade unions. In an Australian context, this role was built-into the industrial legal framework throughout most of the twentieth century, only to be obliterated by a raft of legal and economic changes — including a regulatory shift toward individual enforcement — in the 1990s.[44] Nevertheless, organising is not exclusive to trade unions and, as this article shows, can and does play a minor role in the activities of CLCs. Interposing the concepts of 'servicing' and 'organising' to describe the various activities of unions in respect to workers, theorists of these terms explain that unions are most successful in enhancing solidarity, growing membership and spurring members to action, when they combine or integrate cultures and practices of servicing and organising.[45] In this respect, Colling has described such a combination as having the potential to generate 'inspirational' and/or 'radiating effects', consolidating worker feelings regarding a workplace grievance and thereby motivating union members to take action or further consolidate their collective resistance to employer power.[46] Whether such a process results from the combination of servicing and organising in an Australian context is yet to be seen, although this study may lay the groundwork for something approaching this.

Actors in Enforcement

Before answering the research questions posed at the outset of this article, it is necessary to map some of the key actors in the Australian enforcement mix.[47] These actors include the FWO, trade unions, and CLCs, all of which participated in this study. Indeed, the background and experience of these actors is

[41] Ibid, at 212.
[42] Ibid, at 216–17, 226–7.
[43] Ibid, at 212–13.
[44] Schofield-Georgeson, above n 1, at 15–16.
[45] Landau and Howe, above n 40, at 214–15; Colling, 'What Space for Unions on the Floor of Rights?, above n 38, 147; Colling, *Trade Union Roles*, above n 38, p 183.
[46] Trevor Colling, *Court in a Trap? Legal Mobilization by Trade Unions in the United Kingdom* (Warwick Papers in Industrial Relations, Working Paper, 2009), https://warwick.ac.uk/fac/soc/wbs/research/irru/wpir/wpir_91.pdf at p 4.
[47] In a similar, albeit less detailed, manner to the recent mapping exercise of Hardy, above n 7.

essential to understanding their approach to co-enforcement. Although it is noted that their background alone is not determinative of their approach to collaborating with other organisations that enforce labour law, as the interviews in this study showed.

The FWO

As the Federal Government industrial regulator, the FWO has been designed and funded to be the pre-eminent enforcement body in Australian labour law. It is the lynchpin in a neoliberal shift from a twentieth century system of collective bargaining between strong unions and employers (conciliation and arbitration), towards a system of individual enforcement undertaken mostly by lawyers who represent individual workers. While the FWO performs other roles, such as its educative or 'compliance' function in respect to employers, such roles are typically associated with enforcement-related hierarchies and techniques such as 'suasion'.[48] Consistent with its neoliberal roots, the predominant approach of the FWO is to service and regulate both workers and employers, rather than organise them.

Trade Unions

Historically, trade unions have organised workers to bargain for industrial and social change. Since Australian Federation, unions have organised workers for the purpose of industrywide bargaining to set labour standards. This collective role was enshrined within legislation — the Conciliation and Arbitration Act 1904 (Cth). Where necessary, enforcement was largely performed collectively, through the mechanism of strikes.[49] With the erosion of that system through various legislative and market-led forces since the 1970s, there has been a transition to a system that deprives unions of their former pivotal role within the Australian industrial landscape.[50] Unions nevertheless continue to organise and bargain on behalf of workers, mostly in respect to single employers through a system of enterprise (rather than industry) bargaining.

An outcome of this new industrial environment is the largescale re-emergence of forms of work and working conditions not seen since before the growth of trade unions at the end of the nineteenth century — widespread wage theft, piecework, zero hours contracts, casual employment, 'modern slavery' and other forms of contemporary vassalage.[51] In late nineteenth century Australia, the State responded to similar problems with a novel but effective approach, introducing an industry wide-bargaining model

[48] FWO enforcement typically follows a regulatory 'enforcement pyramid', as described by I Ayres and J Braithwaite in *Responsive Regulation: Transcending the De-Regulation Debate*, Oxford University Press, New York, 1992, pp 19, 35. See also, Hardy, above n 7, pp 149–52.
[49] Stewart et al, *Creighton & Stewart's Labour Law*, 6th edn, Federation Press, Annandale, 2016, p 921.
[50] Schofield-Georgeson, above n 1, 1–2.
[51] Johnstone et al, *Beyond Employment*, Federation Press, Annandale, 2010, pp 1–76.

in which trade unions played a key role.[52] Since the mid-1990s, however, the contemporary response of the Australian State has instead been to replace this industrial framework with one centred on individual regulatory enforcement.[53] This system focusses on servicing individual workers, as and when their atomised problems arise. At the centre of this of individual enforcement is the FWO, which has been endowed with significant investigative powers and resources. Meanwhile, the traditional enforcement institution within the Australian industrial landscape — trade unions — have been limited in their role. While unions may nevertheless continue to bargain and bring prosecutions on behalf of individual members, the shift to an individual enforcement framework (along with a range of other factors)[54] has severely curtailed their ability to function, premised as it is on collective problem-solving.[55] A further roadblock to the effective functioning of trade unions in the enforcement space is diminished investigative 'right of entry' powers. Whereas unions were previously entitled to inspect the employment records of all workers at workplaces in which they maintained members, they are currently restricted to inspecting only members' records of their members, unless they have the consent of non-unionised workers.[56] The new enforcement system also encourages individual enforcement by workers through the engagement of private lawyers.

Sidelining unions in this way has substantially contributed to a downward spiral in which union density and power has reached desperately low levels, further contributing to an increase in precarious work, along with poor and unlawful working conditions, particularly among migrant, low-paid and small business workers.[57] Accordingly, without industry bargaining, this system of individual enforcement stretches resources thin, leaving regulators, unions and CLCs scrambling to service as many individual workers as possible. Inevitably, many individual workers cannot be serviced, perpetuating exploitation and requiring further enforcement on a case-by-case, individualised basis.

