JONES DAY

JUNE 2016

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

IN THIS ISSUE

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MESSAGE FROM THE EDITOR

In this month's *Update*, we comment on the proposed amendments to the *Fair Work Act 2009* (Cth) in response to allegations of widespread underpayment of employees by retail franchisees, consider planned changes by the Coalition to outlaw so-called "sweetheart deals" between employers and unions, provide an update on Coles' response to the decision of the Fair Work Commission (which we featured in last month's *Update*) and take a look at a recent Fair Work Commission decision regarding alleged workplace bullying involving an employee's hurt feelings.

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

FEDERAL ELECTION HELD ON 2 JULY 2016—FATE OF LEGISLATION TO ENACT INDUSTRIAL RELATIONS REFORM REMAINS UNCLEAR

As you may recall, a Federal Election was announced on 8 May 2016, after a double dissolution of Parliament that was triggered by the Senate's failure to pass a number of key pieces of industrial relations legislation (including bills to re-introduce the Australian Building and Construction Commission and establish a Registered Organisations Commission). The Federal Election was held on 2 July 2016, but at present the result is still uncertain, and there is no clear indication as to which party will claim victory, with the possibility of a hung Parliament still looming. It is difficult

to say what this result will mean for the industrial relations legislation in question, as well as its broader impact on the future of labour and employment law in Australia.

However, it is apparent that even if the government is returned for a further term, the task of passing legislation will not be made easier by the composition of the newly elected Senate. It is likely the Senate will again comprise senators from across the political spectrum, including several cross-benchers from newly formed minor parties. If the bills in question once again fail to pass the Senate, then Parliament may have to proceed to a joint sitting. Thus, the future of this legislation remains very much in doubt.

MAJOR PARTIES OUTLINE PROPOSED POLICIES TO CRACK DOWN ON WIDESPREAD EXPLOITATION OF VULNERABLE WORKERS

Factual Background. In August last year, allegations came to light that large numbers of retail franchisees had systematically underpaid migrant workers, using threats and coercion to maintain workers' silence. The revelations drew public condemnation and forced the federal government and opposition to consider amendments to the *Fair Work Act 2009* (Cth) ("FWA") to counter employee exploitation.

In the past few months, the two major parties have announced proposals to tackle the problem. In our January 2016 *Update* we reported on the Australian Labor Party's early proposals, and in our March 2016 *Update*, we analysed a bill introduced into the Senate by Labor. On 19 May 2016, the Liberal Party announced its proposals to deal with employee exploitation, and this *Update* will primarily focus on those proposals.

Liberal Party Proposals. On 19 May 2016, a policy document was released by the Minister for Employment, Senator Michaelia Cash. The document, *The Coalition's Policy to Protect Vulnerable Workers* ("Policy"), outlines in broad strokes the Liberal Party's proposals to crack down on employers exploiting vulnerable employees. The Policy is an important blueprint of what a Liberal Government bill might look like. Important proposals within the Policy include:

- Amending the FWA to increase penalties payable by employers who deliberately and systematically underpay workers and fail to keep proper pay records. The current maximum penalties for underpaying employees is $10,800 per breach for individuals and $54,000 per breach for corporations. The proposed penalties for underpaying employees is $108,000 per breach for individuals and $540,000 per breach for corporations. These are significant increases in pecuniary penalties.
- Introducing a new offence that makes franchisors and parent companies liable for breaches of the FWA by their franchisees or subsidiaries, in circumstances where the franchisor should reasonably have been aware of the breaches and could reasonably have taken action to prevent the breaches from occurring.
- Amending the FWA to strengthen the investigatory powers of the Fair Work Ombudsman. The Policy proposes that the Ombudsman be given powers that resemble the powers of the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission and the Australian Taxation Office—currently the most powerful federal regulatory agencies.
- Establishing a Migrant Worker Taskforce within the office of the Fair Work Ombudsman.
- A promise to inject an additional $20 million of funding to the Fair Work Ombudsman.

In a statement released on 19 May 2016, Senator Cash remarked that these proposals were intended to improve safeguards for "vulnerable workers who have been let down . . . by blatant non-compliance with workplace laws by employers across a number of industries and in many cases, multinational corporations who ignore their obligations under Australian laws." Senator Cash went on to criticise Labor's Bill, arguing that the proposed changes would fail to address the particular conduct that was leading to the exploitation of employees.

Labor Party Proposals. In our January 2016 *Update*, we reported on policy announcements that the Labor Party made early in the year. In our March 2016 *Update*, we reported on the Fair Work Amendment (Protecting Australian Workers) Bill 2016 introduced by Labor into the Senate. That bill lapsed when Parliament was prorogued on 15 April 2016, and a Senate Inquiry into the bill by the Senate Standing Committee on Education and Employment also lapsed on 9 May 2016, when Parliament was dissolved by the Governor-General in preparation for the 2 July election.

