JONES DAY

JUNE 2013

MONTHLY UPDATE — AUSTRALIAN LABOUR & EMPLOYMENT

MESSAGE FROM THE EDITOR

The week ending Friday, 28 June 2013 is a big week in Australian Federal Politics because it is the final week of sitting of the 43rd Commonwealth Parliament before the 14 September 2013 Election. At the time of writing, there are a number of pieces of draft legislation before Parliament, the outcome of which may see changes for Australian employees. In this Update, we comment upon the status of the proposed amendments to the Fair Work Act and highlight new data breach notification obligations (as at 25 June 2013). If you are interested in knowing where things get to, please feel free to drop me an email.

Adam Salter, Partner

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

MAKING DO WITHOUT LEGAL REPRESENTATION

The Fair Work Commission ("**FWC**") has held that an employer will be granted permission to have legal representation only in very limited circumstances when defending an application of unfair dismissal brought by an unrepresented employee.

The unrepresented employee applied to the FWC for an unfair dismissal remedy. Lawyers for the employer (Ashurst Australia) had applied to act on behalf of the employer, but the unrepresented employee objected on the basis that such

representation would undermine the interests of justice and fairness.

The FWC held that legal representation will only be granted in three circumstances:

- Where the complexity/efficiency of the matter requires legal representation;
- Where the person is unable to represent himself or herself; or
- Where fairness otherwise requires that the person be represented.

The FWC's decision follows Federal Court authority denying employers legal representation where it will cause too great an imbalance between the parties that could create the potential for the absence of a fair and just hearing.

Azzopardi v Serco Sodexo Defence Services Pty Limited [2013] FWC 3405

DRUG TESTING IN THE WORKPLACE: WORKER SACKED FOR REFUSAL TO SUBMIT TO URINE TESTING NOT "UNFAIR"

There continues to be controversy over whether urine or saliva testing is the most appropriate method for drug testing in Australian workplaces. Recently, the Full Bench of the FWC upheld the dismissal of a store officer because of the employee's repeated failure to provide a urine sample for drug and alcohol testing. The employee claimed that a saliva test was more appropriate for testing impairment given the employer's policy on alcohol and drugs misuse provided for the testing of employees for impairment only whilst at work.

The Full Bench found that in this case, the employer's policy "did not confine itself to testing for impairment" and upheld the employer's direction to be "both lawful and reasonable".

Accordingly, the Full Bench held that the employee was "contractually bound to comply" with the employer's "lawful and reasonable request" to provide urine sample, taking into account the common practices that existed in the industry and the reasonableness of the direction from the employer. By refusing to do so, the employee had engaged in conduct that was "repudiatory of his employment contract" according to the Full Bench.

Interestingly, the Full Bench pointed out that the employee could have used the dispute resolution mechanism available under the applicable Enterprise Agreement to agitate his concerns about the method of testing rather than simply defying the employer's direction, thereby causing the termination of his employment which led to the unfair dismissal.

Mr Raymond Briggs v AWH Pty Ltd [2013] FWCFB 3316

NEW AND NOTEWORTHY—IDENTIFYING KEY DEVELOPMENTS IN AUSTRALIAN LABOUR REGULATION

PARLIAMENT WATCH: FAIR WORK AMENDMENT ACT

The *Fair Work Amendment Bill 2013* ("**Bill**") is looking on track to take effect from 1 January 2014. As reported in our April and March Updates, the Bill seeks to introduce new anti-bullying provisions, expand the scope of the FWC, update modern awards and improve workplace flexibility for families including expanding the right to request flexible work arrangements, eligibility for carer's leave and protections for pregnant women.

The Bill was recommended by the House Standing Committee on Education and Employment ("**Committee**") in its report delivered on 5 June 2013. Subsequently, the Bill has been amended following the withdrawal of support from the Independents in Parliament. Relevantly, the Bill has "watered down" the additional right of entry proposals for visiting union officials and introduced a new option that will see the FWC arbitrate eligible adverse actions disputes if the parties agree. Further, the introduction of the FWC's proposed anti-bullying jurisdiction has been pushed back to commence on 1 January 2014.

