JONES DAY

MARCH 2015

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

CONTENTS

MESSAGE FROM THE EDITOR

Adam Salter
Partner, Jones Day

This month, the Federal Court has ruled that the Federal Government's attempt to indirectly reform offshore labour and migration laws is unlawful. Also, we look at recent decisions of the Supreme Court of New South Wales into the law relating to the incorporation of employment policies into an employee's contract of employment. Finally, we discuss a recent decision which has validated an employer's use of a zero tolerance drug and alcohol policy.

Adam Salter, Partner

ECONOMIC DEVELOPMENTS

Earlier in March 2015, the Federal Government released the 2015 Intergenerational Report—Australia in 2055. The report predicts that average wage growth will fall to 1.5 percent annually over the next 30 years (compared to 1.7 percent annually over the last 40 years) and that gross national income (per person) will slow to a growth rate of 1.4 percent in the next 40 years (compared to 1.7 percent over the last 40 years). The report also draws attention to the aging of the Australian working population (and predicts a 100 percent increase in the number of Australians over 65 years old by 2055). It seems likely that the Government will use the report to argue for reforms to Australia's superannuation and pension programs in the 2015 Federal Budget (to be released in May).

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

COALITION ATTEMPT TO ALTER MIGRATION STATUS OF NON-CITIZEN WORKERS IN OFFSHORE RESOURCE SECTOR FAILS

In 2014, the Coalition government attempted to undo, by ministerial determination, reforms implemented by the previous Labor government, which brought non-citizen workers in the offshore resources sector within Australia's immigration regime. In *Australian Maritime Officers' Union v Assistant Minister for Immigration and Border Protection* [2015] FCAFC 45, the Federal Court found this to be an invalid exercise of the Minister's powers.

The case is indicative of the lengths that the Coalition has been willing to go to push through reforms in various areas despite a relatively hostile Senate, and the potential pitfalls associated with those methods. Similar scenarios are likely to play out in respect of any reforms that the Coalition seeks to implement following its review of workplace legislation if these reforms lack sufficient support in the Senate.

Background

In 2012, the Federal Court of Australia held that two pipe-laying vessels of the coast of Western Australia were not "Australian resources installations", and therefore persons working on them did not require visas under the *Migration Act 1958* (Cth) (the "Migration Act"): *Allseas Construction SA v Minister for Immigration and Citizenship* [2012] FCA 529; (2012) 203 FCR 200.

Following the judgment, and resulting discontent on the part of the Maritime Union of Australia (the "MUA") and the Australian Maritime Officers' Union (the "AMOU"), a Taskforce established by the Labor government recommended that a specific legislative concept be created to bring such workers within the Migration Act.

Accordingly, in 2013 legislation was passed, with effect from July 2014, which deemed persons who engage in an "offshore resources activity" to be within Australia's "migration zone"—so that non-citizens undertaking such activities required a specific visa to work (the "2013 Act"). The amendments also gave the Minister for Immigration the power to exempt an activity or activities from the definition of "offshore resource activity", so that they would not be captured by the new regime.

After coming into power, the Coalition government made some moves toward repealing and/or watering down this new regime. In March 2014, it introduced a bill to this end, which is, at the time of writing, still being considered by the Senate. In May 2014, regulations were made which allowed holders of certain temporary visas to work in the offshore resource sector, but these were disallowed by the Senate in July 2014.

After the regulations were disallowed, the Assistant Minister for Immigration purported to use the powers granted by the 2013 Act to exempt "*all* regulated operations and *all* regulated activities from the whole of the defined content of 'offshore resources activity'. . . with the consequence that non-citizen workers involved in those operations and activities did not require visas" (the "Determination").

Issue

Both the MUA and the AMOU applied to the Federal Court seeking a declaration that the Determination was invalid, as the Assistant Minister lacked the power to make it under the Migration Act. The crux of their argument was that the power to create exemptions to a general rule did not include the power to create a universal exemption so that the general rule applied in *no* case whatsoever.

Discussion

Despite the logical attraction of this argument, it failed at first instance. The primary judge found that Parliament had intended to create an "unfettered" or unlimited discretion in the Minister, which extended to "a complete (and perhaps temporary) exception of the kind effected by the Determination." This was heavily criticised by the unions on appeal, which argued (among other things) that the judgment failed to give effect to the clear purpose of the legislation. In response, the Assistant Minister argued that the purpose of the 2013 Act was to ensure that offshore activities *could* be regulated under the Migration Act, not to ensure that they *would* be so regulated.

