Australian Institute of Employment Rights

The Debate: Current Controversies

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Current controversies

The arena of workplace relations never lacks issues and controversy. While employees and their employers have much in common and much to gain through mutual effort, some tension between them is likely to be ever-present. Employee earnings are employers costs. Workplace 'flexibility' is often worker insecurity.

We spend much of our adult lives at work. Workplaces can be places of social contact, learning and professional development, and achievement; or places of drudgery, boredom, harassment, and real danger of death and injury. Collectively, the outputs of workplaces – in both the private and public sectors – determine the economic well-being of our society and also contribute enormously to social and community well-being.

Onto this complex mix, governments seek to superimpose rules determining behaviour and outcomes. They are never short of advisers with a vested interest in telling them what they need to do.

This year has been no exception. Productivity has continued to be a hot topic and AIER was pleased to be at the centre of this through the second annual Ron McCallum debate in Sydney. The Fair Work Act has been reviewed and the government has had plenty of advice – expert, partisan and otherwise – on what needs to be changed or retained.

The new system's modern awards are also undergoing their first formal review although ultimately changes are not expected to be great. However, into this mix has come Senator Nick Xenophon with a radical proposal to bypass Fair Work Australia and legislate to remove penalty rates from small business employees in retail and hospitality.

Bullying remains a serious concern in many workplaces – AIER and other organisations have made submissions to a parliamentary committee of inquiry, seeking to address this issue. As AIER President Michael Harmer said in verbal evidence to the Inquiry, this is a general cultural problem in Australia that needs decisive action, particularly to address the chaotic regulatory 'system' that allows bullying to flourish in some workplaces.

Approaches to industrial relations continue to evolve in the wake of Qantas's 2011 action to ground its planes in order to bring protected industrial action by three unions to a head. These matters are not fully resolved but have industrial parties re-examining their tactics.

A new President was appointed to Fair Work Australia this year after a long stint at the helm by the well-respected Geoffrey Giudice. I am very pleased that His Honour, now an Honorary Professor at Melbourne University, has contributed an article on the importance of an independent industrial relations tribunal in this country. His Honour worked hard to maintain the tribunal's independence from all would-be influencers during his time at the top, earning him respect from all sides. I commend his article to you.

Controversies will always exist. Our mandate at AIER is always to try to find common ground between employers and employees, in an effort to create decent work and decent workplaces for all.

Lisa Heap, Executive Director, AIER

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Barclay in the High Court – an opportunity lost

The Barclay case has been important in considering the 'adverse actions' protections available to officers of trade unions under the Fair Work Act: the High Court recently overturned a decision of a full bench of the Federal Court involving the actions of an Australian Education Union official. Melbourne barrister Mark Irving was junior counsel for Barclay and the AEU. Opinions expressed in this article are his own.

The High Court decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) HCA 32 is an important decision concerning the protections in the Fair Work Act for employees, especially delegates, engaging in industrial activities.

The protections in the Act

The Fair Work Act prohibits an employer from taking adverse action (such as suspending an employee) because the employee is a delegate or has engaged in industrial activities. Industrial activity includes encouraging or participating in a lawful activity organised or promoted by a union and representing or advancing the views, claims or interests of a union. One purpose of these provisions is to protect representatives from victimisation as the result of representatives' activities on behalf of a union – to remove the fear of adverse action against an employee taking union office and performing the functions of that office. A second, facilitative purpose of the provisions is to permit representatives at the enterprise level to play an active role in the industrial relations system. This role is central to the effective functioning of the scheme established by the Act.

The facts

Mr Barclay was the President of the AEU sub-branch at BRIT. Members of the AEU approached him as their union representative. Four members told Mr Barclay that they had been asked to create misleading or false documents as part of an audit process. The members told Mr Barclay that:

- They did not want him to disclose their names or detailed information about their complaints to the employer.
- They did not want him to file a formal grievance or speak on their behalf to a line manager.
- They were concerned about the possibility of reprisals if their names were revealed to management.

Mr Barclay wrote an email to union members, signed by him as President of the BRIT AEU sub-branch. It was titled 'Subject: AEU – A note of caution' and said:

"It has been reported by several members that they have witnessed or been asked to be part of producing false and fraudulent documents for the audit.

It is stating the obvious but, **DO NOT AGREE TO BE PART OF ANY ATTEMPT TO CREATE FALSE/FRADULENT [sic] DOCUMENTATION OR PARTICIPATE IN THESE TYPES OF ACTIVITIES**. If you have felt pressured to participate in this kind of activity please (as have several members to date) contact the AEU and seek their support and advice."

The employer asked Mr Barclay to disclose the names of the union members who made the reports to him, but he refused because the members had asked him to keep their confidence. Mr Barclay, the Court found, "had the right (and probably the duty) to discuss workplace issues of concern to members with those members and to advise them" and "was also bound to respect confidences."

Mr Barclay had engaged in industrial activity by sending the email on 29 January 2010; encouraging members of the AEU to contact the AEU and seek support and advice; and retaining the confidences of AEU members who had approached him in his capacity as an officer of the AEU.

> **"The High Court's decision is an opportunity lost."**

"The High Court's approach leaves the delegate more exposed to adverse action. Notwithstanding the decision of the High Court, the protections in the Fair Work Act for delegates remain extensive and strong."

The employer took adverse action against Mr Barclay. It wrote to him saying,

"disciplinary action may be warranted because of:

- the manner in which you have raised the allegation, via a broadly distributed email;
- your actions in not reporting the instances of alleged improper conduct directly to your manager or me to enable us to take appropriate action; and
- your refusal or failure to provide particulars of the allegations when asked to do so by your manager."

By sending the email, Mr Barclay, arguably, contravened BRIT's policies. The reason the employer gave for the action was that: "Mr Barclay's conduct in sending the Email on the basis that he is an employee of [BRIT] who is required to adhere to policy and procedures that govern his employment, not because of his membership of or role in the AEU… I made the decision to suspend Mr Barclay because I was of the view that the allegations against him were serious and I was concerned that if Mr Barclay was not suspended he might cause further damage to the reputation of [BRIT] and of the staff [of BRIT]." The employer's evidence was believed.

The issues and their resolution

The issue was whether the adverse action was taken against Mr Barclay '*because*' he had engaged in an industrial activity. The majority in the Full Federal Court (Justices Gray and Bromberg) stated that:

"The real reason for a person's conduct is not necessarily the reason that the person asserts, even where the person genuinely believes he or she was motivated by that reason. The search is for what actuated the conduct of the person, not for what the person thinks he or she was actuated by. In that regard, the real reason may be conscious or unconscious, and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator held a benevolent intent. It is not open to the decision-maker to choose to ignore the objective connection between the decision he or she is making and the attribute or activity in question… All of the relevant conduct in issue in this case involved Mr Barclay in his union capacity. None of it involved him in his capacity as an employee of BRIT. Mr Barclay's interaction with other members of the AEU, in receiving information, maintaining the confidence of the information received, and communicating with AEU members through his email, was all done for and on behalf of the AEU. […] If adverse action is taken by an employer in response to conduct of a union, it is impossible for that employer to dissociate or divorce from that conduct its reason for the taking of the adverse action simply by characterising the activity of the union as the activity of its employee."

