JONES DAY

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MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

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MESSAGE FROM THE EDITOR

In this month's *Update*, we discuss recent reforms proposed by a Senate inquiry into the exploitation of foreign and temporary workers. If legislated, the reforms will have significant impacts upon employers—particularly franchisors—using student and migrant workers. We also look at a recent decision of the Federal Court explaining when the court will provide an account of profits against employees who set up in competition with their employer. Finally, we discuss a decision of the Federal Circuit Court which gives some guidance on what are "reasonable additional hours" in the legal industry.

IN THIS ISSUE

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

LABOUR LAW REFORMS RELATING TO LABOUR HIRING AND MIGRANT WORKERS SET TO PLAY KEY ROLE IN FEDERAL ELECTION

An Australian Senate inquiry into the exploitation of temporary visa workers (the "Inquiry") has recommended a number of reforms to the *Fair Work Act 2009* (Cth) ("FWA"). These recommendations, if implemented, would impose licensing requirements on labour hire companies and additional burdens on employers of temporary visa workers. These recommendations, and a number of other key recommendations, are strongly opposed by the Coalition government, which holds a majority in the lower house but a minority in the Senate.

A number of other reforms, aimed at protecting foreign and other vulnerable workers and increasing penalties for noncompliance by companies, are the subject of the *Fair Work Amendment (Protecting Australian Workers) Bill 2016* (the "Bill"), which is currently before a Senate Committee.

These reforms are likely to be at the forefront of the Labor Party's campaign in this year's federal election. Further, as we discussed in our January 2016 *Update*, the Coalition government is threatening a double dissolution election if laws resurrecting the Australian Building and Construction Commission are not passed by the Senate.

Senate Inquiry Recommendations. The Inquiry made a number of wide-ranging recommendations in its Labor–Greens-backed majority report. The most important of these include:

- Requiring labour hire companies, including those based overseas, to be licensed and maintaining a public registry of licensees;
- Imposing a $4,000 levy per sponsored worker on employers who sponsor the 457 visas of skilled foreign workers;
- Imposing quotas of a "one-for-one" employment of foreign and Australian tertiary graduates and requiring sponsors of trade visas to demonstrate that apprentices represent at least 25 percent of their workforce;
- Clarifying that temporary workers have the same rights as Australian workers in their visas;
- Stronger regulation of franchisors (including allowing franchisors to terminate a franchise agreement without notice where there are reasonable grounds for believing that serious contraventions of the FWA have occurred);
- Protection of whistleblower temporary workers who report exploitation (by forbidding the Fair Work Ombudsman from identifying them to the Department of Immigration and Border Protection and by ensuring visa breaches do not necessarily void employment contracts); and
- Independent review by the Fair Work Ombudsman.

The Inquiry also made recommendations for the review of the penalty, accessorial liability and sham contracting provisions under the FWA, some of which are the subject of provisions in the Bill.

Although made under the premise of reviewing the conditions of temporary workers, many recommendations make it more difficult in practice for Australian businesses to employ foreign workers and protect Australian workers from foreign competition.

The Coalition minority in the Senate has voiced strong opposition to many of the key recommendations, stating that a review of the issue (and the Bill) by the government is already in progress.

Fair Work Amendment (Protecting Australian Workers) Bill 2016. The Bill, which is currently before a Senate Committee, also contains provisions concerning foreign and other vulnerable workers. Key provisions of the Bill include a clarification that the FWA applies to all employees regardless of the employee's visa status, reform of provisions relating to sham contracting and increasing penalties for noncompliance by employers.

If the Bill passes, maximum civil penalties will be increased to three times the current maximum (from $54,000 to $162,000 for corporations) in cases of intentional breaches of the Act. In addition, courts will be empowered to make directors of phoenix companies liable for unpaid employee entitlements and to disqualify persons from managing a company under the *Corporations Act 2001* (Cth) for breaches of certain civil contraventions of the FWA. New criminal offences will also be inserted mirroring the offences concerning slavery and slavery-like conditions found in the federal *Criminal Code*.

What This Means for Employers. Similar law reform proposals concerning migrant workers and labour hire arrangements have been the subject of vigorous political debate internationally, most notably in the United States. It is uncertain which, if any, of the proposals for reform will be implemented in Australia, but they will certainly form a key part of the political discussion if a double-dissolution election occurs this year.

Jones Day' Australian Labour & Employment team will continue to monitor developments associated with, and provide updates on, the labour law reform proposals in Australia.

