The Australian HR Institute

Submission to the Australian Government's Industrial Relations Reforms 2020

August 2020

Contact:
Sarah McCann-Bartlett
CEO, Australian HR Institute
sarah.mccann-bartlett@ahri.com.au

About AHRI:

The Australian HR Institute (AHRI) is the professional body for Human Resources in Australia, with approximately 20,000 members from Australia and across the globe.

AHRI sets industry standards for HR practice through both the AHRI Practising Certification program and industry accreditation of HR qualifications at Australian universities.

Professional membership with AHRI ensures that HR practitioners:

- Adhere to a robust professional code of conduct that is supported by governance requirements and disciplinary procedures
- Are effectively supported in their continuing professional development to ensure currency of skills and knowledge is maintained.

AHRI provides a wide range of learning and development opportunities in HR, people management and business skills. AHRI's globally benchmarked Model of Excellence underpins all AHRI's professional development products, events and programs.

AHRI conducts independent research and liaises with both Australian and international partners on matters of interest to Australian employees and workplaces.

AHRI Industrial Relations Working Group:

This submission was prepared on behalf of AHRI by an Industrial Relations Working Group consisting of AHRI members, specialist advisors and employees:

Lisa Mannering	Employment Lawyer & HR Consultant	Langtree Legal Pty Ltd
Leisa Messer	Managing Director	HR Business Direction
Natalie Morris	Director, People and Performance	SA Department for Innovation and Skills
Colleen McAleese	Human Resources Relationship Manager	University of Queensland
Briarna Hughes	HR Senior Manager	Huon Aquaculture
Sarah McCann-Bartlett	CEO	Australian HR Institute
Elaina Pittas	Manager, Marketing & Communications	Australian HR Institute
Nick Ruskin	Partner	K&L Gates
Susan Sadler	Director	Red Wagon Workplace Solutions Pty Ltd AHRI State President, South Australia
Gerry Treuren	Senior Lecturer	University of South Australia
Donna Young	Lead – Employee Relations	Accenture (Australia and New Zealand)

Submission scope:

This submission focuses on three of the government's Industrial Relations (IR) working groups:

- Award simplification
- Casuals and fixed term employees
- Compliance and enforcement

This reflects the areas that affect AHRI's members and where they can make a significant difference to Australian businesses and their employees. HR practitioners are largely responsible for the interpretation, compliance and practical application of awards, as well as related advisory roles to senior decision makers within their businesses. In addition, the employment processes for casual and fixed term employees are managed and evaluated by HR practitioners.

Recommendations:

AHRI has made a number of recommendations in this submission. They include the following:

- **Change in relationship between Fair Work Ombudsman and employers:** AHRI believes the Ombudsman should provide more guidance to employers under its education compliance programs. Additionally, it should approach self-reporting by employers less aggressively and require less of employers that do so if the non-compliance arises from mistake or inadvertence compared to deliberate underpayment. This could encourage self-reporting.
- **Regular auditing and reporting of payment processes and outcomes:** While AHRI recommends that employers be required to undertake regular auditing and reporting of payment processes and outcomes, incorporating this process into the annual financial audit and creating a routine in a businesses' annual governance cycle, care to not make the reporting requirement too onerous will need to be taken.
- **Creating a simpler awards system:** AHRI has provided suggestions such as altering the awards system so that there is consistency between like clauses. This would involve creating a simpler awards system by including all the definitions and core terms and conditions in one base award, and supplementing the base award through specialist awards.
- **Greater clarity in which award applies:** A clear delineation between awards and classifications to provide clarity to employers. Suggestions include allowing for self-selection, with a business declaring that as a majority of its employees are covered by a particular award, therefore all its award covered employees are covered by that award; or assigning a company an award when registered, based on business type.
- **Greater flexibility allowed in Individual Flexibility Arrangements:** To allow for greater variation in awards when there is agreement between employer and employee.
- **Reduce the scope of casual employment and introduce a new type of casual category:** This recommendation would involve restricting casual employment to fixed term, non-ongoing roles, with employers limited in how long they can employ casuals, with casual contracts ending after 6 or 12 months or being converted to a casual employment category that provides for the payment of annual and personal leave (and public holiday pay) with a reduced casual loading. Correspondingly, the definition of part-time employment should be loosened to allow for greater flexibility in employee's working hours.

