JONES DAY

OCTOBER 2015

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

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

FAIR WORK COMMISSION APPROVES NEW MODEL ANNUAL LEAVE TERM

As part of its four-yearly review of Australia's modern awards, the Fair Work Commission has settled the terms of a new modern award annual leave model term to be included in all revised modern awards at the conclusion of the Commission's review. The new annual leave terms provide increased flexibility and additional rights for employees, namely allowing:

- **Direction to take excessive annual leave:** Modern awards would allow employers to direct their employees to take annual leave where they have more than eight weeks of annual leave accrued.
- **Cashing out of excessive annual leave:** Modern awards would allow employees to elect to cash out up to two weeks' annual leave each year (provided that the employee retains at least four weeks' annual leave after such additional amounts have been cashed out).
- **Granting leave in advance:** Modern awards would allow employees to take annual leave in advance of accruing the necessary entitlement (with their employer's agreement), and an employer will be able to deduct leave taken in advance from an employee's final pay.
- **Time for payment of annual leave:** Modern awards would allow employers to pay annual leave by electronic funds transfer in an employers' usual pay cycle (some existing awards require that employees be paid for annual leave in advance periods of leave that they have taken).

IN THIS ISSUE

SENATE APPROVES AMENDMENTS TO THE GREENFIELDS AGREEMENT PROVISIONS IN THE FAIR WORK ACT

On 13 October 2015, the Senate approved the Fair Work Amendment Bill 2014 ("Bill") which amends the greenfields agreement provisions in the *Fair Work Act 2009* (Cth) ("FWA"). The amendments give employers greater power to resolve deadlocks when negotiating greenfields agreements.

Greenfields agreements are enterprise agreements which are made between an employer and one or more unions in circumstances where the employer is establishing a new enterprise. The negotiation of greenfields agreements can be difficult.

The Bill is directed toward ensuring that enterprise agreements are negotiated efficiently. The proposed amendments allow employers to seek approval of their proposed greenfields agreement if no deal has been reached with the union or unions after a six-month "negotiating period". This is designed to give employers a mechanism to resolve deadlocks to prevent excessive delays in project start dates. However, the approval is still subject to restrictions, including the "better off overall test" and good faith bargaining requirements.

The original proposal allowed employers to seek approval of their proposed greenfields agreements after a three-month negotiating period, but the period was extended to six months after opposition from crossbenchers in the Federal Parliament. The new greenfields provisions will be the subject of a review after two years, meaning this area could be the subject of further change in the future.

Despite the Senate's approval of the Bill, it still needs to be passed by the House of Representatives before it becomes law. The Bill also includes other amendments to the FWA, such as changes to the protected action ballot order requirements and a new obligation on employers to give employees a reasonable opportunity to discuss requests to extend parental leave.

PROPOSED MERGER OF TWO OF AUSTRALIA'S MOST POWERFUL UNIONS

The Maritime Union of Australia ("MUA") and Construction Forestry Mining and Energy Union ("CFMEU") have announced this month that they are considering a merger.

The MUA and CFMEU are two of Australia's largest and most powerful unions, with approximately 16,000 and 140,000 members respectively. The merger proposal will be put to the MUA's members at its national conference in February 2016. In the meantime, both the MUA and CFMEU have expressed support for the merger and the impact it will have on workers' rights in Australia.

Paddy Crumlin, National Secretary of the MUA, has said that the merger will create Australia's most powerful union. He recently stated that "discussions to merge with the like-minded CFMEU will help us fight the ever-pervasive anti-worker and anti-union attacks on workers and their entitlements and job security". Mr Crumlin has also identified the ability to pool financial and legal resources as a significant factor motivating the proposed merger, particularly in light of the various complex legal issues currently being faced by unions in Australia.

Michael O'Connor, National Secretary of the CFMEU, has also expressed the opinion that the merger will strengthen both the national and international union movement. He recently stated that "the struggle isn't just about increasing wages, or creating a safe work site, there is also a bigger and important political struggle. . . [t]his move will be hugely beneficial to not just the members of the MUA and CFMEU but will lead the way for all working men and women".

