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 report on the rate of wage increases in the Australian private sector. We then continue our discussion from the July *Update* of the South Australian *Labour Hire Licensing Bill 2017*. In addition, we review the amendments made to the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* prior to its passage in the Senate. Finally, we comment upon a recent decision in which the Supreme Court of Victoria upheld a four-year post-transaction restraint.

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

PRIVATE SECTOR RATES OF PAY AT RECORD ANNUAL LOW

On 16 August 2017, the Australian Bureau of Statistics published the Wage Price Index Report for the June quarter 2017. The WPI Report measures changes in the price of labour in the Australian labour market.

In the June quarter 2017, the private-sector WPI rose to 1.8 per cent, the same rate of growth as has been recorded by the ABS for the last three quarters and the longest period of low growth for five successive quarters. The private-sector WPI is lower than the 2.0 per cent pay growth forecast for both the private and public sectors in the May 2017 Federal Budget.

IN THIS ISSUE

In the private sector, the mining industry recorded the highest quarterly rise of 0.8 per cent, driven by wage growth in Western Australia as a result of some mining employees receiving their first wage increases in several years. In addition, the WPI Report indicated that pay rates (excluding bonuses) rose by 0.4 per cent in the June quarter 2017, down 0.1 per cent from the March quarter 2017.

On 14 August 2017, the Department of Employment published the "Trends in Federal Enterprise Bargaining Report" for the March quarter 2017. The TFEB Report published that the average annualised wage increase for 761 agreements approved in the March quarter for private-sector employees was 2.7 per cent—down from 3.0 per cent for the December quarter 2016. This increase mirrors the stagnating rates of pay published in the WPI Report and is the lowest since reporting in relation to enterprise bargaining agreements began in the December quarter 2001.

SOUTH AUSTRALIA INTRODUCES LABOUR HIRE LICENSING BILL

In the July 2017 *Update*, we discussed the *Labour Hire Licensing Bill 2017* (Qld) ("Queensland Bill"). If enacted, the Queensland Bill will establish a licensing scheme to regulate the provision of labour hire services in Queensland. South Australia recently introduced a similar bill—the *Labour Hire Licensing Bill 2017* (SA) ("South Australian Bill")—to provide for the licensing and regulation of persons who provide labour hire services.

The Queensland Bill and the South Australian Bill are very similar in their intent and drafting. For instance, both bills would require providers of labour hire services to be licensed to provide such services. To be granted a licence under both bills, the applicant would need to be a "fit and proper person" to be the holder of a licence (including, in the case of an applicant that is a body corporate, each director being a "fit and proper person") and have demonstrated sufficient financial resources to properly carry on a business under a licence.

Unlike the Queensland Bill, the South Australian Bill purports to hold principals/employers of agents/employees and directors of a body corporate convicted of an offence under the South Australian Bill to be vicariously liable if an offence is committed by an agent/employee or body corporate. In addition, the South Australian Bill would not require labour hire services to pay an annual licence renewal fee. Rather, such services will hold their licence until the licence is suspended or cancelled, the licence holder dies or, in the case of a body corporate, is dissolved.

Both bills as currently drafted have the potential to significantly impact the labour hire services industry in both Queensland and South Australia. Similar legislation is anticipated in other Australian States.

"VULNERABLE WORKERS" LEGISLATION PASSES SENATE

In the February 2017 *Update* and the June 2017 *Update*, we reported on the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Cth).

On 4 September 2017, the bill was passed by the Senate with significant amendments to section 557A ("Serious contravention of civil remedy provisions").

Prior to the amendments, section 557A(1) of the *Fair Work Act 2009* (Cth) provided that a contravention of a civil remedy provision under the bill would be a "serious contravention" if a person's conduct was "deliberate" and "part of a systematic pattern of conduct relating to one or more other persons". This section has since been clarified such that a contravention will be taken to be deliberate if the person *knowingly* contravened the "essential elements" of that contravention. This would include knowledge, or at least some appreciation, of the fact that the conduct was unlawful at the time it occurred. For example, an alleged wrongdoer may have known that their employee or an identifiable class of employees is not receiving their full entitlements under the Act or the person is contravening the applicable record-keeping or payslip requirements under the Act or the *Fair Work Regulations 2009* (Cth).

In addition, section 557A(2) provides a non-exhaustive list of matters that a court may consider when determining whether a person's conduct was part of a "systematic pattern" for the purposes of section 557A. Among other things, the section states that a court may consider the number of contraventions of the Act committed by the person and the period over which the relevant contraventions occurred. The amendments to the bill added a further matter to the list—namely, that a court may have regard to the person's response, or failure to respond, to any complaints about the relevant contraventions. This may include consideration of the nature and timing of any

response, and whether the response achieved a reasonable solution to the problem for all affected employees.

