JONES DAY

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MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

IN THIS ISSUE

Adam Salter
Partner, Jones Day

MESSAGE FROM THE EDITOR

In this edition of the *Update*, we discuss Caltex's decision to create a $20 million fund to compensate employees of terminated franchises for unpaid wages. We then examine two recent decisions relating to Australian employment law. In the first decision, the Supreme Court of Western Australia's interpretation of a non-competition restraint clause in a foreign employment agreement. In the second decision, we look at a judgment of the Federal Circuit Court of Australia to hold an accounting firm accessorily liable for one of its employer client's contraventions under the *Fair Work Act 2009* (Cth).

AVERAGE ANNUALISED WAGE INCREASE DROPS IN PRIVATE SECTOR AGREEMENTS

The December quarter 2016 "Trends in Federal Enterprise Bargaining" report released by the Department of Education shows that the average annualised wage increase ("AAWI") for Private Sector agreements approved was 3.0 per cent, down from a 3.4 per cent increase in the September quarter 2016 and up from 2.9 per cent increase in the December quarter 2015. The highest AAWIs were the construction industry (5.2 per cent) and rental, hiring, real estate services (3.7 per cent). The lowest AAWIs in the private sector included information media and telecommunications (2.0 per cent), administrative and support services and mining (both at 2.3 per cent).

CALTEX RESPONDS TO WORKPLACE LAW AMENDMENTS

In a new development in the ongoing debate over new laws targeting franchisors for the conduct of franchisees, Caltex has created a $20 million fund to pay employees of its franchisees who have been underpaid. Caltex runs 1,900 service stations through 600 franchisees and has been the target of recent government investigations into breaches of Australian workplace laws by its franchisees.

Caltex is currently engaged in an audit of its service stations in order to identify and weed out illegal franchisee conduct. So far that process has led to the termination of franchise agreements with 19 franchisees, with more likely to come. The purpose of the fund will be to compensate workers of those terminated franchises for wages not paid, which Caltex will then try to recover from the franchisees themselves.

Caltex has explicitly said that it "has no liability to pay franchisee employee entitlements, and the fund has been established because Caltex wants to do the right thing by franchisee employees". Although that may be true, the new laws discussed in the February 2017 *Update* will require franchisees to put in place extensive audit and safeguard procedures to ensure that franchisees do not breach Australian workplace laws. Therefore, while the $20 million fund may keep regulators at bay for now, Caltex, like other franchise businesses, will still be required to make significant and costly changes to their businesses in the future to avoid coming under regulatory attack.

Caltex has been further disrupted by resistance from some store owners who allege that Caltex should take more responsibility for the wage fraud of its franchisees. Seventy of those Caltex service station owners marched through the centre of Sydney in March 2017 in protest of Caltex's approach to the problem of franchisee misconduct. The events show that implementing systems to ensure that franchisees do not breach Australian workplace laws may not be welcomed by all parts of a franchisor's business. Franchisors need to be aware that the legal problems created by new laws and regulatory scrutiny are equalled by the practical problems of ensuring that their businesses continue to run smoothly and profitably.

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

NAIAD DYNAMICS US INC V VIDAKOVIC [2017] WASC 109

Factual Background. The applicant, Naiad Dynamics US Inc, is in the business of maritime stabilisation systems in the global shipping markets. In 2009, the applicant employed the respondent, Dr Vidakovic, as the company's Global Sales Director. The employment agreement between the parties was governed by the law of Connecticut, U.S. The agreement included a non-competition clause restraining the respondent from employment by any company, including any company based in Australia, engaged in maritime stabilisation for a period of two years after the termination of the respondent's employment. The respondent ended his employment in January 2017 and soon after commenced working as the Global Sales Manager of Veem Ltd, a Perth-based company in the business of the manufacture and sale of marine stabilisation systems.

The applicant commenced proceedings in the Supreme Court of Western Australia. The applicant claimed that the respondent was in breach of the non-competition clause in the employment agreement by being employed by Veem. In March 2017, Judge Le Miere granted an interim injunction restraining the respondent from carrying out duties or work for Veem or any related entity. The applicant then sought an interlocutory injunction that the respondent be restrained from being employed by Veem or any related entity.

Legal Background. An interlocutory injunction is a court order requiring a person to do or refrain from doing something before the court makes a final order in the proceedings. For an Australian court to grant an interlocutory injunction, the applicant must demonstrate that there is a prima facie case (or a case where there is a serious question to be considered by the court as to the applicant's entitlement to relief). There must also be a sufficient likelihood of the applicant succeeding at trial to justify the grant of an injunction. The applicant must also demonstrate that he or she will likely suffer injury for which damages will not be adequate compensation unless an injunction is granted, and that the so-called "balance of convenience" favours the grant of an injunction.

In this case, the enforceability of the non-compete clause was considered by Judge Le Miere in accordance with the law of Connecticut. This was because the employment agreement was governed by Connecticut law. The judge heard expert evidence in relation to how Connecticut courts would treat the non-competition clause. Connecticut courts are required to balance several factors, including the length of time of the restraint, its geographic scope, the fairness of the protection provided to the employer and how much the non-compete clause restricts the employee from pursuing the employee's occupation. The courts can modify an employment agreement if its terms state that it may be severed or modified (as was the case in the parties' agreement).

Decision. The Court held that there was a prima facie case that the applicant was not obliged to pay the respondent severance when he terminated his employment (as the respondent had argued). This meant that the applicant had not repudiated (or discharged) the employment agreement, and the respondent was not released from his obligations under the agreement's non-compete clause.