The High Court rejected this approach. The issue raised by the sections above, is why the employer took the adverse action. It is not a question of trying to ascertain the subjective reason or objective reason for the action. Nor is it a question of ascertaining the conscious or unconscious reasons. All of the evidence is weighed (including that of the decision-maker):

"In assessing the evidence led to discharge the onus upon the employer under s 361(1), the reliability and weight of such evidence was to be balanced against evidence adduced by the employee and the overall facts and circumstances of each case; but it was the reasons of the decision-maker at the time the adverse action was taken which was the focus of the inquiry."

As applied to Mr Barclay:

- The employer gave evidence that the industrial activities of Mr Barclay were not a reason for its adverse action;
- Notwithstanding the close association between the acts that caused the employer to take the adverse actions and the industrial activities of Mr Barclay, the trial judge concluded that the reason for the employer's actions did not include the prohibited reasons;
- Once the employer's denial of the connection between the activities and the reason for the conduct was given *and accepted*, the employer had proved it did not act for a prohibited reason.

Conclusion

The High Court's decision is an opportunity lost. The approach that was taken by Justices Gray and Bromberg provided a high level of protection for employees engaging in industrial activities. It promoted the policies of the Act. It allowed a delegate who negotiated with the employer or distributed emails to union members (and thereby engaged in industrial activities) to know before taking that step that he or she will be protected from adverse actions.

The High Court's approach leaves the delegate more exposed to adverse action. Notwithstanding the decision of the High Court, the protections in the Fair Work Act for delegates remain extensive and strong.

The Statutory Guarantee of Freedom from Interference: Section 580 of the Fair Work Act (2009)

Article 10 of the Australian Charter of Employment Rights deals with the rights and obligations of employers and employees to participate in good faith dispute resolution processes, and "where appropriate, to access an independent tribunal to resolve a grievance or enforce a remedy". Earlier this year, the Hon. Geoffrey Giudice AO retired as President of Fair Work Australia after a long stint as head of that tribunal and its predecessor, the Australian Industrial Relations Commission. In this article, he reflects on the importance of the independence of the tribunal, of which he was a strong champion during his tenure.

Geoffrey Giudice is now Honorary Professorial Fellow in the Faculty of Business and Economics – Department of Management and Marketing; and in the Melbourne Law School's Centre for Employment and Labour Relations Law.

Industrial tribunals are charged with responsibility for resolving workplace disputes, whether individual or collective ones. The need for tribunals to operate free of outside interference is implicit in the nature of that obligation. We often take it for granted that our industrial tribunals will determine matters in accordance with the circumstances of the case and the relevant statutory and award provisions.

But independence is not just an aspiration or a matter of good intentions. The legal system bolsters and protects the independence of tribunals, including industrial tribunals. It does this in two ways. First, the rules of natural justice require a tribunal to be truly impartial in its proceedings and in its decisions. Where a tribunal is biased, or there is a reasonable apprehension that it might be, its decision is liable to be set aside.

Secondly, the law protects the tribunal itself from extraneous pressure or influence. This short article examines this second area. It deals in particular with the legal protections against attempts to influence administration and decision-making. The focus of this examination is the national industrial tribunal, Fair Work Australia (FWA) and Section 580 of the *Fair Work Act 2009* (the Fair Work Act).

Section 580 provides that an FWA member has, in performing his or her functions or exercising his or her powers as an FWA member, the same protection and immunity as a Justice of the High Court. Members of FWA's statutory predecessors were protected by similar provisions[1]. The operation of this section requires some explanation, but some related provisions should be noted first.

There are a number of sections in the Fair Work Act which deal with the obligations on FWA and its members in relation to the Executive and the Parliament. There is a requirement that the President provide an annual report to the relevant Minister for tabling in the Parliament[2]. There is also provision for removal of a member by decision of both Houses of Parliament for proved misbehaviour or incapacity[3]. These provisions have antecedents going back to 1904. There are some new provisions which require the Governor General to terminate the appointment of a member of FWA for specified conduct[4].

Section 580 extends the "protection" and "immunity" of a High Court judge to members of FWA. While "protection" and "immunity" can be different concepts, the cases do not clearly distinguish between them, perhaps because the concepts overlap to a large degree. A convenient starting point in considering the operation of the section is the doctrine of the separation of powers.

At the core of the doctrine is the idea that it is essential for good government that the legislature, the executive and the judiciary should function independently of each other. While FWA is not a court and its members are not part of the judiciary, s.580 invokes the same protections as apply to judges of a superior court. For that reason, what is said below in relation to courts and judges applies equally to FWA and its members.[5]

The need for the judiciary to be independent of the other two branches of government is almost self-evident. Judges must decide cases by applying the relevant law, free of extraneous pressure or influence of a personal, political or any other kind.

As an example, the implementation of government policy, except to the extent that it is incorporated in

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relevant legislation, should play no part in the judicial process. It is not unusual for the executive government, in one guise or another, to be a party to litigation or to have a significant interest in the outcome.

The idea that the executive, through a Minister or a public servant, for example, might seek to influence the outcome of proceedings other than through the proper judicial process or to influence the administration of the courts, or to whom a case is allocated, would be inconsistent with judicial independence. The same considerations apply to actions by the legislature. The general principles are set out in a relatively recent Australian case[6].

In the following passage from the reasons of Gleeson CJ in *Fingleton v R* it is pointed out that judicial independence is not confined to the proceedings but extends to matters of court administration[7]:

"53 In recent years, the Supreme Court of Canada [24], and the Constitutional Court of South Africa [25], have found it necessary to examine the theoretical foundations of judicial independence for the purpose of considering whether arrangements in relation to particular courts satisfied the minimum requirements of that concept. In that context reference was made to 'matters of administration bearing directly on the exercise of [the] judicial function.' [26] The adjudicative function of a court, considered as an institution, was seen as comprehending matters such as the assignment of judges, sittings of the court and court lists, as well as related matters of allocation of court-rooms and direction of the administrative staff engaged in carrying out that function. Judicial control over such matters was seen as an essential or minimum requirement for institutional independence [27]."

