JONES DAY

JUNE 2017

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

Adam Salter
Partner, Jones Day

MESSAGE FROM THE EDITOR

In this edition of the *Update*, we consider the Senate Education and Employment Legislation Committee's recommendations in relation to the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*. We then comment upon the increase to the high income threshold and the proposed amalgamation of three major Australian Unions.

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

SENATE REPORT PROVIDES SOME RELIEF FROM VULNERABLE WORKER LEGISLATION, FLAGS MORE WORKPLACE REFORMS TO COME

On 9 May 2017, the Senate Education and Employment Legislation Committee ("Committee") released its report into the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* ("Bill"). Although the Committee recommended relatively minor changes to the Bill, it did indicate that more changes may be in the pipeline.

The Bill extends the circumstances where a franchisor could become liable for breaches of workplace law by its franchisees, increases penalties for serious contraventions of workplace law, and increases the powers of the Fair Work Ombudsman. Under the current draft of the Bill, a franchisor will avoid incurring liability for breaches of workplace law by its franchisees by arguing that it is not a "responsible franchisor entity". A franchisor will not be a "responsible franchisor entity" where it can prove that it does not exercise "a significant degree of influence or control over the franchisee

IN THIS ISSUE

entity's affairs". In addition, a franchisor will avoid incurring liability where it can prove that it was not reasonable for it to have known about the contraventions or prove that it has taken "reasonable steps" to prevent breaches of workplace laws. Further detail regarding the Bill can be found in our February *Update*.

In its review, the Committee took the view that the Bill is necessary because "the existing provisions within the *Fair Work Act 2009* are insufficient to effectively deal with situations where vulnerable workers have been deliberately and systematically exploited". But of the four recommendations, two of them provided some relief to employers.

One recommendation was that where the Bill holds franchisors responsible for workplace law breaches if they have control over the "affairs" of the franchisees, "affairs" should be replaced with "workplace terms and conditions". By making this change, the new laws would only apply to franchisors with control over the workplace relations of franchisees, not other areas of control such as over products and supply chains. This would afford protection to franchisors that have substantial control over products and supply chains of their franchisees, but may have no knowledge or control over employees of franchisees. It would also mean that franchise businesses generally, where substantial control and responsibility rests with franchisees, remain viable.

The Committee also recommended that the explanatory memorandum to the Bill be amended to articulate a more measured approach to the use of new investigative powers by the fair work ombudsman. Although many employers who made submissions to the Committee did not have significant problems with the ombudsman's increased powers under the Bill.

The Committee did, however, recommend that the government consider whether any further reforms were required to address exploitation. Specifically, the Committee was faced with submissions suggesting that breaches of workplace law were present in many businesses with fragmented structures outside of franchising. Specifically, the Committee said:

> "[T]he committee is also aware of evidence that indicates that other business models and employment structures, such as labour hire and supply chains, harbour a high risk of worker exploitation due to the complex and fragmented nature of the organizational structures and business networks involved".

Labor and Greens senators had additional comments. Those comments were in favour not only of the Bill, but also further reforms. The Labor senators' comments state that "the bill as currently drafted falls well short of addressing the range of ways that workers are exploited". They recommended that the Bill be significantly expanded to cover all kinds of labour hire and supply chain networks to prevent franchise businesses from restructuring their businesses to avoid the consequences of the Bill. They also recommended that the onus of proof in record-keeping failures be reversed, so that an employer must prove that it has kept correct records in relation to payment of employee wages.

The Greens' additional comments went further again. They recommended that the Bill make franchisors primarily liable for franchisee underpayment of employees. Franchisors would then need to recover those amounts from the franchisees later, increasing the risk for franchisors.

The main difference between the main report and the additional comments was that the additional comments pushed for more intervention in the Bill, whereas the main report advocated leaving that intervention to other legislation. Either way, employers should expect these additional measures to make their way to Parliament sooner rather than later. Those measures will have for-reaching implications for franchisors and others in the franchising chain.

UNFAIR DISMISSAL AND COMPENSATION AMOUNTS INCREASED

On 1 July 2017, the high income threshold and maximum compensation amounts for unfair dismissal claims were increased. The high income threshold is the maximum annual earnings of an employee before he or she cannot bring a claim for unfair dismissal. This threshold has been increased from $138,900 for last financial year to $142,000 in 2017–18. Unfair dismissal claims are an important feature of Australian employment law, and comprise the largest part of the workload of the Fair Work Commission ("Commission"), which receives over 14,000 applications annually.

Also on 1 July 2017, the maximum compensation that can be awarded in an unfair dismissal claim by an employee was increased from $69,450 to $71,000; although for employees

with a lower annual income than $142,000, the compensation cap is six months' pay. The compensation cap is an important safeguard for small to medium-sized businesses, who in addition to paying compensation, may also be simultaneously paying for the unfairly dismissed employee's replacement.

PROPOSED AMALGAMATION OF THREE AUSTRALIAN UNIONS

On 20 June 2017, the Construction, Forestry, Mining and Energy Union ("CFMEU"), the Maritime Union of Australia ("MUA") and the Textile, Clothing and Footwear Union of Australia ("TCFUA") jointly lodged an application under section 44 of the *Fair Work (Registered Organisations) Act 2009* (Cth) ("FWRO Act") for amalgamation of the three unions. The application proposes that both the MUA and the TCFUA become new divisions of the CFMEU.

Union mergers are generally approved by a membership ballot. However, the CFMEU has applied for an exemption from this requirement under section 46 of the FWRO Act. The CFMEU argues that an exemption is justified because the combined total membership of the MUA and the TCFUA represents only 12.5 percent of the CFMEU's 130,000 members.

Industry bodies have raised concerns about the proposed amalgamation. The Australian Mines and Metals Association ("AMMA") has said that the amalgamation "will give the militant CFMEU and MUA greater capacity to inflict economic damage on all aspects of the resources and energy sector". The AMMA's Workplace Relations Director also said that the merger may lead to a "monopoly of the supply chain [which] would translate to millions of dollars of foregone revenue for both state and federal Governments, in turn affecting all Australians". The proposal has led the AMMA to repeat its calls for the employment minister to expedite new legislation promised during the 2016 Federal election to introduce a new "public interest" test for union mergers.

On 4 August 2017, the Commission will hold a preliminary hearing in relation to the proposed amalgamation. If the Commission approves the application for submission of amalgamation to ballot, the amalgamation may well be finalised by the end of the year.

We thank Associate Katharine Booth and Law Clerk Bowen Fox for their assistance in the preparation of this Update.

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.

UNSUBSCRIBE

If you no longer wish to receive the *Monthly Update—Australian Labour & Employment*, please send an email to asalter@jonesday.com with the subject UNSUBSCRIBE.

JONES DAY GLOBAL LOCATIONS

ALKHOBAR
AMSTERDAM
ATLANTA
BEIJING
BOSTON
BRISBANE
BRUSSELS
CHICAGO
CLEVELAND
COLUMBUS
DALLAS
DETROIT
DUBAI
DÜSSELDORF
FRANKFURT
HONG KONG
HOUSTON
IRVINE
JEDDAH
LONDON
LOS ANGELES
MADRID
MEXICO CITY
MIAMI
MILAN
MINNEAPOLIS
MOSCOW
MUNICH
NEW YORK
PARIS
PERTH
PITTSBURGH
RIYADH
SAN DIEGO
SAN FRANCISCO
SÃO PAULO
SHANGHAI
SILICON VALLEY
SINGAPORE
SYDNEY
TAIPEI
TOKYO
WASHINGTON