JONES DAY

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MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

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MESSAGE FROM THE EDITOR

In this edition of the *Update*, we take a closer look at two proposed changes to Australian employment law. The first is a Modern Slavery Act, which would introduce new penalties for holding people in slavery or servitude and human trafficking, and require corporations to make disclosures about measures taken to ensure these practices do not occur in its supply chains. The second is a new law banning payments to unions. We also take a look at a recent English decision that demonstrates the limits on damages that can be awarded by the court where an employee steals confidential information but does not make valuable use of the stolen information.

IN THIS ISSUE

Attorney-General Commences Inquiry into Australian Modern Slavery Act 1

New Laws Banning Union Payments Introduced to Parliament 2

Marathon Asset Management LLP v Seddon [2017] EWHCA 300 (Comm) 3

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

ATTORNEY-GENERAL COMMENCES INQUIRY INTO AUSTRALIAN MODERN SLAVERY ACT

On 15 February 2017, the Australian Attorney-General, George Brandis QC, asked the Parliamentary Joint Committee on Foreign Affairs, Defence and Trade to examine the possibility of establishing a Modern Slavery Act in Australia. This would have major implications for employers and corporations operating in Australia.

UK Modern Slavery Act 2015. The move is inspired by the UK *Modern Slavery Act 2015*. That Act creates a number of offences for holding a person in slavery or servitude and human trafficking. It also creates an Independent Anti-Slavery Commissioner to monitor breaches of the Act. Of particular relevance to corporations is section 54, requiring those carrying on any part of their business in the UK to produce a statement setting out what the corporation has done in the last financial year to ensure that slavery and human trafficking are not taking place in its supply chains or business, or if it has done nothing. The statement must be published on the corporation's website and a link to it must be displayed "in a prominent place on that website's homepage".

What an Australian Approach May Look Like. The Commonwealth *Criminal Code 1995* already prohibits modern slavery, servitude and human trafficking. As such, an important focus of any Australian reforms will be on corporate accountability. In particular, in June 2013, the Joint Committee released *Trading Lives: Modern Day Human Trafficking*, a report recommending:

> … the Australian Government … undertake a review to establish anti-trafficking and anti-slavery mechanisms appropriate for the Australian context. The review should be conducted with a view to:
>
> - introducing legislation to *improve transparency in supply chains;*
> - the development of a *labeling and certification strategy* for products and services that have been produced ethically; and
> - increasing the prominence of fair trade in Australia.

This suggests that the Australian government may intend to introduce more far-reaching measures than the UK. The UK Act's provisions only require a corporation to produce a statement about what it is or is not doing to prevent modern slavery. The UK statement does not need to be in a particular form, and the UK Act instead relies on nongovernmental organisations or the Independent Anti-Slavery Commissioner to raise questions about corporations who do little to combat modern slavery.

By contrast, a labeling and certification scheme might impose more rigorous requirements on Australian corporations. The Australian government might also choose to impose more onerous requirements on Australian corporations to disclose what measures they are taking to prevent modern slavery in their supply chains. For example, it may adopt more specific requirements for public disclosure. Rather than merely stating what measures, if any, the corporation is taking, a corporation may be required to disclose what system it has in place to combat slavery, servitude and human trafficking. Going further, the corporation may have to specify whether it has officers specifically engaged in combating these crimes, and whether it has commissioned internal audits or investigations. Finally, the government may extend liability to corporations for being part of slavery, servitude or human trafficking. This would create major challenges for businesses whose supply chains and business processes may inadvertently interact with victims of these crimes.

The inquiry has invited submissions on the matter until 28 April 2017. Those interested are encouraged to submit their views.

NEW LAWS BANNING UNION PAYMENTS INTRODUCED TO PARLIAMENT

On 22 March the Liberal Party introduced the *Fair Work Amendment (Corrupting Benefits) Bill 2017("Bill").* The Bill prohibits certain payments between employers and trade unions and requires employers and unions to disclose any benefits that a trade union or employer will receive as a result of any enterprise agreement. The Bill implements one of the key recommendations of the Royal Commission into Trade Union Governance and Corruption, headed by former High Court Justice Dyson Heydon.

What Payments Are Prohibited. The main feature of the Bill is that it makes the payment and receipt of money or other benefits a criminal offence in two separate sets of circumstances. The first is where an employer makes or promises to make a payment to a union or union official. For employers, it is a crime to make the payment "with the intention of influencing" a union or union official to perform his, her or its powers "improperly". For a union or union official it is a crime to request, receive or agree to receive a benefit on the basis that the payment will influence him or her or it. What makes a union or union official's exercise of powers "improper" under the new crimes is not defined in the Act in any detail.