In His Honour's reasons for decision in the same case, the then Chief Justice pointed out that maintaining the independence of the judiciary requires protection not only against the possibility of interference by governments, but also against retaliation by persons or interests disappointed or displeased by judicial decisions.[8] In this context, government is not to be regarded narrowly, and the capacity to carry out functions "free from interference by, and scrutiny of, the *other branches* of Government is an essential aspect of judicial independence" (emphasis added).[9]

Another important component of judicial independence is the protection against any requirement to disclose reasons for decision, other than the published reasons. This important protection is exemplified in the following passage:

"The entire, general, protective immunity of a Justice of the High Court is conferred on the member of the [Refugee Review] Tribunal by s. 435(1) of the [Administrative Appeals Tribunal] Act [163]. The rationale for immunity from compulsory disclosure is the assurance that judges should be free in thought and independent in judgment. That rationale naturally extends to an immunity from disclosing any or all aspects of the decision-making process itself [164]."[10]

When the terms of s. 580 are considered in light of these authorities it is apparent that the protection provided by the section includes protection for members of FWA against retaliation by persons or interests disappointed or displeased by tribunal decisions and against interference by, and scrutiny of, the other branches of government. The protection is unconfined and extends to the performance of all functions and the exercise of all powers under the Fair Work Act. [11]

Endnotes

1 These were in order: Commonwealth Court of Conciliation and Arbitration, Commonwealth Conciliation and Arbitration Commission, Australian Conciliation and Arbitration Commission and Australian Industrial Relations Commission.

2 Section 652

3 Sections 641 & 642

4 Sections 643 & 644. These provisions are unusual as they require the removal of a member of FWA without the need for the approval of Parliament.

5 The executive and the legislature control the supply of money to the judiciary, but that does not extend to prescribing the way in which money is spent. All of the federal courts have a block allocation of funds in the Budget which is described as a single-line budget. FWA has a single-line budget. There is no specification of how money is to be spent, apart from some broad outcomes.

6 See for example *Fingleton v R* (2005) HCA 34; per Gleeson CJ at [38] and Kirby J at [188] &[189]

7 Cited above

8 At [39]

9 At [52], citing *Minister for Immigration and Multicultural Affairs v Wang*

10 *Muin v Refugee Review Tribunal* (2002) HCA 30; per Callinan J at [299], see also at [300]; Gleeson CJ at [25]; Kirby J at [196]

11 In the circumstances the requirement currently imposed upon the President of FWA by the Senate to attend Budget Estimates Hearings and to answer questions is problematic.

Quotation footnotes: *Fingleton v R*

[24] *Valente v The Queen* (1985) 2 SCR 673; *R v Genereux* (1992) 1 SCR 259; Reference re: *Public Sector Pay Reduction Act* 1997, 3 SCR 3.

[25] *Van Rooyen v The State* (2002) 5 SA 246.

[26] *Valente v The Queen* (1985) 2 SCR 673 at 708.

[27] *Valente v The Queen* (1985) 2 SCR 673 at 709.

Quotation footnotes: *Muin v Refugee Review Tribunal* **(2002) HCA 30**

[163] http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/

[164] *Herijanto v Refugee Review Tribunal* (2000) HCA 16; (2000) 74 ALJR 698; 170 ALR 379.

"Nimble, productive but fair." Can the Fair Work Act produce workplaces like these?

The role of industrial legislation in promoting productivity in Australian workplaces has been one of the hot topics of 2012. In this article, AIER Executive Director Lisa Heap looks at the outcomes of the review of the Fair Work Act in respect to productivity and other issues, and the government's response so far.

The Federal Government has begun the process of amending the Fair Work Act to address key recommendations of the Fair Work Act Review Panel. The Panel's Report was publicly released by the Federal Government on 2 August, the day AIER held its second annual Ron McCallum Debate on productivity. On 15 October Minister Bill Shorten announced the first tranche of 17 proposed changes to the Act arising from the Panel's report.

Professor Ron McCallum, who headed the Review Panel, is also a Patron of AIER and spoke briefly at the beginning of the 2 August productivity debate, on the findings of the Panel. He said that the Panel's report called for the creation of Australian workplaces that were "nimble, productive but fair". "This is what I want to see for my children and grandchildren," he declared.

Ron McCallum said that "the Panel did not accept that enhancing productivity and enhancing equity are conflicting goals. Increased productivity permits both higher wages and higher profits. Increased equity need not come at a cost to productivity. Indeed, by supporting harmony in the workplace, increased equity may well reduce turnover, training costs and employee dissatisfaction, all of which enhance a productive workplace culture".

The relationship between industrial relations laws and policies was given specific consideration in the Panel's report. The panel did not agree that industrial laws alone drove productivity, but that it was the result of a complex interaction of factors which did not appear to be associated with differing legislative regimes over the past ten years.

However, the Panel made a number of recommendations which it said might improve productivity, including that:

- Fair Work Australia and the Fair Work Ombudsman (FWO) extend their role to include actively encouraging more productive workplaces
- Individual Flexibility Agreements (IFAs) should be easier to access and more attractive to both employers and employees
- a form of arbitration be available if the parties are unable to reach a 'greenfields' agreement in the resource sector in a reasonable time
- the legislation be amended to require that protected-action ballot orders can be issued only after bargaining has commenced (this recommendation overturns the current case law on this issue)
- the central consideration as to the reason for adverse action is the subjective intention of the person taking the alleged adverse action. This would have also overturned the case law current at the time the report was made, but the decision to which this recommendation was directed has since been overturned by the High Court (see article by Mark Irving).

Among recommendations that are intended to increase workplace equity, the Panel said that the Act should be amended to :

- prohibit enterprise agreement clauses that permit employees to opt out of the agreement (the case law on this has also been overturned by a full bench of FWA), and to prohibit the making of an enterprise agreement with one employee
- extend the right to seek flexible work arrangements to a wider range of caring and other circumstances

- require an employer, upon making an IFA, to notify the FWO of the commencement date of the arrangement, the name of the employee party and the relevant modern award or enterprise agreement
- provide that if an employee requests additional unpaid parental leave or flexible work arrangements, the employer must hold a meeting with the employee to discuss the request.

The first three of these equity recommendations implement at least in part recommendations put to the Review Panel in AIER's written submission.

The government's first tranche of changes deals with relatively non-controversial matters and include action on only one of the matters above: that is, the inability of employees to opt out of agreements, the case law on which has been changed by a full bench of the Fair Work Australia tribunal since the Review Panel's report was released.

Conclusion

AIER welcomes the thorough review of the Act and of many of the issues and current controversies in industrial law carried out by the Review, which has added greatly to the store of knowledge on these important issues. AIER is disappointed that a number of key recommendations of the Panel – including a number proposed or supported by AIER – have not yet been acted upon by the government, and looks forward to further legislative action in 2013.

Just give me the facts…

The Review Panel had been asked to do a 'fact-based' analysis of the Fair Work Act and a considerable part of the Panel's report is devoted to looking at the evidence for various assertions made in the public debate. Some of the findings of the Panel which run contrary to popular perceptions include:

Unfair dismissal

"Although the number of unfair dismissal cases increased to 13,488 in 2011, the Panel noted that this was a very small fraction of the two million separations that occur each year in today's workforce. The total compensation paid to successful complainants was in the order of $28.1 million in 2011. While an individual payment is significant to a small employer, the total is insignificant compared to total labour costs of $690.3 billion."

