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Union responses to regulatory change: Strategies of protective layering

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Abstract

Changes to the Australian regulatory landscape over the past three decades of global liberalisation created regulatory uncertainty for unions. Coupled with membership decline and internal restructuring through union amalgamations, they prompted an important reorientation by unions (back) to the workplace, and precipitated different strategic decisions and organising challenges. However, the proliferation of fragmented employment relationships rendered workplace-centred organising an insufficient response. As a result, some unions experimented with ways of supplementing existing legal frameworks by other regulatory initiatives, through campaigns that resulted in the layering of regulation. In this article, we examine attempts by three unions – covering garment workers, road transport workers and aged care workers – to address the needs of members in garment homeworking, road transport and aged care in a contested regulatory environment.

JEL Codes: J51, J53, K31, L50

Keywords

Employment regulation, informal regulation, institutional layering, labour law, regulatory layering, regulatory pluralism, reinforcing labour regulation, supply chain labour standards, trade union strategy, union campaigning

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Introduction

For much of the last century, Australian unions, like their Western counterparts, played a privileged role in securing worker protections. Australian unions were heavily influenced by their engagement with the arbitration system and their relationship with, if not reliance on, the state (Kaine and Wright, 2013). The contemporary landscape for Australian unions differs significantly from that faced a generation ago. The fabric of awards (the Australian documents that set out minimum terms and conditions of employment) has been shrunk, and union membership levels have fallen with only a few, short-lived periods of stabilisation. Unions no longer have a guaranteed role in negotiating terms and conditions of employment exacerbated by the proliferation of fragmented employment relationships. Additionally, the shift in the bargaining scale brought about by the emergence of workplace-based bargaining in the late 1980s (Sadler and Fagan, 2004) was accompanied by a shifting of unions from the political centre to the periphery under the federal Howard government (Peetz and Bailey, 2012).

These changes to the Australian industrial relations landscape over the past three decades of global liberalisation have compelled unions to take part, alongside state institutions, in new forms of regulatory pluralism and informal regulation. A particularly important union strategy is that of 'layering' or reinforcing of labour protections. Our interest here centres on such regulatory strategies, in contrast to the capacious literature on union revitalisation, which examines renewal strategies such as grassroots worker organising, community–union coalitions and inter-union alliances (Brigden and Kaine, 2015). We examine regulatory strategies adopted for different cohorts of workers, and argue that these union strategies are ways of building specific regulatory spaces for the protection of workers' rights and conditions. They include the adoption of 'organising' in the mid-1990s with its explicit aim of regulating outcomes at the workplace level; attempts to initiate or develop regulatory regimes to supplement existing industrial relations legislation across industries throughout the 2000s, and the ongoing efforts of unions to utilise and influence the legal framework nationally. None of these strategies has proven to be the panacea, and defeat and disappointment have accompanied these efforts. Yet, the story of the past two decades is one of union resilience, through persistence in pursuit of both traditional and reconfigured regulatory strategies.

This article examines how unions have sought to carve out or cling on to aspects of their regulatory relevance. To illustrate the argument, we examine three union campaigns, each of which blends orthodox and innovative methods, covering garment homeworking, road transport and aged care. These cases have been chosen because they exemplify various aspects of union attempts to develop, enhance or protect 'regulatory architecture upon which to build appropriate labour standards' (Kaine and Wright, 2013: 59). The examples have previously been examined through other lenses such as supply chain regulation, government procurement and corporate social responsibility (e.g. Nossar et al., 2015). However, our focus is on how unions have sought to act as agents of regulation through strategies attempting both to appropriate aspects of the formal regulatory system *and* to augment that system with non-traditional regulatory options. When the external context changed, or existing regulatory frameworks no longer provided enough protection to workers, unions explored ways to expand the boundaries and nature of those frameworks.

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In each sector, the idiosyncrasies of work and employment arrangements posed a significant challenge to existing state-derived labour regulation. In the textile, clothing and footwear (TCF) industry, the outsourced, fragmented, home-based workforce rendered problematic the enforcement of legal minima. As has been noted elsewhere, TCF homeworkers or, to use the Australian term, outworkers, 'occupy the lowest, most exploited level' in a contractually complex supply chain characterised by attempts by more powerful supply chain actors to 'evade or minimise the impact of state regulation imposing employment protection obligations' (Rawling, 2006: 522).