CLCs

CLCs have historically been associated with identity-based causes that emerged in Australia in the late 1960s and 1970s in response to a range of social liberation struggles associated with the plight of Aboriginal people, homosexual activism, women and migrants.[58] Throughout much of Australian history, these social groups were largely unrepresented, unacknowledged and even shunned by the

[52] S MacIntyre and R Mitchell (Eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration, 1890–1914*, Oxford University Press, Melbourne, 1989. Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law*, Lawbook Co, Sydney, 1994, pp 143–4.
[53] Schofield-Georgeson, above n 1, at 14–16.
[54] Ibid, at 2, 19–20.
[55] Ibid.
[56] Hardy and Howe, above n 1, at 324–9.
[57] Johnstone et al, above n 51, at pp 29–46. Other factors contributing to this 'downward spiral' include a shift away from manufacturing to service-based industries,
[58] J McCulloch and M Blair, 'Law for Justice: The History of Community Legal Centres in Australia', in E Stanley and J McCulloch (Eds), *State Crime and Resistance*, Routledge, Melbourne, 2012, pp 168–82; MA Noone, 'The Activist Origins of Australian Community Legal Centres' (2001) 19 *LiC* 128.

labour movement. The work performed by CLCs among these marginalised communities was commonly associated with criminal law. But since the demise of trade union density and the trend towards individual enforcement from the mid-1990s, employment law practices within CLCs have steadily grown.

This historical legacy among marginalised groups and geographies is part of the way in which CLCs have approached employment law in recent times, particularly through the establishment of the short-lived MELS. In this respect, CLCs have, to a limited extent, engaged with organising and educating predominantly low-paid migrant workers through a program known as the 'train-the-trainer' via the former Migrant Employment Legal Service (MELS)[59] — a Friere-style[60] workplace rights education program. The program was developed by the WEstjustice program in Victoria. It is obvious that such programs can benefit from union assistance. This program, run out of Marrickville Legal Centre in Sydney, had one staff member or organiser. It operated for a couple of years before being terminated (at the time of writing) due to a funding dispute with an eastern suburbs and inner city legal centre. Perhaps more than anything else, the longevity and minimal reach of this organising project within CLCs, illustrates the fractious, fragile and constraining funding environment in which CLCs operate. It is also noted that the three inner city CLCs that established and dissolved MELS, were active in making other minor contributions outside of the traditional servicing roles of CLCs, including advocacy or policy work, in the form of submissions to government inquiries. Despite this short-lived experiment in community organising and the other advocacy work of CLCs, the bulk of employment law work performed by CLCs involves delivering legal services to individual clients from marginalised backgrounds.

Understanding Barriers to Co-Enforcement

Airing grievances: recognising 'non-substitutable capabilities' and differences between organisations

As Fine has proposed, for co-enforcement to occur between organisations, partnering organisations must recognise their own unique capabilities as well as those of other organisations. In practice, however, this study found that a crucial component on this process involved the ventilation of

[59] This service was based at Marrickville Legal Centre and was jointly funded by three inner city Sydney legal centres. Its programs, including 'train-the-trainer' were premised upon a model established by WEstjustice at the Footscray Legal Service in 2017. In late 2021, two of these inner city legal centres re-opened under the name of the Employment Rights Legal Service. At this stage, the Service does not involve any dedicated worker training or organising program, nor any programs directed towards vulnerable migrant workers, unlike the previous MELS program. The author is currently attempting to resurrect such a program among the centres, with the assistance of a major trade union.

[60] Premised on the 'critical education pedagogy' of Paulo Friere, whose work was foundational to the development of literacy among Brazilian peasants in the 1960s, in order to enfranchise and liberate them from oppressive colonial rule: see P Friere, *Pedagogy of the Oppressed*, Herder and Herder, Barcelona, 1970.

significant grievances between organisations (and the use of Fine's concept has been modified accordingly). Indeed, acknowledging such differences was an important part of understanding the current lack of collaboration between organisations in the labour law space in NSW — a primary objective of this article. In the process, participants came to terms with their own respective organisational cultures and roles (mostly in terms of 'servicing' and 'organising'), as against those of other organisations acting on behalf of workers in the industrial space. This, in turn, permitted reconciliation on the one hand, while on the other, improving collaboration through mutual understanding of the differences or 'non-substitutable capabilities'[61] between organisations — capabilities that are not necessarily in competition with those of other organisations acting in the worker representation space (discussed in the next section of the article). Reflecting on these differences through a frame of 'servicing' and 'organising', clarifies how these differences have emerged and what might be done to resolve them through more effective collaboration.

All participants recognised the significant power and resources of the Federal Government regulator — the FWO — as its major non-substitutable capability. Almost without exception, however, participants (other than FWO representatives) were strongly critical of the regulatory approach taken by the FWO as being ineffective in terms of both organising *and* servicing. In respect to servicing, participants spoke of the considerable budget allocated to the FWO, resulting in few cases being prosecuted and negligible payments being returned to workers, particularly in respect to wage theft and sham contracting matters. Union participants compared the relative strength of the FWO's right of entry powers to their own, which have been watered-down to permit the FWO to take precedence over trade unions in the enforcement space. Indeed, this view is confirmed by the scholarly literature.[62] In respect to differences surrounding organising, union participants were joined by FWO representatives in acknowledging tensions between themselves and the FWO, arising from the Registered Organisations Commission which actively prosecutes trade unions. Non-FWO participants also roundly condemned the lack of collaboration and communication forthcoming from the FWO, despite numerous attempts on the part of non-FWO participants to engage with the FWO. CLC participants discussed a period when the FWO funded CLCs, predominantly for wage theft service provision, saying that the results attained by CLCs were demonstrably and significantly more efficient and effective than those attained by the FWO.[63] Finally, participants compared the FWO budget and general enforcement results to their own, producing a compelling picture of regulatory failure.[64] These reasons, along with those associated with a hostile

[61] Fine, 'Enforcing Labor Standards in Partnership with Civil Society', above n 9, pp 364–6.
[62] Hardy and Howe, above n 1, at 324—9.
[63] CLC lawyers added that there was no distinction in the difficulty or type of wage theft matters referred. See also the following footnote for a snapshot of relevant data relating to this comparison. [Which footnote? The next note, note 64.]
[64] In 2019-2020, the FWO litigated a mere 54 matters, including wage theft matters. In that year, its budget was $207.5 million (see *Fair Work Ombudsman and Registered Organisations Commissions Entity Annual Report 2019-2020*, Parliament House, Canberra, 2020, pp 10, 53). Lawyers from one CLC alone estimated that they litigated at least double that number of employment matters on an annual budget of less than $200 000. Unions,

political environment (discussed below), explain why the FWO is an unlikely co-enforcement partner with unions and CLCs, as contemplated by this wider research project.

