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 examine the Queensland Government's *Labour Hire Licensing Bill 2017*. If enacted, the Bill will establish a licensing scheme to regulate the provision of labour hire services in Queensland. We then consider the Fair Work Commission's recent decision for all modern awards to contain a provision by which casual employees may elect to convert to permanent employment. Finally, we discuss the Federal Circuit Court of Australia's record $660,020 fine imposed on a fruit market business for underpaying an employee.

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

PROPOSED STATE-BASED LABOUR HIRE LICENSING SCHEMES

The Queensland Government introduced the *Labour Hire Licensing Bill 2017* (Qld) (**Bill**) in response to a 2016 Parliamentary Committee Inquiry into the practices of the Queensland labour hire industry (**Inquiry**). According to the Bill's Explanatory Notes, the Inquiry contained "*disturbing evidence of exploitation and mistreatment of labour hire workers in Queensland*." The objectives of the Bill are to establish a licensing scheme to regulate the provision of labour hire services in order to protect workers from exploitation and to promote the integrity of the labour hire industry.

The Bill requires a provider of a labour hire service (a **Provider**) to apply for and operate under a licence. It is an offence for a Provider to provide such a service without

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a licence and to advertise or hold out that they provide, or are willing to provide, a labour hire service unless they hold a licence. Additionally, "*avoidance arrangements*" whereby a person circumvents or avoids obligations imposed by the Bill will be unlawful unless that person has a reasonable excuse. These offences carry significant civil penalties for individuals and corporations, plus up to 3 years imprisonment for individuals.

To be granted a licence, a Provider must provide information about whether the business is financially viable and whether the applicant has, for the five years prior, complied with the *Work Health and Safety Act 2011* (Qld) and the *Workers Compensation and Rehabilitation Act 2003* (Qld), and is able to comply with those Acts. The applicant must also provide any information reasonably required for the Chief Executive to decide whether the applicant, nominated officers and 'executive officers' (including persons who take part in "*the management of the corporation*") of the business are 'fit and proper persons' to provide labour hire services. In determining whether a person is 'fit and proper', the Chief Executive must consider a range of factors, including whether that person is under the control of, or substantially influenced by, another person whom the Chief Executive considers is not a fit and proper person to provide labour hire services. The definitions of 'executive officer' and 'fit and proper persons' would capture a broad range of people in a business.

The Bill requires applicants to pay an application fee, and Providers to pay an annual licence renewal fee. It is anticipated that the fee will be structured according to the size of the business, and will range between $1,000 for a small Provider and $5,000 for a large Provider.

A licence may be suspended or cancelled. Prior to cancellation, the licence holder must be provided with a show cause notice and the Chief Executive must be satisfied, among other things, that the Provider is no longer a fit and proper person, or is an insolvent under administration, or that the Provider, an employee or representative of the Provider, has contravened a condition of the licence or a relevant law. Once cancelled, an ex-Provider cannot apply for a new licence for two years. In addition, an ex-Provider that is a corporation, and any related bodies corporate of that corporation, cannot apply for a new licence unless the Chief Executive is satisfied that because of a "*genuine sale*", no shareholder when the cancellation was made is still a shareholder, and no person who was in a position to control or influence the affairs of the corporation is still in such a position. Again, these provisions are extremely broad and would foreseeably impose a significant burden on labour hire businesses.

In July 2017, the Finance and Administration Committee (**Committee**) tabled a report in relation to the Bill. The Committee did not recommend that the Bill be passed. However, the Committee made a number of suggestions, including that the scope of the Bill be clarified and that the Government conduct further consultation with businesses to ensure awareness of the licensing scheme.

Labour hire services and businesses engaging such services in Queensland should be aware of the provisions of the Bill and the potential impact that the Bill, if enacted into legislation, may have on their business.

Additionally, Victorian and South Australian labour hire services and businesses engaging such services should be aware that similar legislation to the Bill is also under consideration in those States. South Australia recently introduced the *Labour Hire Licensing Bill 2017* (SA) (**SA Bill**). The SA Bill provides for the establishment of a licensing scheme to regulate the provision of labour hire services on similar terms to the Bill.

