JONES DAY

MARCH 2014

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

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MESSAGE FROM THE EDITOR

In our November and Holiday Editions, we commented upon the conservative Federal Coalition Government's apparent reluctance to engage on the thorny issue of industrial relations reform, still "trigger shy" following its loss of power in 2007 following the introduction of WorkChoices in 2006. That reluctance appears to have now come to an end.

Emboldened by recent accusations of union officials' corruption and links to organised crime made by mainstream media outlets, Prime Minister Toby Abbott has announced the formation of a Royal Commission to examine bribery and mismanagement in and around trade unions. The announcement of the Royal Commission dovetails with two moves previously foreshadowed by us, namely the proposed re-establishment of the Australian Building and Construction Commission to oversee the heavily unionised construction sector and the *Fair Work (Registered Organisations) Amendment Bill 2012* which would overhaul the system for oversight of trade unions.

Further, in late February 2014, the Federal Government proposed several major employer-friendly changes to the *Fair Work Act 2009* (Cth) (**Fair Work Act**), the cornerstone of labour and employment law in Australia. The *Fair Work Amendment Bill 2014* (Cth) (**Fair Work Amendment Bill**) follows a pre-election promise to stabilise workplace relations and the report of the Fair Work Act Review Board, commissioned

by the former Federal Labor Government in 2012. It may be that the pendulum has swung back (or is at least swinging back) to the right.

Paul Howes, speaking as leader of the traditionally left-wing Australian Workers' Union, made a sensational speech in which he called for a "grand compact" between labour, capital and government on industrial issues. Howes acknowledged the "culture of perpetual instability" is bad for both business and employment: "it's near impossible [to plan for the long term] when you don't know what rules you'll be playing under.… business and unions believe … they don't need to cooperate today because they'll be able to rewrite the rules tomorrow". The fact that Mr Howes has since resigned from the union may suggest his views are not shared by everyone within the labour movement.

This Edition also considers recent comments from the ACCC regarding secondary boycotts, decisions of the Fair Work Commission (**FWC**) regarding salary deductions by Jetstar and its first ruling on workplace bullying jurisdiction and the announcement by Toyota of its decision to cease manufacturing in Australia (following similar recent announcements from both Ford and General Motors).

Adam Salter, Partner

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

FEDERAL COALITION GOVERNMENT PROPOSES MAJOR CHANGES TO THE FAIR WORK ACT

As noted above, the Federal Government has proposed several major changes (largely employer-friendly) to the Fair Work Act through the Fair Work Amendment Bill. In short, the major changes include those listed below.

Greenfields Agreements: The Fair Work Amendment Bill imposes a statutory obligation on unions and employers to bargain in good faith when engaged in Greenfield Agreement negotiations, just as they would be under s228 of the Fair Work Act if they were negotiating an Enterprise Agreement in respect of existing employees. It also gives employers the right to apply to the FWC to have a proposed Greenfields Agreement approved if the negotiating parties fail to reach agreement within three months, and if the FWC is satisfied the proposed wages and conditions are consistent with prevailing industry standards.

Union Rights of Entry: The Fair Work Amendment Bill proposes the following key changes: restricting the circumstances in which union officials can enter premises without the employer's consent; giving the FWC more power to make orders to resolve disputes between employers and unions over the number and frequency of union officials' access; abolishing any obligation to transport or accommodate trade union officials to remote premises; allowing employers to reasonably require union officials to use certain rooms or areas for their discussions, instead of allowing the official to choose their workspace; and updating FWC-issued entry permits to include a photograph of the bearer to prevent their abuse by unauthorised persons.

Individual Flexibility Agreements (IFAs): The Fair Work Amendment Bill proposes a significant change to minimum term of IFAs, extending the minimum notice of termination of an IFA by either party from four weeks to 13 weeks.

Annual Leave Loading: The Fair Work Amendment Bill proposes to make it clear that annual leave paid out upon termination will be exclusive of annual leave loading, unless an industrial instrument expressly requires it to include annual leave loading.

Meeting to Discuss Extensions of Unpaid Parental Leave: In order to facilitate meaningful discussion and consideration of requests for additional unpaid parental leave, the Fair Work Amendment Bill proposes that if the employer intends to reject the additional leave request, then the employer and employee must at least meet to discuss the request before rejecting it.

Protection Action Ballot Orders: The Fair Work Amendment Bill also contains provisions which aim to reverse the decision of the Full Federal Court in *JJ Richards & Sons Pty Ltd v Fair Work Australia* (2012) 201 FCR 297. The amendments would mean that an application for a protected action ballot order cannot be made until the employer's obligation to provide employees with notice of their representational rights in bargaining has actually been triggered. In essence, employees cannot take protected industrial action (namely legal strikes permitted by the Fair Work Act) to force an employer to agree to bargain.

