

Unfair Dismissals – Paying More to End Bad Employment Relationships

Seventy-nine per cent of the 15,177 unfair dismissal applications finalised by the Fair Work Commission between 1 July 2014 and 30 June 2015 were settled at conciliation with a payment from employers. Less than five per cent of cases progressed to arbitration and the Fair Work Commission reinstated a mere twenty-seven people to their previous employment. 141 applicants received compensation.

The Fair Work Commission [Annual Report](#) ironically entitled 'New Approaches to Workplace Relations' reveals the extent to which the regulation of unfair dismissals has degenerated into an exercise in extracting additional payment from employers when employment relationships end badly. The average compensation awarded by the Commission to successful applicants was between \$10,000 and \$14,999. In the twelve months ending 30 June 2014 the average amount paid by employers to settle claims made by disgruntled employees at conciliation was between \$6000 and \$7,999, although the median amount was slightly less between \$4,000 and \$5999.

Unfair dismissal applications represent nearly 43 per cent of all applications filed with the Fair Work Commission, which has annual operating expenses of \$86.1 m. It may well be the case that the payment to employees compensating them for the loss of employment is justified. However, the cynical amongst us might think that is a lot of taxpayer money to effectively manage a clearinghouse for settling termination payments at the end of employment.

Read more interesting news from the Fair Work Commission [Annual Report](#) in In the Commission: What's happening at the Fair Work Commission.

Royal Commission uncovering more and more union corruption

The [Royal Commission into Trade Union Governance and Corruption](#) is drawing to a close its public hearings this November. The final report is due by 31 December 2015.

It is difficult to decide where to start and where to finish as the evidence of personal and organisational corruption is uncovered almost weekly. The recent ABC edition of Four Corners on the life and times of Kathy Jackson and

Michael Lawler was extraordinary. This week the corrupt Belan family's dynastic reign over the NSW Branch of the National Union of Workers was finally exposed.

Several of the more high profile case studies examined by the Royal Commission has involved the Leader of the Federal Labor Opposition, Bill Shorten whilst Victorian State, and National Secretary of the Australian Workers Union. Information submitted to the Commission paints a picture of business relationships between the AWU and some employers characterized by substantial undisclosed payments to the union with little or no apparent consideration provided by the AWU for the money it received.

Counsel assisting the Commission has submitted that a number of officials of the AWU may have engaged in conduct in conflict of interest by causing the union to enter into lucrative side deals that were not disclosed to the members. However, there has not been any claim of unlawful or criminal conduct against Mr Shorten.

On a more positive side, readers may be interested to review the Commission's [Discussion Paper -- Options for Law Reform](#) and various submissions filed in response. The real strength of the Commission is its understanding of corporations law and governance. The options canvassed for the reform of trade union governance compare and contrast the organisational structures and regulation of trade unions (as registered organisations) with those applied under Australian corporations law. Importantly, the Commission's discussion paper questions the utility of continuing separate legal structures and regulation of trade unions where corporations law and in particular, director liabilities under the law provide a more robust and effective regime of regulation.

I am encouraged that some [submissions in response](#) are similar to views that I have expressed on the reform of trade unions dating back many years and most recently in the [Maguire Consulting Blog](#).

We shall wait with anticipation of the final report and the government's response.

Calculating the cost of motor vehicles

Leasing or owning a vehicle for business purposes is a legitimate business expense and it is also a benefit to employees where they are entitled to private use a business vehicle. However, employers often struggle to accurately calculate the value of the car fringe benefit in employee remuneration. This can cause some anxiety at

the end of an employment relationship when attempting to calculate termination payments. A useful resource is the information on operating costs of a broad range of vehicles published by automobile clubs such as the RACV.

RACV publishes a guide of calculated vehicle operating costs for 111 popular new vehicles in July each year. The calculations include the cost of financing the vehicle, depreciation, scheduled services, registration, insurance, fuel, tyres, etc. The calculations are provided as a guide to the car operating costs of a privately owned vehicle over a five year, 75,000 km (15,000 km per year) period.

[\[More\]](#)

Productivity Commission – Workplace Relations Framework: Draft Report

Amongst the many reviews and investigations currently underway into Australia's unique system of employee relations regulation readers may recall that the Productivity Commission was asked to make a broad-ranging assessment of Australia's workplace relations framework, considering current laws, institutions and practices and recommend how the framework can be improved to enhance the welfare of Australians.

A [draft report](#) was published on 4 August 2015. '[The Workplace Relations Framework - Draft Report](#)' stops short of recommending wholesale replacement of the current legislative and institutional system underpinning workplace regulation in Australia. Rather, it has opted for what it describes as '*repair*' of some of the institutional structures and legal procedures applied in setting national minimum wages and conditions of employment.