"Employer concerns about the increase in claims should also be viewed in the context of the likelihood of an employer being subject to a claim... Using 12,840 as the number of unfair dismissal applications (and assuming the overall separation rate remains stable), our calculation is that approximately 1.4 per cent of involuntary separations resulted in an unfair dismissal application under the FW Act in 2010–11…"

Industrial action

"…Forsyth and Stewart submitted that the official figures on days lost to industrial action disclose no significant increase in industrial action since the FW Act took effect. They say that 'industrial action has all but disappeared in most parts of the private sector and only a minority of Australian businesses now experience coordinated work stoppages'."

Minimum wages

"…award minimum wages as a proportion of the median earnings have declined over the last one and a half decades. The minimum award rate (as defined by classification C14 in the Manufacturing Award) was 62 per cent of median full-time earnings in 1997, and had fallen to 54 per cent in 2010…"

"Overall, Australia has a relatively low unemployment rate compared to countries with low minimum wages such as the US and the UK, which demonstrates that overall economic performance, including the performance of the labour market overall, is evidently more significant than differences in minimum wages."

"Though real wages have increased, the corporate profit share of total factor income has continued the trend increase as a share of factor incomes evident since the middle of the 1970s. The corporate profit share was 25 per cent when the enterprise bargaining system was introduced in 1993. It has risen to around 29 per cent in recent years, as shown in Chart 4.4."

'Flexibility'

"The transition from arbitration, and the legislative frameworks since, have evidently been compatible with increasing diversity in work patterns. In August 1992, 21 per cent of employees (excluding owner-managers of incorporated enterprises) were casual... By August 2011 the proportion had increased to 24 per cent. Part-time employment has also increased, from 24 per cent of employment in 1992 to 30 per cent in 2012."

Privacy and work: Can you keep a secret?

Privacy at work is becoming an issue of increasing importance in the online age. In this article, Mary Lambert, a former senior union official with over 20 years experience in the trade union movement, considers the implications for employers and employees.

In recent years Mary Lambert has lectured at both undergraduate and postgraduate levels at Monash University and also taught at RMIT University, in areas relating to Employment Relations, Negotiating and Bargaining.

Workplace privacy issues are emerging as one of the major areas of concern and confusion in the modern workplace. In particular, the privacy of employee information and personal details held by employers is one of growing concern. Many organisations are facing the task of meeting staff expectations of strict confidentiality while balancing this against other operational needs and obligations. For employers seeking to undertake best practice in the workplace and implement the philosophy of the Australian Charter of Employment Rights, ensuring proper privacy protections for staff must become a priority.

Employee records

To promote a healthy and productive workplace there is a need to competently and appropriately handle and administer personal information provided by staff. The provision of private details by employees, such as health status and residential address, is done in the belief that these will not be publicly disclosed nor internally distributed within the organisation.

Employers also hold other forms of personal employment information, including Performance Reviews, Incident Reports, Warning Letters, etc. These documents, when placed in a staff member's employment file, become an official part of the employee's work record and can impact upon an employee's future career progression.

Stringent storage and access conditions for such information are integral to the building of a trust relationship between employer and employee.

Existing privacy protection

Employees employed in the public sector are covered by the *Privacy Act 1988 (Cth)* (the Privacy Act). Employers in this sector must abide by the National Privacy Principles (NPPs) when dealing with employee records. These ten NPPs arise directly out of the Privacy Act and regulate the collection, management and disclosure of private information. Consequently, employees in the public sector are afforded a number of privacy protections, and are also entitled to access their employment records.

Disappointingly, for employees in the private sector there is little protection under the law concerning their employment records. Neither the Privacy Act nor the *Fair Work Act 2009 (Cth)* (the Fair Work Act) provides much joy in this regard. The Privacy Act contains an exemption for private sector employee records. While the Fair Work Act obliges employers to keep particular employment records, it does not provide for their privacy. The need for greater privacy protections for private sector employees has been acknowledged and supported without much action for some years.

In 2000 it was stated by the then federal government that privacy of

Two sets of workplace standards

The Privacy Act treats public sector and private sector employee records differently. A private sector employer is not required to comply with the National Privacy Principles (NPPs) set out in the Privacy Act.

Private sector employers are not obliged to grant their staff access to their employee records.

Consequently, private sector employees have lesser legal rights regarding personal and employment information stored in their employee records.

employee records was not a matter for the Privacy Act but, rather, should be covered by industrial law:

"While this type of personal information is deserving of privacy protection, it is the government's view that such protection is more properly a matter for workplace relations legislation."[1]

However, in June the same year a House of Representatives Standing Committee found industrial law did not offer privacy protection for employees in the private sector.

"…it is clear from the evidence received by the Committee that current coverage of employee privacy in the workplace relations context is, in fact, minimal."[2]

And also:

"In the Committee's view it is important to ensure that the privacy of an employee's personal information is protected in all employment contexts."[3]

The Australian Law Reform Commission

Some years later, in 2008, the Australian Law Reform Commission (ALRC) reviewed privacy laws and made 295 recommendations for changes to privacy regulation and policy. Amongst these, the ALRC recommended uniform privacy principles for both federal government and the private sector in the Privacy Act. It was argued that the current exemption for employee records in the private sector should be abolished.

The government has commenced its formal response to the ALRC's review, which is to be conducted in stages. This area will be addressed in its Stage Two response, due once the Stage One process, currently underway, is completed.

Given current time frames, any legal changes arising from the ALRC review that might affect privacy of employee records in the private sector will probably be at least 12–24 months away.

Current Review of the Fair Work Act: the Privacy Commissioner's comments

The federal Privacy Commissioner has recommended to the current Review of the Fair Work Act that the Fair Work Act be enhanced to ensure that personal information of employees is given greater privacy protection.[4]

However, in the Privacy Commissioner's submission, the case was also put for the removal of the exemption for employee records in the private sector under the Privacy Act. The Privacy Commissioner stated that a number of benefits would arise from coverage of private sector employee records under the Privacy Act. Providing certainty for employers and employees about rights and obligations in this area is one benefit. Another benefit cited in the submission is that a stronger privacy framework for employee records may assist in promoting trust and confidence in the employment relationship.

Irrespective of whether these rights are bestowed to all employees via the Fair Work Act or the Privacy Act, employees in the private sector should be afforded the same rights to privacy of their employment records as those who work in the public sector.

Australian Charter of Employment Rights

In modern Australian workplaces employees should have a legitimate expectation that their personal information and employment records will be treated sensitively and handled with the utmost confidentiality by their employers. The need for employers to do this, even when not mandated by law, is a matter of workplace ethics, and gives rise to many benefits for the organisation.