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

PREVENTION BETTER THAN CURE IN THE CASE OF COMPETITION FROM EX-EMPLOYEES

Lifeplan Australia Friendly Society Ltd v Woff [2016] FCA 248 concerned a familiar, if nightmarish, scenario for employers—namely the loss of key employees to a competitor, the misuse of the former employer's confidential or commercially sensitive information to further the rival business and the solicitation of clients away from the former employer to its competitor.

The Facts. The first plaintiff, Lifeplan, was in the business of funds management and the provision of investment products, including funeral products, which it marketed and distributed through a wholly owned subsidiary (FPM, the second plaintiff). FPM sold funeral bonds through a network of funeral directors, accounting for about 70 percent of the "pre-need" market (i.e., bonds sold prior to the death of the individual) in 2010 (bonds could also be purchased through financial planners, or directly from friendly societies). Lifeplan maintained standard form funeral contracts and terms of agreement, which were distributed to funeral directors.

The fourth defendant, Foresters, was a friendly society and also in the business of funds management along with the provision of funeral products. Foresters had grown rapidly between 1997 and 2011 through the acquisition of smaller friendly societies and was, by the time of the events the subject of this dispute, seeking to identify opportunities for "organic growth".

The first and second respondents, Mr Woff and Mr Corby, were each ex-employees of FPM who began work with Foresters (together, the "Employees"). Mr Woff was a funeral fund manager and Mr Corby was a national sale manager. Together, they represented almost the entirety of FPM's sales team (along with another, more junior sales manager and an administrative assistant). Each had signed a confidentiality agreement, but neither was subject to any post-employment restraints. Mr Corby resigned from his employment with FPM effective 25 November 2010, and commenced employment with Foresters on 6 December 2010. Mr Woff left FPM on 29 December 2010, and began with Foresters on 4 January 2011.

From July to November 2010, the Employees initiated and executed a plan to join Foresters and grow its funeral bonds business, by capturing the "pre-need" market then dominated by their employer, FPM. They incorporated a company, FPA, for the purpose of receiving a commission from Foresters. At the request of a Mr Hughes, Mr Woff's contact at Foresters, the Employees prepared and presented to the Foresters board a business plan drawing heavily on the plaintiff's confidential information. The Employees "sounded out" potential clients at a conference of funeral directors in October 2010 and, in November, secured for the new business the plaintiffs' "top performing" client, Tobins. They procured stationery order forms and standard form contracts that closely resembled those of FPM, in the knowledge that some funeral directors would fill out the new forms without realising the change. FPM's mailing list of funeral directors was also obtained. Finally, the Employees sent to their personal email addresses (including under deliberately innocuous subject lines) a number of documents containing confidential or commercially sensitive information of the plaintiffs. FPA entered into a marketing and distribution agreement with Foresters on 31 December 2010.

The Investigation and Claim. In February 2011, the assistant to Mr Woff's former supervisor at Lifeplan noticed a strange email in Mr Woff's Lifeplan account. This prompted an initial investigation of Mr Woff's work emails, which revealed very little. The supervisor discovered the existence of FPA but did not investigate further. Lifeplan discovered the Employees' plans to compete in August 2011, following the receipt by it of stationery order forms and pre-paid contracts that were intended for Foresters. Lifeplan then initiated a more thorough investigation of Mr Woff's Lifeplan email account (including deleted emails) and the marketing activities of FPA.

Lifeplan and FPM brought proceedings in the Federal Court against the Employees, FPA (then in liquidation) and Foresters. The plaintiffs alleged that the Employees had acted in breach of their contractual duties, fiduciary duties, and duties of confidence. Mr Woff was also alleged to have breached duties imposed by the Corporations Act 2001 (Cth) on officers and employees of companies. The plaintiffs claimed that Foresters was liable as an accessory and/or vicariously liable in respect of the various wrongs committed by the Employees. It was further alleged that Foresters had induced the Employees to breach

their contracts of employment with FPM, and that each of the defendants had sought to pass off the business of Foresters/FPA as that of Lifeplan/FPM.

The plaintiffs sought injunctions restraining the use of their confidential (or commercially sensitive) information, and orders for the delivery up of documents containing such information. By way of monetary relief, they sought an account of profits against each of the Employees and Foresters, instead of damages or equitable compensation. The "profits" of the Employees consisted of their salaries earned at Foresters and some small amounts received through FPA. As against Foresters, the "profits" claimed were the net present value of the profits earned and to be earned in relation to the funeral bond fund, or roughly $30 million.

Disposition: Pinning Down the New Employer. Justice Besanko found that each of the Employees had breached his contractual and fiduciary duties as well as duties of confidence. His Honour found that Mr Woff had also breached ss181 to 183 of the *Corporations Act 2001*.