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.

[\[Read more\]](#)

TIP OF THE MONTH: The facts on the China - Australia free trade agreement

The free trade agreement between Australia and China ([ChAFTA](#)) is the largest trade agreement Australia has negotiated. However, it has been mired in controversy over the arrangements for temporary entry of Chinese workers into Australia. The Australian government has had to negotiate changes to the Immigration law to ensure that the Senate will approve [ChAFTA](#). The changes agreed with the Labor opposition address labour market testing requirements and licensing obligations for trades persons to satisfy local regulatory standards. In this article I explain the provisions of the ChAFTA that deal with movement of workers between each country, analyse what the fuss has really been about, and consider the opportunities for Australian employers.

Introduction

The preamble to the ChAFTA describes the general objectives of the agreement as:

- 1) Creation of an expanded market for goods and services in each nation through establishing clear rules governing their trade which will ensure a predictable, transparent and consistent commercial framework for business operations; and
- 2) Recognising that the strengthening of their economic partnership through a free trade agreement, which removes barriers to the trade of goods and services and investment flows, will produce mutual benefits for the two nations

A key strategy to achieving these fine objectives is facilitating the flow or movement of labour between the two nations. Chapter 10 and Annexure 10-A of ChAFTA

set out the primary terms of agreement for Chinese and Australians to work temporarily in each country. However a Memorandum of Understanding on 'Investment Facilitation Arrangements' ("IFA") for major projects and a side letter on streamlining skills assessment of some categories of tradespersons that may wish to work in Australia, are also relevant to the terms of agreement and it seems, the controversy.

Movement of Natural Persons

Article 10.4 of the ChAFTA chapter entitled 'Movement of Natural Persons' sets out the primary terms permitting Chinese and Australians to work in each country.

It provides in paragraph 3:

'In respect of the specific commitments on temporary entry in this Chapter, unless otherwise specified in Annex 10-A, neither Party shall:

(a) impose or maintain any limitation on the number of visas to be granted to natural persons of the other party, or

(b) require market labour testing, economic needs testing or other procedures of similar effect as a condition for temporary entry.'

Article 5 states: *'... temporary entry granted in accordance with this Chapter does not replace the requirements needed to carry out a profession or activity according to the applicable laws and regulations in force in the territory of the Party authorising the temporary entry.'*

The only term specified in Annex 10-A that limits the number of visas granted to Chinese workers is in respect of 1,800 Chinese chefs, Wushu martial arts coaches, Mandarin language tutors, and traditional Chinese medicine practitioners.

Temporary Entrant Categories

Granting of temporary entry to persons that fit the occupational categories listed in Annex 10-A is contingent on meeting eligibility requirements contained within Australia's migration law and regulations, as applicable at the time of an application for grant of temporary entry. This would include any skills testing and licensing arrangements.

The following occupational categories are specified in Annex 10-A:

- Business visitors looking for investment opportunities and the like in each country
- Intra-corporate transferees such as executive and senior management, specialists and divisional managers/independent executives of a Chinese

enterprise who is establishing a branch or subsidiary in Australia

- Contractual service suppliers including Chinese who have trade, technical, or professional skills and work experience who have been assessed as having the necessary qualifications, skills and work experience accepted as meeting Australia's standards for their nominated occupation.
- Installers and servicers of machinery and equipment where such installation and servicing by the supplier is a condition of the purchase. An installer or servicer must abide by Australian workplace standards and conditions and cannot perform services, which are not related to the installation, or servicing activity of the contract.
- Chinese chefs, Wushu martial arts coaches, Mandarin language tutors, and traditional Chinese medicine practitioners.

With the exception of business visitors (who continue to be paid by their Chinese based enterprise) all temporary visas may be issued for a maximum of 4 years.

Any Chinese person who is granted the right of entry and temporary stay for a period of longer than 12 months may apply for the right of an accompanying spouse or dependent to work for an equal period.

Investment Facilitation Arrangements and Skills Assessments

The MOU on Investment facilitation arrangements (IFA) and the commitment to remove mandatory skills assessments for ten categories of trades as well as the remaining categories within the next two years are the primary source of political controversy.

An IFA for any particular project opens up the opportunity for the employers undertaking the major project to negotiate flexibility in the following areas of temporary skilled work visa requirements:

- Occupations covered by the IFA project agreement
- English language proficiency requirements
- Qualifications and experience requirements, and
- Calculation of the terms and conditions of the Temporary Skilled Migration Income Threshold (TSMIT), currently \$53,900.

