



MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

DEVELOPMENTS IN AUSTRALIAN LABOUR AND EMPLOYMENT LAW IN 2015 AND PROSPECTS FOR 2016

Compared with recent years, 2015 was a relatively quiet year for legislative change in the labour and employment arena, due largely to the current Liberal/National Coalition Government's desire to avoid introducing any radical change. However, late in the year, Prime Minister Tony Abbott was ousted by Malcolm Turnbull, who has a more socially progressive agenda. Parliament passed the Fair Work Amendment Bill 2015, although with significant amendments from Senate crossbenchers. The Productivity Commission report on the workplace relations framework and the 2016 Federal election are likely to result in changes to Australian labour and employment law in 2016.

■ PASSING OF THE FAIR WORK AMENDMENT BILL 2014

On 11 November 2015, the Fair Work Amendment Bill 2014, aimed at improving the efficiency of collective bargaining, was passed by both houses of Parliament, after initially being introduced in February 2014. The amendments allow employers to submit proposed greenfields agreements to the Fair Work Commission for approval if a deal has not been reached with unions during a six-month "negotiating period". The original bill allowed employers to seek approval of their proposed greenfields agreements after a three-month negotiating period. However, following opposition from crossbenchers, the amendments agreed in the Senate extended the period to six months.

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■ NOTEWORTHY CASES

Notwithstanding the relative dearth of legislative changes, there were some significant decisions of the courts in 2015 which provide insight into trends in labour and employment litigation in Australia. Some of these are summarised below.

High Court Clarifies that Injured Workers Can Bring Civil Claims Following FWO Prosecutions. In *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28, the High Court unanimously held that employees are not estopped from bringing civil claims seeking damages for injuries sustained in the workplace following a successful prosecution of the employer by the Fair Work Ombudsman. In this particular case, the employer had previously been prosecuted for underpayment of wages, which did not prevent the employee from bringing a civil claim.

State Employers Required to Comply with Enterprise Bargaining Agreements. In *United Firefighters Union v Country Fire Authority* [2015] FCAFC 1, the Full Federal Court upheld the validity of an enterprise bargaining agreement between the Country Fire Association (a State-owned corporation) and the United Firefighters Union. The decision reverses a recent finding of the Federal Court and means that State-owned employers are subject to commitments contained within enterprise bargaining agreements, like their privately owned counterparts.

Full Federal Court Provides Guidance on Adverse Action and Mental Health. In *State of Victoria (Office of Public Prosecutions) v Grant* [2014] FCAFC 184, a solicitor who suffered from depression claimed that, by terminating his employment, his employer took adverse action against him because of his mental disability. The Full Federal Court concluded that the reason for the termination was the employee's absence from work and underperformance, and not the employee's illness, and dismissed the employee's claim.

This decision should give employers confidence when defending adverse action claims associated with employees' mental health issues. Provided that employers have evidence to substantiate their adverse action, they should not censor themselves against disciplining (or terminating) underperforming employees simply because they suffer from mental illnesses (even if that mental illness may partially explain their underperformance).

Exploitation of Temporary Labour in the Agricultural Sector.

Outside of the court room, a report titled "Slaving Away", released in May by Four Corners, an Australian investigative journalism program, has uncovered some troubling labour practices in Australia's agricultural sector. The report reveals that some labour hire companies are exploiting vulnerable tourists with holiday visas, predominately from Asia, by engaging them in temporary labour while paying them less than minimum wage and imposing unsatisfactory working conditions. The fallout from this report is likely to involve a number of substantial claims and prosecutions in 2016.

■ OUTLOOK FOR 2016

The next Federal election in Australia must be held on or before 14 January 2017, but could be held any time after 6 August 2016. Given that historical changes in Federal Governments have led to major changes in labour and employment law over the past 15 years, a change in Government following the election could well result in changes to Australian labour and employment law.

In 2015, the Productivity Commission undertook a public inquiry on the workplace relations framework. The Commission's draft report was released on 4 August 2015, and states that Australia's workplace relation system "needs repair not replacement". The final report is due to be released in the coming months. It remains to be seen whether amendments to address the deficiencies in the system identified by the report (some of which are quite controversial, including removing weekend penalty rates) will be implemented.

*We wish all of our readers a
Happy Festive Season and New Year.*

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	INDIA	MIAMI	PITTSBURGH	SINGAPORE
BEIJING	DETROIT	IRVINE	MILAN	RIYADH	SYDNEY
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