Trade Unions and CLCs: Silos of servicing and organising

Despite initial hostility and mistrust, most trade union and CLC participants agreed that the recent political reconfiguration of the industrial landscape necessitates their mutual co-operation. Where trade union density is at its lowest ebb and employment laws have largely been re-rewritten in the interests of employers, trade unions and CLCs could clearly see a mutuality of interests where both offer legal services to workers. Collaboration, however, requires mutual understanding of each organisation's initial hostility, mistrust and any reluctance to co-operate.[65] It requires answering the question: why have these organisations failed to collaborate, to date? Such reluctance, it seems, stems primarily from cultural differences in each organisation's approach to industrial relations. In accordance with the theoretical literature, the fundamental difference between unions and CLCs may be articulated as: *the difference between organising and servicing workers.* That is, while trade unions organise workers to bargain collectively for enduring social and industrial change, CLCs provide a 'one-off' or transactional legal service to individual workers. This difference is corroborated by the practical co-enforcement literature, which adds that such a divergence means that unions and CLCs are reliant upon starkly different funding models — membership vis-a-vis government funding — a fact that compromises the independence and activism of CLCs.[66] Further, while servicing workers is a relatively recent phenomenon within Australian industrial relations, organising the workforce is a far older practice, as discussed above.

Previous interview-based research with trade unions regarding the shift from bargaining to enforcement in Australian industrial relations has shown that while unions perform both servicing and organising tasks, they see their primary function as organising workers.[67] This accords with their history, as discussed above. Union participants in this study confirmed these findings. Additionally, both the extant literature and the interviews conducted here suggest that while unions service long-term members and perform the crucial servicing task of monitoring wages and conditions, the extent of their servicing work both for individual members and potential members could be improved. The previous study, together with other existing scholarship, suggests that for unions to retain density and to remain relevant within a changed industrial environment in which individual enforcement is key, that unions must pivot

meanwhile, showed that they were successful in recovering wages in 70% of wage theft matters, compared with the FWO's success rate of 42% in such cases (see, Unions NSW, *Wage Theft: The Shadow Market*, Sydney, 2020, p 18).

[65] Fine, 'Enforcing Labor Standards in Partnership with Civil Society', above n 9, pp 364–6.

[66] J Fine, V Narro and J Barnes, 'Understanding Worker Centre Trajectories', in J Fine et al (Eds), *No One Size Fits All: Worker Organization, Policy and Movement in a New Economic Age*, Labor and Employment Relations Association, Illinois, 2018, p 7 at p 34; Narro and Fine, above n 11, at p 67.

[67] Landau and Howe, above n 40, at 224.

more towards servicing, while also maintaining their organising functions.[68] Rather than 'root and branch' organisational change on the part of trade unions, collaboration with servicing organisations such as CLCs, through a program of co-enforcement, might be one straightforward way to achieve this.

Throughout the interview process, CLC lawyers emphasised the importance of their servicing role – in a similar manner to the emphasis placed on organising by trade union participants. According to CLC participants, the primary role performed by CLCs in the employment law space is to service client-workers. In particular, CLC lawyers emphasised their specialisation in wage theft matters (although CLCs perform a range of other work in relation to sham contracting and discrimination claims).[69]

But such a role — premised as it is in service provision — makes only a minimal contribution to effecting widespread industrial change, while being non-threatening to both the State and employers. As representatives of the FWO confirmed, this is one reason why the FWO recently entered into a non-ongoing funding arrangement with the MELS service. And clearly, CLCs must continue to tread a delicate line between organising and servicing if they are to continue to be funded, particularly by non-Labor Governments. It follows that if CLCs are to effect enduring and meaningful change to the predicament of their predominantly non-union worker-clients, they must do more in the organising space, primarily by collaborating in co-enforcement with trade unions. Most CLC participants willingly acknowledged this. An outstanding question, however, was the strategy by which this might be achieved (discussed below), in light of ongoing conflict between their respective cultures of servicing and organising.

Trade Unions and CLCs: Conflict between servicing and organising

Mutual frustrations were expressed by interviewees from both unions and CLCs regarding the nature of the other's role. That is, unions expressed annoyance at the short-term 'transactional' nature of servicing work performed by CLCs which, while solving problems for individual workers, does not prevent the recurrence of workplace problems for other workers. Unions also saw the CLC approach as fragmenting collectivities of workers. Meanwhile, CLCs expressed concern about the number of existing union members who sought their assistance, frequently after having reported their problem to the union. CLCs also reported that most of their clients had never been approached by a union to join.

Participants also vented a range of other hostile sentiments and misconceptions, impeding their collaboration to date. Such misunderstandings appear to arise from an unfamiliarity with the other organisation's culture of organising or servicing. These sentiments are outlined here and explained through the frame of servicing and organising, in order to facilitate organisational co-operation.

[68] Hardy and Howe, above n 1, at 335–6; Landau and Howe, above n 40, at 226–7.
[69] There are 41 CLCs in NSW. Most offer specialist employment law advice. Interviewees estimated that each practice received inquiries from around 35-40 new employment law clients per week.

