JONES DAY

SEPTEMBER 2013

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

MESSAGE FROM THE EDITOR

After a protracted election campaign, on Saturday, 7 September 2013 the incumbent Labor Party was replaced by the conservative Coalition between the Liberal and National Parties. Mr Tony Abbott was sworn in as Australia's 28th Prime Minister on 28 September 2013. As at the date of writing, no material announcements have been made about industrial relations reform; however, tweaks to the *Fair Work Act 2009* (Cth) are expected in line with the "Coalition's Policy To Improve The Fair Work Laws" which we comment on below. In this edition, we also touch on two cases where employers have been unsuccesful in the courts, together with highlights of changes on the horizon in Australian workplace law.

Adam Salter, Partner

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

EMPLOYEE WINS POST-EMPLOYMENT RESTRAINTS CASE

An employer has failed to prevent a former employee from working for a rival company. Although the employee's new role was materially different, the employer unsuccessfully brought an injunction before the Supreme Court of New South Wales seeking to enforce certain post-employment restraints in the employment contract. The nature of the new position played a significant role in determining the outcome of the case.

The employee successfully argued that he would be working on the procurement side of the business rather than the customer sales side of his original position. Further, his new role with the rival company began in New Zealand rather than Sydney so the businesses were not in direct competition.

This enabled the employee to see out his restraint period of six months with the employer without there being a risk of breaching his contractual obligations. In addition, the new employer had included a contractual clause protecting the continuing interests of the original employer. The Court recognized that both the employee and the rival company were "acutely conscious" of the restraints of the employment contract and sought to avoid an actual or threatened breach.

The Court rejected the employer's claim for relief and found that the employee had a "sound moral compass" and was genuinely concerned about complying with his contractual obligations. The Court found the likelihood of harm to the original employer was "remote and tangential" in deciding to dismiss the employer's application, awarding costs in favour of the employee.

Lesson for Employers

Careful consideration needs to be given about the prospects of enforcing a restraint as it can be a costly exercise if unsuccessful. In particular, employers should review the appropriateness of post-employment restraints and seek legal advice when preparing employment contracts to ensure the restraint is enforceable.

Allied Mills Pty Limited v Miners [2013] NSWSC 1117

A "WORKPLACE RIGHT" IS GIVEN A WIDE DEFINITION BY THE FEDERAL COURT

The Federal Court of Australia has found that the definition of a "workplace right" includes the right of an employee to seek legal advice in relation to employment matters. An employer who threatened to fire an employee when she expressed her intention to make legal inquiries was found to have taken adverse action under the general protections provisions in the *Fair Work Act 2009* (Cth) (**FW Act**).

The Court took an expansive view of what constitutes a "workplace right" under the FW Act. The employee had made complaints in the past to her employer about unpaid commissions, and when such complaints proved to be ineffective in resolving the issue, the employee threatened to seek legal advice. The employee alleged that in response her employer threatened to terminate her employment and also treated her adversely in suspending her employment.

The Court accepted that the employee had sought to make an inquiry to her solicitor which the judge found was within the reading of a "workplace right". The decision will allow employees to seek legal assistance without the "fear of repercussions" from their employer. While penalties are yet to be determined, the employee was successful in recovering four years' worth of unpaid commissions against her employer.

Lesson for Employers

This decision significantly broadens the scope of the already wide-ranging adverse action provisions. Unless or until this decision is overturned on appeal, employers will need to be careful when managing difficult employees who have sought or threaten to seek legal advice. An employer should ensure that any disciplinary or less favourable treatment towards an employee is based on a valid reason and not because the employee has a right to seek legal advice.

Murrihy v Betezy.com.au Pty Ltd [2013] FCA 908

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

PRODUCTIVITY CHANGES ON THE HORIZON FOR THE FAIR WORK ACT?

The newly-elected Coalition Government has committed to engaging the Productivity Commission to review the "Fair Work" framework and is set to play a significant role in influencing the industrial relations framework in Australia.

Recently in an address to business leaders, the Chairman of the Productivity Commission, Mr Peter Harris, expressed his view that the Australian workforce needs to alter its expectations regarding income growth from the current expectation of around 2% a year to a more realistic 0.5% a year.

