JONES DAY

NOVEMBER 2014

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

CONTENTS

Adam Salter
Partner, Jones Day

MESSAGE FROM THE EDITOR

This month, the Australian government has increased their crackdown on union corruption with the establishment of a new joint police taskforce aimed at targeting alleged bribery, fraud, intimidation, extortion and nepotism within the Australian labour movement.

Also, some important cases have made their way through the Federal Circuit Court. In *Evans v Trilab Pty Ltd* [2014] FCCA 2464, the Court has expanded the scope of the accepted interpretation of an employee's 'workplace right' (for the purposes of adverse action complaints). In *CFMEU v Whitehaven Coal Limited [2014] FCCA 2657*, the Court provided some useful insights into how it calculates what penalties should be imposed for breaches of enterprise bargaining agreements.

Adam Salter, Partner

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

INDUSTRIAL DISPUTES MORE LIKELY AS PRIME MINISTER INCREASES PRESSURE ON CORRUPT TRADE UNIONS

The tradition of new Australian federal governments making widespread legislative changes to labour law upon winning power seemed to have been broken in 2013: the newly elected Prime Minister Tony Abbott had already declared that the labour policies of the previous Liberal government were "dead, buried and cremated" and that he would not enact major reforms to employment law before 2016. Since that time, as promised, there has been no wholesale revision of Australian labour law. Employees and employers have enjoyed a welcome period of stability in labour relations.

That period of stability may now be coming to an end: as readers will be aware, the Abbott government established a Royal Commission (an investigative body with wide powers to seize documents and compel testimony) into trade union governance in March 2014. Since then, the Royal Commission has heard testimony that officials of certain trade unions have engaged in bribery, fraud, intimidation, extortion and nepotism. The Assistant Commission of Victoria Police claimed that individual union officials were engaging in serious criminal conduct, and organised crime figures were committing criminal offences on behalf of certain officials. The allegations have been unquestionably embarrassing to the labour movement, which is currently experiencing its lowest ever levels of private sector workforce penetration.

Now, the Prime Minister has announced a further development that may further destabilise certain parts of the union movement: a new joint taskforce will be formed from officers of the Australian Federal Police and Victoria Police to investigate violence and corruption within the construction industry. Unlike the Royal Commission, the taskforce will have the power to arrest suspects and prepare criminal cases to be brought by prosecutors. It seems that if Mr Abbott does not intend to change the law around labour relations and unions, he at least intends to ensure they abide by the existing laws.

In the long term, identification and prosecution of criminal activity within unions should benefit employers, honest officials and employees alike. But in the short term, the joint police taskforce may increase the likelihood of labour disputes in already volatile construction sector and even spill over into other heavily unionised sectors like extractives and logistics. Companies operating in those sectors should review their crisis management plans and anticipate that negotiating with trade unions over enterprise agreements or redundancies may be even more sensitive than ever before.

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

FEDERAL CIRCUIT COURT ACKNOWLEDGES BREADTH OF WORKPLACE RIGHTS IN ADVERSE ACTION CLAIMS

In *Evans v Trilab Pty Ltd* [2014] FCCA 2464, Judge Lucev held that an adverse action claim can be based on the exercise of rights that do not arise from statutory, regulatory or contractual provisions and are only indirectly connected to employment.

Hayden Evans (**Evans**) managed a soil testing laboratory for Trilab Pty Ltd (**Trilab**). Trilab and Evans differed on the appropriate method to test soil. Evans believed that the firm's preferred method did not comply with Australian standards. He propagated that belief among his staff. Evans raised the matter with his superiors on numerous occasions. Trilab declined to use Evans's preferred method, and the chairman of the board directed Evans to abandon the issue. Four days after the direction, the chairman dismissed Evans on the basis of his performance review and his intransigence on the testing issue.

Feeling aggrieved, Evans claimed that he had been dismissed for exercising his workplace right to make a complaint or inquiry under s 341(1)(c)(ii) of the *Fair Work Act 2009* (Cth) (**Act**). Trilab sought summary dismissal of Evans's claim for the reasons that the complaint could not be characterized as an employment complaint under the Act. Judge Lucev disagreed, considering that a right need not arise from statute, regulation or contract and the complaint need be only indirectly related to the employee's terms and conditions of employment. His Honour concluded that Evans's conduct had the capacity to be described as a complaint that bore upon his employment. Judge Lucev therefore refused to dismiss the claim.

Lessons for Employers

Evans stands for only the proposition that a complaint regarding standards can be characterized as a complaint in relation to a workplace right. Even so, employers should take away three points. The first is that courts are starting to take a liberal view of whether a complaint is connected to employment. For this reason, employers should carefully document their responses to complaints and should never dismiss them out of hand. If it is necessary to dismiss an employee shortly after he or she has made a complaint, the reasons for the dismissal should be carefully given in writing (and the employer should be sure that it has investigated and addressed the complaint).

JUDICIAL DISQUIET TOWARDS $19,000 PENALTY APPLIED TO WHITEHAVEN COAL

Judge Emmett of the Federal Circuit Court has approved a $19,000 penalty to be applied to Whitehaven Coal (**Whitehaven**) pursuant to the Act after it breached an enterprise bargaining agreement (**EBA**) in the course of closing one of its mines. Judge Emmett expressed concern that the penalty could be 'manifestly excessive'.

Whitehaven and the CFMEU had three EBAs, one for each of its mines in northwestern New South Wales. Two of the agreements required Whitehaven to notify employees when a definite decision had been made to introduce a workplace change. The third agreement was more generous, conferring upon the employees a right to be consulted regarding the changes and giving them the right to representation in those consultations.

Whitehaven resolved to reduce its operations at its mines in northwestern New South Wales. It had foreshadowed this in negotiations with the CFMEU in February 2013. One month later, Whitehaven announced it would reduce its operations by making redundant certain positions in all three of its mines and effected those redundancies on the same day. In doing so, Whitehaven had failed to consult its employees governed by the third agreement. The CFMEU commenced proceedings against Whitehaven, but the dispute was resolved by agreement: Whitehaven would pay $19,000 to the CFMEU—40% of the maximum penalty under the *Fair Work Act 2009* (Cth). Judge Emmett approved the settlement but considered that it may be considered manifestly excessive. The reason for this conclusion was that Whitehaven had never before breached an EBA; it had conceded liability and co-operated in making a joint submission to the court.

Lessons for Employers

Employers can take two points away from the approval of this penalty. The first is that employers should not capitulate readily to union demands in negotiations. Courts are willing to take a balanced view of employers' breaches of EBAs and the Act. Employers should not take to heart warnings by unions that their conduct will be viewed dimly by the courts. Equally, employers should carefully review EBAs and employment contracts before acting on any decision affecting employees.

ACKNOWLEDGMENTS

Thanks to associates Michael Whitbread, Viv Jones and Andrew Berriman 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. Adam can be contacted by email at asalter@jonesday.com or by phone on +612 8272 0514.

UNSUBSCRIBE

If you no longer wish to receive the *Monthly Update—Australian Labour & Employment*, please send an email to asalter@jonesday.com with the subject UNSUBSCRIBE.

JONES DAY GLOBAL LOCATIONS

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
BOSTON	DÜSSELDORF	LONDON	MUNICH	SAN FRANCISCO	TOKYO
BRUSSELS	FRANKFURT	LOS ANGELES	NEW YORK	SÃO PAULO	WASHINGTON
CHICAGO	HONG KONG	MADRID	PARIS	SHANGHAI	