This is in keeping with best practice workplace relations, and conforms with the basis of the Australian Charter of Employment Rights. The Charter's preamble states:

"…improved workplace relations requires a collaborative culture in which workers commit to the legitimate expectations of the enterprise in which they work and *employers provide for the legitimate expectations of their workers*" (emphasis added).

Recommendations

Organisations must act fairly and transparently in the way they collect, handle and manage employee records. The need to safeguard personal and sensitive employee information will have to be carefully balanced against other legitimate operational needs, which may vary from one organisation to another. This balance between the employee's right to privacy and the needs of the organisation can best be served by developing well-thought-out policies.

Employers should develop appropriate procedures and policies for the handling of this information, which comply with modern-day expectations and general practices around privacy. However, developing policies and promulgating them amongst staff is not enough. Organisations must also ensure that all staff involved with keeping or accessing these records are aware of and adhere to these policies. Review of such privacy policies should be undertaken from time to time, and employee input sought.

Establishing privacy protections for employees is integral to building the trust relationships that result in effective and productive workplaces.

Endnotes

1 Australia, House of Representatives, 12 April 2000. The Hon. Daryl Williams AM QC MP, Attorney-General, Second Reading Speech, *Hansard*, p. 15077.

2 Australia, House of Representatives, June 2000. *Advisory Report on Inquiry into the Provisions of the Privacy Amendment (Private Sector) Bill 2000.* Chapter 3, Employee records exemption, p. 27, para 3.7

3 Ibid. p. 36, para 3.40

4 Timothy Pilgrim, Australian Privacy Commissioner, 17 February 2012. Submission to Fair Work Act Review, Canberra.

Employer response actions in the wake of the Qantas dispute

Many observers consider that Qantas's 2011 decision to ground its fleet in response to the protected industrial action taken by unions representing some of the airline's employees changed the industrial landscape forever. In this article, Queensland barrister and AIER Executive member Sean Reidy considers the events of 2011 and their aftermath.

In its submissions to the Fair Work Act Review Panel, AIER identified that the *Fair Work Act 2009* (the FWA) permits lockout action disproportionate to the protected employee action to which such action responds. The lockout at Qantas is a notorious example.

AIER promotes the right of both parties to fairness and balance in industrial bargaining. It is the title of Charter Right 9 of the Australian Charter of Employment Rights. This Charter right stipulates that workers have the right to bargain collectively through the representative of their choosing. Both sides have the obligation to conduct the bargaining in good faith.

Having bargained in good faith, workers have the right to take industrial action. Workers also have the right to associate for the protection of their occupational, economic and social interests and to be represented by their union in their workplace (Charter Right 6).

The right to strike follows from the right of association, and is a necessary aspect of fairness and balance in bargaining. This right is protected by the International Labour Organization's (ILO's) Convention No. 87 (Freedom of Association and Protection of the Rights to Organise).

Employers have the right to respond. The FWA has nothing to say about lockout action by employers, beyond requiring that it be in response to worker action; that is, that it be response action. The issue is: does permitting unfettered response action by an employer promote the fairness and balance in industrial bargaining contemplated by Charter Right 9?

The policy and statutory context

The FWA protects employer response action. The essential features of employer response action are:

- it is organised or engaged in by the employer to be covered by the enterprise agreement
- it is taken against employees who will be covered by the same agreement
- it is organised or engaged in as a response to industrial action by an employee bargaining representative or an employee who will be covered by the agreement.

See section 411 of the Act for the definition and section 408(c) for what constitutes protected industrial action. The reference to the common requirements at section 411(c) can be disregarded for present purposes. It is fair to say that, in practice, the only real restriction on employer action is that it is taken in response to employee action.

The FWA imposes one procedural requirement. The employer must give written notice of the action to the bargaining representatives and take all reasonable steps to notify employees (see section 414(5) of the Act). No period of operation of the notice is required before the action can commence.

The federal government made a deliberate choice to allow for unfettered employer response action under the FWA. While not the subject of discussion in the Explanatory Memorandum, the government gave notice of its policy intention in a speech to the National Press Club by the Hon. Julia Gillard MP, who was at the time Minister for Education, Minister for Employment and Workplace Relations, and Minister for Social Inclusion:

"As the ultimate response to industrial action, employers will be able to lock out employees. But offensive, pre-emptive lockouts – taken by the employer when employees haven't taken any industrial action – will no longer be permitted."[1]

"Causing significant damage to the economy is likewise inconsistent with fairness and balance. That strategy is either designed to or has the effect of forcing the hand of the government to intervene in a bargain between the parties, thus diverting from the promotion of bargaining in good faith."

The Explanatory Memorandum, at paragraph r. 299, implicitly confirmed this approach, and at r. 300 expressed the hope that the eradication of pre-emptive lockouts would both reduce their incidence overall and the consequent negative impact on productivity and the economy.

The second contextual aspect is that access to the Fair Work Australia tribunal to arbitrate lengthy or major disputes is restricted. The bar is high. Matters such as "significant economic harm", threats to community, health, safety and welfare, or significant harm to a third party have proved difficult to establish (for example, see *CFMEU v Woodside Burrup Pty Ltd* (2010) FWAFB 6021). The Explanatory Memorandum counselled that access was not available for inconvenience caused by bargaining disputes and that legitimate protected industrial action was not to be curtailed (see paragraph 1709).

Finally, the bargaining provisions in the FWA are inadequate in their protection of the right to strike and freedom of association, as assessed against the independent ILO benchmarks. For instance, the provisions on bargaining do not operate in conformity with the principle of encouraging and promoting negotiations between employers and organisations of workers (see ILO Committee on Freedom of Association, Report Australia (Case No. 2698); Report No. 357 (Vol. XCIII, 2010, Series B No.2) at paragraph 220 (the ILO Report)). The ILO Report also found that legal provisions rendering a strike unlawful should be reasonable and not such as to place a substantial limitation on the means of action open to trade union organisations. The ILO Report found that the ballot provisions for industrial action were excessive and recommended that they be reviewed (see paragraph 220).

Trends in employer response action

The cataclysmic events of the Qantas dispute have naturally caused it to be the focus of attention as the dispute that changed the landscape. For example, Alan Kohler describes the Qantas dispute as "shifting the playing field" towards the new "militancy" of employers.[2] However, the trend was evident before the Qantas dispute and has continued since. For example, in June and July 2010, Pinnacle Career Development Pty Ltd locked its employees out on two occasions (see *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and allied Services Union v Pinnacle Career Development Pty Ltd* (2010) FCA 1350). JB Swift workers at a Brooklyn (Victoria) meatworks were locked out for six weeks at the beginning of 2011. JELD-WEN Australia engaged in a 72-hour lockout in Perth, Melbourne, Sydney and Adelaide in September 2011. Also in September, G4S locked out its employees at the Thomas Embling psychiatric prison in Melbourne.