- ‘CLCs better represent low-paid workers than trade unions because they are cheaper’: This notion was expressed by a number of the CLC lawyers interviewed. . Clearly, it arises from the notion that the organising model involves paid membership, whereas servicing entails a one-off and comparatively inexpensive transaction. Certainly, from a short-term perspective, the notional servicing fees charged by CLCs (around $200) are cheaper than most conventional union dues (around $500 p.a.). However, union participants in this project have recently implemented ‘on-demand’ membership programs in which workers in its traditionally precariously employing industries can join for as little as $10 per month. Further, most unions index their dues to worker pay-scales, while all dues are tax deductible, effectively rendering membership free to all workers who earn above the tax-free threshold ($18,200 p.a.). From a long-term perspective, union membership also provides low-paid workers with ongoing financial gains in the form of collectively and politically bargained penalty rates and other entitlements.
- ‘CLCs better represent migrant-workers than trade unions’: There was a perception on the part of some CLC lawyers that CLCs were best placed to represent migrant workers because: i) CLCs have a more inclusive history than trade unions; ii) CLCs are less threatening to employers and are therefore preferred by vulnerable migrant workers to trade unions; and iii) the former MELS service was designed around the special needs of migrants. By extension, this is a view that organising models have been exclusionary, whereas individual transactional services have fewer barriers to access and share a history with a shift towards ‘human rights’ and individualising anti-discrimination legislation and claims, discussed above.[70]

  While it is true that trade unions supported exclusionary policies in relation to migrants and women until at least the mid-twentieth century, unions also have a much longer history than CLCs.[71] In this respect, unions have not supported exclusionary policies since the late 1970s and 1980s, coinciding with the emergence of CLCs. In fact, the enactment of Australian anti-discrimination law, has overwhelmingly been the product of the labour movement and labour governments, since 1975. Moreover, Australian ‘left’ unions have been organising among migrant workers since the first wave of post-war migration in the late 1940s.[72]

  Both major trade union stakeholder participants in this study maintain multicultural and ethnically diverse organising teams and many organisers are fluent in the first language of their

[70] J Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism,* Verso, New York, 2019, at pp 20–34, 220.
[71] M Quinlan, *The Origins of Worker Mobilisation: Australia 1788-1850,* Routledge, Oxfordshire, 2018.
[72] RW Connell, *Ruling Class, Ruling Culture*, Cambridge University Press, Melbourne, 1977; J Collins ‘The Changing Political Economy of Australian Immigration’ (2006) 97 *J Econ Geog* 7.

members and potential members. In fact, Unions NSW, together with the United Workers Union were instrumental in establishing long-term, sustained funding for the Immigration Advice and Rights Centre: a CLC run in conjunction with Unions NSW, specifically to service migrant workers with Visa problems. As one senior official of Unions NSW acknowledged, for migrant workers, their key 'priority is to stay in Australia not to get (their) backpay'. Both CLCs and trade unions refer clients and members to this service, before providing their respective employment law services and neither organisation is equipped nor permitted to deal with immigration matters. Trade unions also work in partnership with representatives of ethnic and religious groups such as the Sydney Alliance and the Ethnic Communities Council to organise migrant workers, such as in relation to the recent International Student Hub (an initiative in which MELS was also involved).

- Some CLC lawyers suggested that migrant workers prefer CLCs to unions due to their 'non-threatening' or neutral status in the eyes of employers. In this way, migrant workers were said not to want to draw attention to themselves for fear of loss of their individual reputation among other employers, nor wanting to jeopardise the employment of fellow migrant workers. The corollary of this individual approach — inherent to the servicing model — is that it sustains exploitation for the migrant co-workers of individual migrant workers. Indeed, as CLC lawyers observed, even when they have attempted to 'tip-off' the FWO about such conditions for the co-workers of individual migrant worker clients, the FWO rarely, if ever, takes action. And as union participants recognised, anything short of a collective approach rarely brings change for any worker, other than the individual complainant.

- 'CLCs better represent small business workers than trade unions': This claim was made mostly by CLC lawyers and was largely conceded by union officials. Indeed, it is borne-out by over 100 years of trade union organising showing that even at the high point of 20th century trade union density, that non-union members were overwhelmingly small-business employees.[73] This is primarily due to the size of small business workforces and their necessarily personal nature in which workers and bosses often work closely together. In the absence (and indeed current prohibition) of 'industry-wide' or 'pattern' bargaining, small business environments are less conducive to collectively bargained outcomes and ongoing union representation. At present, workers in small business environments stand to gain from one-off transactional representation embodied within the servicing model.

[73] MacIntyre and Mitchell, above n 52, pp 152, 169, 227–9; 264.

- ‘Unions do the same thing as CLCs’: A key misunderstanding expressed by some CLC lawyers and union officials was the nature of the role played by the other institution. More specifically, some participants equated those from the other organisation as doing the same thing as them, albeit in an inferior way. As discussed above, CLCs were critical of trade unions because they saw them as existing primarily to service members, while doing that poorly. Although some CLC lawyers spoke of the collective political role played by trade unions, not a single CLC representative mentioned the notion of ‘bargaining’. Similarly, some trade union representatives saw CLCs as existing only to service clients, primarily for their own benefit in the form of government funding, while replacing the function of trade unions to bargain and organise on behalf of workers.

If such mistrust, exemplified by these responses can be overcome, it is only logical that synergistic differences between unions and CLCs should attract, more than they repel. Indeed, where organising creates enduring solutions for collectivities of workers, servicing covers a significant volume of individual and technical or complex cases. From this perspective, each organisation performs the very role needed by the other. Accordingly, the frustrations expressed by participants (outlined above) need not impede collaboration. Indeed, they are useful because they illustrate that both organisations can perform *different* roles in relation to workers. CLCs have responded to the system-wide shift to individual enforcement model by servicing or representing individual workers, detached from their traditional collective class power in a union. Such an approach might be seen as the organisational equivalent of bailing-out the ocean. Unions, meanwhile, have been slow to react to the recently atomised environment, steadfastly pursuing the organising model while members confront increasingly individualised problems. So long as these divisions between organisational cultures of servicing and organising persist, CLCs and unions may face increasingly futile futures. Rather, their differences might well be said to complement each other. Seen strategically, these non-substitutable capabilities between each organisation offer a fortuitous opportunity for collaboration.

