JONES DAY

APRIL 2013

MONTHLY UPDATE — AUSTRALIAN LABOUR & EMPLOYMENT

MESSAGE FROM THE EDITOR

SOMETHING TO COMPLAIN ABOUT?

There seems to be a lot to complain about at the moment. The courts of course are always handling complaints, and in the last month the same court has in at least two cases had reason to consider whether an employee's "complaint" constituted a complaint that would give rise to protections under Australian law with contrasting outcomes. At the same time, there have been mixed reactions to the Australian Government's recent announcements in the legislative space. There have been complaints on both sides of the fence following the Government's introduction of amendments to the Fair Work Act and the decision to scrap the draft consolidation of anti-discrimination laws. While it is impossible to make everyone "happy" it will be interesting to see in the lead up to the September 14 election whether the Government responds to these "complaints" with further changes to current and proposed legislation.

Adam Salter, Partner

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HOT OFF THE BENCH—DECISIONS OF INTEREST FROM THE AUSTRALIAN COURTS

NOT ALL COMPLAINTS ARE CREATED EQUAL

A court has determined that an employee had a workplace right under the *Fair Work Act 2009* (Cth) ("Act") to make a complaint entitling the employee to proceed with her general protections claim. The employee alleged that her former employer engaged in adverse action by terminating her employment because she exercised a workplace right. The employer was unsuccessful in its application to have the claim thrown out by the court which found that the employee had a workplace right to claim about not being paid correctly. The court was satisfied that the employee had a workplace right because she was entitled to a benefit (being full pay) and was "able to" make a complaint about not being paid in full. The decision does not resolve the employee's adverse action claim, rather it clarifies that the employee has jurisdiction to make her claim if it proceeds. *Devonshire v Magellan Powertronics Pty Ltd* (2013) FMCA 207

In a separate decision, the same court has rejected an employee's adverse action claim, finding that the employee's complaints about management did not constitute a workplace right covered by the general protections provisions in the Act. The decision of Federal Magistrate Burnett (now Justice Burnett) is reported as being the first time a court has considered the proper construction of section 341(1)(c) of the *Fair Work Act 2009* (Cth), which protects an employee's right to make complaints or inquiries "in relation to" his or her employment.

The employee was unsuccessful in his six-figure claim for damages, alleging his former employer took adverse action against him by terminating his employment because he had made complaints or inquires about his employment. Rather, the former employer defended its decision to terminate the employee because of a history of "mild insubordination" and a "long standing clash of personalities". Accordingly, the employee's "complaints or inquiries" were found to have arisen from the employee's discontent with his employer's management approach and was not sufficiently connected to his employment governed by a contractual or statutory framework to fall within the ambit of the general protections provisions in the Act. *Harrison v In Control Pty Ltd* (2013) FMCA 149

Key takeaway: Given the uncertainty that has surrounded the operation of section 341(1)(c) of the *Fair Work Act 2009* (Cth), the decision of Justice Burnett should be welcomed by all employers, both large and small. By applying a narrow cumulative construction to the workplace right found in the two limbs of section 341(1)(c), employers should be more confident about making legitimate management decisions in the ordinary course of business with less fear of a disgruntled employee bringing an adverse action claim against them founded on a difference of opinion about a management decision or a clash of personalities.

NEW AND NOTEWORTHY—IDENTIFYING KEY DEVELOPMENTS IN AUSTRALIAN LABOUR REGULATION

FAIR WORK COMMISSION TRIALS CONCILIATION "COOLING OFF" PERIOD

Following a trial last year, Australia's national workplace relations tribunal is offering parties conciliating unfair dismissal claims a "cooling off" period of three business days to give unrepresented parties a chance to seek advice about the proposed settlement. The effect of the new cooling off period is that a party can decide to withdraw from a settlement reached at a conciliation conference by notifying the Fair Work Commission during the cooling off period of three business days following the conciliation conference. However, the cooling off period can be waived by the parties at their request.

FYI: A ***conciliation conference*** is an informal, private and generally confidential process where a member of the Fair Work Commission assists the parties to resolve an unfair dismissal application by agreement. It is a preliminary step intended to encourage resolution of the unfair dismissal claim before the application is considered and determined formally through a conference or hearing.

BACK TO THE DRAWING BOARD FOR COMMONWEALTH CONSOLIDATED DISCRIMINATION LAWS

We previously reported in our December 2012 Update that the Australian Government had been working to consolidate existing discrimination laws and had released an Exposure Draft for public comment. Recently, the Attorney-General

confirmed the Australian Government was not proceeding with the Exposure Draft (which was launched by his predecessor) and will instead continue to work on consolidating Australia's anti-discrimination laws.

Since this announcement, the Australian Government has introduced draft legislation to amend the *Sex Discrimination Act 1984* (Cth) to extend the current discrimination laws to cover sexual orientation, gender identify and intersex status. If the *Sex Discrimination Amendment (Sexual Orientation, Gender Identify and Intersex Status) Bill 2013* (Cth) is passed in its current form, it will provide new protections against discrimination and is intended to provide protection against discrimination for same-sex de facto couples.

IN THE PIPELINE—AUSTRALIAN FEDERAL ELECTION POLICY UPDATE

SECOND TRANCHE OF AMENDMENTS TO THE FAIR WORK ACT BEFORE PARLIAMENT

As foreshadowed in our March Update, the Government has introduced its "second tranche" of proposed amendments to the *Fair Work Act 2009* (Cth). The draft legislation was introduced into the Australian Parliament on 21 March 2013 and broadly the changes include introducing "family friendly" measures, new bullying protections, expanding right of entry, protecting penalty rates and introducing new consultation obligations regarding changes to hours or rosters.

Already we have seen some major employers and employer groups (most notably including BHP Billiton) speak out about their dissatisfaction with the proposed changes, citing concerns about the impact of productivity and the broader economy.

DID YOU KNOW?

The Federal Magistrates Court has changed its name and is now called Federal Circuit Court of Australia. Along with the new name, Federal Magistrates will now be referred to as Judges and the title of the Chief Federal Magistrate has changed to "Chief Judge".

QUESTIONS

If you have any questions arising out of the contents of this *Update*, please do not hesitate to contact Adam Salter, Partner, or Lisa Franzini, Associate.

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ALKHOBAR	COLUMBUS	JEDDAH	NEW YORK	SILICON VALLEY
AMSTERDAM	DALLAS	LONDON	PARIS	SINGAPORE
ATLANTA	DUBAI	LOS ANGELES	PITTSBURGH	SYDNEY
BEIJING	DÜSSELDORF	MADRID	RIYADH	TAIPEI
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