In addition, a new subsection 557(5A) was inserted which provides that an accessory commits a "serious contravention" if the principal/franchisee's contravention was a "serious contravention" and the accessory/franchisee *knew* that the principal's contravention was a "serious contravention". In circumstances where the accessory was knowingly involved in the principal's contraventions (which the accessory knew to be deliberate and systematic at the time of the contravention), the accessory will be subject to higher penalties.

The enactment of the bill will have far-reaching implications for franchisors. However, it is hoped that the amendments made to the bill prior to its passage through the Senate will clarify what an alleged wrongdoer needs to know before he or she may be held accountable for a "serious contravention" under section 557A.

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

COURT UPHOLDS FOUR-YEAR POST-TRANSACTION RESTRAINT

Factual Background. The defendant, Mr Palmer, was employed by the plaintiff, Southern Cross Computer Systems Pty Ltd, since May 2001. Prior to 2016, the defendant owned 40 per cent of the shares in the plaintiff. In June 2016, the defendant sold his shares to the second plaintiff pursuant to a share sale and purchase agreement. Pursuant to the agreement, the plaintiff paid the defendant $3.5 million in consideration for the defendant's shares. The agreement also provided for the defendant to continue on as an employee of the plaintiff for one year and to be subject to a restraint of trade clause.

The relevant clause provided, "During the Restraint Period, [the defendant] must not . . . carry on, engage in or have any involvement in the Restricted Business." The Restraint Period was for a period of up to four years from the completion date of the agreement. The agreement defined "Restricted Business" as "any business which is competitive with, or likely to be competitive with, the Business at the relevant time during the Restraint Period" and "Business" as "the business of IT procurement and associated IT managed services carried on by the Company".

The plaintiff commenced proceedings in the Supreme Court of Victoria against the defendant in June 2017. For several months prior, the defendant had been providing services to a direct competitor of the plaintiff for one day per week and had been receiving remuneration of approximately $5,000 per month from the competitor.

Justice McDonald was required to consider whether the restraint of trade clause operated beyond the scope of the plaintiff's business as at the completion date and, if so, whether the restraint clause was unenforceable as an unreasonable restraint of trade.

Legal Background. Australian courts will enforce a contractual restraint of trade clause only when satisfied that the restraint is both reasonable and necessary to protect the legitimate business interests or goodwill (meaning ongoing relationships with clients and suppliers) of the employer or company. This involves establishing whether the restraint was reasonable at the time the contract was entered into.

There are two types of restraint of trade clauses: post-employment restraints and post-transaction restraints. Australian courts are more willing to enforce the latter type of restraint clauses. The main reason for this is that post-transaction restraints can be properly regarded as facilitating trade and commerce, whereas post-employment restraints restrict trade and commerce.

Decision. The Court held that the four-year Restraint Period in the post-transaction restraint was reasonable for four reasons. First and foremost, the plaintiff paid a "substantial amount of consideration" in return for the terms of the agreement, including the restraints imposed on the defendant. Second, the defendant had worked for the plaintiff since 2001 and was designated in the agreement as a "Key Employee". He had a significant degree of knowledge of the plaintiff's customers. Third, the Restraint Period was a term of the agreement entered into freely by the defendant. Fourth, although the Restraint Period operated for four years, the agreement provided for the defendant to continue working for the company for one year of the Restraint Period (up until June 2017). The Court imposed a four-year injunction operative until June 2020 restraining the defendant from having any involvement with the competitor.

The plaintiff also sought two more orders: First, an order restraining the defendant from soliciting the plaintiff's employees as at the completion date from leaving their employment with the company. Second, an order restraining the defendant from soliciting any of the plaintiff's customers as at the completion date or at any date during the 12-month period prior to the completion date with a view to obtaining the business of any customer in the competitor's business. However, Justice McDonald refused to grant the proposed orders without first being provided with a list of relevant customers.

Lessons for Employers. Unlike post-employment restraints, post-transaction restraints are not limited in the duration of the restraint which can be agreed to. It is relatively rare for Australian courts to intervene and consider a post-transaction restraint to be unreasonable and unenforceable. Generally, the courts prefer to leave it to the parties to agree to what is reasonable. In this case, the Court was persuaded by the fact that the parties had come to commercial agreement, and that a "substantial amount of consideration" was paid by the plaintiff to the defendant in return for the terms of the agreement, including the restraint of trade clause.

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

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QUESTIONS

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ALKHOBAR	CLEVELAND	HOUSTON	MILAN	RIYADH	TAIPEI
AMSTERDAM	COLUMBUS	IRVINE	MINNEAPOLIS	SAN DIEGO	TOKYO
ATLANTA	DALLAS	JEDDAH	MOSCOW	SAN FRANCISCO	WASHINGTON
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