The unique position of HR practitioners:

AHRI does not speak for employers or employees – its members have a responsibility to serve both groups fairly and objectively. It is this unique position that provides HR practitioners with a valuable perspective to be able to meaningfully contribute to the changes to the Australian industrial relations system - they see the daily application from both sides of the debate.

AHRI's members are employed by large and small organisations, from international conglomerates to local SMEs, NGOs and public sector, from capital cities to regional and remote locations.

It is now universally understood that better business outcomes are reliant on employers looking after their employees and that doing so creates a virtuous cycle that delivers effectively functioning workplaces, creating positive outcomes for businesses, the workforce and the wider community.

Organisational culture plays a significant role in this, and commitment to ethics and compliance is central to a healthy culture – as we have seen play out in the Royal Commission into the Banking and Financial Services industries.

AHRI members are usually those within organisations making the IR decisions, and advising on culture either within the IR context or separate to it. AHRI members are responsible for the implementation of the regulatory framework and have a clear view of what works in practice, and where the practical issues and tensions arise, including blind spots and misunderstandings. AHRI members may also be advising organisations from outside, as specialist consultants.

HR practitioners are also increasingly being held personally liable for their organisation's (and their own) compliance with the legislative obligations. Therefore, the role of the HR practitioner is being extended to educate and influence management, provide informed direction, and actively partner with the organisation to ensure compliance with the IR system.

Given the role of HR practitioners across Australian organisations, increasing their knowledge of the IR framework provides a unique opportunity to improve the quality of IR planning and implementation for the benefit of employers and employees.

Overarching issues:

There are a number of overarching factors that lead to confusion about, and poor implementation of, the current IR framework.

Clarity:

IR rules are far too open to different interpretations or even misinterpretation. There is a range of unexpected complexities that arise from the operation of the IR system in practice, even for those who are diligent and well-meaning. However, there is no straightforward way to get certain advice on correct interpretation, but there are substantial penalties for getting it wrong. It is only recently that the Fair Work Ombudsman's strategic position has shifted, and with that change, came the provision of clearer and more definitive information on interpretation of the *Fair Work Act 2009* (Cth). It remains to be seen to what extent this advice can be relied on.

It is AHRI's position that clearer and bolder examples should be provided within the legislation, industrial instruments and supporting documents to assist with interpretation, decrease ambiguity, and mitigate against inadvertent misinterpretation.

From an organisational viewpoint, the IR framework doesn't lend itself to practical interpretation and implementation. For example:

- One large retailer had an employee who worked at their petrol station three afternoons a week covered by the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*. When this employee worked at the same retailer's bakery two days a week, they were covered by the *General Retail Industry Award 2010*;
- Most awards, such as the *Social Community, Home Care and Disability Services Industry Award 2010*, provide that where an employee may be covered by more than one award, the employer must apply the most appropriate classification to the work performed and the environment in which the employee normally works, both of which are open to interpretation. If it is wrong, a penalty of up to $66,600 can be imposed;
- The types of positions covered under an award can vary depending on the award. A CEO-level role has traditionally not been award-covered, yet is likely covered under the *Social, Community, Home Care and Disability Services Industry Award 2010*;
- The use of the *Miscellaneous Award 2020*, despite recent attempts at clarification, remains ambiguous;
- It is difficult to determine a classification under an award such as the *Clerks – Private Sector Award 2020* where the criteria between classifications are nebulous and loose. This can be shown in the table below that compares some of the classification descriptors for Levels 4 and 5.

Clerks – Private Sector Award 2020	
Level 4	***Level 5***
Employees at this level require only limited guidance or direction and would normally report to more senior staff as required.	Employees at this level are subject to broad guidance or direction and would report to more senior staff as required.
Employees at this level will have achieved a level of organisation or industry specific knowledge sufficient for them to give advice or information to the organisation and clients in relation to specific areas of their responsibility.	Employees at this level will typically have worked or studied in a relevant field and will have achieved a standard of relevant or specialist knowledge and experience sufficient to enable them to advise on a range of activities and features and contribute, as required, to the determination of objectives, with the relevant field or fields of their expertise.