Similarly, in road transport, the prevalence of independent or quasi-independent contractors and the established link between pay rates and safety outcomes for drivers also provided a regulatory conundrum. Labour law has traditionally been based on a direct relationship between employer and employee and does not 'extend any obligations to parties up the supply chain beyond the direct employer, do not address the pay/safety nexus for employees and do not extend minimum standards to contract road transport workers' (Rawling and Kaine, 2012: 247).

The role of the state as the ultimate procurer of aged care services from private organisations creates a publicly funded supply chain, and as such, the government acts as the dominant economic agent in that chain: despite not being party to the direct employment relationships between aged care workers and aged care providers. This mediated and difficult-to-regulate relationship between workers and dominant agents in supply chains is common to all of the cases examined and is central to the regulatory challenge faced by the three unions. It also explains the inability of a workplace-centred organising strategy – such as Organising Works (see below), of itself, to provide adequate employment protections.

The next section sets out conceptual developments regarding regulation before examining the changing environment faced by unions precipitating the need to pursue protective layering of regulation. Attention is first given to Bray and Waring's (2005) discussion in the industrial relations literature, of horizontal and vertical regulation, described here as layered and parallel regulation, whereby new regulatory instruments do not fully displace but sit on top or alongside the old. This analysis is followed by an explication of the three campaign examples. Here, we provide short overviews drawing primarily on the extant literature where these developments have already been canvassed, including the work of one of the authors, together with document analysis. In the final section, the discussion reinterprets the strategies, teasing out the dimensions of layered and parallel regulation.

Dimensions of regulation

The regulatory role of unions has been much considered. For the purposes of this article, however, a contemporary focus on the role of unions beyond their 'monopoly power' to raise wages is instructive. The multidisciplinary field of 'new regulation studies' provides important insights into why unions have had to reconsider their position and function within the regulatory framework. Frazer (2014) argues that while

> state power may continue to be expressed by forms and language of legality…[it] is increasingly manifested in ways that depart from traditional notions of law as concerned with the creation and distribution of rights and obligations. (p. 8)

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Freiberg (2010) highlights the move away from command and control regulation by the state and underlines the development of regulatory pluralism that has resulted, counter-intuitively, not in deregulation but in '[r]egulatory reconfiguration … [leading] to more and more complex regulation' (p. 24), a view with which Ellem (2006) concurs. It is within this context of an emerging 'regulatory pluralism' in which non-state actors, including unions, participate in 'co-regulation' (Frazer, 2014), that this study is located. Therefore, we use a definition of regulation that extends beyond formal instruments of labour law to consider not just state power but market and workplace power. That is, regulation includes direct regulation in the form of rules 'promulgated by the state', indirect regulation encompassing 'more general state-based regulation of the economy' and non-state regulation that includes 'all mechanisms of social control, formal and informal, state-directed and otherwise' (Gahan and Brosnan, 2006: 132).

Changes to the nature of the regulatory environment across time have prompted adaptation in union strategy vis-a-vis these various modes of regulation. These changes highlight the complex interaction of agency and contextual pressures. That is, unions act as regulating agents but are also themselves subject to regulation, not just by the state but by external factors (or in Dunlop's (1958) language, 'contexts'). The article considers the agency and capacity of unions to adopt strategies at different levels of the labour market in an effort to maintain some form of 'regulatory role' despite significant challenges.

Bray and Waring (2005) argue that analysis of regulation has failed to consider those dimensions of it that underpin the 'complexity' and 'congruence' found in labour regulation. The three dimensions they identify are the layering of regulation, parallel regulation and regulatory congruence. The neglect of these dimensions, they argue, has led to under-theorisation of labour regulation in the Australian context. In the case of layered regulation, 'the new regulatory instruments did not fully replace the old, but rather they were built on top of the old' (Bray and Waring, 2005: 3). As we will see, the selected instruments were not exclusively formal, or conventional industrial instruments. Conventional instruments were leveraged by unions but in combination with other regulatory mechanisms outside existing labour law, thus adding regulatory 'layers'.