Judge Le Miere found that the non-compete clause was prima facie enforceable. His Honour took into account the respondent's knowledge of the applicant's customers and his connection with those customers being a "potential threat" to the applicant's business, and that the company was "entitled to protect that and other confidential information for a reasonable period of time". A two-year restraint was held to be reasonable, having regard to the nature of the applicant's business and the company's order cycle. The judge held that the geographic reach of the clause was not unreasonable in light of the applicant's business activities in Australia and the respondent's former role as the principal point of contact for all new and existing customers. In any event, if the geographic reach of the non-compete clause was considered to be unreasonable by the trial court, the judge said that it could be modified or severed in order to be valid.

The Court balanced the protection of both parties' interests. It considered that the operation of the clause did not preclude the respondent from pursuing his occupation in any field other than the field of ship stabilisation nor prevent him from supporting his family. Therefore, the non-compete clause was reasonably necessary to protect the respondent's interests.

Judge Le Miere decided that damages were inadequate because it would be difficult to identify transactions or profit lost to the applicant due to the respondent's employment by Veem. The judge weighed the irreparable damage to the applicant's business if an injunction were not granted and the applicant succeeded at trial, and the inevitable loss of the respondent's employment by Veem if an injunction were granted. He decided that "the balance of convenience, or the balance of injustice" favoured the grant of an injunction. The principal reason for this was that the respondent agreed to the non-compete clause in the employment agreement. As a result, there was a prima facie case that the restraint clause was enforceable and that the respondent should be bound by the agreement unless it was determined at trial that the restraint was unenforceable.

Accordingly, the judge ordered that the respondent be restrained until judgment or further order from being employed by Veem or any related entity.

Lessons for Employers. The decision demonstrates the Court's willingness to uphold non-compete clauses in employment agreements in interlocutory proceedings. The grant of an injunction was primarily based on the employee's acceptance of the terms of the agreement and the Court's belief that that employee should be bound by those terms until such a time as a trial court considered them to be unreasonable.

Australian courts will interpret a foreign employment agreement in accordance with the agreement's governing law. However, any remedy sought in an Australian court in relation to that agreement will be made under Australian law.

- ***FAIR WORK OMBUDSMAN V BLUE IMPRESSION PTY LTD* [2017] FCCA 810**

Factual Background. The Fair Work Ombudsman ("FWO") commenced proceedings against the respondent employer, Blue Impression Pty Ltd, the owner of a fast food chain, and the employer's accountant, Ezy Accounting 123 Pty Ltd. The FWO alleged that the employer had not paid some of its employees the minimum hourly rate of pay and penalty rates in accordance with the applicable modern award. It was alleged that the accounting firm was involved in and accessorily liable for several of the employer's contraventions of the *Fair Work Act 2009* (Cth) ("FWA"). The FWO alleged that the

accounting firm had known about the contraventions but that it had continued to process the pay of one of the employees, knowing that it was less than the applicable award rates.

The employer made full admissions of the alleged contraventions of the FWA. The accounting firm, however, denied liability and argued that it had been the employer's responsibility to ensure that the amounts paid to employees were paid in accordance with the applicable award. The firm agreed that it had been notified of the FWO allegations, that it had corresponded with the FWO and an employment law expert in relation to these allegations and that it had not updated its payroll system.

Legal Background. Employers must pay employees in accordance with any applicable modern award under the FWA.

The FWA provides that a person who is *involved* in a contravention of a provision of the Act may be taken also to have contravened that provision if he or she had been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to an offence. This person is referred to as an "accessory" and will be "accessorily liable" if they have "actual knowledge" of the contravention or offence. Proof of "actual knowledge" can be inferred from a person's knowledge of suspicious circumstances coupled with the person's deliberate failure to make inquires which may have confirmed those suspicions (referred to as "wilful blindness").

Decision. Judge O'Sullivan was critical of the accounting firm's conduct and evidence in the proceeding. The judge was satisfied that the accounting firm knew that the employer was underpaying its employees because it knew the employees' rates in its payroll system were not sufficient to allow the employer to comply with the obligations imposed on it by the applicable award. The firm had been notified of the FWO proceedings against the employer and the entitlements of the employees under the award.

The judge said that the accounting firm had "engaged in a contrivance, a deliberate shutting of the eyes or calculated ignorance" and was wilfully blind. He was satisfied that it was possible to infer actual knowledge on the part of the accounting firm of suspicious circumstances and failure to make inquiries into the duties of the employee and the employer's failure to meet the award obligations. The judge commented that the most basic query would have revealed that the employee had not been paid in accordance with the award. The accounting firm persisted with the maintenance of its payroll system, with the inevitable result that contraventions of the award occurred. Accordingly, Judge O'Sullivan held that the accounting firm was accessorily liable for the employer's contraventions.

Lessons for Advisors. This case is a warning to payroll service providers and accounting firms that they should not ignore or be wilfully blind to an employer's contraventions of the FWA. If they do, they may be held to be accessorily liable to an employer's breach if the court finds that the employer has contravened the FWA. In this case, the evidence against the accounting firm was clear on its face—the accounting firm had known about the employer's contraventions and had done nothing to ensure that its employees were paid in accordance with the applicable modern award.

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LAWYER CONTACT

Adam Salter
Partner
Sydney
+61.2.8272.0514
asalter@jonesday.com

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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ALKHOBAR	CLEVELAND	HOUSTON	MIAMI	PITTSBURGH	SYDNEY
AMSTERDAM	COLUMBUS	INDIA	MILAN	RIYADH	TAIPEI
ATLANTA	DALLAS	IRVINE	MINNEAPOLIS	SAN DIEGO	TOKYO
BEIJING	DETROIT	JEDDAH	MOSCOW	SAN FRANCISCO	WASHINGTON
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CHICAGO	HONG KONG	MEXICO CITY	PERTH	SINGAPORE	