Since Qantas, it superficially appears there has been an acceleration of activity. For example, there have been lockouts at Schweppes (seven weeks), POAG at Fremantle and Bunbury in December 2011, Schenk Process in December 2011 at Thornton (Victoria), Asciano in March 2012, Sigma Pharmaceutical (also in March 2012), the Bucyrus mining machinery plant at Beresfield in June 2012, the JBS Fitzroy River abattoir in July 2012, and Grocon at its Sydney site in August 2012.

Consequences of the unfettered lockout provisions

The 'lockout' bargaining disputes have not been studied. In the absence of research, a cautious approach must be taken to drawing conclusions. Nevertheless, the number and frequency are notable.

The noted trend and the anecdotal material arising from the Qantas dispute allow for some observations to be made. A lockout is costly to production and productivity. Lockouts can cause wider economic impact and damage than merely to the participants. Qantas is the prime example. This raises the issue of how long damaging disputes in bargaining should be permitted to continue.

The serious action of a lockout would not be deployed unless a forensic advantage was to be derived. In its submission to the Fair Work Act Review, Qantas gave an insight into its strategy. It said that its motive in locking out its workforce and grounding the airline was to "resist the attempts by a number of unions to use the provisions of the [FWA] to control business strategy and to obstruct change". It went on to say: "This has come about as a direct result of the 'prohibited content' provisions being removed" from the FWA.

Alan Kohler, cited above, groups Qantas, Asciano and presumably other post-Qantas disputes as not being about the money but about 'managing the business'. This accords with the Qantas submission. These 'principle' (some might say ideological) underpinnings of disputes enhance their capacity for

intractability. Another feature may be the perceived tactical advantage in forcing a dispute to arbitration.

The real question is whether the lockout strategy permitted under the current legislation promotes fairness and balance. A motivation on grounds of 'principle', or the pursuit of a forensic tactic to avoid bargaining because the alternative produces a better result, are strong signs that the pursuit of an agreement by genuine, fair and balanced bargaining is a lower-order concern. This explains resort to available and disproportionate strategies of lockout.

Disproportionate response action is inconsistent with fairness and balance. A scheme that allows for opportunistic resort to a lockout is inimical to fairness in bargaining – see the observation of Perram J in *Australian and International Pilots Association v Fair Work Australia* (2012) FCAFC 65 (AIPA v FWA) at [157], to the effect that the action of Qantas in relation to the pilots was probably opportunistic).

Causing significant damage to the economy is likewise inconsistent with fairness and balance. That strategy is either designed to or has the effect of forcing the hand of the government to intervene in a bargain between the parties, thus diverting from the promotion of bargaining in good faith.

The conclusion must be that the Fair Work Act 2009 does not promote fairness and balance in bargaining as required by Charter Right 9.

What should be done?

The Fair Work Act does not impose any requirement that a lockout be "reasonable, proportionate or rational" (see *AIPA v FWA* at [156]–[157] per Perram J). It certainly permits disproportionate action. It follows that it must also support unreasonable and irrational action. Long and unresolved disputes should not be a feature of Australia's industrial relations system. Nor should unreasonable and irrational action. These features are to be discouraged.

Charter Right 9 incorporates a right to access conciliation services and, ultimately, arbitration, if there is no reasonable prospect of agreement being reached and the public interest requires it. The purpose of this aspect of the right is to address the intractability that can occur.

To accord with the Charter Right, the FWA should incorporate the following features:

- It should contain a principle of proportionality. Minor industrial action should not justify a lockout as employer response action.
- The role of the Tribunal should be enhanced by giving it the powers to intervene to promote resolution by mediation, conciliation and arbitration.
- The Tribunal should have the opportunity to deal with cases of 'surface' bargaining which might satisfy the forms and processes of genuine bargaining but which have the capacity to lead to long and unresolved disputes.
- The capacity to take opportunistic lockout action should be removed by the introduction of notice periods.

In addressing the problem, the focus must be on establishing the framework for fair and balanced bargaining. This is not an argument for ready access to arbitration. Charter Right 10 recognises the right to effective dispute resolution. This is not the same as saying that there is a right to arbitration of disputes in every instance. A robust right of effective dispute resolution equips the dispute resolution body with the power to fashion an approach that meets the circumstances. In the case of bargaining, it is the environment of fairness and balance.

Endnotes

1 Speech, The National Press Club, Canberra, 17 September 2008, http://ministers.deewr.gov.au/gillard/introducing-australias-new-workplace-relations-system

2 Alan Kohler, *Business Spectator*, 21 March 2012, http://www.businessspectator.com.au/bs.nsf/Article/IR-Fair-Work-Qantas-Asciano-penalties-contract-FWA-pd20120321-SKRNM?OpenDocument

> "WorkChoices certainly did not help productivity," he said, "nor has the Fair Work Act hurt it."

Productivity and industrial relations – a report of AIER's second annual Debate

AIER's second debate in the Justice at Work series examined closely the key issue of productivity in Australian workplaces, asking: is productivity the imperative, and if so at what cost does it come?

'More productivity' has become the catch-cry of politicians, commentators and employers. Four experts joined Professor Ron McCallum in the Debate to consider these issues. They were:

- Peter Wilson, National President, Australian Human Resources Institute (AHRI)
- Tim Lyons, Assistant Secretary, ACTU
- Steve Vamos, President, Society for Knowledge Economics
- Lisa Heap, Executive Director, AIER

Fair Work Act review and productivity

Productivity was an issue that could not be avoided in the Review of the Fair Work Act, Prof. McCallum told the 250-strong audience in Sydney. The Review report noted that while productivity growth in the 1990s was strong, it had been 'disappointing' since 2001, but this could not be attributed to industrial legislation.

This was because it had occurred under three different industrial legislation regimes: the 1996 Workplace Relations Act, WorkChoices and the new Fair Work Act. WorkChoices, in particular, had been "low on equity" and others may have been low on productivity – the key thing, he said, was to work to build a system that delivered both productivity increases as well as more equitable workplaces.

Tim Lyons echoed Ron McCallum's views on the role of IR legislation and its relationship to productivity growth. He said that the highest productivity growth had been delivered under centralised wage-fixing but had also been boosted by enterprise bargaining.

"WorkChoices certainly did not help productivity," he said, "nor has the Fair Work Act hurt it." Tim Lyons noted that there had also been a "de-coupling" of the link between labour and productivity: the gains of productivity growth were increasingly going to capital at the expense of labour, he said.

Investment in people and technology is important

AHRI President, Peter Wilson, also called for workplaces that were "productive, flexible and fair". "Total factor productivity" is the key, he declared, also taking a broader view of what drives productivity. Skills, technology and innovation are key drivers of productivity boosting change. IR laws could be the jewel in the productivity crown or could tarnish it, he said.

Steve Vamos, President of the Society for Knowledge Economics, told the audience that he was wary about straying into the arena of industrial relations. He noted that it was always possible for a company to cut costs, but there was a limit to this and "no company grew to greatness this way".