Consequences. Whatever the eventual outcome of the 2 July Federal Election, the Labor Bill is due to be debated soon. If the Labor Party form government, they will presumably seek

to implement the bill in its current form. On the other hand, the Policy released by Senator Cash on 19 May gives an indication of the key amendments that would likely form part of a Liberal bill. If the Liberal Party are able to form government, they would presumably seek to pass a bill that incorporates the key changes outlined in the Policy.

At the time of writing, the outcome of the 2 July election is not at all clear. It appears that whichever party forms government will be required to negotiate with the other major party and a whole host of other parliamentarians in the Senate and potentially also in the House. Ultimately both major parties have put forward a legislative package that shares a common objective and many common mechanisms and features. With popular support and bipartisan parliamentary support to introduce legislation on this topic, this bill might be the only industrial relations bill that is written into law in the next Parliament.

INCREASE TO THE HIGH INCOME THRESHOLD UNDER THE *FAIR WORK ACT 2009* (CTH)

The High Income Threshold for former employees claiming unfair dismissal under the *Fair Work Act 2009* (Cth) will increase from $136,700 to $138,900 on 1 July 2016. Under section 382, a person cannot bring a claim for unfair dismissal against a former employer where the sum of their annual rate of earnings exceeds the High Income Threshold, unless that employee is covered by a modern award or an enterprise agreement.

The following payments are included when determining an employee's earnings: (i) wages; (ii) amounts dealt with on the employee's behalf or as they direct; and (iii) the agreed value of non-monetary benefits. However, payments that cannot be determined in advance (e.g. incentive-based bonuses or non-guaranteed overtime), reimbursements and compulsory superannuation contributions by an employer are not included when calculating an employee's earnings.

The annual rate of earnings of an employee is calculated in accordance with regulation 3.05 of the *Fair Work Regulations 2009* (Cth). Where an employee is continuously employed by the employer (and was not on leave without full pay at any time during the 12 months immediately before their dismissal), their annual rate of earnings will be the amount paid to the person in respect of the 12 months *immediately before* their dismissal. Therefore, while an employee's current annual salary may exceed the High Income Threshold, they may in fact fall under the threshold where they received a lower annual salary at any point during the 12 months immediately before their dismissal.

For example, an employee receives an annual salary of $140,000 at the time of their dismissal on 1 July 2016, having received a pay increase on 1 January 2016 from $130,000 to $140,000. This employee still will be under the new High Income Threshold because the employee earned $65,000 for the first six months and $70,000 for the remaining six months, bringing their annual rate of earnings for the 12 months immediately before their dismissal to $135,000.

THE COALITION'S PLANS TO OUTLAW EMPLOYER "SWEETHEART DEALS" WITH UNIONS

The Coalition has announced that it plans to introduce legislation amending the *Fair Work Act 2009* (Cth) to make "sweetheart deals" between employers and unions unlawful, by adopting recommendations of the Heydon Royal Commission into Trade Union Governance and Corruption ("Heydon Royal Commission"). However, it should be noted that due to the possibility of a hung parliament, or (at the very least) a hostile senate, the Coalition will likely struggle to enact many of these proposed changes.

In a statement released on 17 June 2016, Employment Minister Michaelia Cash stated that, if re-elected, the Coalition would "outlaw 'corrupting benefits'—payments between an employer and union that are not covered by legitimate exemptions." Senator Cash went on to remark that "Australian workers deserve to know that their employers and their unions are acting ethically and honestly and in their best interests . . . with strong penalties for anyone that does anything wrong".

The Heydon Royal Commission recommended in recommendation 41 that the *Fair Work Act 2009* (Cth) be amended to make it: (i) a criminal offence for an employer to provide, offer or promise to provide any payment or benefit to an employee organisation (i.e. a union) or its officials; and (ii) a criminal offence for any person to solicit, receive or agree to receive any such prohibited payment or benefit. A maximum term of two years' imprisonment would apply for both offences and/or a fine of $90,000. However, certain legitimate categories of payment would be permitted, for example: membership payments, wage claim payments, charitable

donations and payments for goods or services at the prevailing market price in the ordinary course of business of the employee organisation.

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

UPDATE REGARDING THE COLES SUPERMARKETS ENTERPRISE AGREEMENT

In last month's *Update*, we reported that the Full Bench of the Fair Work Commission ("Commission") found that the *Coles Store Team Enterprise Agreement 2014-17* ("2014 Agreement") did not pass the "better off overall test" ("BOOT"). Coles was given until 10 June 2016 to provide certain undertakings and if such undertakings were not provided, the Full Bench would make an order quashing the 2014 Agreement. However, Coles indicated that it will not provide undertakings, instead reverting to the *Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited Retail Agreement 2011* ("2011 Agreement") while preserving wage and penalty rates (as contained in the 2014 Agreement) and honouring a previously agreed-upon pay rise of 1.5 percent.