Layering is evident when different instruments regulate different aspects and issues in the employment relationship, as well as when multiple instruments regulate the same issue. Examples include the intersection of state enforced minima with provisions in collective bargaining agreements. Combinations of industrial instruments and legislative regulation are found in the areas of discrimination, workplace safety and leave, made more complex by jurisdictional considerations in federated systems like Australia (Bray and Waring, 2005: 5–6). Parallel regulation, where different instruments regulate different employees, is another source of complexity. Examples of parallel regulation include those arising from multi-unionism (where workplaces with different occupational groups had an associated set of occupational and/or industry awards and agreements which could also be federal or state-based) as well as employer approaches to regulation of the employment relationship (as seen in the dual presence of individual agreements and awards/agreements) (Bray and Waring, 2005: 7). The recognition that neither layering nor parallel regulation is 'good' or 'bad', despite the complexity they create, led Bray and Waring to foreground regulatory congruence. The notion of congruence is important, they posit, as

it is when congruency is absent or has been eroded that complexity becomes regarded or defined as a problem, due to a perceived lack of 'fit' between instruments or rules.

This concept of layering has not been as frequently applied to labour regulation, despite Bray and Waring's call, as it has in political economy more broadly where it has been described as involving 'the grafting of new elements onto an otherwise stable institutional framework' (Thelen, 2004: 35; see also Mahoney and Thelen, 2010; Streeck and Thelen, 2005). In this analysis, we focus on actors' strategies in adding instruments. For our purposes, the identification of the layering of regulation enables us to explore how various trade union regulatory strategies intersect. Bray and Waring suggest that the unit of analysis shifts away from individual instruments to the structure of regulation in an enterprise or industry. Our focus on particular trade unions and the regulatory choices they have made seeks to demonstrate Bray and Waring's (2005) view that this will 'increase the consciousness of the inter-relationship between different forms of regulation and encourage more holistic analysis that will better capture the complexity of labour regulation' (p. 13). We thus use their descriptors of layered and parallel regulation to explicitly build on their under-utilised work in the industrial relations domain.

Union regulatory strategies: The changing context

At the beginning of *An Emerging Agenda for Trade Unions?* Hyman (1999: 1) reminds readers of Flanders' depiction of trade unions: 'Trade unions have always had two faces, sword of justice and vested interest' (Flanders, 1970: 15) as the basis for his contention that '[o]ne of the challenges which confront trade unionism in the twenty-first century is therefore to revive, and to redefine, the role as sword of justice' (Flanders, 1970). In Australia, prompted by the self-described 'crisis' (Crosby, 2005) of dwindling membership and impermeable bargaining frameworks post 1990, unions both revisited and revived organising strategies and created new ones, as they rethought ways to stem the decline. The approach adopted by the United States Organising Institute influenced the creation of what became a key component of the new organising strategy, the Australian Council of Trade Unions' (ACTU) Organising Works programme. This was promoted as a vehicle not only for recruitment but for driving union organising: organising the unorganised. Promoting an active shift in union activity from servicing to organising (Cooper, 2001; Crosby, 2005), it set in train a major change process that led to a range of unions restructuring and reorienting organisationally (Carter and Cooper, 2002).

The 'new' organising model soon underpinned the 'union renewal' project, with emphasis initially at the workplace. The introduction of Organising Works in 1995 occurred at a time of significant upheaval for unions. As the process of union amalgamation reshaped union structure, enterprise bargaining was extending its reach (Griffin and Moors, 2004). As unions struggled with the demands of the organising model (Cooper, 2001; Griffin and Moors, 2004), more change was to occur. With the election of the Howard coalition government in 1996 and the passage of the Workplace Relations Act came a seismic shift in the 'regulatory space' (Hancher and Moran, 1989) within which industrial relations occurred (Naughton and Pittard, 2013).

In responding to what was seen as a macro-level assault on their existence (Cooper et al., 2009), unions turned more emphatically towards grassroots and somewhat informal

organising techniques. However, the introduction of the Workplace Relations Act 1996, which made provision for individual employer–employee agreements, a reduction of the role and scope of awards and the diminution of the industrial tribunal and its dispute resolution processes created limits to the efficacy of informal regulatory power. That is, while unions were attempting to reconstitute workplace power through increased membership and activism levels, these legislative provisions made it more difficult for them to access workers in the workplace and enhanced managerial prerogative (Cooper and Ellem, 2008). The passage of amendments to the Workplace Relations Act in 2005 presented another challenge. Referred to as 'WorkChoices', the full title of the new law was Workplace Relations Amendment (WorkChoices) Act 2005 (Cth). Described as 'represent[ing] the most fundamental revolution in industrial relations since federation' (Hall, 2006: 292), its main features were the attempt to establish a 'national' industrial relations system by replacing State jurisdictions, a new wage-fixing institution, changes to collective bargaining and unfair dismissal regulations and tighter control of industrial action (Riley and Sarina, 2006).

