JONES DAY

NOVEMBER 2013

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

MESSAGE FROM THE EDITOR

The end of another year is almost here and now is a good opportunity to reflect on the year that has passed. It has been a tumultuous year in the industrial arena with the rushed passing of employee and union friendly legislation by the former Labor Government in the lead up to the Federal Election, the change in Government following the convincing defeat of the Federal Labor Party and the slow but inevitable shift back towards the right led by the new Federal Coalition Government.

Somewhat surprisingly, the new Federal Government has decided to proceed with the introduction of the new workplace bullying jurisdiction which will commence on 1 January 2014. Given the problems it will likely cause for employers in the New Year, we have decided to provide a more detailed overview of the new bullying complaints jurisdiction to answer some of the key questions employers have about this new regime. We also touch on developments in Federal industrial relations policy, now that the Federal Parliament has resumed being led by the newly elected Coalition Government.

For those of you reading in the US, we also wish you and your loved ones a very Happy Thanksgiving!

Adam Salter, Partner

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

WORKPLACE BULLYING: A NEW INDUSTRIAL "BATTLEGROUND" DOWN UNDER

From 1 January 2014, a majority of Australian workers will have access to a new regime to deal with allegations of bullying in the workplace, opening a new industrial "battleground" for Australian employers.

The new provisions commencing 1 January 2014 will enable these bullying complaints to be heard as industrial disputes in Australia's national independent workplace relations tribunal, the Fair Work Commission (**FWC**), which is expecting to receive a significant number of applications and inquiries in its first year of operation.

We answer some of the key questions our clients have been asking in preparation for the introduction of this new jurisdiction on 1 January 2014.

What conduct is covered?

The Fair Work Amendment Bill 2013 (Cth) (**Amendment Bill**) amends the Fair Work Act 2009 (Cth) (FW Act) to give the FWC jurisdiction to hear complaints from workers who are "bullied at work".

A person is "bullied at work" where an individual or group repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member, and that behaviour creates a risk to health and safety. The definition includes bullying behaviour by clients or regular visitors that occurs at work.

Typical examples of workplace bullying may include unreasonable work expectations, the dissemination of malicious rumours, inappropriate practical jokes or workplace rituals, pressure to engage in inappropriate behaviour, intimidating or aggressive conduct and belittling or humiliating comments.

Reasonable management action carried out in a reasonable manner will not amount to workplace bullying. Hence, reasonable management actions that include responding to poor performance, taking reasonable and necessary disciplinary action and directing the manner in which work is to be conducted will not constitute bullying behaviour if carried out in a reasonable manner.

The FWC needs to be satisfied that there is a risk to a worker's health and safety as a result of the unreasonable behaviour. However, whether the individual has suffered adverse health and safety consequences as a result of the bullying is not determinative.

Who can make a complaint?

he Act provides that a worker in a constitutionally covered business who reasonably believes that he or she has been bullied at work will be able to apply to the FWC for an order to stop the bullying. A "worker" is defined broadly (consistent with Australia's harmonised work, health and safety (**WHS**) laws) and means an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience, a volunteer, a member of the Australian Federal Police or a Commonwealth statutory office holder.

A "constitutionally covered business" is conducted by a constitutional corporation, the Commonwealth, a Commonwealth authority or a body corporate incorporated in a Territory, or is a business or undertaking conducted principally in a Territory or Commonwealth place. A foreign corporation that has been formed outside of Australia is a constitutional corporation that is subject to the FWC's anti-bullying jurisdiction.

Consequently, not all workers will have the benefit of this new jurisdiction. The regime will not apply to unincorporated partnerships or associations, sole traders, volunteer associations that do not employ any workers, trusts or a State government department, and the Australian Defence Force.

What can the FWC do?

The FWC has been given a wide berth to deal with bullying claims including the power to conduct its own inquiries or research. The FWC will have the discretion to deal with complaints by contacting the parties and or arranging a mediation or conciliation conference (although the FWC is not obliged to conduct a mediation or conciliation conference).

Applications that have not been resolved at mediation will generally proceed to a preliminary conference before an FWC Member prior to a hearing for determination.

The FWC has the power to dismiss applications where it considers that the application has no reasonable prospects of success, is not made in accordance with the FW Act or is frivolous or vexatious.

What orders can the FWC make?

The FWC will make an order only if it is satisfied that the bullying behaviour has occurred and there is a risk that the worker will continue to be bullied at work, meaning that it is

unlikely the FWC will make an order where a worker is no longer in the relevant employment relationship.

However, the FWC has a broad discretion to make any order it believes is appropriate to prevent the continued bullying of the worker at work and enable normal working relationships to recommence, although it cannot make an order of monetary payment.

Orders that the FWC could make include requiring:

(a) individual/s to cease bullying behaviour;
(b) regular monitoring of the occurrence of the behaviour by the employer;
(c) compliance with anti-bullying policies, and reviews of these policies; and
(d) education and support offered to workers involved.