The Explanatory Memorandum states that:

> Some examples of impropriety would include where an officer or employee of a registered organisation exercises his or her duties in a manner that is not bona fide or for the genuine benefit of the members of the organisation.

That seems to suggest a high threshold for impropriety, but it is not in the text of the Bill, so what could be "improper" under the new Bill is difficult to say at this stage. The penalties are very high, being imprisonment for 10 years or a maximum fine of $900,000 for individuals or $4.5m for corporations and unions.

The second type of payment that is now a criminal offence is any payment in cash or in-kind made by an employer to a union, union official, spouse of a union official or entity controlled by the foregoing. Both the gift and receipt of the payment is prohibited. This prohibition is much broader than the first prohibition, and is an alternative criminal offence where impropriety and intention that the payment influence the recipient cannot be proven. There is no requirement that these payments be improper in any way, but there is a list of payments that are exempt from the prohibition. They include deductions from employee wages for union dues, payments for goods and services at market rate, or payments made "for the sole or dominant purpose of benefiting the defendant's employees". The penalty for these crimes is lower than for the first type of payment, being two years imprisonment or $90,000 for individuals or $450,000 for corporations or unions. The text of the Bill does not presently deal with whether a single payment could trigger both crimes.

New Disclosure Obligations. In addition to prohibiting payments, employers and unions are also required to disclose any financial benefits that they obtain as a result of an enterprise agreement to each other and employees who will vote on the enterprise agreement. This part of the Bill is intended to cover situations where unions require employers to use particular providers of services such as income protection insurance that results in the union accruing financial benefits.

Employers Should Take Care in Dealings with Unions. Employers who regularly negotiate with unions should follow the passage of this Bill. Those who rely upon close relationships with unions to keep industrial relations running smoothly may find maintaining those relationships more difficult if the new prohibitions become law. Employers should also be aware that enterprise agreements will come under greater scrutiny in light of increased disclosure requirements to employees, who must ultimately approve the agreement. Even if the Bill does not pass Parliament, employers should also expect negotiations with unions to be more carefully scrutinised.

HOT OFF THE BENCH—DECISIONS OF INTEREST FROM THE COURTS

- ***Marathon Asset Management LLP v Seddon*** **[2017] EWHCA 300 (COMM)**

Factual Background. In this case, the three founders of a funds manager, Marathon Asset Management LLP, came into dispute. One of them left to set up a competing business with several former employees. Before the founder left, one of the employees transferred Marathon's computer documents to a shared drive to allow another of the departing employees to copy the documents to a USB. In all, the pair copied 40,000 documents from Marathon's network. These documents contained information about Marathon's operating procedures and internal controls, compliance manual, recent financial statements, and schedules of fees. Information about clients was also included.

The judge, Justice Leggatt, was satisfied that the act of copying the documents to the shared drive was done with the intention of assisting the other employee in stealing the documents. The documents were commercially valuable. An expert valuation put that value at £15m, but they were never used. Before the defendants had the opportunity to do so, they were caught and required to hand back the documents. The issue of general interest here is whether the claimant was entitled to any compensation for having its documents stolen.

Legal Background. Where an employee, partner or director takes confidential information belonging to his or her company, he or she breaches a fiduciary duty owed to the company. Typically, the theft will also breach a contractual clause prohibiting misuse of confidential information.

In these cases, the victim can obtain a range of orders. Nonmonetary orders include an injunction to prevent the

wrongdoer from misusing the information or an order that he or she return the information or destroy it. There are three important monetary orders. First, the court can give compensation for any loss suffered by the victim. Secondly, the court can order that the wrongdoer pay the victim the profits it obtained through use of the confidential information. Thirdly, a more untested order is that the wrongdoer pay "licence fee" damages, equal to the value of a hypothetical licence if the wrongdoer had paid the victim to use the information in the way that it did.

Decision. The fact that the wrongdoers did not make any valuable use of the information meant that all monetary orders failed. Looking first to compensation for loss, the claimant could not point to any loss except for a highly speculative loss of opportunity to sell the information. Regarding an account of profits, the wrongdoers had been caught before they had the opportunity of using the information, so they did not obtain any profits from use of the information. Finally, the claim for the cost of a licence to use the information failed because there was no substantial use. No person would pay much for a licence to have the confidential information without using it.

Lessons for Employers. The case is a reminder of the difficulty of protecting confidential information and its value in law. Employers need to be vigilant to protect their information, but they cannot expect a payout if the information is not used in some way. As such, the costs of policing confidentiality fall on employers, so having systems, such as forensic IT alerts, in place to ensure that this is done quickly and efficiently are important.

We thank associate Claire Goulding and law clerk Bowen Fox for their assistance in the preparation of this Update.

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