The procedure to establish more flexible arrangements in these areas is complex but there does seem to be clear advantages for companies undertaking an eligible project. The safeguards are that the IFA will only apply to an enterprise registered in Australia and the project company must comply with all Australian laws and

regulations, including applicable Australian workplace law, work safety law and relevant Australian licensing, regulation and certification standards.

An IFA is negotiated with the Department of Immigration and Border Protection and must set out guaranteed occupations and the terms and conditions against which overseas workers can be nominated for a temporary skilled visa for the purposes of the eligible project. The IFA will also record any requirements and conditions that the project company must comply with.

There is no express requirement for labour market testing to enter into an IFA. However, the Australian government has clarified that that labour market testing or at least evidence of the labour market shortages underpinning the applications for skilled visa entries must be provided at some stage or other of the procedure.

The commitment to abolish mandatory skills testing of Chinese tradespersons does not mean the persons temporarily working in Australia do not have to meet Australian quality standards. China have simply been moved from the list of nominated countries where Australia requires mandatory testing of skills of trades qualified persons before they may apply for a temporary work visa.

Applicants from the nominated countries must undertake a skills assessment recognised by Trades Recognition Australia (TRA) prior to lodging a visa application. Applicants from all other countries (and now including China) are required to include evidence of requisite skills, qualifications and work experience as part of their application. Applicants from both streams need to meet all other visa requirements as well as any Federal, State or Territory licensing or registration requirements. For example, Chinese skilled workers including nurses, engineers, plumbers, welders and carpenters will be required to meet applicable federal, state or territory licensing requirements within 90 days or their 457 visas will be revoked.

Effect on 457 Temporary Visa Applications

ChAFTA succeeds in removing the limitation on the number of temporary skilled work visas that may be issued and at least partially, recognizing the skills of Chinese tradespersons. However the original agreement to remove labour market testing seems to have been qualified in the fine print. Evidence of skills shortages will remain the order of the day, although how rigorous that evidence remains to be seen.

Article 10.4 of ChAFTA does preserve the requirement that temporary visa applicants *'follow prescribed application procedures for the relevant immigration formality'* and *'meet all relevant eligibility requirements*

for such temporary entry'. As such, all other requirements for standard 457 visa applications would apply, including the following:

- Sponsorship obligation to demonstrate ongoing commitment to training Australian workers
- Sponsors must show that they will provide 457 visa nominees with no less favourable terms and conditions than those of an equivalent Australian worker.
- The market salary rate of 457 visa nominees must be greater than an annually indexed temporary skilled migration income threshold (TSMIT), to ensure that they will earn enough money to be self reliant in Australia.
- 457 visa applications are assessed by the Department of Immigration to ensure applicants' meet necessary occupational qualifications and English language proficiency.

Opportunities for Australian Employers

The original intention of the ChAFTA once approved by the Australian Parliament, was to allow Australian employers to sponsor Chinese workers under 457 temporary work visas more easily due to the relaxation of the market testing requirements. However, as anyone who has sponsored a person to work temporarily in Australia would testify, the requirements and the costs to do so are still substantial disincentives, particularly where there are qualified Australians to perform the work.

The changes negotiated with the Labor opposition will not improve the opportunities, especially for small to medium sized enterprises.

Conclusion

It is clear that the aim of the MOU on IFA is to facilitate major infrastructure investment by China in Australian food and agribusiness, resources and energy, transport, telecommunications, power supply and generation, environment, or tourism sectors.

So, why the controversy?

The debate has primarily focused on the side deals negotiated between the countries that would allow further relaxation of the rules for major infrastructure projects. Unless one were privy to the negotiations it is not entirely clear as to the reason for the separate MOU and side letter to address essentially the same issues of labour market testing, visa entry arrangements and skills assessment, as does Chapter 10 and Annexure 10-A. Reading between the lines, one might conclude that the MOU dealing with labour market arrangements for an IFA seems to reflect in a practical way, the ambition (provided in Article 10.4 of Chapter 10) that neither party

would impose or maintain limitations on the number of visas granted or, require labour market testing as a condition for temporary entry. The side letter reassuring Chinese authorities that the Australian government would remove mandatory skills assessments for ten categories of trades and address the remaining categories within the next two years is also consistent with the objective of facilitating easier movement of people to work temporarily in Australia.

The CFMEU currently has enormous influence on the success of major infrastructure projects as it effectively controls the terms and conditions of employment of the workforce. It is paranoid that the ChAFTA and related MOU will weaken its control of the workforce and therefore its capacity to control conditions of employment.

Now that the passage of the ChAFTA through the Australian Parliament is reassured, the question of whether this agreement will break the stranglehold of the CFMEU, affect employment opportunities for Australians or alter in any respect the salaries and working conditions in major infrastructure projects, remains to be answered. We will find out in due course.