CASUAL EMPLOYEES NOW ABLE TO CONVERT TO PERMANENT EMPLOYMENT

As part of its four yearly review of modern awards, the Fair Work Commission (**Commission**) has decided that all modern awards should contain a clause by which casual employees may elect to convert to full-time or part-time permanent employment in order that they meet the modern awards objective. That objective requires the Commission to ensure that "*. . .modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions. . .*"

The National Employment Standards (**NES**) comprise ten minimum entitlements that are provided to all Australian employees. Casual employees, however, only have access to three of the ten NES entitlements, namely unpaid carer's, compassionate and community service leave and the provision of the Fair Work Information Statement. The Commission expressed concern that the entitlements under the NES would be rendered irrelevant if employers chose to engage and pay

workers as casual employees, regardless of the incidents of employees' employment.

The Commission developed a draft model casual conversion clause for the 85 awards which do not currently contain such a clause. The model clause has the following features:

1. the employee must have worked for a period of 12 or more months;
2. the employee must have worked a pattern of hours on an ongoing basis which, without significant adjustment, could continue to be performed in accordance with the full-time or part-time provisions of the relevant award;
3. the employer must provide all casual employees with a copy of the casual conversion clause within the first 12 months after their initial engagement (whether they become eligible for conversion or not); and
4. the employer may refuse a conversion on one of four grounds:
    a. it would require a significant adjustment to the employee's hours of work to accommodate them in full-time or part-time employment in accordance with the provisions of the relevant award;
    b. it is known or reasonably foreseeable that the employee's position will cease to exist;
    c. the employee's hours of work will significantly change or be reduced within the next 12 months; or
    d. on other reasonable grounds based on facts which are known or reasonably foreseeable.

The evidence before the Commission did not suggest that most employers were choosing to engage casual employees who equally might readily be engaged as permanent employees under the terms of the relevant modern award. The majority of employers recognised that maximisation of permanent employment was desirable in order to maintain a dependable and motivated workforce. However, the evidence demonstrated that some employers indefinitely engaged casual employees who otherwise might be, or want to be, employed permanently. Accordingly, the Commission concluded that it was necessary for all modern awards to contain a casual conversion clause in order to ensure that the NES entitlements were not rendered irrelevant.

The Commission has invited interested parties to make submissions in relation to the proposed model casual conversion clause. The Commission may decide to amend the draft clause in response to any submissions it receives.

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

BUSINESS FINED RECORD $660,020 FOR UNDERPAYMENT OF EMPLOYEE

The Federal Circuit Court of Australia (**FCCA**) has fined a Melbourne fruit market business a record $660,020 for underpaying an employee by $25,000 in four months of work.

The employee, a newly arrived refugee, was initially paid $3.50 per hour and later received up to $10.00 per hour to a maximum of $120.00 per day. Under the applicable modern award, the General Retail Industry Award 2010 (**Award**), the employee should have been up to $17.00 per hour on weekdays, $35.00 per hour on weekends and $43.00 per hour on public holidays. The employee was not paid regularly and when paid, was paid in cash. He was not provided with meal breaks as required under the Award, despite at times working more than 12 hours per day. The Commission concluded that the business deliberately ignored warnings about required rates of pay from the Fair Work Ombudsman ("FWO") and was not lawfully run.

Judge Burchardt described the underpayment as "*enormous*" and "*egregious*". His Honour concluded that the business "*took advantage*" of the employee: "[*The employee*] *was a vulnerable employee in that he was a recent arrival to Australia and totally lacked fluency in English, and could reasonably be understood to be most unlikely to be aware of any entitlements at law*."

The business was fined $644,000 and the business's operator was order to pay an additional $16,020. This is the largest penalty ever awarded by the FCCA as a result of litigation commenced by the FWO. The decision has been described by the FWO as a warning to employers who deliberately exploit vulnerable employees.

In February, the FWO ordered that a business and the business's operator pay (the then record) fine of $532,910 for the exploitation of five employees, including two employees on visas. This penalty has since been surpassed by the FCCA's most recent penalty.

We thank Associate Katharine Booth for her assistance in the preparation of this Update.

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QUESTIONS

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JONES DAY GLOBAL LOCATIONS

ALKHOBAR	CLEVELAND	HOUSTON	MILAN	RIYADH	TAIPEI
AMSTERDAM	COLUMBUS	IRVINE	MINNEAPOLIS	SAN DIEGO	TOKYO
ATLANTA	DALLAS	JEDDAH	MOSCOW	SAN FRANCISCO	WASHINGTON
BEIJING	DETROIT	LONDON	MUNICH	SÃO PAULO	
BOSTON	DUBAI	LOS ANGELES	NEW YORK	SHANGHAI	
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