Level 4	***Level 5***
A principal feature, but not a requirement, of this level is supervision of employees in lower levels in terms of responsibility for the allocation of duties, co-ordination of work flow, checking of progress, quality of work and resolving problems.	Employees at this level are responsible for their own work and may have delegated responsibility for the work under their control or supervision including scheduling workloads, resolving operations problems, monitoring the quality of work produced and counselling staff for performance and work related matters
Employees at this level exercise initiative, discretion and judgment at times in performing their duties.	Employees at this level would often exercise initiative, discretion and judgment in the performance of their duties.
Employees at this level are able to train employees in Levels 1-3 by personal instruction and demonstration.	Employees at this level would also be able to: • train and supervise employees in lower levels by means of personal instruction and demonstration; and • assist in the delivery of training courses.

Education:

Australian workplaces often have an insufficient understanding of the IR framework to ensure compliance. There are several reasons for this:

- While employment law and industrial relations are often included in university HR study programs, these units tend to provide a general overview of the IR framework;
- The majority of HR practitioners are generalists, not specialists;
- Generalist HR practitioners are not required to specialise to be responsible for the day-to-day implementation of functions such as payroll and awards application. This responsibility used to be vested in traditional IR specialists;
- It is commonplace in Australia for HR practitioners to gain years of experience across several businesses without exposure to a sophisticated IR or Employee Relations (ER) unit – many businesses (home grown and international) do not understand the need for these specialisations, and so the lack of IR/ER expertise perpetuates;
- Those tasked with HR responsibilities in SMEs are usually multi-tasking HR duties with a variety of other office administration/management duties, and do not have the time, resources or support to invest in specific IR training or education.

Many businesses operating in Australia are part of global organisations with an international head office. These businesses' HR strategies are often set globally, and the complexity and nuances of the Australian IR landscape are not considered a priority. Notwithstanding this, it is AHRI's understanding that recent media attention on Australia-based corporates has resulted in a number of large organisations taking heed of the reputational and related market risks associated with IR compliance failures.

Conversely, data from the Australian Bureau of Statistics (ABS) (*8165.0 – Counts of Australian Businesses, including Entries and Exits, June 2015 to June 2019*) shows that for the 2018-19 year, almost 70% of employing businesses had 1-4 employees. This means nearly three-quarters of Australian businesses are considered small businesses for the purposes of the Fair Work system, yet are required to uphold compliance to the same level and with the same potential penalties as the multinational corporations discussed above.

In Australia, the interpretation of awards can be done by anybody, whether that is a union representative, an HR practitioner, a business owner/operator or an office allrounder. In all cases, there is no minimum level of training required or expected. While it is generally accepted that lawyers interpret legislation, it is generally the role of HR (in whatever form that takes in the business) which takes on the responsibility of interpreting the next level down, such as modern awards and enterprise agreements. However, the consequences of mistakes can be substantial, and include:

(i) Fines on the organisation;
(ii) Fines on individuals within the organisation, under the accessorial liability provisions in the *Fair Work Act*;
(iii) Reputational damage to the organisation.

These consequences may be experienced even if the organisation makes a genuine mistake in interpreting the interaction of different industrial instruments (such as an award and workplace agreement) or identifying the correct industrial instrument or terms within an instrument.

Notably, the Fair Work Commission and the Fair Work Ombudsman have released a number of helpful resources for businesses related to compliance with the *Fair Work Act*. However, there are few aides related directly to award compliance and interpretation. However, while the FWO can punish mistakes, there appears to be no way for practitioners to obtain the advice or guidance from the FWC on correct interpretation. Larger businesses spend significant sums on legal advice related to award application – the most recent example being the introduction of new annualised salary obligations. Smaller businesses do not have this ability, yet as noted above, often face the same level of complexity.

