

Welcome to 2016 – A Defining Year for Australian Employee Relations

In my latest [blog](#) post I made a bold New Year prediction, suggesting 2016 would be the year that defines how Australian employment relationships will be governed for the next generation. The forces for flexibility, agility, and risk taking face formidable reactionary cries for fairness, caution and security, the classic battle lines that have defined Australian political and economic debate for over 100 years. Once the debate in this election is settled, I suspect the resultant framework, for better or worse, will rule our workplaces for at least the next decade.

My rather presumptive prediction is premised on 'reform fatigue,' the idea that eventually everyone gets tired of the debate and either one view prevails or a compromise solution is accepted and the resulting status quo prevails until economic or social crisis push us to something different.

Until the fatigue sets in let's start the year with a bit of enthusiasm and analyse the case for reform. There are four important reports that every Australian employer should read this summer:

- [Competition Policy Review Final Report](#), Professor Harper et al March 2015
- [Towards Responsible Government, The Report of the National Commission of Audit](#) Phase 1, February 2014
- [The Workplace Relations Framework, Productivity Commission Inquiry Report](#), No. 76 30 November 2015
- [The Royal Commission into Union Governance and Corruption Final Report](#), 28 December 2015

These papers provide a useful analytical framework for the ensuing debate as they address social, legal, economic and political themes critical to a rational consideration of the issues. In the remainder of this edition, I highlight some of the key findings and recommendations of each of the four reports that ought to be considered in the debate. I welcome your contribution to the discussion.

Competition policy and employment

The Australian government spent most of 2015 equivocating on the recommendations of Professor Ian Harper's analysis of the state of Australian business competition laws – the [Competition Policy Review Final Report](#). The most controversial of the recommendations concerned predatory behaviour of large business toward smaller competitors and suppliers. The Report recommended changes to the law to prohibit large businesses with substantial market share "... *engaging in conduct if the conduct has the purpose, effect or likely effect of substantially lessening competition in that or any other market.*"

In relation to employment regulation the Review Panel endorsed the general principle espoused by the Productivity Commission that:

"In part, industrial law may be separated from competition law because it has ethical and social dimensions at its heart, to a greater extent potentially than the business-to-business aspects of competition law. In addition, labour markets have some characteristics different from goods markets ..."

However, Professor Harper did take aim at anti-competitive provisions in awards and enterprise agreements such as limitations on the use of labour contractors, and the provision of financial and other services (superannuation), an issue also addressed in the Royal Commission into trade union corruption and governance.

In particular, the Review Panel recommended that sections 45E and 45EA of the [Competition and Consumer Act 2010](#) (dealing with contracts restricting trade) should be amended so that they expressly apply to awards and industrial agreements, except to the extent that the awards and industrial agreements deal with the remuneration, conditions of employment, hours of work or working conditions of employees. The Review Panel believed that such an amendment would preserve the integrity of the current exception for employment arrangements, while protecting the trading freedom of employers outside the scope of that exception.

In order for this to occur effectively, the Australian Consumer and Competition Commission (ACCC) should be given the right to intervene in proceedings before the Fair Work Commission, which seems a pretty sensible recommendation.

Similarly, Professor Harper reinforced the need to retain and enforce the secondary boycott provisions of the Competition and Consumer Act, which are a major issue inhibiting competition in the building and construction industry.

Does anyone remember the National Commission of Audit?

One of the first actions of the Abbott government in 2013 was to commission an audit of the Commonwealth's finances inviting the Commission panel to provide advice and recommendations on what should be done to ensure that spending is placed on a sustainable long-term footing.

The [Phase One report](#) published in February 2014 provides an interesting analysis of the relationship between unemployment benefits and the minimum wage, grappling with the age old problem of the need to provide a reasonable standard of living for the unemployed whilst ensuring there is sufficient incentive and opportunity to participate in paid employment.

Highlighting the comparatively high minimum wage in Australia, the Commission recommended slowing the growth in the minimum wage for a period of 10 years (approximately 1.5 per cent per year) until it reaches 44 per cent of National Average Weekly Earnings (NAWE). Under this arrangement the minimum wage would continue to grow over time in nominal terms but at a slower rate than under current arrangements. After ten years the minimum wage would be indexed in line with growth in NAWE further enabling a degree of variation across the nation to take into account regional differences in the labour market and variations in the cost of living.