‘Strong Political Support’

As discussed in the literature review, Fine’s work suggests that ‘strong political support’[74] is a further pre-condition to co-enforcement.

Along these lines, Fine’s US research suggests that the most successful co-enforcement projects are those in which either a state or federal labour regulator (or other executive body such as the Austin Police Department in one instance) have been involved.[75] Nevertheless, this suggestion has recently been challenged by the recent work of the CAF, which has been shown to work in an Australian context in circumstances which the academic leaders of the CAF have characterised as a ‘hostile political

[74] Fine, ‘Enforcing Labor Standards in Partnership with Civil Society’, above n 9, 367.
[75] Ibid.

environment',[76] contrary to Fine's theory. Indeed, the CAF receives only minimal input from the FWO, while FWO participants recognise the frailty of the 'low-trust' environment (also involving employers) in which it operates.

Similarly, participants from the FWO in this study emphasised the importance of their organisation's political 'impartiality'. They acknowledged the difficulties of participating in a co-enforcement project within a political hostile environment. While the FWO did not close-off the possibility of their involvement, they emphasised that in such an environment the FWO's participation would be conditional upon the accompanying involvement of employers.

This finding is consistent with Kaine and Rawling's finding that the inclusion of employers in Australian co-enforcement projects is crucial to the involvement of the FWO.[77] Indeed, where the FWO has collaborated with union stakeholders (such as in respect to the CAF and 'Hospo Voice' campaigns), employers have been involved. Similarly, where the FWO has funded CLCs to perform service delivery, the lack of any connection to a culture of organising was considered an asset by the FWO within a hostile political climate. As will become clear from the suggestions of union and CLC participants (discussed below), however, the type of co-enforcement strategies contemplated by this study necessarily exclude employer involvement by virtue of their focus on worker organisations, education and organising, as well as enhancing the impact of general and specific deterrence against employers. Indeed, this is not unusual in light of similar co-enforcement initiatives in the United States.[78] As already mentioned, FWO participation in a proposed co-enforcement initiative with unions and CLCs is unlikely. It remains to be seen whether any collaboration between trade unions and CLCs in NSW will be affected by a lack of political support. Indeed, it may be that acknowledging the differences between cultures of servicing and organising, proves uniquely complementary to pairing these organisations.

Possibilities for Co-Enforcement

In this study, the key means through which participants recognised possibilities to co-operate included a recognition of mutually representing similar groups of workers (or 'sectoral targeting')[79], as well as an openness to discuss particular practical strategies for co-enforcement.[80] Commencing with the first of these concepts — 'sectoral targeting' — a component of the interviews in this project asked participants about which low-paid industries were most represented among their clients. One specific industry, enquired into by this study, was early childhood education. Participants from some inner city

[76] Kaine and Rawling, above n 18, at 309–13.
[77] Ibid.
[78] Fine, 'Enforcing Labor Standards in Partnership with Civil Society', above n 9; Fine, *No One Size Fits All*, above n 9.
[79] Fine, 'Enforcing Labor Standards in Partnership with Civil Society', above n 9, pp 366–7.
[80] Ibid.

CLCs had seen a significant number of cases arising from within the early childhood education sector. As anticipated, CLC sources also indicated that the bulk of their matters (underpayments and sham contracting) hailed mainly from low-paid industries including cleaning, security, hospitality, transport and retail. Accordingly, it is from among these industries that the two key union participants draw their membership and it is for this reason that they were selected to take-part in this study. In this respect, the project has proven that there are clear synergies between the activities of CLCs and relevant trade unions, in that they represent workers in the same industries. Hence, the project foregrounds the possibility of industry specific co-enforcement between CLCs and unions, with each playing to their respective strengths in servicing and organising. Indeed, early childhood education organisers from one particular union expressed great interest in collaborating with CLCs, proposing a range of useful co-operative strategies.

Meanwhile, all organisations apart from the FWO, expressed a degree of willingness to formalise co-enforcement relationships with each other by discussing practical strategies for co-enforcement. This openness was assessed by the way in which participants responded to a key suggestion that they enter into an agreement or memorandum of understanding outlining the duties and responsibilities of each organisation vis-à-vis each other in an organisation program of co-enforcement, as suggested by the practical literature.[81] In this respect, participants from within both CLCs and unions recognised that collaboration represented 'more hands-on-deck' in a space in which there is no shortage of work. Such collaboration is the first step to connect both currently disparate organisational cultures of servicing and organising. Indeed, it is the first step in assessing the second objective of this research (outlined at the outset): what are the possibilities for co-enforcement between organisations that represent workers in NSW?

Union participants supported collaboration with CLCs on the basis that it presents opportunities to attract members and increase union density or rather, to enhance organising activities. Some union participants saw collaboration as an opportunity to show moral leadership through community engagement and involvement. One union leader observed that the enforcement framework has been designed to establish competition between the 'apolitical' servicing role of lawyers and the political organising role of unions. She continued that to maintain hostilities to other organisations, whose values align with those of the labour movement, would be to fall for a trap laid by a politically hostile State. Such a trap might be said to inculcate a culture of servicing within the labour movement, to the exclusion of organising. She reflected that organisation and collaboration, the traditional qualities of the labour movement, offered a solution here.

Nevertheless, some union participants were keen to point-out that significant differences between organisations, on the basis of servicing and organising, meant that any collaboration would require firm

[81] Fung and Wright, above n 36; Amengual and Fine, above n 20; Ansell and Gash, above n 36.

boundaries between organisations through a formal agreement. These participants emphasised that formalising collaboration in this way would ensure that short-term individual services provided by CLCs would not detract from the enduring collective solutions and organising role of unions. Put differently, union participants were keen to ensure that workers were not encouraged to pursue a 'quick-fix' with a CLC, at the expense of union membership and long-term industry and social change.

CLCs supported collaboration on the basis of a general alignment of social and political values. Most CLC lawyers were themselves union members. CLC lawyers also saw opportunities to enhance the efficacy of their largely servicing-based work through co-ordinated and more targeted casework. Additionally, some CLC lawyers raised the prospect of funding by unions as a potential benefit of collaboration (discussed further below).