Against these developments, the limited success of Organising Works further prompted unions to re-imagine their regulatory role, both within the broad bounds of traditional labour law and beyond it. The election of a federal Labor government in 2007 offered opportunities but also reinforced the status quo. Some new legislative provisions in the Fair Work Act 2009 did open up regulatory spaces for unions to redress unequal remuneration and low-paid employment (Cooper, 2014; Macdonald and Charlesworth, 2013). However, with only a handful of cases pursued under these two provisions, and with mixed results, these avenues have proven narrower than hoped. In the case of the low-paid bargaining provisions, there has yet to be a case that has resulted in a multi-employer agreement. While all new provisions take some time to be bedded down, disappointing results for low-paid workers indicate the limits of formal regulation. With this context in mind, the next section considers how unions act as regulators.

Constructing layered and parallel regulation

In the following sections, we examine the success or otherwise of three unions in their attempts, both to appropriate those aspects of the formal regulatory system that still provide protective scope for their members and to augment that system with non-traditional regulatory options. Their campaigns have certain similarities, with supply chain regulation a key element in two of the three cases. Regulation of non-standard workers is another common thread, with sub-contracting a feature of some of the employment relationships (or in one case, employees being classified as contractors). Part of the strategic decision-making for the unions centred on which layers in the supply chain could be subject to better regulation.

The cases demonstrate that trade unions seek not only to respond to regulatory changes and challenges but also to shape regulatory options and respond to them. This adoption of a range of approaches has been evident in what is described as 'jurisdiction shopping', where unions choose among different court systems. Alternatively, unions may focus on influencing the political context. For example, electoral campaigns included the national 2007 'Your Rights @ Work' and the 2014 Victorian 'We are Unions' campaigns, both of

which were instrumental in the electoral success of the Labor Party (Ellem, 2013). Although having a Labor government is no guarantee of union-friendly legislation, the alternative has proven to create a regulatory environment that is at best neutral and at worst anti-union.

The transport case and the garment industry case demonstrate attempts by unions to harness the market power of dominant actors in the supply chain to raise labour standards, resulting in the layering of new regulatory forms, both formal and informal. The aged care example shows a union attempting to access existing direct regulation in the form of legislative provisions but when these failed to deliver suitable outcomes for workers in the sector, pursuing non-legislative indirect state regulation through the targeted deployment of public funding.

However, what these cases also reveal is that where access to formal state regulation (either direct through legislation or indirect through procurement policies) has been secured, it is vulnerable to party politics and ideology. That is, campaigns that started with a union/employer interaction and include a regulatory dimension may be and have been undone at a (government's) whim (Ravenswood and Kaine, 2015).

TCF industry: The Textile, Clothing & Footwear Union of Australia

One of the longest running campaigns aimed at building up protective layers of regulation has been that of the Textile, Clothing & Footwear Union of Australia (TCFUA) and, before that, the Clothing Trades Union, for outworkers. The TCFUA has just under 4000 members across the country (as at 31 December 2014; TCFUA Annual Return provided to the Fair Work Commission).[1]

In 1987, the achievement of specific provisions covering outwork in the relevant federal award addressed award avoidance by employers (*Re Clothing Trades Award* 1982 (1987) 19 IR 416). Faced with ongoing employer non-compliance with the award, the union turned to action to raise community awareness of clothing outworkers' conditions of work. Its report *The Hidden Cost of Fashion* (TCFUA, 1995) led to a 1996 Senate Inquiry into Outwork in the Garment Industry. The inquiry's recommendations supported voluntary regulation, in particular a joint union-industry Homeworkers Code of Practice. Established in 1996, the code was set up as a basis for monitoring companies' treatment of outworkers and for the accreditation of ethical manufacturers. Legislative avenues continued to be pursued as well, with state-based legislation secured in New South Wales (NSW) (2001, 2005), Victoria (2002, 2003), South Australia (2005) and Queensland (2005) (Burchielli et al., 2014).