The court observed the general principle that employees may take some steps toward new employment or a new business without breaching his or her duties. In this case, the registration of a domain name, the incorporation of FPA, the establishment of a trust and contacting the NSW Office of Fair Trading were all found to be within the permissible sphere of activities. However, assisting Foresters to amend the rules governing its funeral benefit fund and preparing disclosure documents were actions that "went well beyond" what an employee might do. Foresters, through Mr Hughes, had an active role in these activities and was thus liable as an accessory in equity and under the *Corporations Act*, and primarily liable for inducing breach of contract.

The plaintiffs faced greater difficulties in making out their other claims as against Foresters. Besanko J found that Foresters had "knowingly assisted" in respect of certain breaches by the Employees of their fiduciary duties and duties of confidence—including the preparation of the business plan and approaches to certain funeral directors. In response, Foresters argued that although a senior employee (Mr Hughes) was aware of these activities, it had not provided any practical assistance to the Employees. This was rejected by the court, which preferred a "breach approach to assistance" in the context of equitable duties. By contrast, several claims against Foresters for inducing various breaches of contract, and for "knowing involvement" in various breaches of the *Corporations Act*, failed in the absence of proof of specific knowledge on the part of senior employees.

Importantly, Justice Besanko held that the concept of vicarious liability did not extend to equitable wrongs (as opposed to torts committed by an employee in the course of his or her employment). Instead, the new employer had to be shown to have "knowingly assisted" in the breach, a much higher standard.

For completeness, the claim for passing off failed against all defendants in the absence of direct proof that there was confusion in the market or any actual damage suffered by the plaintiffs.

Relief: $30 Million Claimed, but Only $50,000 Awarded. As mentioned, the plaintiffs did not seek to be compensated for losses suffered by them as a result of the defendants' breaches. Rather, they sought an account of the profits earned by the defendants (and equivalent relief under the *Corporations Act*) which they alleged to be in the order of $30 million by reference to Forester's notional profits from February 2011 onward. The $30 million figure was derived from the expert opinion of a forensic accountant, who valued Forester's funeral products fund on a going concern basis and assuming significant growth.

Foresters argued that an account of profits could be awarded only in respect of profits *actually earned* as at the date of the award (as opposed to the net present value of future profits). However, the fundamental weakness in the plaintiffs' case was the lack of a demonstrable connection between the use of confidential information and the generation of profits by Foresters. In light of this, the account of profits case completely failed against Foresters.

The plaintiffs' claim for an amount equal to the salaries of the Employees likewise failed. Again, the court found that there was no causal link between their breaches and these alleged "profits" given each was entitled to leave Lifeplan, join Foresters and be paid a salary. Instead, the plaintiffs' recovery was restricted to the amounts received by the Employees through FPA, or roughly $50,000.

Lessons for Employers. *Lifeplan* involves a common and relatively straightforward factual scenario, but one which engages legal issues of surprising complexity. The successful prosecution of such a claim requires an extensive factual investigation coupled with significant legal expertise so that the plaintiff is able to cover off on *each* component of *each* claim. We outline here some takeaway points for employers.

Prevention Is Better Than Cure. No business wants to litigate, but the usual risks associated with litigation are particularly acute in these circumstances. It is generally necessary to obtain the assistance of forensic IT professionals and accountants as well as experienced legal counsel. As *Lifeplan* demonstrates, the monetary payoff may not be as high as expected even where there is blatant wrongdoing on the part of the former employee. There is also the risk of adverse cost orders being made where the employer is only partially successful and the failed aspects of the claim take up a significant amount of the court's time.

In other words, preventative measures are essential. These include to:

- Maximise contractual protections: ensure that all employees are party to confidentiality agreements and that key individuals are subject to appropriate post-employment restraints.
- Train employees in relation to their obligations, particularly with respect to confidential information, intellectual property and the employer's IT systems.
- Invest solidly in IT systems and professionals, including external consultants where necessary, to facilitate the detection and investigation of wrongdoing. Internal management and human resources should be in a position to detect "red flags" in real-time such as large-scale printing and emailing to personal email addresses.
- When the business undergoes a major change, identify key individuals and monitor the risk of departure. In this case, each of the Employees was vocally critical of perceived changes to Lifeplan's business following its acquisition in 2009 by Australian Unity. They made their plan, and began to execute it, long before they handed in their notices. The case highlights the need to be alive to the risk of illegitimate competition long before an employee resigns, or commences employment with a competitor.

