JONES DAY

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MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

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

Recent amendments to the *Fair Work Regulations 2009* (Cth) have passed the Australian Senate after Palmer United Party Senators joined with Coalition Senators.

The amendments to the regulations will allow the government of Western Australia and interested third parties to make applications to the Fair Work Commission to have protected industrial action terminated pursuant to section 424 of the *Fair Work Act 2009* (Cth) (the "Act"). The federal government (and all other state and territory governments) have been able to make such applications to the Commission since 2009 when they referred their industrial relations powers to the Commonwealth.

Extending the jurisdiction of section 424 applications to third parties is a significant move. It will allow parties who are affected by industrial action to approach the Fair Work Commission and request that this action be terminated. This could include, for example, clients or joint venture partners of employers whose operations are slowed or suspended because of industrial action.

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

COSTS ORDERS IN FAIR WORK ACT PROCEEDINGS

Section 570 of the Act makes it difficult for parties to claim costs in relation to claims made through the Act. The section states that parties can have costs awarded against them only where they have either:

- Instituted the proceedings vexatiously or without reasonable cause;
- Acted unreasonably and by doing so caused the other party to incur costs; or
- Unreasonably refused to participate in a matter before the Fair Work Commission arising from the same facts as the proceedings before the Court.

In practice, costs orders are very rarely made against parties. In two recent decisions, the Federal Court and Federal Circuit Court have illustrated how this section is interpreted and applied in practice (and in what circumstances the Court will be inclined to order costs in line with section 570 of the Act).

SHEA V ENERGY AUSTRALIA

In *Shea v Energy Australia Services Pty Ltd (No 7)* [2014] FCA 1091, the Federal Court ordered Ms Shea (a former executive of Energy Australia) to pay costs wasted by Energy Australia, on an indemnity basis, in responding to several aspects of her claim which were unreasonably advanced.

Facts

Ms Shea alleged that she had been terminated from her employment because she complained that her manager has sexually harassed her (and other female staff members) in breach of section 340 of the Act (adverse action). Ms Shea made several complaints to Energy Australia management. These complaints were directed at the conduct of Energy Australia's Chief Financial Officer, Mr Kevin Holmes and other senior male employees. Ms Shea alleged that she was terminated because she made a complaint to Energy Australia management about an unwelcome sexual advance made by Mr Holmes.

In the course of the litigation which followed Ms Shea's dismissal, Energy Australia made a without prejudice settlement offer of $440,000 to Ms Shea. Ms Shea rejected this offer. Justice Jessup acknowledged that this was an attractive settlement offer.

Offers of Compromise and Adverse Action Claims

It is not uncommon for settlement offers made before a hearing to be expressed as offers of compromise made in accordance with the Federal Court Rules. Ordinarily (in litigation not subject to section 570 of the Act), the Federal Court will take the existence of a reasonable offer of compromise into account when later determining a costs application. If a party refuses a reasonable offer of compromise, and then proceeds to be unsuccessful in the litigation or is successful but fails to achieve an order from the Court which provides for the payment of more than the pre-litigation offer, that party can expect to be ordered to pay the opposing parties costs (usually on an indemnity basis) from the date the offer of compromise was made. The orders of the Federal Court in *Richardson v Oracle Corporation Australia Pty Limited (No 2)* [2013] FCA 359 are an example of this.

The offer made by Energy Australia was very reasonable. However, Justice Jessup could not find that Ms Shea was acting unreasonably in refusing it because she was seeking an additional remedy which had not been offered: reinstatement.

Basis for Indemnity Costs Order

Justice Jessup ultimately ordered that Ms Shea pay part of Energy Australia's costs (on an indemnity basis). His Honour considered that Ms Shea wasted the Court and the Respondent's time by unreasonably including allegations within her claim which were not supported with evidence and, in any event, were not directly relevant to the issue in dispute. These unreasonable allegations included:

- That another Energy Australia staff member, Mr McIndoe, sexually harassed a female employee at a staff party in 2006;
- That Mr McIndoe attempted to engage in sexual misconduct at a staff Christmas party in 2010; and
- That Mr McIndoe received a telephone call, at work, from the irate husband of a female employee whom he had sexually pursued.

Ms Shea did not witness any of these incidents directly. The basis of her allegations was the "rumour mill". Such hearsay evidence was ruled as inadmissible. As Ms Shea had no

admissible evidence to support these allegations, Justice Jessup concluded it was unreasonable for her to have brought them.

Further, even if these allegations were established, it is difficult to see how they are relevant or would assist Ms Shea's claim. They do not establish that Ms Shea complained about such conduct and was terminated as a result of her complaint—the issue which was in dispute. Ultimately, the Court ruled that Ms Shea was terminated by Energy Australia for poor performance, not because of her complaints.

Justice Jessup ordered that Ms Shea pay the legal costs wasted by Energy Australia in responding to the allegations which were unreasonably made.

MILLER V EXECUTIVE EDGE

In *Miller v Executive Edge Travel & Events Pty Ltd (No 2)* [2014] FCCA 2271, Ms Miller brought an adverse action claim against her former employer, Executive Edge. This claim was dismissed. Executive Edge sought costs against Ms Miller on the basis that she had acted unreasonably in refusing two settlement offers which were made in the course of the litigation.

The first settlement offer, made on 8 May 2014 and expressed to be open until 15 May 2014, was for $5,500. A second settlement offer was made on the eve of the hearing (by email) for $11,000.

Ms Miller was unrepresented in her claim, and Justice O'Sullivan considered that given her status as a layperson, she did not act unreasonably in refusing the offers of settlement. This was the case particularly because Executive Edge's affidavit evidence was not available to Ms Miller when the first offer expired and also because there was no evidence that Ms Miller received the offer made on the eve of the hearing before it expired.

If Executive Edge's offers were made after they served their evidence and within a timeframe which allowed Ms Miller to properly consider them, they would have been in a much better position to make an argument for costs on the basis of Ms Miller's refusal of these offers.

If Ms Miller had been represented, the Court would have been more inclined to make a costs order against her (as the Court would infer that Ms Miller's legal representative would have explained to her the consequences of refusing a reasonable settlement offer).

ACKNOWLEDGMENTS

Thanks to Michael Whitbread (Associate) for his 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 the author, Adam Salter, Partner.

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