As a reminder that ongoing protection of regulation is necessary, the federal award provisions governing the conditions of clothing work needed to be defended when the Workplace Relations Act 1996 (Weller, 1999) and later the 2005 WorkChoices legislation 'simplified' the range of 'allowable' award matters. The union successfully advocated for an exemption from the Independent Contractors Act (Cth) 2006 which otherwise would have overridden state legislative provisions protecting outworkers (Barnes, 2007: 389). Federal Labor government funding from 2008 supported a process for accrediting employers, based on their employment practices, through Ethical Clothing Australia (ECA), a joint union-industry non-government organisation

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(Burchielli et al., 2014). In 2014, as part of its 'red tape' repeal day, the conservative Abbott government revoked the Fair Work Principles which required accreditation of TCF manufacturers under the Code of Practice administered by ECA, and ended the funding for ECA as of June 2014 (Department of Employment, 2014). Reinforcing the point about political vicissitudes, the newly elected Victorian Labor government announced in December 2014 that in line with an election promise, it would provide 2 years funding for ECA (2014). Described by Burchielli et al. (2014: 87; see Table 1: 88) as a 'suite of regulatory mechanisms', the result is an array of regulatory tools exhibiting the interlocking effect of parallel regulation (the code of conduct, state-based legislation) and layered regulation (federal and state award provisions) covering outworkers.

Road transport: Transport Workers Union

The Transport Workers Union (TWU) is a federal union with state branches representing over 75,000 members (as at 31 December 2014, Annual return, Fair Work Commission, 2015) working across the transport and logistic sectors. Historically, close to one-third of its membership have been independently contracted owner-drivers (TWU, 2006). Consequently, the TWU has pursued different regulatory instruments over a long period. It too needed to address the differing needs of members, in this case the needs of owner-drivers, compared with those of employee-drivers.

The TWU's 'Safe Rates' campaign began with its NSW branch seeking to better regulate pay rates for truck owner-drivers. What developed was described by the TWU as 'comprehensive campaigning'. The approach included 'a combination of industrial, organisational, community and political activities in pursuit of an articulated strategic goal, namely, the enforceable provision of "safe rates" of pay' (Kaine and Rawling, 2010: 184). The campaign built on legislative protections in Chapter 6 of the NSW Industrial Relations Act, secured in 1979 and sustained during the 1990s, despite changes in government. Chapter 6 enabled the state tribunal to make rulings about minimum terms and conditions of engagement and minimum earnings for owner-drivers (see NSW Industrial Relations Act, 1996). For our purposes, it is key that the NSW TWU's approach was one driven by a long-term objective which '*integrates* a series of apparently one-off initiatives within an overarching campaign' (Kaine and Rawling, 2010: 190, emphasis in original).

In the mid-2000s, three further state-based regulatory gains were made, all in NSW, utilising health and safety and industrial relations avenues. The first new instrument, introduced by WorkCover NSW, was the Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation, 2005 (NSW) which provided risk assessment and elimination to reduce harm from fatigue. The second and third were outcomes of the NSW Mutual Responsibility Case: the Transport Industry – Mutual Responsibility for Road Safety (State) Award and (State) Contract Determination, 2006. These two instruments sought to reduce the risks and harm associated with fatigue. Moreover, the union's argument focused on gaps in the fatigue regulation, namely, the issue of remuneration, which had been specifically excluded from the regulation by WorkCover NSW.[2]

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Like the TCFUA, the TWU also gained an exemption from the Independent Contractors Act, successfully protecting chapter 6 of the NSW Industrial Relations Act (1996). Arising out of the NSW-based regulation came an extension to national regulation. This was achieved under the federal Labor government, with the passage of the Road Safety Remuneration Act (Cth) 2012 and the establishment of a specialist tribunal, the Road Safety Remuneration Tribunal. The tribunal's first Road Safety Remuneration Order, covering road transport and distribution and long distance operations, took effect on 1 May 2014. This Remuneration Order covers dispute resolution provisions, protection against adverse conduct, written driver contracts, pay, safe driving plans, training and drug and alcohol policy (Road Safety Remuneration Tribunal, 2013). The future of the tribunal, however, is uncertain. A review of the Road Safety Remuneration Act by the federal Coalition government, undertaken in 2013, has, at the time of writing, yet to be released, with the work of the tribunal continuing (Workplace Express, 2015).

Aged care: United Voice

United Voice has 105,935 members (as at 31 December 2014, Annual return, Fair Work Commission, 2015). It represents workers across a wide range of industries, including non-nurse aged care workers.

