JONES DAY

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MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

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MESSAGE FROM THE EDITOR

This month, we discuss how economic pressures affecting the resources sector are resulting in increases in Australia's unemployment rate and in industrial action. We also discuss recent legislation the Federal Government has introduced to try to limit such industrial action. We discuss a recent decision of the District Court, *Mitchell-Innes v Willis Australia Group Services Pty Ltd (No 2)*, in which approximately $300,000 in damages were awarded to an executive who was wrongfully dismissed for being intoxicated at work, and Justice Gleeson's decision in *Schmitt v Carter*, which has broad consequences for all employment claims brought against employers in administration.

Adam Salter, Partner

ECONOMIC DEVELOPMENTS

STEADY RISE IN UNEMPLOYMENT RATE

Since April 2012, Australia's unemployment rate has steadily climbed from 4.9 percent to its current high of 6.3 percent (the highest it has been in 12 years).

2015 is likely to see further increases in unemployment as the resources sector slows down off the back of declining commodities prices. Since February 2013, global iron ore prices have fallen from approximately USD 150 per ton to USD 73

per ton. Oil prices have similarly dropped from a high of USD 108 per barrel (in June 2014) to recent lows of USD 77 per barrel. Declining commodities prices can be expected to affect the profitability of many Australian mining operations and will most certainly stagnate development in new mining ventures.

Additionally, large Australian employers outside of the resources sector are feeling the pinch and laying off large numbers of staff, both in the private and public sectors. For example, according to the Community and Public Sector Union's Nadine Flood, the Australian Government has slashed more than 8,000 public service jobs in 2014 in an attempt to reduce budget deficits partly caused by falling tax revenue from mining profits.

Worsening industrial relations in the mining industry

The resources slowdown is not just causing an increase in the unemployment rate; it is also promoting fractured labour relations at some of Australia's largest resources projects. The Maritime Union of Australia (**MUA**) has been involved in significant disputes with DP World at Fremantle (near Perth), Teekay Shipping at Port Hedland and Chevron and its contractor Mermaid Marine at the Gorgon project in Western Australia.

The Australian Mines and Metals Association has accused the MUA of "waging some sort of misguided industrial war against the resources industry", and the Royal Commission into Trade Union Governance and Corruption heard that $1 million was paid to a MUA training fund to resolve a labour dispute over foreign crewing off Western Australia. Major employers involved in Western Australia are publicly lobbying the Australian Government to make its industrial policies and regulations competitive globally. Labour unions and employers alike know that a crunch time is approaching. We anticipate a worsening of labour relations as each side of the negotiating table seeks to protect the interests of its constituency.

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

FEDERAL GOVERNMENT ATTEMPTS TO INTRODUCE LEGISLATION TO LIMIT INDUSTRIAL ACTION

The *Fair Work Amendment (Bargaining Processes) Bill 2014* was introduced into the Federal Parliament on 27 November 2014. If passed into law, the bill will amend sections 187 and 443 of the *Fair Work Act 2009* (Cth) to:

- Require the Fair Work Commission, when approving a collective bargaining agreement (enterprise agreement), to be satisfied that the employer and employees, when bargaining for the agreement, discussed ways to improve productivity in the workplace; and
- Prevent the Fair Work Commission from making a protected action ballot order (which allows employees to engage in protected industrial action) where it is satisfied that either: (i) the employees' claims are manifestly excessive (having regard to the conditions at the workplace and the industry in which the employer operates); or (ii) if implemented, the employees' requests would have a significant adverse impact on productivity in the workplace.

Whether the proposed legislation will pass through the Australian Senate and be introduced into law is unclear. Many of the Federal Government's recent reforms have been frustrated by an adversarial Senate.

Employers battling with unions in the Fair Work Commission and who are about to commence enterprise bargaining negotiations will be following the bill's progress carefully.

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

DISTRICT COURT AWARDS NEARLY $300,000 TO GENERAL MANAGER WRONGFULLY DISMISSED FOR INTOXICATION AT WORK

In *Mitchell-Innes v Willis Australia Group Services Pty Ltd (No 2)* (Unreported, District Court of New South Wales, Taylor DCJ, 8 December 2014), Donald Mitchell-Innes sued his employer, Willis Australia Group Services (**Willis**) for wrongful dismissal after Willis summarily dismissed Mr Mitchell-Innes

for what it believed was gross misconduct: being drunk at work. Taylor DCJ found that the plaintiff had been wrongfully dismissed and ordered Willis to pay nearly $300,000 in damages.

Background

On 30 October 2012, Mr Mitchell-Innes travelled to Melbourne to attend a work conference. The night before the conference, Mr Mitchell-Innes attended dinner and drinks with colleagues, during the course of which he admitted to consuming 17 standard drinks. On the following morning, Mr Mitchell-Innes arrived at the conference and appeared intoxicated. Senior colleagues reported that he was "smelling strongly of alcohol … talking loudly, slurring his words, making animal noises and throwing lollies".

