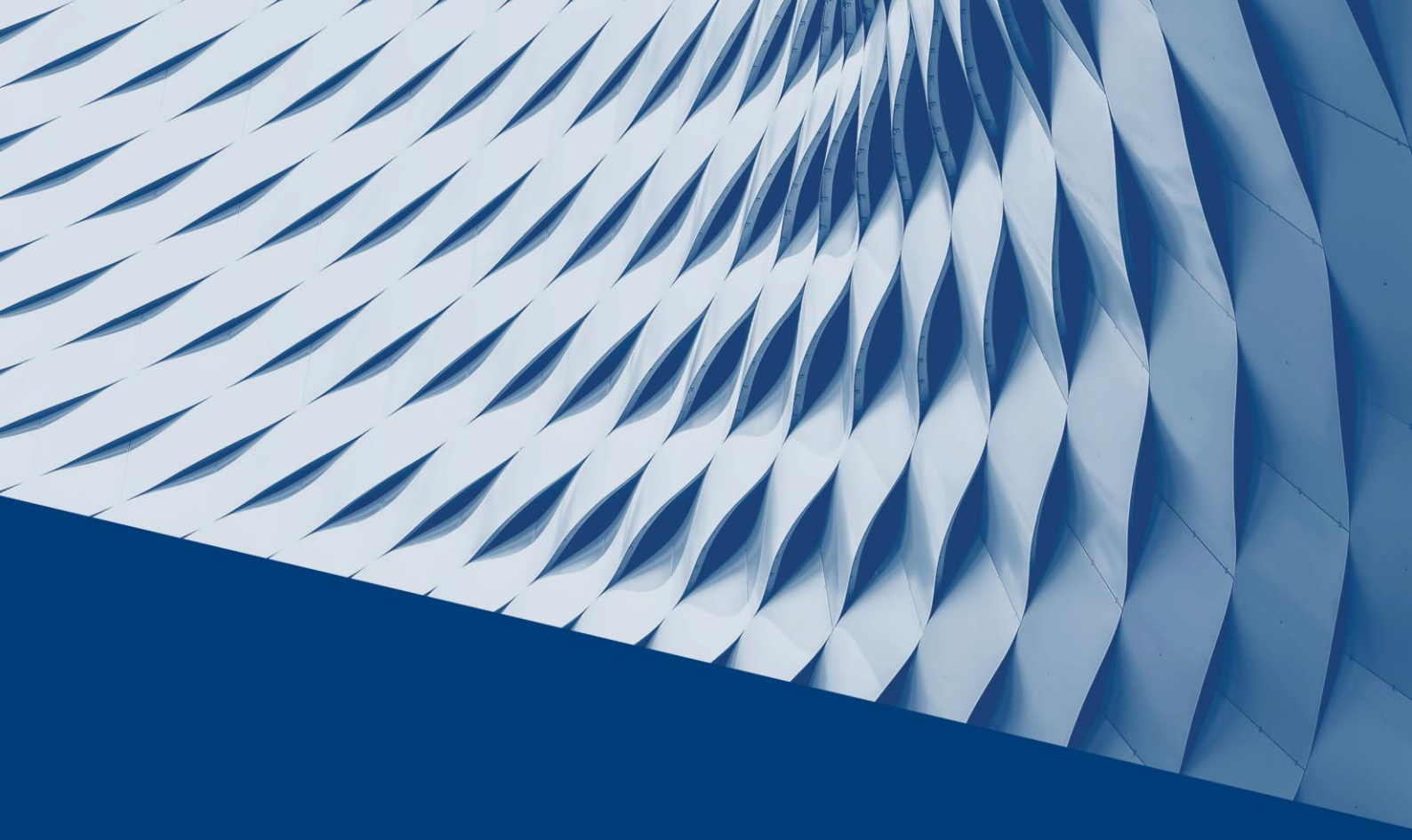

Privacy Act Review

Australian Council of Trade Unions response to October 2021 Discussion paper

ACTU Submission, 17 January 2022
ACTU D. No 01/2022

ACTU
australian council of trade unions

Contents

Introduction

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For 90 years, the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates. They have approximately 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

Privacy Act Review

The Attorney General's Department (**AGD**) is currently reviewing *the Privacy Act 1988 (Cth)* (**Privacy Act**).[1] As part of the review, AGD has released an Issues Paper and a subsequent Discussion Paper.[2] This submission forms the ACTU's response to the Discussion Paper.

Our submission's area of focus is on workers' rights, and the protection of worker's rights to privacy in particular.

Our submission is summarised as follows:

1. Individuals should, but do not, enjoy similar privacy protections as workers as they do in other contexts as individuals.
2. Privacy should not be (and should not be able to be) used as a means to seek to deny freedom of association, the rights to organise and other workplace rights.

Workers' Rights to Privacy

Workers' rights to privacy should be protected. The nature and scope of employment, and the volume of data collected by employers incidentally to the employment relationship has grown exponentially in recent times. This information encompasses highly sensitive subject matters and includes information which, if collected in another context (such as a customer/supplier relationship) would be subject to the utmost protections.