Trust:

HR practitioners are looking to balance the socio-economic benefits for employees with the business imperative. At the moment, the system is based on distrust on both sides whereas the system needs to be based on trust. In well-functioning organisations, a culture of trust exists between leaders and employees, and the IR system should reflect this. One strategy to address this could be to counter the negative press on award compliance and underpayments to give positive publicity to organisations who have sophisticated compliance procedures in place.

One example that could help to improve trust is a system similar to that within Queensland's Workplace Health and Safety Regime, the Injury Prevention and Management Program (IPaM). IPaM works with employers (self-nominated or referred through WorkCover) to prevent and manage the outcomes of workplace injuries, to review safety processes and

procedures, understand legislative responsibilities as an employer and prioritise safety and return to work issues specific to a workplace. It assists employers in avoiding further prosecution and enforcement matters. Some other states have similar systems.

AHRI consider tools such as IPaM powerful and underutilised services which allow for engagement between employers and Workplace Health and Safety officers, allowing employers to engage and gather relevant information on complying with their obligations without the threat of enforcement or strict timelines.

AHRI would see the benefit of such a service to be delivered through the education arm of the FWO, and suggests it could be of benefit to both small and large businesses to assist with ensuring compliance.

Working Group: Award Simplification

HR practitioners understand that they must comply with the law but because of the complexity of the modern award system many find it difficult. However, the concept of award simplification is also not simple, and can be approached in a number of ways.

The question of flexibility also arises when the simplification of awards is discussed, although that is also difficult to define. Some may see it as the ability to do whatever you want to do when you want to do it. AHRI does not favour this approach.

Simplification:

The Fair Work Commission (through its predecessor Fair Work Australia) reduced the number of awards from about 1,560 state and federal awards to 122 modern awards in 2008-2009. This was a major achievement and should have eased the confusion and uncertainty about award coverage.

However, at the commencement of the *Fair Work Act 2009* (Cth), it was also intended that in order for the Act's objective '*to create a simple, easy to understand and sustainable award system*' to be met, the Fair Work Commission would undertake a review of all modern awards each four years. Ultimately, a Productivity Commission report concluded that this legislative obligation should be repealed due to the '*4 yearly review mechanism [being] too resource intensive for both the FWC as well as the employer and employee organisations taking part in the review*'. This is indicative of the cumbersome and complex nature that still exists within the modern award system.

Irrespective of the reduced number of modern awards, the uncertainty has not been removed, especially in an era where employers, as they should be, are under the spotlight to accurately meet each of the terms and conditions of applicable modern awards.

A more radical thought is to completely alter the awards system so that there is consistency between like clauses, less overlap between awards and simpler award classifications. This could be achieved by aligning the awards and considering the awards system as a whole, as discussed further below.

According to ABS and HILDA data, only 26% of employees are employed under an award. However, despite the awards system not currently covering a majority of the working population, a great deal of time and resources is spent on the awards system.

The reason for this circumstance is unclear. One possibility is employers simply not being aware of how many of their employees are actually award covered. This could stem from a number of reasons including misunderstandings related to contract coverage, industry type, work type, salary ranges, rapid increases to headcount, no in-house IR expertise, misleading award titles, or ignorance on the part of senior management, and as previously outlined, points to the complexity of the modern award system.

Aligning the awards:

The Fair Work Commission is now producing 'simplified awards'; however, these share features with their predecessors that will likely cause similar complexity. If the Commission is struggling to simplify the modern awards, it raises the question of whether the simplification processes should be looked at differently.

As a start, reaching businesses of all sizes about their compliance obligations is critical – and educating businesses on the "why's" as well as the "how's" would, in AHRI's experience, yield greater results.

Further, AHRI members have emphasised that it is often the high level of variation between awards that causes confusion, difficulty and errors.

For example, there is no reason why one company should have to adhere to three different rules for a first aid allowance in their payroll system just because they have employees covered by three different awards. This is particularly pertinent when the payment is much the same in each of the three awards.

One way of achieving greater simplicity in the awards system is by considering it as a whole, rather than only looking at each individual award.

