JONES DAY

AUGUST 2013

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

MESSAGE FROM THE EDITOR

Since our July Update, Prime Minister Kevin Rudd announced that the Federal Election will occur on Saturday, 7 September 2013, one week earlier than set by the former Prime Minister Julia Gillard. As Australia heads to the polls, matters of unemployment, job security and industrial relations are front and centre for the voting public and business. In this issue, we give an update on the Coalition's IR policy but will be in a better position for our September Update to detail what the outcome of the election means for employers once we know who is in power. Until then, we provide an overview of two landmark decisions and changes on the horizon in Australia.

Adam Salter, Partner

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

RECORD FINE IMPOSED AGAINST EMPLOYER FOR UNDERPAID AND MISREPRESENTED EMPLOYEES

The Federal Circuit Court of Australia (**FCC**) has imposed a record fine for a sham contracting claim brought by the workplace regulator Fair Work Ombudsman (**FWO**). The (FCC) held that the company, which operates an airport shuttle service, had underpaid seven drivers by misrepresenting their employment as independent

contractors, in breach of s 357 of the *Fair Work Act 2009* (Cth) (**FW Act**). The drivers were found to be employees rather than independent contractors, because the company owned the drivers' vehicles, the company had a high degree of control over their work and the company determined how much they would be paid.

In finding that the company was the employer of the drivers, the FCC determined that the company had failed to meet the required Modern Award entitlements with the seven employees underpaid $26,000. The company was fined $238,920 while the sole director was fined $47,784, amounting to a record total fine of $286,704.

The FWO commenced proceedings relying on evidence it had obtained about the company's history with sham contracting including two ATO determinations, four workplace complaints and findings by the Administrative Appeals Tribunal. The Federal Court judge took this history into account, particularly the company's disregard of the FWO's letter of caution regarding its contracting practices.

Fair Work Ombudsman v Happy Cabby Pty Ltd & Anor [2013] FCCA 397

Lesson for Employers

This is a prime example of the consequences of incorrect classification of workers. While organisations may prefer to engage contractors, it is critical that the arrangement is truly one of independence and not a master/servant type relationship which is likely to be classified as employment. The significant fines imposed (including those imposed on individuals) act as a timely reminder of the importance of proper classification of workers.

THE IMPLIED TERM OF MUTUAL TRUST AND CONFIDENCE ACCEPTED BY THE FULL FEDERAL COURT OF AUSTRALIA

The Full Federal Court of Australia has handed down a landmark decision recognising the implied term of mutual trust and confidence in employment contracts in Australia. As reported in our September 2012 Update, an employee of the Commonwealth Bank successfully argued that his employer breached the implied term when it failed to adequately consider alternative employment options to redeploy him before he was dismissed after more than 20 years of employment, which was upheld on appeal to the Full Federal Court and awarded damages to the employee for $335,623. This is the first time the Full Federal Court has recognised a breach of this implied term.

The implied term of mutual trust and confidence requires the employer to not, without reasonable cause, conduct itself in a manner "likely to destroy or seriously damage the relationship of confidence and trust" between employer and employee. In its decision, the Full Court examined the actions of the Commonwealth Bank and found that it had breached its obligations of the implied duty of mutual trust and confidence by removing the employee's access to email and phone as well as not taking appropriate steps to notify or redeploy him.

Even though the majority of the Full Court accepted that the employment contract did not incorporate the redeployment policy, it found that the employer should have taken the necessary steps to consult with the employee given the employment contract contemplated the possibility of redeployment or redundancy as an alternative to termination. Accordingly, the Full Court held that the employee had a legitimate expectation that the Commonwealth Bank would notify and inform him of alternative employment options and by not doing so, it had breached the implied term in this employment contract.

The Full Court also discussed whether the implied term was in force at the point of dismissal or if it was limited to situations prior to dismissal. In this case, the employer's failure to take positive steps to follow its redeployment obligations were "separate from and anterior to" the termination of employment. The conduct occurred before the termination, rather than at the point of termination itself, so the Court held that the implied term of mutual trust and confidence applied in this circumstance.

This decision ultimately turned on the specific facts, with the Full Court taking into account the long term employment of the employee (over 20 years), the large size of the employer and the clauses in the employment contract.

Commonwealth Bank of Australia v Barker [2013] FCAFC 83

Reflection for Employers

As predicted in our September 2012 Update, this decision will further embolden plaintiff lawyers acting for executives

and other senior employees who do not have access to the statutory unfair dismissal regime and have been increasingly commencing claims alleging a breach of the duty of mutual trust and confidence by their employer to seek redress for circumstances leading to the termination of their employment. Although it seems likely that there will be an appeal to the High Court of Australia, it is important for employers to carry on the employment relationship bearing in mind the risk of a mutual trust and confidence until such time.

In the meantime, employers are encouraged to review existing clauses in employment contracts regarding the redeployment and redundancy as well as policies and procedures in relation to how they deal with employees in redeployment situations to avoid imposing onerous obligations that may lead to a breach of the duty mutual trust and confidence if not followed.

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

FEDERAL ELECTION POLICY UPDATE—COALITION'S PAID PARENTAL LEAVE

If the Coalition wins the Federal Election, it has committed that its paid parental leave scheme will start on 1 July 2015 and feature 26 weeks of paid leave entitlement for women, calculated on their actual wage or the national minimum wage (whichever is higher). Superannuation contributions at the mandatory rate will also be paid for the entire period of parental leave. However, payments will be capped for those women earning $150,000 or more.