What are the consequences for contravening the FWC's orders?

Any contravention of an FWC order relating to workplace bullying will not amount to the commission of an offence, but will give rise to civil remedies. The worker affected by the contravention, an industrial association, or a Fair Work Inspector has six years from the date of the alleged contravention to apply to either the Federal Court, the Federal Circuit Court or any other eligible State or Territory court. Currently the maximum penalty is $51,000 (300 penalty units) for a contravention by a body corporate and $10,200 (60 penalty units) for a contravention by an individual.

Implications for employers

The new bullying jurisdiction will change the dynamics in workplaces for resolving bullying complaints. The new regime exposes employers to potentially frivolous claims, as there is no mechanism to prevent workers "abusing" the system, for example by raising frivolous or vexatious bullying claims when they receive unfavourable performance reviews.

Unlike the current unfair dismissal regime, there is no minimum employment qualifying period or high income cap that would otherwise limit the scope of potential claimants. Consequently, employers who fall within the definition of "constitutionally covered business" will need to be mindful that everyone in their business, from the volunteer work experience student to the CEO, will be able to take advantage of the new jurisdiction from 1 January 2014.

It is possible that the new Coalition-led Federal Government will seek to amend the current provisions for the handling of bullying complaints, having been critical of the process proposed when the Amendment Bill was being debated in Parliament. However, at this stage no amendments have been proposed, although it has been suggested that an intermediary like a worker's compensation agency should approve all claims before they proceed to the FWC.

NEW AND NOTEWORTHY – IDENTIFYING KEY DEVELOPMENTS IN AUSTRALIAN LABOUR REGULATION

COALITION LABOURS OVER IR REFORMS

Having won the Federal election in September 2013, the Abbott-led Federal Government has begun implementing its industrial relations policy, so we haved highlighted some of the recent developments.

Return of the Construction Industry Watchdog

Earlier this month, the Coalition submitted a Bill in the Lower House of parliament to re-introduce the Australian Building and Construction Commission (**ABCC**) as foreshadowed in our October Update. The construction industry watchdog, originally established by the Howard Government in 2005, was shut down in the final months of the Labor Government and replaced by the Fair Work Building and Construction (**FWBC**) inspectorate. It may be some time before the Bill becomes law however, as the configuration of the current Upper House is unlikely to pass the Bill. A new Senate will commence sitting on 1 July 2014, at which time the Bill is more likely to pass the Upper House (Senate) with the support of additional Coalition Senators. Employers in the building and construction industries should pay close attention to the progression of the Bill through the Federal Parliament, as the newly established ABCC is likely to introduce a number of additional reporting obligations. The proposed ABCC Bill also includes a provision giving the Commission powers to stop picketing of building sites.

Consultation for Roster Changes

The Fair Work Commission (**FWC**) has recently released a draft consultation clause to be included in modern awards as of 1 January 2014, when the employer's duty to consult employees about roster changes takes effect. The new requirement is contained in s 145A of the Fair Work Act 2009. The FWC has stressed that the proposed clause is not binding on employers and has requested that any interested persons wishing to comment on the proposed variation file a written submission with the FWC by 6 December 2013.

A New FWC Appeals Body Under Consideration

Meanwhile, Employment Minister Eric Abetz has announced that the Federal Government is considering the introduction of an appeals body to review FWC decisions. The reform is currently in consultation stage with the Minister's office seeking submissions by 13 December 2013. Although any potential implementation is at least several months away, employers are encouraged to keep abreast of media discussions for any further announcements.

Delays to Superannuation Increases

The new Federal Government has also indicated that it is likely to delay the introduction of previously announced increases to the level of compulsory superannuation contributions by two years. Employers should take this delay into account when reviewing salaries and budgeting in future years.

DID YOU KNOW?

The FWC released its annual report earlier this month, announcing that applications to approve enterprise agreements dropped by 17% in 2012-2013. The report noted that the Commission approved 90% of single enterprise agreements within 54 days of lodgement and cut the time for multi-enterprise agreements, with 90% approved within 64 days.

The Tribunal also reported that for the first time it received over 4,000 unfair dismissal applications in the September quarter—a 5% increase on the previous year. The vast majority of claims were settled at conciliation, with only 167 determined by the Tribunal, and in only 55 of those cases the dismissal was found to be unfair.

ACKNOWLEDGMENTS

Thanks to Lisa Franzini (Associate), Nicola Walker (Graduate) and Nathan Krapivensky (Summer Clerk) for their assistance in the preparation of this *Update*.

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
AMSTERDAM	DALLAS	JEDDAH	MUNICH	SHANGHAI
ATLANTA	DUBAI	LONDON	NEW YORK	SILICON VALLEY
BEIJING	DÜSSELDORF	LOS ANGELES	PARIS	SINGAPORE
BOSTON	FRANKFURT	MADRID	PITTSBURGH	SYDNEY
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