For example, at the moment, under the *Vehicle Repair, Services and Retail Award 2020*, a junior below the age of 18 is not permitted to work unsupervised evening shifts and must not be employed between the hours of 9:00pm and 6:30am. However, under the *Hospitality Industry (General) Award 2020*, there are no restrictions for juniors on times of day or night that can be worked. Further, both awards at different points employ a different definition of the term 'junior', adding further complexity for employers.

The issues with this situation include:

- It incentivises employers to pick and choose which award they employ staff under, where a workplace could fall under more than one award and one award allows for a more convenient employment situation for the employer;
- Employers making an error;
- The risk of underpayment for the employee.

Creating a simpler awards system could be achieved by placing all the definitions and core terms and conditions in one base award. This would include making basic benefits such as allowances and overtime common. At the same time, the information could be reordered to make it logical and easy to find. Supplementing the base award could then be done through specialist awards which identify specific terms that are different, bolting on top of the core document. It would then be easier for enterprise agreements to align with this system or 'ecosystem'. Given the national tribunal was able to reduce down awards from 2,700 to 122 in 2008-2009 this is not such a mammoth undertaking.

The benefits of driving simplification through an aligned awards ecosystem include:

- Removing complexity;
- Eliminating minor differences in basic benefits;
- Getting rid of duplication;
- Making the information easy to find and understand;
- Enabling employers to pay a standardised rate of overtime;
- Modernising to reflect contemporary and future ways of working – such as remote working, normalisation of extended business operating hours, mutually agreed flexible hours, global working in light of Australia's time zone, and internationally recognised qualifications and professional bodies;
- An ability for employers to use simple, affordable and compliant payroll software;

- Decreasing the likelihood of underpayments arising;
- Decreasing disputes at the workplace level regarding basic terms and conditions of employment and disparity between staff;
- Driving greater flexibility for employers and employees through the potential for easier negotiation of individual flexibility agreements.

Classification:

Several award titles and classifications are outdated, vague and lead to uncertainty about which grade applies. A problem with the award titles and classifications is that they will always be out of date. This is because they fail to take into account changes such as globalisation, changes to education, the make-up of the current and future workforce, and future jobs and roles that do not yet exist.

An example of problems with titles and classifications include: the title of the *Clerks - Private Sector Award 2020* is outdated, and the *Professional Employees Award 2020* covers IT employees with a specific type of degree. These classification misnomers may make employers think a particular award is not relevant to them and they may then try to shoehorn an employee into the wrong classification or award, or assume they are award free.

It is often unclear when award coverage ceases to apply based on the seniority of a position. For example, the highest level in the *Clerks - Private Sector Award 2020* states:

> *Characteristics*
>
> *(a) Employees at this level are subject to broad guidance or direction and would report to more senior staff as required.*
>
> *(b) Employees at this level will typically have worked or studied in a relevant field and will have achieved a standard of relevant or specialist knowledge and experience sufficient to enable them to advise on a range of activities and features and contribute, as required, to the determination of objectives, with the relevant field or fields of their expertise.*
>
> *(c) Employees at this level are responsible for their own work and may have delegated responsibility for the work under their control or supervision including scheduling workloads, resolving operations problems, monitoring the quality of work produced and counselling staff for performance and work related matters:*
>
> *(d) Employees at this level would also be able to:*
>
> *(i) train and supervise employees in lower levels by means of personal instruction and demonstration; and*
>
> *(ii) assist in the delivery of training courses.*
>
> *(e) Employees at this level would often exercise initiative, discretion and judgment in the performance of their duties.*
>
> *(f) Employees at this level may possess relevant post-secondary qualifications. However, this is not essential.*

It is very difficult to reasonably delineate between an award and non-award covered person such that any error is a breach of the *Fair Work Act*; an example of this is where overtime is not provided because the employer thought the employee was not covered and therefore used an annual salary clause in the contract.