In addition, the Committee did not support the related *Fair Work Amendment (Tackling Job Insecurity) Bill 2012* introduced by Greens MP Adam Bandt which sought to strengthen the position of casual and contractual workers (for more background, see our March Update).

As at 25 June 2013, the Bill is before the Senate yet to be passed.

PRIVACY LAW UPDATE – NOTIFICATION OBLIGATIONS FOR DATA BREACHES

There have been significant developments in the Australia privacy landscape in the past year, with the most recent developments comprised in the *Privacy Amendment (Privacy Alerts) Bill 2013* (the "**Bill**") which was introduced into Federal Parliament on 29 May 2013. The purpose of the Bill is to amend the Commonwealth *Privacy Act 1988* ("**Privacy Act**") to introduce a mandatory data breach reporting scheme for federal government agencies and private sector organisations.

If passed, the Bill will take effect on 12 March 2014, immediately after the commencement of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* ("**Privacy Amendment Act**"). The Bill seeks to further enhance Australian Privacy Principle 11 introduced by the Privacy Amendment Act, which provides that entities currently regulated by the Privacy Act ("**APP entities**") must take reasonable steps to protect personal information held by them.

The Bill introduces compulsory notification requirements for serious data breaches in relation to personal information held by APP entities, credit reporting information held by credit reporting bodies, credit eligibility information held by credit providers and tax file number information held by recipients. This accountability extends to breaches by overseas entities associated with APP entities and domestic credit providers (such as parent companies and foreign service-providers).

Under the Bill, where a serious data breach occurs (for example, through hacking or accidental disclosure of information), notification will be required to be made to affected individuals and the Australian Privacy Commissioner. Notification details must include the identity and contact details of the organisation, a description of the breach, the kinds of information concerned, and recommendations about the steps affected individuals should take. Any contravention of the proposed notification provisions will be taken to be an interference with the privacy of an individual and will accordingly enliven the enforcement and remedy provisions of the Privacy Act.

As at 25 June 2013, the Bill is before the Commonwealth Senate (upper house of Parliament) and is likely to be passed by Parliament by the end of its term as it has bipartisan support and has received a recommendation from the Senate Committee for the passing of the Bill.

IN THE PIPELINE—HIGHLIGHTING CHANGES OF INTEREST TO EMPLOYERS IN AUSTRALIA

ANOTHER STEP CLOSER TOWARDS A BULLY-FREE WORKPLACE?

Australia's safety policy body, Safe Work Australia ("**SWA**"), has released a long-awaited revision to its draft model "Code of Practice for Preventing and Responding to Workplace Bullying" ("**Draft Code**") for public comment. The Draft Code has been revised following an earlier period of public consultation and follows the House of Representatives' investigation into workplace bullying, resulting in the release of a lengthy report titled "Workplace Bullying – 'We just want it to stop'".

The Draft Code supports the model Work Health and Safety Act which forms the basis for harmonised workplace safety laws across Australia. The Draft Code contains guidance about identifying, preventing and responding to workplace bullying. When the Draft Code is approved and in a final form, it will be admissible in court proceedings under the workplace safety laws, and courts may have regard to the code as evidence about the hazard of workplace bullying.

In a new development, SWA has prepared a new "Workers Guide to Managing Workplace Bullying" that accompanies the Draft Code, and as the name suggests is designed to assist workers to identify and respond to workplace bullying.

Key takeaways for employers

- This is likely to be the last opportunity to comment on the Draft Code before it is finalised, so if there are concerns with the current Draft Code, these should be raised in the form of a written submission to SWA before Monday 15 July 2013 at 5:00 p.m. AEST. We can assist with preparing or reviewing submissions for employers or industry associations.
- Employers will need to review their workplace policies to ensure that there are appropriate policies and procedures regarding workplace bullying that are consistent with the finalised Code of Practice.

DID YOU KNOW?

Take Note: New rates and thresholds to take effect from 1 July 2013

- The national minimum wage will be $622 a week, or $16.37 per hour.
- The high-income threshold for unfair dismissal applications will rise to $129,300.
- The maximum compensation for an unfair dismissal claim will be capped at $64,650.

ACKNOWLEDGMENTS

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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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