Nevertheless, CLCs identified two key hurdles to co-operation with trade unions in a co-enforcement project, arising from their servicing role: client legal privilege; and the appearance of political impartiality for the purposes of continued funding. CLC lawyers raised the hurdle of client legal privilege or their duty of confidentiality[82] specifically in respect to proposals to share information between organisations — a co-enforcement strategy discussed below. Such strategies form the basis of co-operation between worker centres and trade unions in the United States.[83] It is acknowledged that while similar to worker centres in their education and advocacy role, CLCs are different to worker centres in that they provide individual client legal advice, requiring a legal duty of client legal privilege.[84] Notwithstanding this duty of confidentiality, under Australian evidence law there exist a range of permeable legal boundaries to the privilege that permit information sharing, facilitating the kind of co-operative organisational proposals contemplated by this study. For instance, information may be shared when it is done: i) in confidence with an existing or prospective co-plaintiff (all information);[85] or ii) where there is a common interest in proceedings (all information);[86] or iii) with client consent (all information);[87] or iv) it is merely general information (names of parties);[88] or v) where it consists merely

[82] 'Client legal privilege' exists at common law (*Baker v Campbell* (1983) 153 CLR 52, p 91; 49 ALR 385; [1983] HCA 39 (per Wilson J), as well as under ss 118–26 of the State and Federal Uniform *Evidence Acts*: see, eg Evidence Act 1995 (NSW). Section 118 is the dominant provision among these sections. In sum, it provides that confidential legal advice (documents and communication between lawyer(s) and client) must not be used in court if the client objects to its disclosure. As a general rule of ethical practice, lawyers should treat all legal advice as capable of use in court such that disclosure requires express client consent, unless subject to a statutory or common law exception: Law Society of NSW, *Solicitors' Duties to Clients*, at <https://www.lawsociety.com.au/for-the-public/going-court-and-working-with-lawyers/solicitor-client-relationship/solicitors-duties-to-clients> (accessed 17 February 2022).

[83] Narro and Fine, above n 11, at pp 77–86.

[84] Ibid. US worker centres, by contrast, do not tend to run cases and mostly refer legal matters to affiliated private lawyers.

[85] *Mann v Carnell* (1999) 201 CLR 1; 168 ALR 86; [1999] HCA 66.

[86] *Hamilton v New South Wales* [2016] NSWSC 1213.

[87] Evidence Act 1995 (NSW) s 122(3)(b).

[88] *Federal Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341; 229 ALR 304; [2006] FCAFC 86 at [47]; *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499; [2003] FCA 384 at [58] (per Allsop J); *Hastie Group Ltd (in liq) v Moore* (2016) 399 ALR 635; [2016] NSWCA 305.

of the names of parties *and* general cause of action (e.g. 'underpayment') and the originating process has been filed.[89] Accordingly, it would appear that the boundaries of confidentiality are not a significant obstacle. The second hurdle raised by CLCs — 'political impartiality' — should be considered in conjunction with the *CLCsNSW Constitution* (2020), which requires CLCs:

> 2.4 To advocate for social justice, particularly for people who are socially or economically disadvantaged and whose inability to access the legal system further aggravates or perpetuates their disadvantage;
>
> 2.8 To liaise closely and, as appropriate, work co-operatively with other organisations … in relation to justice issues and the provision of Community based services.[90]

Given the potential benefits of co-operation with trade unions, discussed above and below, in the form of improved servicing and organising for low-paid and migrant workers, the Constitution of CLCsNSW would appear to urge co-operation on behalf of these client-constituents. From another perspective, however, some CLCs expressed reluctance to collaborate with unions on the basis of concerns regarding withdrawal of government funding by Coalition Governments. But refraining from co-operation with unions on this issue might be seen as a political act in itself, aligning CLCs with the preferences of incumbent Coalition Governments at both a State and Federal level at the expense of CLC client-constituents.

Collaborative proposals from both organisations sought to further and enhance their own respective servicing or organising culture. Importantly, they did not seek to import the activities of the other organisation into their own work. Rather, they indicated a preparedness to drop barriers to collaboration, facilitating the activities of the other entity within their own institution.

As established, participants from CLCs and trade unions indicated a willingness to collaborate in respect to a co-enforcement partnership. From the outset, a senior executive at Community Legal Centres NSW made clear in their interview that any such project would involve a 'devolved model of co-operation' on the part of CLCs, such that each CLC is free to choose to participate. This decentralised proposal is consistent with a more individuated organisational model than the centralised model through which trade unions agreed to participate. Accordingly, union and CLC participants were asked to comment on three key ways proposals to share and combine their respective strengths in servicing and organising. These were: i) direct legal service provision; ii) education programs; and iii) advocacy for systemic change. These aspects of co-operation are borrowed from the Victorian WEstjustice program in which

[89] Evidence Act 1995 (NSW) s 119. *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2004] NSWSC 40 (10 February 2004).
[90] Community Legal Centres NSW, *Constitution of Community Legal Centres NSW Incorporated*, Surry Hills, November 2019.

trade unions participate and co-operate, albeit in a limited way, in each of these areas of CLC practice and influence.

Direct Legal Service Provision[91]

Client and Member Referrals

Through their focus on individual legal service delivery, CLCs have the capacity to reach workers who are not union members. This cohort of workers frequently includes migrant and low-paid workers as well as those in small business. But as participants from both CLCs and unions agreed, many of these workers, particularly those employed by medium to large employers, should probably belong to trade unions in order to enhance their collective bargaining and social power. Accordingly, CLCs acknowledged the importance of the organising role of unions, which was a crucial step towards collaboration on this specific practical co-enforcement strategy.

This acknowledgment leant itself to potential for client referrals from CLCs to unions, with one senior CLC lawyer even suggested an electronic referral process between CLCs and trade unions. With client permission, she suggested, a CLC lawyer could enter a client's details into an online portal to refer the person to a relevant trade union. Within 24 hours, someone from that union could contact the person to offer them union membership and enquire regarding their problem. Such a process, the lawyer continued, would 'reduce the burden on the worker'.