The proposed merger is said to be a response to the tough current political climate for unions, with the new Turnbull government continuing to promote the Abbott government's proposals to limit the powers of unions in Australia. If the merger goes ahead, it will likely improve the bargaining power of both unions in opposing the government's move toward restricting the influence of unions in the Australian workforce.

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

RESTRAINT OF TRADE CLAUSES IN THE SPOTLIGHT

In *Epichealth Pty Ltd v Peng-Kung Yang* [2015] VSC 516, an interlocutory injunction was granted by the Supreme Court of Victoria restraining the defendant (a medical practitioner) from providing any services associated with carrying on a general medical clinic within a 10-kilometre exclusion zone.

Factual Background. The contract, by which the defendant was engaged as an independent contractor, required that the defendant provide six months' notice of termination and included a restraint of trade clause that applied a standard cascading definition of the restricted geographical area and restraint period. The defendant provided the plaintiff with notice of termination; however, prior to the expiry of the six-month notice period, the defendant ceased providing services to the plaintiff, and, in breach of the restraint clause, the defendant commenced operation as a sole medical practitioner and sole director of a medical clinic six kilometres from the plaintiff's clinic.

Decision. In determining whether to grant the injunction, Justice Dixon applied the relevant principles articulated by the High Court in *Australian Broadcasting Corporation v O'Neill*. Firstly, his honour held that the plaintiff had prima facie demonstrated the defendant was in breach of the termination and restraint clauses of the contract. Secondly, in the circumstances, his honour determined damages would be an inadequate remedy given the complexity involved in assessing loss attributed to customer loyalty to a medical business. Finally, his honour held that the balance of convenience weighed in favour of the plaintiff, noting that the likelihood of the defendant facing financial hardship was a commercial risk accepted by the defendant which did not justify permanently depriving the plaintiff of the protection the restraint clause provided to its business.

SUPREME COURT UPHOLDS RESTRAINT CLAUSE IN BUSINESS SALE AND SERVICE AGREEMENTS

In *Richmond v Moore Stephens Adelaide Pty Ltd* [2015] SASCFC 147 (29 September 2015), a Full Court of the South Australian Supreme Court rejected a claim that a restraint clause included in a number of business sale agreements was unenforceable.

Factual Background. An accountant agreed to sell his practices and its services over a four-year period. The Business Sale and Service Agreements ("Agreements") contained a cascading restraint clause which operated for four years, three years, two years and one year after completion of the sale within a 10-kilometre radius of the business. Such cascading clauses allow employers to enforce a lower-level restraint if a broader restraint is deemed too harsh, without the entire restraint clause being unenforceable.

The accountant claimed that the purchaser, Moore Stephens, failed to pay him an instalment of $600,980 for the purchase of the business. The purchase price was dependent upon the level of achieved fees over the first three years, and disputes had arisen in relation to the amount of fees which had been achieved.

Legal Background. The accountant argued that the restraint clause in the Agreements should not be enforced because:

- Moore Stephens breached an essential term of the Agreements by failing to pay him part of the purchase price, meaning that the accountant was entitled to terminate the Agreements; and
- the restraints were void for uncertainty and because they constituted an invalid restraint of trade.

Decision. Justice Blue, with whom Kourakis CJ and Stanley J agreed, decided that while Moore Stephens was in breach of the Agreements by failing to pay the correct amount for the purchase, those breaches did not entitle the accountant to terminate the Agreements. As such, the Agreements including the restraint clauses remained on foot.

The accountant argued that the restraint, which prevented him from soliciting the custom of or dealing with any person with whom he had had '"direct or indirect dealings", was too uncertain to be enforceable. However, Blue J was of the view that that phrase had a clear connotation, even though an inquiry would need to be conducted to determine whether the accountant had had "direct or indirect dealings" with a client.