Unfair Dismissal Applications: Following on from concerns from employers about time wasted on frivolous claims where the employee is refusing to comply with the timetable for the proceedings, the Amendment Bill provides the FWC with the ability to dismiss an unfair dismissal application without a hearing where the application has no reasonable prospects of success or the former employee has unreasonably failed to attend, comply with directions or discontinue the application which has been settled.

NEW AND NOTEWORTHY IDENTIFYING KEY DEVELOPMENTS IN AUSTRALIAN LABOUR REGULATION

ROYAL COMMISSION INTO UNION CORRUPTION WILL ALSO PUT CORPORATIONS UNDER THE SPOTLIGHT

On 10 February 2014, Australian Prime Minister Tony Abbott announced the creation of a Royal Commission to inquire into corruption and financial impropriety around trade unions. The primary objectives of the Royal Commission will be to report publicly on the prevalence and patterns of bribery, fraud and financial mismanagement in and around trade unions, to assess whether the framework for regulating and investigating trade union conduct is adequate and to make recommendations for any legislative reform that it thinks is appropriate.

Trade unions are presently primarily regulated by the *Fair Work (Registered Organisations) Act 2009* (Cth) and monitored by the FWC, but (as mentioned in our December 2013/ January 2014 Edition) the Abbott government believes those arrangements are inadequate and has proposed substantial reforms. The Royal Commission's establishment follows numerous allegations of trade union officials' involvement in bribery, fraud, embezzlement, intimidation and dealings with organised crime figures. There are particular concerns around the use of labour hire companies and the abuse of union funds for undeclared person and political purposes.

As such, many employers will regard the Royal Commission's investigation as long overdue. However, in addition to examining trade unions themselves, the Royal Commission will almost certainly shine a light on some uncomfortable truths about the conduct of some corporations in inducing or facilitating union officials' corrupt behaviour. Dyson Heydon, the former High Court judge nominated as Commissioner, has previously critiqued the regulatory regime for trade unions. If appointed, he will undoubtedly use his extensive powers of compulsion under the *Royal Commissions Act 1923* (Cth) without fear or favour against union and commercial figures alike.

The construction, logistics or healthcare sectors are likely to be of particular interest to the Royal Commission. If you operate in these sectors, we recommend that you consider urgently reviewing your policies and procedures around trade union engagement, antibribery, entertainment, gifts, whistleblowing and the engagement of suppliers.

ACCC TARGETS SECONDARY BOYCOTTS IN 2014

The Australian Competition and Consumer Commission (**ACCC**) has said that it will target secondary boycotts in 2014 as part of its regulatory mandate. ACCC Chairman Rod Sims described secondary boycotts as "extremely detrimental to businesses, consumers and the competitive process", and said the ACCC will investigate secondary boycotts whenever it becomes aware of hem.

The *Competition and Consumer Act 2010* (Cth) (**CCA**) contains a statutory prohibition on secondary boycotts. This makes it illegal for a union to call a "sympathy strike", where a union agrees to help another union in its dispute with an employer by commencing industrial action against the employer's suppliers or customers. The CCA prohibition also extends to organised consumer boycotts of an employer because that employer is engaged in an industrial dispute. Employers at risk of secondary strikes or industrial action-related consumer boycott will welcome the ACCC's statement that secondary boycotts will be an enforcement priority for the ACCC in 2014.

Although the ACCC is independent of the Federal Government, the enforcement of secondary boycott prohibitions tends to increase under conservative Coalition Governments because the scope of the prohibitions is generally broadened. Conversely, when the Labor Party is in power, the provisions are generally narrowed. Consistent with this cycle of expansion and contraction, the Coalition Government has announced it is re-examining the secondary boycott laws with a view to strengthening them. Any changes are more likely to target secondary boycotts by unions or consumer groups motivated by environmental issues rather

than employers' involvement in industrial disputes. However, it would not be outside of the realm of possibility for the Coalition Government to further expand the scope of the prohibitions applying in the context of industrial action by unions.

It is important to note that the types of conduct that amount to industrial action as defined by the Fair Work Act are unlikely to also constitute secondary boycotts under the CCA. However, it is often the case that in periods during which unions and employees are engaging in or considering industrial action, they will also be more likely to engage in conduct that may breach the secondary boycott prohibitions under the CCA.

While protected industrial action may provide immunity for conduct in so far as it amounts to industrial action and meets the additional requirements found in Part 3-3 of the Fair Work Act, it will not extend to protect unions from scrutiny in relation to conduct that does not fall within that narrow definition, such as when unions reach an understanding with suppliers of a target employer which hinders or prevents them from supplying that employer.