If Wrongdoing Is Detected, Investigate and Litigate Early. The *Lifeplan* case exemplifies the potential difficulty facing employers in credibly quantifying the loss suffered, or the gains achieved by the new business, in this kind of case. In light of this—at least where it is plain that the new business is using confidential information of the former employer—it is best practice to seek an injunction restraining the unlawful conduct as soon as possible and thereby avoid losses before they occur.

Of course, it is possible to move quickly only if the wrongdoing has been detected early. Detection in these circumstances is made more difficult because the line between what is and is not acceptable is often unclear.

Be Clear about the Claim and What Relief Is Sought The law in this area is intricate and often confusing. As a client, you need to have a clear picture about the nature of each claim that is engaged—and the form of the relief tied to that claim.

Here, the plaintiffs made an early election for an account of profits. Apparently, they put on no evidence as to loss (and it may have been that none was suffered). In light of this, there may have been little point in prosecuting the contractual and tortious claims—an account of profits not being an available remedy for these wrongs, which also require proof of damage for any substantive recovery.

There are other forensic advantages and disadvantages to consider in relation to each claim, particularly where, as here, a new employer is pursued along with the defaulting ex-employees. Outside tortious claims, which may give rise to vicarious liability, some degree of actual knowledge and involvement on the part of the new employer (or in practice, its senior employees) is required. The degree of knowledge then varies depending on whether the claim is brought, for example, under the *Corporations Act* or in equity.

These are murky waters to navigate, but it is essential to have clarity on such issues at the outset of proceedings to avoid nasty surprises.

FEDERAL CIRCUIT COURT ASKED TO DETERMINE WHAT ARE "REASONABLE ADDITIONAL HOURS" FOR EMPLOYED SOLICITORS

Facts. In *Gorval & Ors v Employsure* [2016] FCCA 231, Mr Sergey Gorval, Matthew Lynch and Christopher Mahoney (the "individuals") were employed full-time as employment lawyers for Employsure (the "Employer"). In their contract of employment, they were all required to work hours which were "reasonably necessary to fulfil the requirements of [their] role" and their core business hours of work were 8:30 a.m. to 5:30 p.m. Monday to Friday. During the week, they were allowed up to one hour of lunch a day and worked a total of 45 hours a week.

Each individual made a small claim under the FWA, alleging that they were entitled to compensation for unpaid overtime. They relied on s 62 of the FWA which provides that

> An employer must not request or require a [full-time] employee to work more than [38] hours in a week unless the additional hours are reasonable.

Mr Gorval made additional claims of $2,700 for a bonus payment for introducing a client to the Employer under s 323 of the FWA and $5,000 for back payment of wages upon discovering that he was being paid $5,000 less per annum than the two other individuals.

Reasoning. Judge Altobelli rejected the individuals' first argument that they were paid on their lunch break and therefore they worked 45 hours. No evidence was adduced by the individuals that they had worked during their lunch breaks, and up to the point of the hearing in court, no claim had been made that they were entitled to payments during lunch breaks. Nor was it made expressly clear in their employment contracts. Therefore, on the basis that a one-hour lunch break was taken from Monday to Friday, the individuals would have worked only up to 40 hours.

Regarding the maximum number of hours under s 62 of the FWA, Judge Altobelli did not consider working two additional hours per week to be unreasonable, taking into account the legal nature of the work the individuals were doing and the culture of working longer hours in the legal profession.

As to Mr Gorval's bonus payment claim, Judge Altobelli reasoned that a difficulty for Mr Gorval relying upon s 323 of the FWA was that Mr Gorval could not show that the bonus payment was "payable to [him] in the performance of work". However, Judge Altobelli relied upon the accrued jurisdiction of the court and considered Mr Gorval's claim as being restitutionary. This meant that the Employer gained a benefit, from Mr Gorval introducing a client to them and it would have been unjust if they did not compensate him for that benefit. Accordingly, Mr Gorval was entitled to receive a payment of $2,700.

Regarding Mr Gorval's back payment of wages claim, Mr Gorval relied upon evidence that he was told by the Managing Director of the Employer that his salary situation would be rectified "quickly". The situation was not rectified until nearly three months later. Judge Altobelli was unable to see how the dispute could be dealt with under the FWA. Despite this, Judge Altobelli relied upon the accrued jurisdiction of the court and regarded the term "quickly" as being a period of two weeks, and therefore Mr Gorval was entitled to be paid the difference in pay, subject to taxation.

Consequences. This decision demonstrates that the number of additional hours required for work in a particular role will often vary with size of the Employer and the Employer's industry.

We thank associates Michael Whitbread and Clare Langford and associates Jay Tseng and Joshua Kang 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.

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