The Full Court found that the "express purpose of the amendments, driven in part by border security considerations, was to *regulate* foreign workers participating in

offshore resources activities by bringing those persons into the migration zone and thereby requiring them to hold a specified visa under the [Migration] Act. . .". The purpose of the regulation-making power in the 2013 Act was to allow the Minister to capture *further* activities than those already caught (including activities regulated by the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) or the *Offshore Minerals Act 1994* (Cth)), or to exempt *certain* activities which he or she considered should not fall within the definition of "offshore resource activity" for these purposes. It was not intended to permit the Minister to implement a universal exemption that would negate the general rule altogether.

Ultimately, this means that the Federal Government will need to continue negotiations with the hostile Senate to progress its policy agenda in workplace relations reform.

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

FULL FEDERAL COURT UPHOLDS DISMISSAL OF FERRY CAPTAIN WHO FAILED TO COMPLY WITH HIS EMPLOYER'S ZERO TOLERANCE DRUG POLICY

In *Toms v Harbour City Ferries Pty Limited* [2015] FCAFC 35, the Full Federal Court of Australia upheld a decision of the Full Bench of the Fair Work Commission ("FWC") overturning the reinstatement of Mr Toms, a ferry captain who was dismissed after failing a drug test.

Mr Toms agreed to fill a vacant shift in July 2013, and his vessel collided with a wharf. He failed the routine drug test following the accident, having smoked marijuana 16 hours earlier to relieve shoulder pain. Mr Toms was initially suspended by his employer, Harbour City Ferries, in accordance with its zero tolerance policy toward drugs and alcohol. He was dismissed one month later following an investigation. Mr Toms applied to the FWC for a remedy of unfair dismissal.

Decision of Deputy President Lawrence of the FWC

Deputy President Lawrence decided that Mr Toms's dismissal was unfair, being "harsh, unjust or unreasonable" within the meaning of section 385 of the *Fair Work Act 2009* (Cth). This was based on the lack of evidence of a causal link between Mr Toms's drug use and the accident. Harbour City Ferries appealed against the decision of Deputy President Lawrence to the Full Bench of the FWC.

Decision of the Full Bench of the FWC

The Full Bench considered that Deputy President Lawrence's focus on mitigating factors, and particularly the absence of evidence of a link between the drug use and the accident, was misguided, given the "serious misconduct" involved. The central factor in determining whether the dismissal was unfair was Mr Toms's "deliberate disobedience" of Harbour City Ferries' zero tolerance drug and alcohol policy. The fact that the marijuana was used as pain relief was a mitigating factor that was rendered irrelevant by Mr Toms' accepting a shift knowing that he could be in breach of the policy.

In light of the importance of the policy, the Full Bench overturned the reinstatement of Mr Toms. Mr Toms appealed against the decision of the Full Bench of the FWC to the Full Federal Court.

Appeal to the Full Federal Court

The Full Federal Court emphasised the importance of the appeals process in supervising the development of "industrial standards". However, the Court was ultimately deferential to the views of the Full Bench of the FWC and held that the Full Bench had not fallen into error. Justice Buchanan, with whom Allsop CJ and Siopis J agreed, stated that:

> The FWC is entitled to approach its task by focusing on considerations it considers to be relevant. . . [I]ts view . . . was that the core question—the deliberate disobedience of a significant policy (one central to the safety of the public and the public's confidence in the safety of ferry travel) was not touched by a lack of evidence of impairment, or by a lack of evidence of causal relationship between the event and the cannabis. . . .

As such, the decision of the Full Bench overturning the reinstatement of Mr Toms was not disturbed.

Points to Note for Employers

This decision demonstrates that failure to comply with zero tolerance drug and alcohol policies can form a legitimate basis for the dismissal of an employee. It also reflects the FWC's willingness to uphold such policies, even in the

presence of mitigating factors that may otherwise weigh in favour of the employee, particularly when such policies impact safety.

ACKNOWLEDGMENTS

Thanks to associates Michael Whitbread, Clare Langford and graduate Stephanie Crosbie 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	