In relation to the 2011 Agreement, Ms Penny Vickers lodged an application with the Commission pursuant to section 225 of the *Fair Work Act 2009* (Cth) seeking termination of the Agreement on the basis that it too does not pass the BOOT. Ms Vickers is an employee of Coles working three shifts per week at the Mount Ommaney store in Queensland. However, the Full Bench had not yet made an order quashing the decision to approve the 2014 Agreement at the time of her filing the application. The Commission dismissed Ms Vickers' application on 17 June 2016 with consent, after Ms Vickers agreed to withdraw her application on the basis that the 2014 Agreement remained in effect at the time of filing.

The Commission noted that it was open to Ms Vickers making a further application to terminate the 2011 Agreement, once an order of the Full Bench in relation to the 2014 Agreement has come into effect. The Full Bench has in turn made an order quashing the 2014 Agreement, which comes into effect on 5 July 2016. It is therefore likely Ms Vickers will file a further application to terminate the 2011 Agreement after this time.

FAIR WORK COMMISSION DISMISSES BULLYING CLAIM FOR "HURT FEELINGS"

The Commission has considered an application for a stop-bullying order brought by a casual receptionist against three co-workers working at a medical centre in Western Australia. The Commission dismissed the application on the basis that the alleged bullying was "over-estimated", "insubstantial" and that there was no repetition of unreasonable behaviour. Further, the anti-bullying provisions of the *Fair Work Act 2009* (Cth) do not substantially protect a person's feelings.

Factual Background. Mrs Miranda Jane Gore, a casual receptionist at the Yura Yungi Aboriginal Medical Service in Halls Creek, Western Australia, filed an application on 16 December 2015 in the Commission for an order to stop bullying against three co-workers: Mr Nia Evans, Mrs Adrienne Evans and Mrs Kristine Chadwick.

Mrs Gore claimed that she was bullied and harassed by her co-workers, whose actions included: (i) speaking to her in an "impolite tone"; (ii) walking into reception to check up on her; (iii) praising another employee in front of her; (iv) reprimanding her for arriving to work late; (v) ceasing to reply to her text messages; (vi) ignoring her when she suggested improvements to her manager that could be made to the business; (vii) being told how to improve her performance by her manager; and (viii) being ignored when she called out a co-worker's name.

Legal Background. Section 789FD of the *Fair Work Act 2009* (Cth) provides that a worker is bullied at work where: (i) an individual or group of individuals repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and (ii) that behaviour creates a risk to health and safety. However, a person is not bullied if it is reasonable management action carried out in a reasonable manner.

The Commission noted that when considering section 789FD: (i) "repeated" refers to more than one incident; (ii) "unreasonable behaviour" is determined objectively having regard to all the circumstances; (iii) a "risk to health and safety" is the possibility of being exposed to harm or danger to one's health and safety and that possibility must be a rationale and not an ideation; and (iv) "reasonable management action" refers to the ability of employers to take appropriate management action, including responding to poor performance,

taking necessary disciplinary action and directing and controlling the way work is carried out.

Decision. The Commission dismissed the application, on the basis that the co-workers' actions did not constitute Mrs Gore being bullied at work because the alleged bullying was over-stated and insubstantial, with no repetition of unreasonable behaviour. In particular, the incident involving a co-worker's "impolite tone" was "too petty to record in any further detail and does a disservice to the definition of being bullied at work". In addition, the Commission said that having a preference about how things should be done, like Mrs Gore, and suggestions not being agreed to by a manager, was not bullying. To deprive a manager of the ability to carry out his or her role in a reasonable way would be contrary to the intent of reasonable management exception.

Further, the Commission stated that the anti-bullying provisions of the *Fair Work Act 2009* (Cth) are to protect bullying behaviour and not substantially a person's feelings. The facts and evidence in the case reinforced Parliament's important recognition of the distinction between reasonable workplace conduct and a person having a self-belief or feelings of discomfort. Such self-belief or feelings do not automatically transform into bullying. Finally, there was no risk to Mrs Gore's health and safety by returning to work.

Lessons for Employers. This decision provides employers an example of the sorts of conduct that do not constitute bullying within the meaning of the *Fair Work Act 2009* (Cth). It also confirms the balancing act that the Commission will take when considering applications for stop-bullying orders, that is, the employee's perspective is balanced against the conduct of others, including reasonable management action carried out in a reasonable manner.

We thank associates Alexander Kritharidis, Claire Goulding and paralegal William Maher for their assistance in the preparation of this Update.

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We thank associates Alexander Kritharidis, Claire Goulding and paralegal William Maher 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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