Royal Commission into Trade Union Governance and Corruption

The [Royal Commission into Trade Union Governance and Corruption](#) published its Final Report on 31 December 2015. The [Report](#) includes 76 recommendations to amend laws regulating the manner in which registered organisations are managed covering themes such as the regulation of union financial arrangements, union officials responsibility to disclose personal interests, outlawing corrupting benefits (*kickbacks*), regulation of related entities (*'slush funds'*), prohibiting anti-competitive terms in enterprise agreements, reinforcing the ban on secondary boycotts, re-establishing the investigative powers of the Building and Construction Commission, and introducing regular training for right of entry permit holders.

The Commissioner recommends transferring all regulatory functions of the General Manager of the Fair Work Commission and the Fair Work Commission insofar as they apply to registered organisations under the [Fair Work \(Registered Organisations\) Act 2009](#), to a new *Registered Organisations Commission*. The new regulatory body would exercise additional powers to oversee the financial and general management of unions and registered employer associations.

Outside of the requirement to appoint a financial compliance officer the Commissioner has taken a generally conservative approach to reform of union structure mainly focuses on aligning statutory duties of union officers with corporations law, significantly increasing penalties for breach and reliance on specialist regulatory authorities and external financial auditing to monitor compliance but has not recommended any changes to the corporate form or structure of registered organisations.

An obvious area of reform that has been overlooked would be to open the sector to competition. I could register a company and commence trading tomorrow, but I can't establish a new union to offer a better service to the eighty-five per cent of the workforce currently unwilling or unable to join current unions. Nevertheless, the Report provides some very useful recommendations for reform.

Productivity Commission – Workplace Relations Framework: Final Report

In the spring edition of [Employee Relations NEWS](#) I reported on the work of the Productivity Commission, which had been invited to consider current laws, institutions and practices and recommend how the regulatory framework can be improved to enhance the welfare of Australians.

The [Final Report](#) published on 30 November and released by the Australian government on 21 December 2015 confirmed much of the analysis and recommendations contained in the [draft report](#). There are over 60 recommendations spread over two volumes covering topics such as the modern awards, minimum wage fixation, the role of the Fair Work Commission, general protections, enterprise bargaining, unfair dismissals, weekend penalty rates, and the relationship between employment regulation and competition policy.

The Productivity Commission does not believe that Australia's workplace relations system is dysfunctional — it just needs repair not replacement.

Nevertheless, It did recognise that some major deficiencies in the regulatory framework need

addressing. Some of the more interesting recommendations of the Report include:

- Amending the National Employment Standards so that employers are not required to pay for leave or any additional penalty rates for any newly designated state and territory public holidays
- Removing the emphasis on reinstatement as the primary goal of the unfair dismissal provisions
- Changing the penalty regime for unfair dismissal cases so that an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct
- The Fair Work Act should require that general protections and workplace rights complaints are made in good faith and that the Fair Work Commission must decide this via a preliminary interview with the complainant before the action can proceed and prior to the convening of any conference involving both parties.
- Introducing a cap on compensation for general protection and workplace rights applications
- Sunday penalty rates that are not part of overtime or shift work should be set at Saturday rates for the hospitality, entertainment, retail, restaurants and cafe industries.
- Weekend penalty rates should be set to achieve greater consistency between the hospitality, entertainment, retail, restaurants and cafe industries, but without the expectation of a single rate across all of them.

One of the most interesting recommendations of the Report concerns transferring the powers currently exercised by the Fair Work Commission to determine minimum wages to a new authority, the *Workplace Standards Commission* with responsibility for reviewing and varying the national minimum wage and modern awards (including the making of equal remuneration orders). Echo's the Work Choices era Fair Pay Commission.

The Productivity Commission was critical of the overly legalistic reliance on past decisions to determine minimum wages and conditions. The proposed new authority would perform its task in a manner that should not just involve impartially hearing evidence from parties, but also seeking out and engaging with parties that do not typically make submissions, and proactively undertaking data collection and systematic, high-quality empirical research as a key basis for decisions.

Some observations on reform

There is a consistency in the analysis and the reforms recommended by the reports that is encouraging. The focus is on improvements to the institutional framework designed to make the system work better. Even the analysis on weekend penalty rates and minimum wages are predicated on the opportunities for employment and economic growth.

The principle that employment relationships and the labour market are fundamentally different from product and service markets is accepted. Consequently, specialist regulatory arrangements are either endorsed or recommended.

Notwithstanding the differences to trade and commerce, the authors recognise the interrelationship and importance of economic forces on employment and income. Concepts of fairness and employment security are not entirely divorced from productivity and economic growth.