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

JETSTAR FLIES INTO TROUBLE AT FEDERAL COURT

Jetstar has been fined $90,000 for breaching the terms of the Air Pilots Award 2010 by unlawfully deducting training costs from the wages of six cadet pilots. The Fair Work Ombudsman brought proceedings in the Federal Court at Sydney under the Fair Work Act.

The training costs were incurred at a time when the cadet pilots were formally employees of a New Zealand Jetstar entity and travelled frequently to New Zealand. The cadet pilots' employment was subsequently transferred to two Australian Jetstar entities, after which point their employers deducted a total of $17,500 from their salaries. The deductions have already been repaid to the cadets as the employees' union, the Australian Federation of Air Pilots, successfully brought action on their behalf in 2011. In setting the fine at 68 percent of the maximum penalty available, Justice Buchanan criticised Jetstar's decision to continue making deductions even after receiving legal advice that they breached the Award.

Jetstar's decision to domicile its pilot training scheme outside Australia and make the assertion that trainees were not subject to Australian awards was contentious, particularly when many of the trainees were Australian residents who had been recruited in Australia and spent time in Australia during their traineeship. We note that the Fair Work Ombudsman has parallel proceedings ongoing against Jetstar over the use of cabin crew engaged by Thailand and Singapore entities on certain domestic Australian sectors where Jetstar claims the employees are not subject to Australian awards.

Key Takeaway

Employers need to be cautious when asserting that employees who live in Australia, are sent to Australia for work or who travel extensively to Australia for work are not subject to Australian awards. Detailed legal advice should be obtained on the issue, and employers should be aware that the regulators are taking a keen interest these arrangements.

FIRST FWC RULING IN BULLYING JURISDICTION

We previously reported that the FWC received 44 reports of bullying in the first month of its jurisdiction over workplace bullying. The FWC has since handed down its first workplace bullying decision: in *BD* [2014] FWC 1019, the complainant applied to the FWC for a "stop bullying" order. The FWC complaint was dismissed by the Commission because the application form was incomplete and the complainant failed to supply the minimum necessary details even after being prompted by the FWC.

Readers should probably not read too much into *BD* as it is a technical and uncontested decision. However, by publishing this as its first finding only six weeks after it gained jurisdiction over workplace bullying, the FWC may be sending two messages which should reassure employers. The first is that the FWC intends to respond quickly to its workplace bullying workload. Secondly, while the FWC intends to provide employees with an avenue for redress in the case of workplace bullying, that does not extend to taking action on defective or incomplete applications. We will continue to monitor developments in this new jurisdiction as they arise.

BREAKING NEWS

- **TOYOTA TO DISCONTINUE MANUFACTURING IN AUSTRALIA: UNIONS AND GOVERNMENT EXCHANGE BLAME**

Toyota has decided to discontinue manufacturing vehicles in Australia by late 2017. Around 2,500 workers will be made redundant. Toyota's decision was long-anticipated, Ford and General Motors have each made similar decisions in recent years. The Australian Manufacturing Workers' Union (**AMWU**) and the Federal Government have each blamed the other for the death of Australia's large-scale auto manufacturing industry.

In late 2013, Toyota sought to renegotiate key elements of the Award (the agreement regulating pay, leave and employment conditions) in place at its plant in Melbourne. Among 28 other variations, Toyota wanted greater flexibility to shorten the plant's annual three week shutdown over Christmas, claiming it often starved supply to Middle East markets and required expensive overtime to clear the backlog. The AMWU, which represents 90 percent of Toyota plant workers, objected to Toyota's proposals. The union claimed Toyota was "trying it on" and would not pull out of Australia, and on 12 December 2013 procured an injunction preventing Toyota's proposals being put to workers at a vote. (Justice Bromberg, who heard the issue in the Federal Court, described the injunction application as raising "interesting and complicated issues" even by the standards of Australian labour law).

Federal Treasurer Joe Hockey subsequently claimed that Max Yasuda, the head of Toyota Australia, had privately told Hockey that AMWU's litigation and intransigence meant Toyota's global leadership could not be convinced that significant efficiencies could be made in Melbourne. However, Mr Yasuda and Toyota flatly denied that that was what Mr Hockey had been told, and said its ceasing manufacturing was the result of Australian market and economic conditions, not labour issues in particular. For its part, the AMWU denied it bore "any blame at all", and identified the Federal Coalition Government's "policy failures" as the cause of Toyota's decision.

Regardless of whether labour issues were indeed the final straw for Toyota, the complexity of the Toyota Award and the difficulties encountered in inflexibility of trade unions are illustrative of the labour-related challenges faced by many manufacturers in Australia.

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QUESTIONS

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

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