In the residential aged care sector over the past 5 years, United Voice has attempted to use not only aspects of the extant formal regulatory structure but also alternative mechanisms to address persistent low pay. In 2010, United Voice and the Australian Workers' Union Queensland sought to vary the wages of 60,000 non-nurse aged care staff employed under the modernised Aged Care Award (2010). In doing so, they made application to the Fair Work Commission (then called Fair Work Australia) through the low-paid bargaining stream – the multi-employer bargaining provisions in Division 9 of the Fair Work Act 2009 (Naughton, 2011). A particular attraction of the low-paid bargaining stream for the unions was the capacity it offered to include third parties such as funding bodies in the bargaining process. As aged care is publicly funded, this provision formed an opportunity to extend the regulatory embrace to involve the major funder of the sector – the Commonwealth government. However, as noted in the employer's submissions to Fair Work Australia during the case, action in practice might differ:

> [W]hile the tribunal could direct the Government to attend a conference, the Government cannot be compelled to make more funds available and … it is unlikely to do so. (Fair Work Australia, 2011, para. 33)

Using a two-stage process, the low-paid bargaining stream mechanism first requires an authorisation to bargain, based on workers being deemed to be 'low paid' (along with additional criteria) and second affords capacity for an arbitrated determination if consent over a multi-employer collective agreement is not reached (Naughton, 2011). Aged care workers were found to be 'low paid' and a low-paid bargaining authorisation was granted. However, regulatory success was only partial, in that the authorisation excluded those workers deemed to have been involved in 'defensive' bargaining.

The authorisation's incapacity to address low pay across the whole residential aged care sector prompted United Voice to lobby for an alternative means of doing so. The union actively supported the federal Labor government's proposal to link collective bargaining to the allocation of aged care funding. In 2013, as part of a larger package of reforms, the federal Labor government quarantined AUD1.2b of AUD3.7b in new funding to the aged care sector, to be used for the improvement of wages and conditions. With funding conditional on aged care providers agreeing to and providing for particular labour outcomes, the process was to be facilitated through the development of a workforce 'Compact' (a tripartite commitment among government, unions and aged care providers) that would establish the conditions for the disbursement of additional funding to meet goals associated with the improvement of labour standards. While some aged care providers agreed to participate in bargaining under these conditions, the incoming conservative government untethered funding from collective bargaining outcomes (Charlesworth and Macdonald, 2014: 386).

Discussion

We now turn to consider the degree to which these cases reflect layered and parallel regulatory strategies, as outlined by Bray and Waring (2005). While there is some evidence of the development of parallel regulation in the TCF example, the cases outlined above illustrate that, although not always successful, these unions have largely adopted a 'layering' strategy in order to protect or enhance the wages and conditions of workers in specific industries. This approach makes intuitive sense. Parallel regulation is the regulation of different employees by different instruments; it has the potential to dilute the representative power of unions by splitting the 'bargaining unit' and also may impose an artificial separation between different categories of workers. For example, the TWU explicitly sought to avoid further parallel regulation by campaigning for both employees and owner-drivers to be included in a safe rates regime. Historically, employees had fallen under the protections rendered by traditional labour law including awards. However, it was clear that despite the differences in the employment status of 'owner-drivers' and employee-drivers, the pressures faced by each category were similar. Companies often engage both employees and owner-drivers, so that the two categories compete for work against each other. Owner-drivers and employees 'suffer from client control of the transport industry in equal measure', and ultimately, 'they operate in the same market doing the same work' (TWU, 2008: 216, cited in Rawling and Kaine, 2012: 242). Consequently, layering regulation which could maintain the connection to labour law for employee-drivers but could also address the dynamics of the road transport supply chain that created adverse outcomes for all drivers was deemed by the union to be the most logical approach.

Similarly, the low-paid bargaining stream had the potential to build another protective layer of regulation for residential aged care workers. However, the interpretation and application by the Fair Work Commission, if this avenue had been pursued by United Voice, would have resulted in parallel regulation that split the sector – with some (those employees who had never engaged in bargaining) able to access more favourable

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bargaining conditions, while others continued to be covered by 'defensive bargains', very close to minimum award pay. Therefore, United Voice decided not to proceed in the low-paid bargaining stream, as to do so would bifurcate the sector and not provide any benefit for the two-thirds of it who would essentially be 'locked out' of the process (Naughton, 2011). As Cooper (2014) commented about United Voice's aged care experience with the low-paid bargaining stream,