Mr Harris commented that weak income growth via productivity at the point of the last decade (around 1.3%) is "hardly to be preferred" over a higher rate that returns to the long-run productivity growth figure of around 1.6%. He highlighted the recent mining boom as having disguised weak

productivity growth for most of the 2000s and masked the even less impressive contribution to productivity from specific sectors such health, aged care, retail and education.

In order to achieve better productivity, Mr Harris suggested a return to the widespread microeconomic reform adopted in the 1990s. Mr Harris calls for a "serious reflection" on productivity needs to be undertaken by business, unions and the bureaucracy and foreshadows there will be significant change made to the *Fair Work Act 2009* (Cth) under the new Coalition Government.

Key Take Away for Employers

Employers should be aware that, despite the political rhetoric, industrial relations policy will be under scrutiny by the new Coalition Government. Any IR reforms in the name of productivity will most likely be met by opposition, so expect the debate on this issue to be ongoing.

NEW AND NOTEWORTHY—IDENTIFYING KEY DEVELOPMENTS IN AUSTRALIAN LABOUR REGULATION

NEW FEDERAL GOVERNMENT: WHAT WILL THIS MEAN FOR AUSTRALIAN EMPLOYERS?

Fresh from the recent success at the Federal Election, the Coalition is set to commence implementing the industrial relations policy it foreshadowed prior to the election. Key changes on the agenda include amendments to the *Fair Work Act 2009* (Cth) (**FW Act**), introducing and reviewing regulatory bodies and implementing the new Paid Parental Leave (**PPL**) Policy as explained below.

CHANGES TO THE FAIR WORK ACT

As reported in our May Update, the Coalition Government is proposing to make adjustments to the FW Act including new limits of protected industrial action, focusing on productivity in enterprise agreement negotiations, time limits on greenfield agreement negotiations and easier access to individual flexibility arrangements (**IFAs**).

In addition, the Coalition is expected to introduce changes to the impending bullying claims jurisdiction which is due to commence in the Fair Work Commission (**FWC**) on 1 January 2014. Specifically, the Coalition has foreshadowed that workers should be required to seek assistance from a independent agency (for example, a safety regulator) before lodging a bullying claim with the FWC to address the potential overload of claims the FWC is expected to receive. Further, the Coalition wishes to expand the new bullying jurisdiction to cover the conduct of union officials towards workers and employers.

Additional changes to the FW Act could also be on the Coalition's agenda, but they are expected to follow recommendations from the Productivity Commission.

REGULATORY FUNCTIONS

The Coalition also intends to re-establish the Australian Building and Construction Commission (**ABCC**) and proposes to review the Federal Government's Building Code and Supporting Guidelines to ensure consistency with state building codes.

The Coalition has also indicated that it intends to establish a Registered Organisations Commission to be tasked as the "watchdog" to ensure compliance for unions and employer organisations.

Meanwhile, the Coalition will review whether there is justification for retaining the Road Safety Remuneration Tribunal (**RSRT**), a specialist regulator introduced by the former Labor Government.

NEW PAID PARENTAL LEAVE SCHEME

As reported in our August Update, the Coalition Government committed during its election campaign to introduce a new PPL Policy due to commence on 1 July 2015, that will see the PPL increased from 18 weeks' PPL at the minimum wage to 26 weeks' PPL at the actual wage (subject to a cap).

Next Step for Employers

It's too early to predict the timing of these changes, but given the Federal Parliament is unlikely to re-convene until late-October or early-November 2013, we doubt there is sufficient time to implement the above measures by the end of this year, especially in light of other non-IR election promises. We will keep you updated as developments come to light.

HR TIP—NOTIFICATIONS FOR WORKFORCE REDUCTIONS

If your organisation decides to dismiss 15 or more of your employees in Australia for economic, technological, structural or similar reasons, the *Fair Work Act 2009* (Cth) requires the employer to notify Centrelink (through the Federal Government's "National Business Gateway") as soon as possible after making the decision but before dismissing any employees. Written notification must be provided in the format of the template "Notification to Centrelink of Proposed Dismissals" form which must include the name of the employer, registered address, details of the affected employees and employment types. A copy of this form is available here: http://www.humanservices.gov.au/spw/business/services/centrelink/redundancy-information-for-employers/template-notice-to-centrelink-of-proposed-dismissals.rtf

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QUESTIONS

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