Awards are further open to misinterpretation based on ambiguity and lack of specificity. For example, the *Professional Employees Award 2020* states that:

Employers must compensate for:
(a) time worked regularly in excess of ordinary hours of duty;
(b) time worked on-call-backs;
(c) time spent standing by in readiness for a call-back;
(d) time spent carrying out professional engineering duties or professional scientific/information technology duties outside of the ordinary hours over the telephone or via remote access arrangements; or
(e) time worked on afternoon, night or weekend shifts.
13.4 Compensation may include:
(a) granting special additional leave;
(b) granting special additional remuneration;
(c) taking the factors in clause 13.3 into account in the fixation of annual remuneration; or
(d) granting a special allowance or loading.
13.5 Where relevant, compensation in clause 13.4 must include consideration of the penalty rate or equivalent and conditions applicable from time to time to the majority of employees employed in a particular establishment in which the employee is employed.
13.6 The compensation in clause 13.4 must be reviewed annually to ensure that it is set at an appropriate level having regard to the factors listed in clause 13.

One employer's definition of 'appropriate level' in clause 13.6 may not be equivalent to that of a different employer.

In order to simplify and clarify the classifications, they should:

- be written in plain English;
- only include clear and modern job roles and classifications;
- provide a clear cut off between classifications and where the award ceases to apply;
- introduce a registration mechanism so that an employer can seek approval and when approved by the Registrar there can be no adverse consequences including no back pay or penalty.

Flexibility in the awards system:

When referring to flexibility, many people mean the ability for employers and employees to agree on reasonable variations to the awards.

An example of this occurred during the Covid-19 pandemic when the *Clerks - Private Sector Award 2020* was varied to allow employees to work outside core hours and work from home.

Other examples of flexibility that may support employers and employees include:

- Waiving overtime so employees can pick up their children and then complete their working day later without the complex individual flexibility arrangements provision;
- Paying out leave if an employee is in a difficult situation;
- Changing part-time provisions for a week due to personal circumstances or employer need with ease without having to effectively alter the hours or days on a permanent basis;
- Updating awards to make provision for flexible arrangements around working from home;

- Allowing a different arrangement with individual employees without the complex individual flexibility arrangements provision.

In addition, it is felt that the recent annual salary provisions decision of the Commission is highly complex, rigid and challenging to administer, even for our members in large, sophisticated organisations, some of whom have taken on additional headcount for this purpose.

Under the individual flexibility arrangement provisions in awards, there is currently uncertainty about whether a variation will leave an employee better off. For example, would a variation such as temporarily provided in the *Clerks - Private Sector Award 2020* meet the requirements for an IFA? In the *WorkPac v Rossato*[1] decision, in looking at annual leave, the Court considered that payment in lieu of annual leave was not the same as the right to take annual leave. Therefore, in a situation where an employee agrees to work in the evening at ordinary-time rates to meet their family circumstances, is the employee better off? If not, then the employer will be in breach for failing to provide overtime rates. This is too restrictive an approach, particularly with a civil penalty for body corporates of up to $66,600 being a consequence of this decision being made incorrectly. Our recommendation is that the award system allow for greater flexibility.

Practical suggestions for business:

While a simpler and more flexible awards system in itself will not drive job creation, it will help employers, in particular SMEs, better understand how to employ someone, making it less onerous and reducing some of the barriers to growth.

This section considers a number of ideas about how to make the awards system more practical for businesses.

Application of awards:

One issue that businesses often face is that the applicable award covers their industry, but another award covers some of the occupations within their company. An example of this is the *Clerks - Private Sector Award 2020* and Industry awards. It is not the terms and conditions of the awards that is the real issue of award compliance, but rather clarity; a good employer wants to know which one award or classification will apply.

Another issue is that for larger organisations, new industry businesses, and globals, the awards system does not align with their classifications, ways of working, growth plans, or administrative set-ups, particularly if centralised from overseas headquarters. To encourage more organisations to base themselves in Australia, more fluid employee enablement is required. This means recognising the need for the awards system to catch-up to contemporary and future ways of working.

Given the overlap between awards, coverage clauses under awards should be much clearer. There should be a clear delineation between awards and classifications to provide clarity to employers.