> The seeming failure of this case highlights the difficulties of relying upon a bargaining-based approach to improve the voice of vulnerable care workers. The limits of the legislation – its failure to incorporate access for employees with little real experience of real collective bargaining and its uncertain arbitral framework – are laid bare. (p. 64)

So the pursuit of further layers of regulation marks a deliberate strategy by unions to compensate for the diminishing capacity of labour law to 'cover the field' in a labour market characterised by complex supply chains and new forms of work (Kaine, 2014; Kaine and Rawling, 2010). As a result, unions have tried to supplement labour law with other mechanisms of protection. Arguably, this has resulted in increased regulatory complexity, and indeed, there has been an intersection of both proactive and reactive union strategies. Some intended to salvage vestiges of state protections (e.g. through the political campaign against WorkChoices and by engagement around Labor's 2010 process of award modernisation). Others sought to exploit new regulatory opportunities (the low-paid bargaining stream application), and still others worked to extend regulation to emerging circumstances and workforce configurations ('Safe rates' and Homeworkers). There are further opportunities to do so that are yet to be fully exploited. For example, provisions of the Work, Health and Safety (WHS) acts that are common to most of the Australian states articulate a defined responsibility of all entities or individuals to all workers in supply chains. These lines of responsibility can 'effectively be used by regulators to uncover … hidden workforces' (Nossar et al., 2015).

Prior to the Road Safety Remuneration Act's enactment, McCrystal and Orchiston (2012) argued that its provisions were 'groundbreaking because outside of outworker regulation under the Fair Work Act, they establish the first national system for minimum wage and conditions protections for a class of independent contractor workers'(p. 285). Moreover, what it provided was 'a mechanism for the *enforcement* of such collective agreements, and a *safety net* against which they can be negotiated' (p. 285, italics in original).

What has also been evident, though, is the ongoing challenge to the achievement of this layering by unions from employers and government. Layering once achieved was subject to removal or cancellation, as seen with the political decisions concerning the Workforce Compact and the Fair Work Principles. This peeling back of the layers, or 'de-layering', reinforces the impact of the political context in which incremental change occurs, and highlights that incremental change may ebb and flow.

Table 1 shows the main types of layered regulation pursued in the three cases and how it relates to existing regulation.

Table 1. Examples of layered regulation.

Example	Foundational labour regulation	Layered regulation pursued by union
Textile, clothing and footwear (Homeworkers)	Award, collective agreements	Ethical Clothing Australia, Code of practice, Fair Work Principles
Road Transport	Award and collective agreements for Employee-drivers, Contract determinations for owner-drivers under Chapter 6 of the NSW IR Act	Road Safety Remuneration Tribunal, Road Safety Remuneration Act
Aged Care	State and federal awards, collective agreements	Low-Paid Bargaining Stream, Workforce Compact

In essence, the past 20 years have seen unions respond to the crumbling of the regulatory structure within which they operated for the better part of a century by building overlapping regulatory layers. These do not sit symmetrically on top of each other in the edifice of labour law, but rather push out the boundaries of labour regulation using new institutions or even the power of lead firms in supply chains.

Turning to Bray and Waring's (2005) third element, regulatory congruence, it is evident that there are competing stances regarding the role of regulation in the workplace space. Despite the limitations of its Fair Work Act 2009, the federal Labor government between 2007 and 2013 was amenable to a range of regulatory tools, such as a specialist tribunal, the workforce compact and the Fair Work Principles, and since the 2013 election, the Coalition government's 'red tape' repeal day, and the ongoing uncertainty over the Road Safety Remuneration Tribunal. The erosion of congruence rests on fundamental questions concerning labour regulation and its associated demands on business practice. What is argued by some to be protections for workers is argued by others as business' regulatory burden. In such an environment, layering is also a practical strategy to protect workers from as many directions as possible.

Conclusion

The past 20 years have seen Australian unions attempting to adapt to constant regulatory, economic and political change. The cases explored in this article tell a story of unions trying to save vestiges of the formal regulatory system that may still provide opportunities for the protection of wages and conditions. At the same time, they have sought to augment these attempts through the pursuit of non-traditional regulatory options. Nonetheless, there has been uneven uptake by unions of such regulatory experimentation.