Justice Blue also decided that the scope of the restraint was reasonable with regard to the interests of the parties. Evidence had been given that the accountant had long-standing relationships with his former clients and that two years were needed to build up a relationship with a client. As such, restraints going beyond one year were reasonable in the circumstances.

Lessons for Employers. This case emphasises that the enforceability of restraints depends on the factors impacting upon each individual business. To be enforceable, restraint clauses need to be sufficiently specific and certain to allow the reader to determine the scope of the restraint. Further, restraint clauses will be enforced only to the extent that

they are reasonable in the circumstances with regard to the nature of the business (and the business interests they seek to protect).

FEDERAL COURT FINES UNIVERSITY FOR ADVERSE ACTION

In *National Tertiary Education Industry Union v Swinburne University of Technology* (No 2) [2015] FCA 1080, the Federal Court of Australia ordered that Swinburne University pay a $14,000 penalty for contravening the *Fair Work Act* 2009 (the "Act").

Factual Background. Swinburne University offered pre-university programs that they delivered through an organisational department known as Swinburne College ("SC"). A decision was made to transfer the functions and operations of Swinburne College to a new independently accredited and registered company Swinburne College Pty Limited ("SCPL"). It was intended that SCPL would employ new staff so as to avoid triggering the "transfer of business" provisions of the Act. New teaching staff would have their employment conditions determined by the Educational Services (Post-Secondary Education) Award 2010 instead of the Victorian TAFE Teaching Staff Multi-Business Agreement 2009 (which applied to the employees in their employment with Swinburne University). Based on a comparative salary scale included in the proposal, significantly lower salaries were to be paid to staff under the Post-Secondary Award (in comparison with the enterprise agreement).

Legal Background. S 340(1)(a)(i) of the Act prohibits an employer from taking or threatening to take adverse action which prejudicially alters the position of an employee because the employee is "entitled to the benefit of a workplace instrument". In March 2015, the parties reached a settlement whereby Swinburne admitted its conduct in making and taking steps to establish SCPL and that transfer SC's operations to SCPL amounted to a contravention of s 340(1)(i). The threatened conduct constituted a breach on the basis that there was an increased likelihood the employees' positions would be made redundant, and a substantial and operative reason for the conduct was that Swinburne College employees were entitled to the benefit of an industrial instrument, namely the TAFE Multi-Business Agreement, whose operation Swinburne did not wish to perpetuate in the new SCPL.

Decision. In determining the penalty to be imposed under s 546 of the Act, Justice Mortimer considered the nature and seriousness of the conduct, noting firstly that the conduct amounted to a threat to take adverse action, rather than the taking of adverse action. Secondly, her honour acknowledged that in order to avoid the protective transfer provisions of the Act, Swinburne had adopted a carefully planned and considered plan involving senior people to employ new people, with the intended effect that employees who had been employed for long periods of time would lose their employment. Thirdly, Justice Mortimer highlighted the fact that Swinburne was a large institution, able to source experienced legal and industrial advice and was used to working with unions. Finally, her honour emphasised that given that Swinburne was recently found to be in contravention of the Act, there was a need for both specific and general deterrence. In particular, her honour noted the need for higher educational institutions to be put on notice of their obligations to employees when restructuring.

Lesson for Employers. While it was recognised that implementing cost savings and creating a more favourable industrial landscape was a motivating factor for Swinburne, the decision demonstrates that employees must always carefully consider their obligations under the Act when restructuring, ensuring that their proposals do not adversely affect employees. Part of that process will often require adopting a transparent environment whereby employers consult and communicate such proposals to employees and unions.

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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JONES DAY GLOBAL LOCATIONS

ALKHOBAR	CLEVELAND	HONG KONG	MADRID	PARIS	SHANGHAI
AMSTERDAM	COLUMBUS	HOUSTON	MEXICO CITY	PERTH	SILICON VALLEY
ATLANTA	DALLAS	INDIA	MIAMI	PITTSBURGH	SINGAPORE
BEIJING	DETROIT	IRVINE	MILAN	RIYADH	SYDNEY
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