Finally, each report reinforces the fundamental importance of open and fair competition in trade and commerce and honesty and integrity in employment arrangements. It is self-evident that regulators must be ever vigilant to prevent and respond to, anti-competitive, dishonest and corrupt conduct, especially where there is institutional failure, as witnessed by the [Royal Commission into Trade Union Governance and Corruption](#).

Consequently, the lesson that I take from these reports is that the law should be changed if it is ignored, inadequate or exploited. Institutions such as unions are no different to public companies. If they can be improved then do so. The Fair Work Commission, and the Building and Construction Commission, are no different to the Australian Competition and Consumer Commission. None of these institutions are sacrosanct. They are merely means to an end, and equally deserving of change if it is in the public interest to do so.

Income profile data reveals microcosms of Australia

New data released today from the [Australian Bureau of Statistics](#) (ABS) reveals which regions most closely reflect the nation in terms of income profile.

[Estimates of Personal Income for Small Areas 2012-2013](#) shows that for Australia, the median total personal income in 2012-13 for people lodging tax returns was \$44,940. The top 10 per cent of earners received 33.7 per cent of the total income and the median age of an earner was 42 years of age. Also, 77.9 per cent of earners reported employee income as their main source of income.

TIP OF THE MONTH: I'm Unhappy and I Want to See My File – The Employment Record Uncovered

I often field enquiries from anxious employers on the issue of access to employment records. In particular, performance related, personal and sensitive information recorded on personal files. Employers record all sorts of information about staff, their activities, role, wages, conditions and performance during the course of their employment, some of which would be considered part of the employment record and sometimes not. It might be personally sensitive information, confidential or just plain frank and truthful assessments.

In this article I explain the nature of the employment record, the obligation to record and make available particular information, and the relationship to privacy.

Defining the employment record

An employment record includes any information specific to an individual person recorded and retained on paper or electronically by their employer in relation to the person's employment.

There may be lots of information recorded that fits this definition but the key to understanding the meaning lies in the phrase '*... in relation to the person's employment.*'

A good rule of thumb to distinguish employment records from other personal information that employers may record is to answer the question: *Was the information recorded and retained primarily for a purpose directly related to the person's job?* For example, were you obliged to record the information for taxation, or in order to pay the employee correctly? Was the information recorded to measure the employee's work performance, or their physical and mental capacity to perform the work to which they have been employed? If the answer is yes, then the information is an employment record. If the answer is no, it isn't an employment record.

The distinction is important, as it will determine the right to collect the information as well as obligations to disclose it to the employee and other interested persons. Unfortunately, the matter of access doesn't end there, as we have to further differentiate the types of employment records, as the right to obtain and the obligation to disclose information will vary dependent on the nature and purpose of collecting the information.

Confused? Let's look at the obligations imposed by two key statutory laws - the Fair Work Act and the Privacy Act.

Fair Work Act

[Section 535](#) of the Fair Work Act 2009 ("Act") states that an employer must make, and keep for seven years, employee records of the kind prescribed by the regulations in relation to each of its employees. It also states that the regulations may provide for the inspection of the records. [Section 536](#) of the Act requires employers to give a pay slip to each of its employees within one working day of paying an amount to the employee in relation to the performance of work. Similarly, the pay slip must be in a form prescribed by the Fair Work Regulations.

The regulations tell us that the employment record must contain the following information:

- a) Employer's name; and
- b) Employee's name; and
- c) Whether the employee's employment is full-time or part-time, permanent, temporary or casual; and
- d) Date on which the employee's employment began; and
- e) Australian Business Number (if any) of the employer.

Employers must also retain a record that specifies the:

- i. Rate of remuneration paid to the employee; and
- ii. Gross and net amounts paid to the employee; and
- iii. Deductions made from the gross amount paid to the employee.

The record must also set out details of incentive based payments, bonus, loading, penalty rate, allowance or another monetary allowance or separately identifiable entitlement paid to the employee.

If the employee is a casual or irregular part-time employee who is guaranteed a rate of pay set by reference to a period of time worked, the record must set out the hours worked by the employee.

The regulations also prescribe the information that must be recorded in relation to averaging of hours of work, individual flexibility arrangements, superannuation, guaranteed annual earnings and leave.

The pay slip must include the employees and employer name, ABN, period for payment, gross and net amounts and separately identifiable amounts such as overtime, penalties, allowances, incentive payments and loadings. Deductions authorized by the employee must be included as well as superannuation contributions made on behalf of the employee to a compliant fund.

Most commercial HR systems and payroll software will include provision for recording this information. However, where in doubt you should simply refer to the Part 3-6 of the Fair Work Regulations.