Another simple solution could be self-selection, with a business declaring that a particular award covers the majority of its employees, and therefore everyone is covered by that award. That business would then be required to make a periodic declaration that this still applies. The Commission could then implement a random checking process or create a process to approve the declaration. The Commission proposed a few years ago that a single

[1] [2020] FCAFC 84

award, bar classifications, would apply to all award covered staff using the award that covered the majority of the staff. This was not supported by the employer associations or unions.

An even simpler solution could be when a company is registered, it is assigned an award based on the business type. This would create certainty and reduce complexity, in particular for SMEs.

Advice and determinations:

Businesses need to be reached, and then educated on how to achieve clarity around employment terms and conditions, and how to comply with them. Authoritative advice in writing from the Commission that employers can rely on would improve compliance. This is particularly important as the regulator, the public and the media place a greater focus on enforcement.

Payroll and underpayment:

The most basic part of most HR practitioners' roles is making sure that employees are paid properly. This issue is particularly pertinent given the systemic issue of underpayment over recent years. There are a wide range of reasons that underpayment occurs, including a lack of understanding, misinterpretation of award coverage, a lack of compliant payroll software packages, inadequate attention to the measures that should have been taken to make sure employees were paid properly and deliberate non-compliance. Some have said that if payroll had the priority of tax or workplace health and safety, then organisations would focus more of their attention on it.

Linking back to the issue of award simplification, the effect of award complexity has direct ramifications for payroll. Mandatory reconciliations are complex enough that businesses need another person to do them, which may be unaffordable. Therefore, many organisations take 'a set and forget mentality' to payroll rather than checking their systems on a regular cycle. In addition, some HR practitioners assume that the financial audit reviews the details of individual employees' pay, which may be incorrect.

Given the importance of ensuring employees are paid properly, the fact that the ill-defined "wage theft" legislation in Victoria, and now Queensland, is being implemented on a state-by-state basis is puzzling. This legislation should be implemented on a federal basis to ensure consistency and include regular auditing provisions, such as in the Victorian legislation. This is particularly pertinent to the significant proportion of employers who employ teams in multiple Australian states and territories. Adding yet another layer of mis-matched complexity would most likely perpetuate the problem, rather than solve it.

Training:

Currently, there is no minimum level of training required for those who administer awards. This has generally led to basic or low levels of IR literacy and understanding of awards in organisations.

While employment law and industrial relations are often included in university HR study programs, these units tend to provide a general overview of the IR framework.

In larger organisations, IR is seen as a specialisation, however in smaller organisations it is the role of the HR generalists. This leads to the conclusion that IR should be seen as a core HR skill for all HR generalists, and proper training required.

HR practitioners can experience tension between compliance obligations and employee experience programs (or even individual employee requests). There is a balance between the two, and a practical solution of 'meeting in the middle' is often not permitted because it would be contrary to strict award requirements; awards should have the flexibility to allow this, consistent with the value that flexibility now has to employees. Currently, in trying to achieve the best outcome for employees, organisations can put themselves at risk. HR practitioners should be provided with a proper governance and regulatory structure to mitigate this risk and manage tension between compliance obligations and employee experience.

Working Group: Casuals and Fixed Term Employment

AHRI has chosen to look at the issue of casual work through the lens of what employers and employees want out of the basic employment relationship.

The demand for casual workers is variable across industries. For example, in hospitality the requirement is seasonal, and some corporate projects are time-bound. However, casual work is traditionally perceived as being for seasonal, fixed-term, non-ongoing roles.

While it goes without saying that employees want to be paid a fair wage for their labour, they also want, or indeed need, stability in employment. This stability allows them access to finance, housing and other services that they would not be able to access if they were in casual work, which is seen as unstable by banks and other financial institutions. However, this instability and higher level of employment risk is often offset by the casual loading, which may be why so many casuals do not request to convert to permanent employment after working as a casual for a year.

On the other hand, employers are often looking for flexibility in employment in order to reduce their employment risk. As their business needs change, they want to be able to easily flex their workforce to meet these needs. From their perspective the casual loading may be the price they are willing to pay for that flexibility.