Real productivity growth grew out of finding ways for managers and employees to work better together, he said, through creating a workplace culture where people "wanted to be the best" they could be.

Loss of workplace rights too high a price to pay

Finally, Lisa Heap, AIER Executive Director, asked the audience and the other panellists to consider whether the cost of increasing productivity was too high. Ms Heap said that in her view, the cost was too high if it involved the loss of workplace rights by employees. "If by flexibility we mean reductions in rights, then it is wrong," she said. The culture in some workplaces, aided and abetted by WorkChoices-type legislation, had become that of "command and control".

Not only did this not assist productivity, it damaged the health of individuals and the nation, leading to and allowing poor management, workplace bullying and harassment. Workers could not leave their rights at the workplace door, she declared: workers and managers must be able to work together. A positive workplace culture was the key to productivity-enhancing change, not an adversarial one.

Keith Harvey, Research Officer, AIER

Workplace bullying – eliminating the 'limbo-dance' remedy

"Every worker has the right to a safe and healthy working environment." Australian Charter of Employment Rights

"The workplace is free of bullying, stress, abuse and anxiety that could be detrimental to the workers' mental health." Australian Standard of Employment Rights

A workplace free of bullying and harassment ought to be the right of every person in the workplace, including young workers, women, and employees and managers at all levels, not just according to AIER's Charter and Standard of Employment Rights, but as a basic human right.

To date, however, protections have been limited in effect, despite legislative developments in some jurisdictions, including Brodie's law in Victoria. Brodie's law, named for a young Victorian worker who committed suicide following workplace bullying, extended the Victorian Crimes Act to provide that workplace bullies can be jailed for up to ten years if found guilty of the offence of stalking, the definition of which includes serious bullying. It commenced to operate in mid-2011.

The extent of workplace bullying is considerable, with as many as 12,000 complaints being made of bullying on the job in New South Wales and Victoria alone in the past financial year. As well as legislative difficulties, enforcement of existing laws is limited, as regulatory agencies lack the resources to tackle the problem effectively.

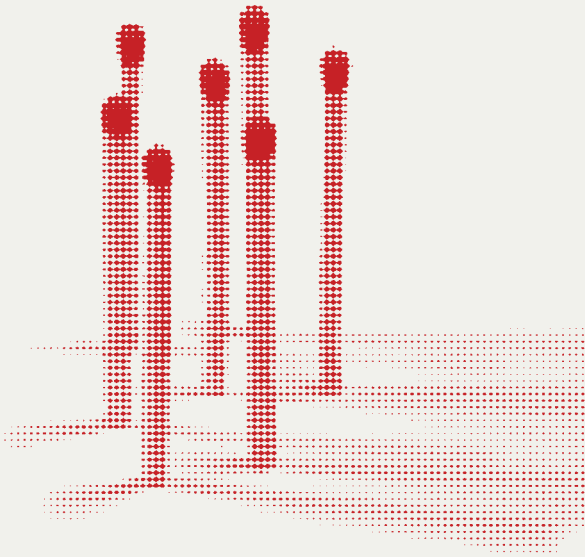
The House of Representatives Standing Committee on Education and Employment conducted an inquiry into workplace bullying in 2012. The Committee received a large number of submissions – 278 – many of which were from individuals who had suffered bullying behaviour in the workplace. At the time of writing, the Committee has not yet released its report. Its terms of reference were wide-ranging, examining the prevalence of workplace bullying as well as considering regulatory and other strategies for dealing with the problem.

AIER and Harmers Workplace Lawyers were among many organisations that also made submissions to the Committee. The Harmers submission pointed to the inadequacy of existing legislation to protect workers from bullying and the lack of any meaningful protections under civil law that could effectively deter would-be bullies.

Michael Harmer addressed the Committee directly in public hearings in Brisbane, to speak to Harmers' written submissions:

"First, …bullying is an issue for the entire Australian community. It is a cultural problem that we face as a country. It is prevalent in our schools, in our clubs and in people in Australia from a very young age. Treatment of it in the workplace has to start at education in schools, in families and at various levels beyond perhaps what this committee will deal with. I commend to the Committee the work of the Australian Institute of Employment Rights, which, through the WorkRight program, has coordinated integration into the school syllabus of education on workplace rights and bullying.

Second, in Australia we have a problem with our business culture. Australian business leadership fails in international surveys to reach important benchmark standards on the treatment of people; and that, in turn, leads to workplace cultures that are conducive to bullying. That is an area that we need to help all Australian management with, and I am one of them. We certainly need, in my view, a system of accreditation of Australian business to genuine standards, because our management are highly educated – they know what to do, but they just do not achieve it. It is that gap between knowing and doing that needs to be bridged if we are going to have any real sort of turnaround of this problem in the country."



"in Australia we have a problem with our business culture. Australian business leadership fails in international surveys to reach important benchmark standards on the treatment of people; and that, in turn, leads to workplace cultures that are conducive to bullying."

The Harmers submission drew attention to the lack of a clear and effective legislative remedy to complaints of bullying, and said that in order to provide a meaningful deterrent in the workplace, the solution must have three key elements:

- a stand-alone legislative prohibition on workplace bullying
- real penalties to discourage the conduct
- efficient and timely access to a court/tribunal to enforce penalties for such conduct.

The submission supported the extension of Brodie's law nationally and proposed an effective dispute resolution system for dealing with allegations of harassment and bullying, beginning with Fair Work Australia but leading on to action in federal courts if matters could not be resolved.

Interviewed by Heather Eward on ABC-TV's *7.30* program on 25 September 2012, Michael Harmer emphasised the need for specific laws:

Heather Ewart: *Many Australians assume there are specific national laws to address bullying. That's not the case. And it's part of the problem.*

Michael Harmer: *The laws definitely need to be changed, rather than having to limbo dance to try to fit it into either discrimination or industrial or trade practices or safety. There needs to be a single, simple law addressing bullying across the country.*

The AIER submission dealt with bullying in the context of the Charter and the Standard and general calls for improved workplace culture in Australia as a means of tackling a range of workplace health and safety and related issues. AIER has renewed its call for a National Centre for Workplace Citizenship to, amongst other things, administer a National Accreditation System designed to foster improvement in workplace culture in all workplaces, large and small.

A National Centre for Workplace Citizenship should be guided by the following objectives:

- improving the quality of working lives of individual Australians
- creating conditions for business success
- enhancing social cohesion via the promotion of respectful workplaces and workplace partnerships
- educating the Australian public about fair work practices.

In addition, strategies for the education and protection of young workers, in particular, need to be implemented urgently. The AIER submission said that education for young people entering the workforce for the first time is critical. Young people need to be educated about their rights and entitlement to a safe and secure workplace free of bullying and other harassment. They also need to know their rights and means of recourse if they do encounter inappropriate behaviour in the workplace.

AIER has developed WorkRight – educational resources to assist schools to teach young people about these key issues and to prepare them for entry into the workplace. Many reported bullying incidents involve young workers.