Implicit in this suggestion (perhaps more so than any other) is an understanding that respective organisational practices of servicing and organising can and should combine for the collective benefit of workers. Unsurprisingly, this suggestion was welcomed by union participants who further suggested that this potential process might work more effectively for both organisations if the process was more targeted towards types of matters to be referred: allowing CLCs to continue to service clients in order to meet their funding quotas or 'Key Performance Indicators', while permitting unions to take advantage of their unique organising strength. Indeed, client referral processes in the US are uncommon precisely because funding for non-union worker organisations is so often linked to KPIs.[92] But as one union participant put it, 'if we could get a framework right, this could benefit both the unions and CLCs…

[91] US co-enforcement collaborations have, to some extent, been reliant upon private law firms to run industrial class actions: Fine, 'Enforcing Labor Standards in Partnership with Civil Society', above n 9, pp 373-4. Given the recent emergence of industrial class actions in Australia (see, eg, D Allen and I Landau, 'Major Court and Tribunal Decisions in Australia, 2019' (2020) 62 *JIR* 446), the strategy of class action claims was floated in interviews with participants as a collaborative technique involving 'direct service provision'. While CLC lawyers were open to class action as a co-enforcement strategy, union participants opposed the idea, citing often sizeable profits derived from class action claims by private firms and litigation lenders, on the back of minimal returns to workers. This study does not encourage class action claims as a co-enforcement strategy.

[92] Narro and Fine, above n 11.

What'd be good is if we had a relationship, and we could actually sit down and say, okay, these ones are yours, these ones are ours.' As another said, 'so we could find ways to kind of divvy up the work, playing to both of our strengths and not kind of treading on each other's feet. But that would require a framework for that relationship and for those discussions, and some understanding about how that would work'. These suggestions directly reflect recommendations from the co-enforcement literature that complex organisational collaboration (such as a client referral program) should be supported by formal agreement and an agreement-making process.[93]

Accordingly, trade union participants agreed that some of their individual-member claims, particularly those that were more intricate, complex or resource-intensive, might benefit from CLC legal representation, perhaps assisted by pro bono firms and the resources availed by these firms. Meanwhile, trade union participants proposed that CLCs refer to unions, simpler matters involving multiple claimants or plaintiffs. Such claims, it was proposed, are ripe for collective bargaining and/or negotiation, frequently between the union and employers with whom the union has a pre-existing bargaining relationship. Union participants added that such referrals would also encourage union membership among larger cohorts or collectivities of workers.

Information Sharing for Sectoral or Regional Targeting and Tip-Offs

A key strategy in effective co-enforcement between partner organisations in the US has involved information sharing.[94] As one union participant in this study acknowledged, there are 'countless ways to share information', that mutually enhance the servicing and organising capabilities of organisations. One effective method involves sectoral or regional targeting. That is, as another participant put it, 'identifying patterns and things that employers are doing' in specific industries or sectors and around particular geographic areas or regions. In this way, organisations can more effectively allocate their resources to target particular patterns of behaviour, thereby deterring employers from engaging in it and improving conditions for a wider group of workers. Knowing what other organisations are doing in the enforcement space or 'knowing who's doing what where', further permits organisations to divide industries and regions between each other, once again benefiting the resource capacities of community sector organisations.

Trade union participants suggested two specific issues on which CLCs could usefully share information. The first is by providing 'tip-offs' to trade unions regarding workplaces and employers that CLC lawyers encounter through the course of their work, particularly where there appear to be multiple employment law contraventions beyond an individual CLC client. Indeed, as CLCs lawyers claimed, their existing tip-offs to the FWO rarely result in regulatory action. The second information-sharing strategy proposed by union participants involves the common practice of employer phoenixing:

[93] Amengual and Fine, above n 20; Fung and Wright, above n 36; Ansell and Gash, above n 36.
[94] Narro and Fine, above n 11, at pp 77-86.

terminating a business and declaring insolvency to avoid paying unpaid wages and entitlements, before reopening the business under a new business name and hiring new workers. As union participants recognised, while workers are covered in respect to phoenixing by the Fair Entitlements Guarantee (FEG) scheme, FEG compensation is almost always inadequate. Reciprocally, CLC lawyers specifically identified phoenixing as creating an unmitigated and ongoing problem in their day-to-day enforcement work. CLC lawyers also claimed that this is a further issue that they have referred to the regulator, consistently resulting in inaction by the FWO.[95] Nevertheless, new (and as yet unused) anti-phoenixing legislation, passed in 2020, permits unions to prosecute such behaviour by seeking maximum penalties of $990,000 and/or a 10-year term of imprisonment.[96] Accordingly, union participants proposed that where CLCs encounter a phoenixing matter, that they should refer it to the relevant union for prosecution.

Education Programs

Awareness about the Role of Unions and Encouragement of Membership

The foremost education strategy deployed by worker centres in the US, leading to successful collaboration with trade unions, has involved educating low-paid and migrant workers, as well as those in small business, about trade unions.[97] This education has two key elements, first it involves discussing the 'right' to join a union. Indeed, CLC lawyers agreed that this much already forms part of their current practice. Additionally, US worker centre education programs focus on the benefits of trade union membership for personal, workplace, industry and broader social gain.[98] In other words, CLC worker education programs should not only create 'awareness' about the existence of unions, they should actively *encourage membership*. Such programs clearly synergise practices of servicing and organising.