The range of information collected by employers includes:

[1] See https://www.ag.gov.au/integrity/consultations/review-privacy-act-1988
[2] See https://consultations.ag.gov.au/rights-and-protections/privacy-act-review-discussion-paper/

- Information relating to illness and injury, for example in the context of personal leave and accident compensation;
- Health information relating to disability, illness and fitness for work, for example in the context of assessing reasonable accommodations, or during pre-employment screening;
- Information relating to COVID-19, including vaccination status;
- Information provided in support of applications for forms of leave such as Family and Domestic Violence leave;
- Personal identification information;
- Criminal history;
- Banking and financial information; and
- Information collected incidentally to the employment relationship or as a by-product of the employment, such as location information, keystrokes and other data.

The above list is indicative of the type of information which is collected by employers either prior to, during, or in some cases after the employment relationship. The central point we make is that the range and depth of information collected has grown significantly and is in need of regulation. For example, pre-employment screening has moved beyond a rarely adopted practice involving a questionnaire and in some industries may now include gathering detailed information and even the collection of blood samples. There is no compelling reason why a worker's privacy should be less protected in this scenario than in any other context.

The handling, storage and usage of worker's information has also changed significantly and may now be stored on data servers in "the cloud" or provided to third parties, such as payroll providers. The provision of workers' information to third parties is particularly concerning and should be regulated as it would be in any other context, particularly where there is potential for the offshoring of that data.

The Privacy Act expressly exempts from its coverage acts or practises relating to employment and employee records.[3] Employee records include health information and personal information about specified matters, such as personal details, leave (including personal leave) and taxation, banking and superannuation affairs.

The Fair Work legislation requires employers to maintain employee records on a number of matters, such as hours of work and leave.

[3] Privacy Act ss 7(1)(ee), 7B(3)

A number of submitters to the Issues Paper put the position that the current regulation provides adequate protection of employee's privacy. However, as Legal Aid Queensland's submission on the Issues Paper points out, the industrial legislation brings about a requirement to keep records but does not regulate the storage, handling and use or potential disclosure of personal information within those records. Accordingly, there is a clear regulatory gap with respect to employee records.

Workers should have the right to privacy in their capacity as employees. The information that may be collected by employers should be reasonable, proportional and necessary for the conduct of the employment relationship. Any information that is collected should be stored, handled and used in a way that is secure, protects workers' privacy and does not exceed what is reasonably required by the employment relationship. Workers should be consulted as to the collection, use and storage of their data.

The ACTU agrees with various submission to the effect that the employee records exemption in the Privacy legislation should be removed.[4] This should be done in a way that is consistent with the recognition and exercise of other workers' rights, as discussed further below.

Privacy and Workers' Rights

A worker's right to privacy should be seen as a workplace right. Accordingly, a workers' right to privacy should be applied in a way that integrates with other key workplace rights. The right to privacy should not be viewed as an external right which is at odds with or overrides other protections.

However, all too often, our affiliates report that the only circumstances in which some employers purport to act to protect employee's privacy is where they do so to attempt to thwart freedom of association, the right to organise or the enforcement of industrial entitlements. For example, our affiliates report encountering resistance to providing information such as advice that a new employee has commenced (where doing so is required by an enterprise agreement); or records of hours worked and amounts paid (where doing so is required by right of entry legislation).

[4] See, for example, Office of the Australian Information Commissioner at 4.18.

There is currently nothing in the Privacy Act which restrains employers from providing relevant information to unions – for example under right of entry provisions. Australian Privacy Principles would allow such a disclosure as being required or authorised by or under an Australian Law. Any extension of the Privacy Act through the removal of the employee records exemptions (which we support above) should occur in a way which explicitly preserves this situation.

The Privacy Act should specifically allow for the release of information by an employer to comply with any legislative obligation (including under an enterprise agreement), as well as to comply with any agreement or arrangement for the purpose of facilitating freedom of association, the right to organise or the enforcement of an industrial instrument.

Associated matters

As the FWC correctly considered out in *Lee*, an employee's consent to provide information may not be freely given, due to the power imbalance and possibility of sanction inherent in the employment relationship. A preferable mechanism to managing the sharing of information would be through the setting of a negotiated collective agreement, such as an enterprise agreement, which is freely entered into by workers and their unions.

The ACTU is supportive of a direct right of action, which would allow workers to enforce their privacy rights. We are further of the view that trade unions should have standing to bring actions on behalf of their members.

We further note that the review is concerned with the small business exemption to the Privacy Act. We are of the view that – whether or the small business exemption continues in place – no exemption for small businesses should apply to employee records.

Conclusion

For the reasons above, the ACTU supports removing the employee records exemption in the Privacy Act.

We are of the view that the volume of information that is now collected by employers warrants the removal of that exception. It is extremely important, in our view, for there to be limits to the information which can be collected on existing and prospective employees, as well as protections relating to the storage, handling and use of that information.

Privacy should not be a cloak for poor employment practises. The removal of the employee records exception should be accompanied by provisions which ensure that freedom of association, the right to organise and enforcement of industrial entitlements is not affected.

address

ACTU

Level 4 / 365 Queen Street

Melbourne VIC 3000

phone

1300 486 466

web

actu.org.au

australianunions.org.au