Access to records

The Fair Work Regulations state that you must make a copy of an employee record available at your business premises for inspection and copying on request by the employee or former employee to whom the record relates within three days of the request for access. Alternatively, you may post a copy of the employee record to the employee or former employee within 14 days after receiving the request.

Note that an employee's representative may also access the employment records created pursuant to the Act, as can a government inspector and the holder of an entry permit. However in relation to a permit holder (union official) the grounds for accessing such information is limited to a reasonable suspicion that a contravention of an award, enterprise agreement or the National Employment Standards has occurred or is occurring. If disputed, the burden of proving that the suspicion is reasonable lies with the person asserting that fact.

Once on site, union officials are only able to access employee records of union members, unless they have written consent of the non-member to access their records.

Privacy

The [Privacy Act 1988](#) (Privacy Act) regulates how personal information (i.e. information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified individual, or an individual who is reasonably identifiable), is handled including access.

Common examples provided by the Office of the [Australian Information Commissioner](#) are an individual's name, signature, address, telephone number, date of birth, medical records, bank account details and commentary or opinion about a person. Health information is regarded as one of the most sensitive types of personal information. For this reason, the Privacy Act provides extra protections around its handling. For example, an organisation generally needs an individual's consent before they can collect their health information.

However there are exemptions to the obligations including for private sector small businesses and employment records will generally be exempt under Australian privacy laws.

Small business exemption

Small businesses are exempted from the obligations imposed by the Privacy Act unless they are a contracted service provider with the Australian government, are engaged in the business of buying and selling personal information or a health provider. A business is a small business if its annual turnover for the financial year is \$3,000,000 or less.

Employee record exemption

Any act or practice such as the collection, storage, and disclosure of personal information by an organisation that is or was an employer of an individual, is exempt for the purposes of the Privacy Act as long as the act or practice is directly related to:

- (a) A current or former employment relationship between the employer and the individual, and
- (b) An employee record held by the organisation and relating to the individual.

The Privacy Act defines an employee record to mean a record of personal information relating to the employment of the employee. There is that similar phrase again, '*...relating to the employment*'. The Privacy Act provides examples of personal information relating to the employment of the employee as being *health information* about the employee and *personal information* about all or any of the following:

- a) Engagement, training, disciplining or resignation of the employee;
- b) Termination of the employment of the employee;
- c) Terms and conditions of employment of the employee;
- d) Employee's personal and emergency contact details;
- e) Employee's performance or conduct;
- f) Employee's hours of employment;
- g) Employee's salary or wages;
- h) Employee's membership of a professional or trade association;
- i) Employee's trade union membership;
- j) Employee's recreation, long service, sick, personal, maternity, paternity or other leave;
- k) Employee's taxation, banking or superannuation affairs.

This definition clearly covers a more extensive range of information than defined in the Fair Work Act. However,

there must have been an employment relationship formed for the records to be exempted. Information collected and retained on unsuccessful candidates for employment is not exempted because they were not employed.

Conclusions

In very simple terms these are the rules governing access to personal information recorded at work:

- (1) Employers are obliged to record, retain and allow access to personal information about employees that is fundamentally necessary to determine compliance with terms of awards, enterprise agreements, the NES and related obligations provided in the Fair Work Act, superannuation, taxation and workplace health and safety regulations. Access to the records is generally limited to the relevant employee (or ex-employee), their representatives or authorized persons investigating or enforcing the law.
- (2) There is not a general right of access to other types of an employment records such as notes and minutes of disciplinary action interviews, grievance investigations and performance assessments. The Privacy Act expressly exempts all employment records from the access obligations imposed on businesses by that law.
- (3) Personal information such as a resume, medical history, interview notes and references collected for the purpose of recruitment that do not relate to a person subsequently employed is not exempted from the privacy laws.
- (4) Other information recorded whilst at work such as online personal banking and shopping transactions, personal emails and transcripts of personal telephone contacts are not employment records and therefore not exempted from the privacy laws.

So in conclusion, returning to the original premise of this article, generally employers do not have to provide current or ex-employees access to all information recorded about them during their employment except individual historical data on pay and conditions related to applicable awards, enterprise agreements and the NES. In some instances there may be a requirement to disclose health records related to an application for workers compensation or decisions on return to work plans or reasonable adjustments to the workplace to accommodate a persons disability. However, these are usually exceptional circumstances and it is information that is generally usefully shared with the employee.

The decision to disclose other information recorded about the individual employee such as performance assessments is matter of discretion for the employer. I tend to the view that you should disclose information to the applicable person unless in doing so, you would place another person at risk of harm, prejudice your legal rights, inhibit your capacity to operate your business, or breaches a confidence with another person. If in doubt get [advice](#).