Undoubtedly, the Organising Works programme did expose most unions to strategies that sought to rebuild their capacity to regulate at the workplace level and stem the decline of the unionised workplace. However, it was not a strategy that could counter the type of regulatory change manifest in various iterations of labour law, starting with the Workplace Relations Act 1996. Wilson and Spies-Butcher (2011) note that the

2005 WorkChoices amendments constructed 'new hurdles … in the way of an "organizing" counter strategy reliant on workplace industrial activity' that 'required different mobilizing structures than those located in a defensive industrial campaign' (p. 311). That is, workplace-based renewal could not directly combat political change nor of itself influence the broader debate, in which labour regulation is routinely cast as impeding business and government.

While individual regulatory changes such as WorkChoices provided impetus for unions to reconsider their relationship with, and status in, formal regulatory structures, it should be recognised that the examples we discuss here reflect lengthy campaigns in which unions have identified particular needs of their members and the industries they organise. These attempts at layering can be told simply in hindsight, but each has been characterised by slow grafting, taking opportunities where they appear, seeking to overlay and reinforce what typically is partial regulation or partially extended regulation. All have been hard fought with employers and contractors preferring to rely on minimal or self-regulation (or none at all).

The framework proposed by Bray and Waring (2005) offers new insights into strategies adopted by this group of unions. What was achieved was layered labour regulation facilitating incremental change. These cases reveal that incremental change is not linear but is intermittent and uneven.

The Australian industrial relations regulatory framework has, moreover, been uncommonly fluid over the past two and half decades. This fluidity has exacerbated the vulnerability associated with reliance on legislation (Ravenswood and Kaine, 2015). In addition, both major political parties have promoted the process of legislative 'harmonisation', where attempts at creating a national industrial relations system elevated the primacy of the federal jurisdiction and reduced the scope of state jurisdictions, in which historically much detailed regulation had been achieved. For unions embarking on layered regulation, a commitment to long duration campaigning was required. Furthermore, it was necessary to identify where regulatory reinforcement was needed and to develop a capacity to respond to the erosion or removal of previously secured layers. Layered regulation, as seen in these cases, could not be presumed to be permanent.

Our analysis rests on three unions and campaigns and we make no claim that they are representative of other unions. Yet, they are illustrative of persistent, ongoing approaches made by unions in a period of continual change. There is clearly scope to see whether these experiences were particular to the industry and occupational context of these unions and investigation of other unions' experiences in seeking to exert influence over the regulatory space. By beginning with Bray and Waring (2005), we have only touched on the institutional change literature, and this body of work offers a broader set of lenses through which to examine strategic approaches to regulatory change. One particular area to explore further would be an analysis of the role of ideational processes in institutional change, as advocated by Béland (2007), especially the narratives of reform that coloured the period under review.

Unions have attempted to reassert agency through rebuilding different regulatory tools that may not sit in the traditional labour law structure, essentially pursuing layers of regulation that create overlaps. The dual effect has been to reinforce a floor of protections while providing scaffolding from which unions may attempt to ratchet up

standards. The approach has not always been successful, as illustrated by the cases described in this article. Unions have been, and are being, thwarted in their regulatory attempts, often by changes in the political context. Thus, an ongoing weakness in many of the regulatory strategies being pursued (even those outside the strict remit of labour law) may well be Australian unions' continuing reliance on state involvement. Despite this susceptibility to variations in the posture of the state towards labour regulation, the appetite for attempting to co-opt existing or formal regulatory options (as seen in attempts to use the low-paid bargaining stream and the Fair Work Principles, the defence of Chapter 6 of the NSW Industrial Relations Act, 1996, and regulatory innovation (evident in the 'Safe Rates' and homeworker campaigns and the aged care workforce compact) demonstrate a resilience on the part of at least some unions. Such resilience is manifest in their dogged efforts to find new ways for the 'setting and enforcement of rules' for the benefit of their members, and arguably for recasting their role as 'sword of justice' in the regulatory space to protect vulnerable workers.

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Notes

1. Annual returns of federally registered trade unions can be accessed via the Registered Organisations' section on the Fair Work Commission's website at https://www.fwc.gov.au/registered-organisations/find-registered-organisations.
2. The decision referred to this omission: 'The 2005 Regulation does not include the impact of remuneration systems on driver fatigue, nor was it intended to, (see evidence of Mr Watson from WorkCover)', Transport Industry – Mutual Responsibility for Road Safety (State) Award and Contract Determination (No. 2), Re [2006] NSWIRComm 328 at 52–53. The campaign secured a system of 'safe rates', guaranteeing drivers a weekly minimum remuneration rate designed to reduce the need to drive excessive hours and distances in order to earn a living wage.

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