JONES DAY

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MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

CONTENTS

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ECONOMIC DEVELOPMENTS

VISA GRANTS DECREASE: IS THE TWO-SPEED ECONOMY SHIFTING GEAR?

The latest Department of Immigration statistics have revealed a 25 percent decrease in the number of 457 visas granted in FY2013. In particular, the number of 457 visas granted in the mining and construction sectors declined by 42 percent and 40 percent respectively, but 69 percent of 457 visa recipients took up work as managers and professionals. The redistribution of 457 visas across the economy suggests a declining growth in the mining states, and the geographic distribution of those visas supports this.

Seventeen percent of all 457 visa recipients took up work in Western Australia, but 62 percent commenced employment in New South Wales and Victoria. As to the nations from which 457 visa holders come, 23 percent arrived from India, 18 percent from the United Kingdom and 6.5 percent from China. The redistribution of 457 visas may reflect a growth in the professional services distributed across the east coast of Australia and a commensurate decline in mining and construction works taking place in Western Australia and Queensland.

The same statistics have revealed that the mining sector still pays the highest base salary, $138,700, to its 457 workers. The financial services sector follows, paying $117,000 and the utilities sector pays $116,100 as its average base rate. Western Australia, however, is no longer paying the highest rates. That honour belongs to New

South Wales, followed by the Northern Territory, Queensland and Victoria. Employers should be aware that the Federal Government may, in light of these statistics, consider decreasing the number of 457 visas in the coming financial year.

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

FAIR WORK (AMENDMENT) BILL PASSED BY HOUSE OF REPRESENTATIVES

The *Fair Work (Amendment) Bill 2014* (Cth), which we have previously reported on, has been passed by the House of Representatives. The Bill now awaits approval by the Senate. In July, we reported that the Senate Standing Committee on Education and Employment recommended to the Senate that it pass the Bill without any amendments. Accordingly, it is almost certain that the Bill will be passed on the next Senate sitting date.

The Bill, in the words of the Attorney-General, "protects and restores" the rights of the individual in the workplace. As discussed in our March and May *Updates*, the Bill prevents unions from taking greenfields agreements to the Fair Work Commission unless they have negotiated with an employer for three months. It also prohibits unions from entering workplaces unless they are covered by an enterprise agreement or are invited onto the premises by a member. It also expands the matters to which an IFA applies and dilutes the power of unions to limit their application. The Bill is expected to become law before the end of the year.

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

FIVEFOLD INCREASE IN DAMAGES FOR SEXUAL HARASSMENT: FULL FEDERAL COURT OF AUSTRALIA

In the most significant decision for employers this year, the Full Federal Court has increased the damages available for pain and suffering in a sexual harassment claim by a factor of five.

In *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82, a female manager employed by Oracle, Rebecca Richardson, was found to have been sexually harassed by a male sales consultant based in Melbourne for six months in 2008. The harassment ceased only when Richardson reported the conduct to her manager. Both the trial judge and the Full Court were critical of Oracle's investigation in four key respects. Firstly, Oracle permitted contact between Tucker and Richardson during the investigation. Secondly, Tucker was required only to give a written, evasive apology. Thirdly, Tucker was not dismissed but given a first and final warning. Finally, Oracle representatives encouraged Richardson not to visit its Melbourne offices again. Richardson resigned and took up elsewhere shortly after the completion of the investigation.

The trial judge found that Oracle was vicariously liable because it had not done everything reasonable to prevent the harassment of the sales manager. Accordingly, the trial judge awarded her $18,000 in damages for pain and suffering. The trial judge noted that he would have awarded her $30,000 for economic loss caused by taking up a lower paid position if the evidence proved a link between that decision and the harassment.

Richardson appealed many aspects of the decision but succeeded upon two, namely that damages for pain and suffering were inadequate and that there was evidence establishing economic loss such that she should have been awarded the $30,000. As to pain and suffering, Justice Kenny of the Full Court held that the award did fall within the range of damages available for pain and suffering. However, that range was now inadequate. Community standards now placed a higher value on quality of life than when the range was first set down. Furthermore, a restrictive approach to damages is inconsistent with the beneficial intent of the Sex Discrimination Act under which the claim was made.

Accordingly, it was found that the pain and suffering Richardson endured merited an award under this head of $100,000 instead of $18,000. As to there being no evidence of the harassment causing economic loss, Justices Besanko and Perram found that statements made by Richardson to others at the time of the investigation—that she had lost confidence in Oracle and her acceptance, soon after, of lower paid employment—established the necessary link.

Key Takeaway

The key takeaway for employers is that there are two points at which they may mitigate their exposure to a sexual harassment claim. The first is at the stage of establishing vicarious

liability, and the second is in the damages calculation. To prevent a finding of vicarious liability, employers should demonstrate that they have done everything reasonable to prevent the sexual harassment. To do this, employers should hold sexual harassment seminars regularly to warn employees of the seriousness of that conduct.

Furthermore, the contract of employment should provide that proven sexual harassment will justify summary dismissal. As to minimizing damages, employers should prevent the subjects of investigations from contacting complainants. Those complainants, whether or not their claims are substantiated, should be given counseling at the employer's expense. Implementation of these strategies should help employers to avoid sharing the fate of Oracle.

SUPREME COURT TAKES DIM VIEW OF EMPLOYEE DISLOYALTY

Justice Kelly of the South Australian Supreme Court has awarded at least half a million dollars to Artcraft Pty Ltd, whose production manager was found to have breached his contract, his fiduciary duties and wrongfully converted his employer's property by selling it to a recycling firm for his personal profit.

Artcraft produces road signs and employed Benjamin Dickson in its Adelaide branch to manage the production of those signs. Dickson decided to sell the scrap metal by-products found at Artcraft's premises to Ferris Metal Recyclers and pocketed the proceeds for four years, which Artcraft was able to prove at trial. Justice Kelly found for Artcraft on all three claims against Dickson. Notably, Justice Kelly awarded exemplary damages in respect of the claim for conversion, calling it a "fraud of the most egregious kind". Justice Kelly also held that Dickson's wife had been an accessory to the fraud and was also ordered to pay $59, 800 to Artcraft.

Key Takeaway

The key takeaway for employers is that they should have confidence that courts will appropriately compensate employers for claims of dishonest conduct on the part of their employees, provided that sufficient evidence is gathered in respect of such misconduct.

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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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ALKHOBAR	CLEVELAND	HOUSTON	MEXICO CITY	PERTH	SILICON VALLEY
AMSTERDAM	COLUMBUS	INDIA	MIAMI	PITTSBURGH	SINGAPORE
ATLANTA	DALLAS	IRVINE	MILAN	RIYADH	SYDNEY
BEIJING	DUBAI	JEDDAH	MOSCOW	SAN DIEGO	TAIPEI
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