Decision

Whilst Taylor DCJ found that Mr Mitchell-Innes' behaviour constituted misconduct, he was not convinced that the misconduct was sufficiently serious to justify summary dismissal. His Honour noted that a single act of misconduct can justify summary dismissal, although that misconduct must be "of such aggravated character that it strikes the employment contract down immediately, completely and permanently."

A clause in Mr Mitchell-Innes' employment contract stated: "a condition of your employment is compliance with any policies and procedures [of the] Willis Group…". The policies included the "Code of Work" policy and "Disciplinary Counselling" policy, both of which included prohibitions against being intoxicated at work. Both of these policies contemplated summary dismissal only when an employee's actions could "seriously damage Willis' reputation" or "endanger the well-being of Willis' staff".

Taylor DCJ determined that this clause meant Willis' policies were incorporated by reference within Mr Mitchell-Innes' employment contract. Taylor DCJ was not convinced that Mr Mitchell-Innes' misconduct resulted in either serious damage to Willis' reputation or endangered the well-being of Willis' staff. Accordingly, Willis was effectively restrained from summarily dismissing Mr Mitchell-Innes because of the restrictions it imposed on itself in its employment policies.

His Honour cited a series of mitigating factors that reduced the seriousness of Mr Mitchell-Innes' misconduct, including:

- The plaintiff's long and blemish-free record of employment with Willis;
- A culture within the firm that encouraged the consumption of alcohol with colleagues and clients;
- The plaintiff caused no reputational damage to the firm because no clients were present to witness the plaintiff's behaviour; and
- The plaintiff did not damage staff morale or staff discipline within the firm.

Taylor DCJ awarded the plaintiff $296,650.75 damages, the sum representing lost salary, a lost retention bonus, lost long service leave entitlements and pre-judgment interest.

Lessons for Employers

This decision makes it clear that intoxication at work will not always justify summary dismissal. Courts will carefully construe the employment contract, employment policies and the company's "culture" to determine the seriousness of any employee misconduct.

Employers should be careful not to draft employment contracts and employment policies in a way which limits their flexibility when responding to and dealing with employee misconduct (as Willis' policy did by requiring serious damage to the firm's reputation or endangerment to the well-being of Willis staff to justify summary dismissal).

FEDERAL COURT ORDERS THAT DAMAGES IN A UNLAWFUL TERMINATION CLAIM ARE NOT A PRIORITY PAYMENT IN THE WINDING UP OF THE EMPLOYER

Section 556 of the *Corporations Act 2001* (Cth) (**Act**) requires that certain employee entitlements be paid in priority to unsecured debts in the case of the winding up of the employer. These priority payments include:

- Payments of wages and superannuation entitlements owing to the employees;
- Payments made as compensation for workplace injuries (workers' compensation payments);
- Payments for accrued leave entitlements; and
- Retrenchment payments.

In *Schmitt v Carter [2014] FCA 1370*, Mr Schmitt worked as the Chief Financial Officer of CMA Corporation Limited; for

much of his employment, he was also a Director of CMA. Mr Schmitt was dismissed summarily and commenced proceedings against CMA for unlawful termination. A few months after he commenced proceedings, CMA entered into voluntary administration. CMA obtained a stay of the wrongful dismissal proceedings upon entering into voluntary administration.

Mr Schmitt approached the Federal Court seeking an order that any damages he obtain in the wrongful dismissal proceedings be paid in priority to other unsecured debts as "retrenchment payments" within the meaning of section 556 of the Act.

The Act defines a retrenchment payment as:

> *an amount payable by the company to the employee, by virtue of an industrial instrument* (which includes an employment contract)*, in respect of the termination of the employee's employment by the company, whether the amount becomes payable before, on or after the relevant date.*

Justice Gleeson decided that the damages Mr Schmitt sought, if payable, would not be an amount payable by virtue of the employment contract because his claim was not an amount payable by the company (yet). Justice Gleeson said (at 47):

> *Although there is an obvious connection between the employment contract and the plaintiff's claim, that claim cannot be described as an amount payable 'by virtue of' the employment contract because the plaintiff's claim arose only upon the termination of the contract.*

This broad principle presents problems for any employment-related claims which may be made against a company in administration.

It is interesting that Justice Gleeson chose to develop her reasoning so broadly as it wasn't strictly necessary for Her Honour to address this issue, since Mr Schmitt wasn't eligible for a priority payment because he was a director of CMA at the relevant time and the exception within subsection 556 (1C) of the Act prevents him from claiming priority.

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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.

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ATLANTA	DALLAS	IRVINE	MILAN	RIYADH	SYDNEY
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