MELS Collaboration

As stated above, since undertaking the interview research for this project, the MELS workplace rights education program has ceased to exist.[99] But at the time that interviews were conducted, some senior trade union officials had not heard of MELS. Many expressed keen interest in discovering more about it. Both they and other union officials who were aware of the program (and had worked with the MELS organiser in relation to the International Student Hub program) saw the 'natural affinities' between the

[95] Given a chance to comment on this claim, the FWO responded by saying that: it lacks resources to deal with *all* complaints; that it is required to triage complaints; and that its methods invariably involve a mix of 'softer' compliance-based approaches to enforcement that many within the labour movement perceive as inadequate.
[96] Treasury Laws Amendment (Combatting Illegal Phoenixing) Bill 2019 (Cth) [specific reference required – also I assume this bill passed. If so, the schedule in Act is a better reference. Please identify relevant part]But I already have, in the text in the bracketed text, here: (amending the Corporations Act 2001 (Cth), s 1317E(3). See also ss 9 and 588FDB(i)).
[97] Narro and Fine, above n 11, at pp 82-88.
[98] Ibid, at pp 77–86.
[99] The author is nevertheless currently working with CLCs and unions to resurrect a version of the former MELS program.

organising work of unions and this organising program within CLCs, which effectively bridged servicing and organising activities within CLCs. Unions also saw the organising capacity of the MELS program as being under-developed and requiring organising experience and expertise - expertise which as they put it, 'has evolved within union organising practice since the mid-nineteenth century'. Union officials gave a range of concrete examples as to how this experience operated in practice.[100] Such experience appears vital to the successful operation of a program such as 'train-the-trainer'.

Indeed, similar US programs, run through worker centres, have benefited not only from union organising experience precisely in this way, but through funding relationships with supportive unions.[101] In these circumstances, the US peak trade union body, the AFL-CIO, agreed to commit small amounts of funding to a number of worker centres, on the basis that worker centre education programs emphasised and encouraged trade union membership. This relationship is formalised in an agreement or memorandum of understanding between partner organisations.[102] A similar partnership arrangement might be entered into between CLCs and trade unions in Australia. Such arrangements would greatly benefit CLCs where their educational programs — are perpetually subject to precarious short-term funding arrangements.

Attendance of Union Officials at CLC Advice Nights and Quarterly Forums

A number of CLC lawyers suggested that one starting-point for educational collaboration between organisations would be for union representatives to attend CLC advice nights and quarterly forums. While union lawyers already attend advice nights, and some senior officials have attended quarterly forums, union organisers expressed indifference about the attendance of such events. Having attended many such events with various organisations, union organisers invariably found that while attendees appreciate a union presence, these events have not led to active collaboration, nor increased union membership. Such events are not suggested as collaboration spaces for CLCs and trade unions.

Advocacy

Co-Ordinated and Mutual Industry Campaigns

All CLC and trade union participants expressed interest in collaborating on industrial campaigns that are of mutual interest. Both parties immediately grasped the benefits of collaboration to extending the reach and publicity of campaigns to target groups of workers, especially vulnerable workers and non-union members. Nevertheless, according to WEstjustice Organisers, an added benefit of their advocacy

[100] For instance, one senior union official discussed the selection of the best workers to lead others or to act as a union representatives within the workplace. She identified distinct personalities, skills-sets and traits that must be identified in order that other workers follow-suit and that will be successful in negotiating with employers. Clearly, these characteristics and dynamics are not obvious to first-time organisers.
[101] Narro and Fine, above n 11, at pp 77–84.
[102] Ibid.

for low-paid and vulnerable workers, independent from trade unions, is that they are afforded a broader political reach. These organisers provided examples of how this independence enabled their advocacy, particularly among conservative MPs and other traditional opponents of the labour movement. In this respect, it is important that any co-enforcement strategy recognise the enduring independence of CLCs and trade unions from each other.

Limitations

Even where participants accept these proposals, CLC participants may nevertheless confront significant resourcing difficulties implementing them. While referral of matters, for example, saves resources within CLCs by reallocating the labour-intensive work of service delivery,[103] the work of establishing and maintaining a referral pathway takes initial and additional effort on the part of CLC lawyers. The same applies in respect to information-sharing and education programs. Indeed, closure of the MELS service and termination of its dedicated education program officer role, is indicative of the effort and fraught funding environment in which such services run. And while unions are willing to contribute significant resources to facilitating this process, including a dedicated organiser to resurrect a MELS-style education program within CLCs, it remains to be seen whether the process is sustainable within CLCs.

Conclusion

While ongoing, the research undertaken in this project demonstrates organisational differences between a variety of entities acting on behalf of workers in the labour law enforcement space. It discovered two organisations — CLCs and trade unions — expressed interest in collaboration due to overlapping as well as non-substitutable capabilities and interests. Equally, it discovered an array of tensions and organisational differences between all participant organisations, contributing to a present state of disunity and division between them. By observing and critically appraising the activities of these organisations through the lens of 'organising' and 'servicing' or individual and collective approaches to labour law, this research identified their crucial need for co-operation. These analytical tools have further enabled this study to develop proposals for organisations to strengthen their enforcement activities, primarily by acting collaboratively. At the time of writing, CLCs and unions are in the process of formalising an agreement to the list of practical co-enforcement strategies identified by this research, discussed in the latter half of this article. While the 'education' and 'advocacy' aspects of the agreement are already in-progress, there are a range of practical hurdles to agreement on the process by which direct service provision (referrals and information sharing) should be handled between organisations. Further research will be required to document the progress of this partnership and its results.

[103] Fine, Narro and Barnes, above n 66, p 28.

Co-enforcement arrangements between organisations that represent workers are designed to strengthen labour law on behalf of workers while fostering and enhancing solidarity between organisations. This is particularly important at a time when union density continues to plateau at its lowest ebb and solidarity between workers is increasingly fragmented by diverse work arrangements, union restrictions and other forms of 're-regulation'.[104] In this respect, the collaborative approaches identified and tested in this study might be replicated (or, at the very least, distinguished) in other collaborations between worker organisations within the field of labour law. Whether such partnerships generate 'radiating effects' for union members as described by the theorists, or whether they translate to positive practical effects such as modest increases in union density and effective enforcement of labour law, remains to be seen. It is only once a foundation of trust has been laid, through mutual understanding of similarities and differences between organisations, that co-operation can begin.

[104] 'Re-regulation' involves dismantling labour regulation under the guise of 'deregulation' while substituting further regulation favouring employers. See, eg, R Cooper and B Ellem, 'The Neoliberal State, Trade Unions and Collective Bargaining in Australia' (2008) 46 *BJIR* 532; Schofield-Georgeson, above n 1.