The House of Representatives Committee is due to report to the government at the end of November. Workplace Relations Minister Bill Shorten is on the record expressing his concern about workplace bullying, but resolving the issue successfully will require cooperative efforts involving, federal, state and territory governments, given the dispersal of regulatory powers in occupational health and safety, workers compensation, discrimination and industrial relations.

Michael Harmer, AIER President and Keith Harvey, Research Officer, AIER

Using the AIER Charter in a tertiary education context

The AIER Charter and Standard of Employment Rights are documents designed for practical use and implementation both in enterprises and in the education of students in their rights and responsibilities in the workplace. In this article, Marjorie Jerrard looks at the use of the Charter in a university setting. Marjorie is a Senior Lecturer in the Department of Management, Monash University. Marjorie Jerrard holds a PhD from Monash University, a Master of Arts (Ancient History) from the University of Queensland and a Graduate Diploma in Industrial Relations from the Queensland University of Technology.

A 1991 survey by the South Australian Trades and Labour Council found that almost half of their 528 working student respondents did not know how to check whether they were receiving the correct amount of pay. Furthermore, nearly one third were not aware that employers are not allowed to discriminate based on gender, and 60 per cent did not understand the purpose of unions. These South Australian findings were also reflected in the 2001 findings by the Victorian State Government "that many young people [were] unable to find out their basic rights in the workplace…particularly in relation to wages, conditions, health and safety issues, and indeed, more sophisticated matters as to how to resolve conflict in the workplace". Former Victorian Minister for Industrial Relations, Monica Gould, also reported that "young people entering the workforce for the first time, need to be informed of their rights" because "young people are one of the most disadvantaged groups in the community in regard to their access to information and advice about the workplace".[1]

Given these startling figures a decade apart, it seems that undergraduate tertiary students studying employment-relations-related subjects would benefit by the inclusion of the Australian Charter of Employment Rights in the curriculum, as it combines rights protected by laws with rights that derive from ethical behaviours. Australia has historically relied upon state and federal legislation and upon industrial awards and enterprise agreements to protect employees' rights; a somewhat precarious situation should governments at either level choose to remove legislative protections as the Liberal–National Coalition Government did with the passing of the *Workplace Relations Amendment Act (WorkChoices) 2005*, stripping back employee entitlements to five minimum conditions and the minimum wage. This demonstrated the need to uphold rights by other methods.

Consequently, in 2008, the Charter was included in a second-year undergraduate unit with the purpose of introducing students, domestic and international, to both legal rights and rights based on ethical behaviour at Australian workplaces. Approximately 140 students complete the subject each year and come from a range of disciplines within Management and also across the Faculty of Business and Economics; but the majority is intending to pursue a career in human resource management. They have varying degrees of employment experience, but the majority has worked in some form of casual employment in Australia – most in retail, hospitality, or other forms of small business, the majority non-unionised or lowly unionised workplaces. Tertiary students are often forced into paid employment because of the high cost of living, the need to pay university fees, the need for work experience upon graduation, and also the need for discretionary income.

Further, reflecting characteristics supposedly common to Generation Y (those born between 1982 and 2000) there is a focus on completing education combined with rising occupational aspirations, an individualistic view of the employment relationship, the desire to 'work to live', an affinity with technology, and a preparedness to change jobs regularly rather than access complaints processes about work-related issues. These characteristics make it essential that students learn about employment rights, not just as they are casual

“Consequently, being treated with dignity at work can be seen to be a centrepiece of the Charter. It is also a right that is transferable beyond Australia, as are the majority of the legally-underpinned rights, in the view of the students.”

employees, but as many will move into management positions in the future and need to be aware of the rights of both their employees and their employees’ representatives, trade unions, should they be present in the workplace.

Introducing the Charter to students

The Charter has a combination of rights for employees, employers and trade unions. It offers a voluntary framework of rights that derives both from legal origins in the case of rights such as

- freedom from discrimination and harassment
- a safe and healthy workplace
- protection from unfair dismissal
- fair minimum standards
- fairness and balance in bargaining
- effective dispute resolution
- union membership and representation
- workplace democracy;
- and ethical origins in the case of the rights to
- good faith performance
- work with dignity.

The voluntary nature of the Charter makes it appealing to students, who regard it as an indicator of employer and management commitment to employees; thus making the raising of rights-related breaches less threatening for the employee as it can be done directly with supervisors, managers, or the employer.

During the activities on the utilisation of the Charter, students are challenged to consider which rights may be the most important in an Australian workplace. They are also asked to consider which rights will transfer readily to workplaces in other countries. The initial student consensus has been that the rights already underpinned by law are those that should be prioritised, as these are the rights that managers and employers must provide. Students do not necessarily recognise that to have these rights enforced, employees must activate a complaints or grievance procedure.

The right to be treated with dignity

The exception to the importance of legal rights is that of union membership and representation, which reflects the propensity of Generation Y employees to focus on an individual employment relationship and not to join unions. It is only after consideration of what the legal and ethical rights entail that an emphasis on work with dignity comes to the fore for some students. Part of this is that there is no complaints procedure associated with breaches of this right that employees must activate.

These students also recognise that if employees are not treated as a commodity and are accorded respect at work, then the other rights will automatically follow as part of the culture at the workplace, irrespective of the requirement for legal compliance or the lack of constitutional protection of both human and employment rights in Australia. Consequently, being treated with dignity at work can be seen to be a centrepiece of the Charter. It is also a right that is transferable beyond Australia, as are the majority of the legally-underpinned rights, in the view of the students.

Workplace democracy and international transferability

In contrast, the right to workplace democracy – which can be regarded as the right of employees to participate in decision-making that affects their work; and the right to be consulted about workplace change, usually achieved via consultation on change clauses in enterprise agreements, but also through non-binding means such as employee voice mechanisms – is regarded as non-transferable to other countries but important in Australia. The main reasons provided by the students for this lack of transferability are cultural reasons surrounding large power distances between employees and managers in non-egalitarian societies; and also the individual management styles that derive from the influences of living in these societies. The main reasons given for the importance of workplace democracy in Australia are that employees – that is, Generation Y – are better educated and more able to voice an informed opinion on change, and that Australia is more egalitarian, with a philosophy of ‘a fair go all round’ still present.

The Charter as a tool for positive relationships

The consensus of students who complete the activities around the Charter is that it is indeed a useful instrument in workplaces because it can be used to build positive relationships, which Generation Y employees value. The Charter can therefore be used by human resource management professionals as a strategy for retaining Generation Y employees, thus reducing turnover costs; and as a means of recognising their contributions at the workplace. Finally, it does not require action to activate formal complaints processes, but encourages direct communication between managers and employees.

Endnotes

1 Gould, Monica, 2001. Media Release from the Minister for Industrial Relations, ‘Young People Need Information and Advice’, 5 February, no page number.

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