Maximum term contracts are also often seen as a more flexible option for employers who may not have the budget for an ongoing role, or who may not know whether a role will be required in the same form in the future.

Looking at this balance between employees needing stability in employment and employers wanting a flexible workforce, there is a question as to why part-time work cannot provide this flexibility. Currently, if an employer decreases their reliance on casual employees then they cannot shift to part-time staff and maintain their workforce flexibility because of the restrictive provisions in most modern awards. If there was more flexibility for employers to change part-time hours, it is likely that Australia would have fewer casual employees and fewer fixed-term contracts.

AHRI views the best option to balance stability for employees and flexibility for employers is to:

1. Retain casuals as an employment category in the traditional sense
2. Build greater flexibility into part-time employment
3. Reduce the loading for casuals but pay sick and annual leave

Casual employment should be restricted to fixed-term, non-ongoing roles. Employers should be limited in how long they can employ casuals, with casual contracts ending after 6 or 12 months or being converted to a new category of casual that provides for annual and personal leave (and public holiday pay) but with a reduced loading.

Award provisions governing part-time employment should be loosened. For example, at present, employers cannot change part-time employees' hours except by mutual agreement.

An example of how to make part-time employment more flexible would be:

- an employer could employ a worker for 10 hours a week with the span of hours being 9am to 5pm Monday to Friday;
- a roster could be provided 4 weeks in advance;

- the employee would accrue entitlements;
- no loading in lieu of annual and personal leave would be paid;
- the employee would receive the security that banks and other financial institutions want.

This proposal reduces the need to create Individual Flexibility Arrangements (IFA) which often creates unnecessary red tape and paperwork, and are uncertain because they are only enforceable if the employee is better off.

In the event that changes are made to the engagement of casuals which requires reclassification to other employment types or variations to employment entitlements, it is recommended that it would be in the interests of building trust in, and employer education of, the IR system, if an amnesty period were to apply for employers to be able to make those necessary changes to their casual workforce without risk of penalties applying or enforcement action being taken.

Working Group: Compliance and Enforcement:

While AHRI does not believe that employment compliance issues are different to other compliance issues, it does see that much non-compliance in the IR system is due to the difficulty of the current award system.

Once these issues have been ironed out, it will enhance award compliance and minimise excuses for non-compliance.

It is clear that there are a number of reasons for non-compliance. Some of these are that:

- Complexity and related confusion, such as uncertainty around which award coverage, if any;
- Genuine misunderstanding and lack of education and helpful resources for business;
- A lack of attention within the organisation;
- Misalignment of payroll systems, award interpretation, business processes (i.e. record keeping);
- A lack of training for senior stakeholders in organisations around risk and understanding award and payroll risk, and what questions to ask;
- Unsophisticated payroll software with some employers unwilling to invest;
- Insubstantial consequences for error.

The Fair Work Ombudsman is doing an excellent job in highlighting compliance and prosecuting employers for non-compliance. However, its current stringent approach to employers who self-report may put off employers otherwise willing to do so. AHRI believes that it should approach self-reporting less aggressively and require less of employers that do so if the non-compliance arises from mistake or inadvertence compared to deliberate underpayment. One suggestion could be for the Ombudsman to offer an educational compliance program for employers. As well as providing education, and combined with a less aggressive approach, this would serve to encourage a more facilitative relationship between the Ombudsman and employers.

AHRI further recommends that employers be required to undertake regular auditing and reporting of payment processes and outcomes. This process could be incorporated into the annual financial audit and would create a routine in a businesses' annual governance cycle. Care would have to be taken to ensure that the reporting requirements on employers are not overly burdensome.

In addition, updated, single touch payroll systems that input awards and classification details, could be used to flag inconsistencies.

Training:

There are a limited number of specialist ER/IR HR programs available in Australia. While employee relations and industrial relations are often included in university HR study programs, these units tend to provide a general overview of the IR framework.

AHRI recommends working with the FWO and other stakeholders to develop further training for HR generalists to ensure that they understand their obligations, have an adequate level of understanding of contemporary IR issues and practical interpretation of the IR framework, and when to seek specialist advice.