In the Commission: What's happening at the Fair Work Commission

There is always something happening in the Fair Work Commission. Here are some of the most significant, and interesting news and events.

4-Year Modern Award Review

The [4-Yearly Modern Award Review](#) continues into 2016 with various common issues to be considered and decided.

Alleged inconsistencies with NES

The Commission accepted that various provisions of modern awards are inconsistent with the National Employment Standards. As such, various awards have been or will be, varied to correct the inconsistencies.

Category 3 and 4 modern awards were varied in May 2015. [See Schedule of Determinations](#)

Category 5 modern awards varied in October 2015. [See Schedule of Determinations](#)

Annual leave

The Fair Work Commission decided in June 2015 to amend modern awards allowing:

- Individual agreement for employees to cash out 2 weeks annual leave each year, as long as they retain at least 4 weeks accrued leave
- Employers to direct employees to take excessive annual leave where they have accrued at least 8 weeks leave and have not agreed on a time to take the leave.
- Electronic funds transfer payment of wages on normal pay day during annual leave rather than payment in advance in 51 modern awards
- Taking of annual leave in advance of an entitlement to leave accruing, by agreement between an employer and employee.

After some delay and adjustments the Commission published for comment a [schedule of draft determinations](#) to implement the decision. Hearings on the draft determinations were held in December 2015. However, due to the high number of submissions received the Commission is re-examining the detail of its draft determinations before finalizing the variations.

Award flexibility

The Fair Work Commission decided to vary modern awards to make employers retain a record of every instance in which an award covered employee agrees to time off in lieu of overtime payment (TOIL). The full bench decision (ironically entitled Award Flexibility) created a model award clause that has now been translated into [draft determinations](#) for each modern award.

The Commission has offered parties an opportunity to file submissions opposing the insertion of the model clause in specific the modern awards, the bulk of which it is currently assessing for making a final determination. Hearings were held in December 2015.

Casual and part-time employment

There are several applications to vary modern awards to prescribe minimum part-time hours of work, limitations on casual employment and a right to permanent part-time and full-time employment for long-term casual employees. There are multiple submissions on the matter, which has been ongoing since 15 October 2014. A decision is not expected until mid-2016.

Family and domestic violence leave

The ACTU has applied to insert into modern awards a right to leave and other support from employers where employees are experiencing domestic violence. The Commission will hear this matter in October 2016.

Family friendly work arrangements

The ACTU has applied to insert into modern awards a right to return to work on part-time or reduced hours after a period of parental leave. This right would extend for 2 years after the birth of the child. It is also seeking paid leave to attend antenatal classes and related activities. The case is scheduled for hearing in August 2017.

Micro-business schedules

Australian Business Industrial and NSW Business Chamber is seeking a schedule to be added within 93 modern awards whereby businesses that employ less than five employees, (micro businesses) would be entitled to apply a simplified set of terms and conditions

covering the types of employment, hours of work, overtime and breaks. A second schedule would be added to allow micro businesses to agree with employees to substitute public holidays to other days. Interestingly, the alternative provisions are not dissimilar to the general provisions that are already in place. It is difficult to see what advantage such micro business schedules would create. The hearing of this application is likely to occur in September 2016.

Public holidays

The Shop Assistants Union has applied for enhanced public holiday entitlements for employees that work over 7 day rosters including additional days for part-time employees that would not have been rostered to work on the public holiday. The hearing of this application will occur on a date to be determined in 2016.

Employee Relations Online Small Business

On 1 September 2015 we launched [Employee Relations Online for Small Business](#). A specialist advice service designed for Australian small to medium enterprises. The aim is to provide a comprehensive suite of informative guides, fact sheets and resources backed up with expert advice to manage your obligations as an Australian employer. Online and over the phone, monthly or yearly membership is a cost effective way to receive advice from us including:

- 1300 Priority Help desk
- 24/7 access to our library of templates, guides, fact sheets and model employment resources to use in your organisation
- ERO Updates regularly delivered to your mailbox
- Connects you with other small and medium enterprise managers and HR practitioners

Designed and managed by [Maguire Consulting](#), it covers all employee relations topics including: award pay rates, National Employment Standards, modern award conditions, leave and holidays, enterprise bargaining, termination of employment, employee tax and superannuation, health and safety and national benchmarks in human resource management. It is the most cost effective method of getting the advice that you need to operate your business.

Contact [Paul Maguire](#) for further information.