[Read the full text of the ChAFTA and related MOU and side letters](#)

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

There has been a fair amount of activity in the Fair Work Commission. Here are some of the most significant, and interesting and news and events.

Annual Report

The Fair Work Commission has published its [Annual Report](#) for the financial year ending 30 June 2015. The report entitled 'New Approaches to Workplace Relations' provides an overview of the Commission's activities and performance over the last twelve months.

Some of the more interesting statistics for the year include:

- 43.8% of the 34,152 applications received by the Commission related to claims of unfair dismissal
- 1 order was issued out of 676 workplace-bullying complaints

[\[More\]](#)

4-Year Modern Award Review

Inconsistent award provisions

The Fair Work Commission has varied various awards to rectify inconsistencies with the NES. In the initial stages of the 4-Yearly Modern Review the Fair Work Ombudsman identified a significant number of [modern award provisions](#) that conflicted or were inconsistent with the National Employment Standards. In particular, quite a number of award definitions of shift work entitling employees to a fifth week of annual leave were inconsistent with the NES. Consequently, the Fair Work Commission [decided](#) to amend modern awards to correct those inconsistencies. The list of amendments is extensive, so care needs to be taken to firstly review the [Schedule of amendments](#) and secondly, where applicable adjust your payroll and policies.

Annual leave

The Fair Work Commission has decided 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.
- EFT 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.

A model clause allowing employers to direct employees to take annual leave over closedown periods was rejected. However, the Commission said the issue should be dealt on an award-by-award basis.

View the [model cashing out](#) clause and [model excessive annual leave clause](#).

Time off in lieu of overtime

The [Fair Work Commission](#) has decided 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') settled on a new model award clause regulating the arrangements that will be inserted in all modern awards. The decision will affect thousands of employers throughout Australia.

The [decision](#) followed an earlier decision in July where the Commission agreed that in the interests of workplace

flexibility all award covered employees would be able to elect with the consent of their employer, to take time off work at ordinary rates of pay in lieu of overtime payments, which incur a higher penalty payment. However, in order to access this arrangement the Commission has imposed a requirement to record every incidence of TOIL with signed agreements. The bad news for employers that are covered by awards that already include time off work in lieu of overtime at penalty rates is the new model clause does not reduce the TOIL to ordinary rates.

The Commission has allowed a period for interested parties to file objections to the variation of individual awards.

Accident pay reintroduced

The Fair Work Commission has decided to reintroduce Accident pay into a select group of modern awards. The provision reinstates the obligation to pay injured employees the balance of their pre-injury weekly wage not covered in compensation payments, that was a feature of many pre-modern federal and state awards.

The following awards listed in a [Schedule of Determinations](#) that have been varied are:

Hydrocarbons Industry (Upstream) Award 2010; Labour Market Assistance Industry Award 2010; Marine Towing Award 2010; Mobile Crane Hiring Award 2010; Oil Refining and Manufacturing Award 2010; Professional Diving Industry (Industrial) Award 2010; Seafaring Industry Award 2010; Airline Operations - Ground Staff Award 2010; Building and Construction General On -Site Award 2010; Business Equipment Award 2010; Concrete Products Award 2010; Dry Cleaning and Laundry Industry Award 2010; Fast Food Industry Award 2010; Horticulture Award 2010; Joinery and Building Trades Award 2010; Mannequins and Models Award 2010; Storage Services and Wholesale Award 2010; Textile, Clothing Footwear and Associated Industries Award 2010; Timber Industry Award 2010; Vehicle Manufacturing, Repair, Service and Retail Award 2010; Wine Industry Award 2010.

Only the modern awards that cover industries where accident pay was universally applicable prior to the formation of modern awards have been varied. The maximum period for the payment will vary between 26 and 39 weeks depending on the modern award.

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In New South Wales and in particular Sydney, if you require legal advice on an employment matter that requires representation at the Federal Court, Human Rights Commission or Fair Work Commission, contact Tass Angelopoulos Special Counsel with [National Workplace Lawyers](#) on 02 9233 3989 and email tass.angelopoulos@nwlawyers.com.au

In Victoria contact Catherin Brookes, Principal at [Moores Legal](#) on 03 9843 0418 cbrooks@moores.com.au. Moores Legal has extensive experience with not-for-profit organisations and can also advise and represent employers on a broad range of legal matters. They provide fixed quote legal fees, which is handy for small to medium enterprises.

[Adams, Maguire and Sier Solicitors](#) based in Ivanhoe, Victoria provide an excellent legal service to businesses across a range of industries at very competitive fees. Contact Shane Maguire on 03 9497 2622 or email smaguire@amslaw.com.au

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.