The Coalition released the details of its paid parental scheme on 19 August 2013. The Coalition says it will cost an additional $6.1 billion, which will be met by savings and reductions in other outlays and more significantly, a 1.5 percent levy on large companies with taxable incomes over $5 million.

Labor's "work test" will be retained by the Coalition so women in other forms of employment such as casual or contract employment will also be eligible under the scheme. Fathers can also take two weeks out of the 26 weeks for dedicated paternity leave either concurrently with or separately from the mother's leave. The Family Assistance Office will directly pay and administer the Coalition's scheme rather than having employers involved in additional paperwork. To offset the paid parental levy, the Coalition says it will also introduce a tax cut from 1 July 2015, reducing the current company tax rate of 30 percent by 1.5 percent to 28.5 percent.

Under Labor's current paid parental leave scheme, women are entitled to 18 weeks of leave paid at the minimum wage with no superannuation contributions. According to its policy document, the Coalition states that women earning the average full time salary of $65,000 will be $21,000 better off under their policy and $50,000 better off in retirement. However, it should be noted that the current political and media scrutiny over the reliability of the Coalition's costings throws some doubt over how much money will be required to implement this scheme.

Stop Press: Coalition IR Policy Update

Separately, the Shadow Minister for Employment and Workplace Relations, Eric Abetz, has shed some light on the direction of the Coalition's industrial relations policy by commenting on productivity reforms and penalty rates in the retail and hospitality industries.

Under the Coalition's policy to improve the Fair Work Laws, industrial action will be protected only if the Fair Work Commission (**FWC**) is satisfied that there have been genuine and meaningful talks between employees and employers. The FWC will need to be satisfied that the parties involved have discussed ways to improve productivity before approving an enterprise agreement. Furthermore, Senator Abetz cast doubt on the provision of penalty rates in the retail and hospitality industries. He referred to anecdotal evidence indicating that jobs were being lost due to penalty rates. The amendments to the *Fair Work Act 2009* (Cth) are set to take effect from 1 January 2014, where the FWC will have to consider the penalty rates of employees who work irregular hours when reviewing modern awards.

GOVERNMENT CALLS FOR SUBMISSIONS ON EMPLOYEE SHARE SCHEMES

The Australian Government is calling for submissions on Employee Share Schemes (**ESS**) regarding the current taxation and administrative policy regarding ESS for start-up companies.

The Discussion Paper published by the Federal Government Treasury is seeking public comment on the impact of ESS for start-up companies, in recognition of the value that start-up companies contribute to economic growth and innovation in Australia. Specifically the Federal Government is seeking public comment on the current ESS system which is marked by implementation and administrative complexities for start-up companies, together with the tax implications for employees.

The Federal Government is also seeking to amend the ESS taxation policy for start-up companies to make ESS more accessible. The Discussion Paper outlines four proposals for change in relation to ESS for start-up companies, which are not conclusive, in order to gain feedback about the current system and the proposed solutions.

NEW AND NOTEWORTHY—IDENTIFYING KEY DEVELOPMENTS IN AUSTRALIAN LABOUR REGULATION

NEW GROUNDS OF DISCRIMINATION TO WATCH OUT FOR

New grounds of discrimination were added to the *Sex Discrimination Act 1984* (Cth) (**SD Act**) making discrimination based on a person's sexual orientation, gender identity and intersex status unlawful from 1 August 2013. The amendment has extended the definition of "marital status" to "marital or relationship status" to provide protection for same-sex de facto couples.

Previously, measures against discrimination based on sexual orientation were available only in relation to adverse action claims under the *Fair Work Act 2009* (Cth). The current amendments make discrimination based on a person's sexual orientation, gender identity and intersex status unlawful in the same areas currently included in the SD Act such as employment, education and the provision of goods and services. Criminal penalties will continue to apply to offences against the SD Act.

HR Tip

Employers should update their policies to reflect the new areas of protection, which should be incorporated into training and education on anti-discrimination to ensure they do not discriminate against employees on the basis of sexual orientation, gender identity, intersex status or relationship status (including same-sex relationships).

HR TIP—DON'T FORGET THE PAY SLIP!

Employers are reminded that when a person's employment terminates and he/she receives payment of salary with their entitlements upon termination, it is important that the employer provides a pay slip within one day of the last day worked (but ideally on the same day) to comply with section 536 of the *Fair Work Act 2009* (Cth). A failure to comply could lead to a civil penalty, which can be up to $5,100 for individuals and $25,500 for corporations.

With more employers outsourcing their payroll functions, and termination payments generally made outside the usual payment cycle, it is important to ensure that someone in your organisation is responsible for ensuring that a compliant pay slip is provided to the employee on time — especially if the employee is disgruntled by the exit, you wouldn't want a small slip-up to land you in hot water!

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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JONES DAY GLOBAL LOCATIONS

ALKHOBAR	COLUMBUS	IRVINE	MOSCOW	SÃO PAULO
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ATLANTA	DUBAI	LONDON	NEW YORK	SILICON VALLEY
BEIJING	DÜSSELDORF	LOS ANGELES	PARIS	SINGAPORE
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