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 Woolworths' commitment to identify and address human rights risks in its Australian supply chains. We then discuss a class action expected to be lodged by a trade union on behalf of thousands of underpaid independent contractors, and the Australian Bureau of Statistics' Wage Price Index Report for the September quarter 2017.

We then consider a Fair Work Commission decision in which a large employer's lawyers were denied permission to represent the employer in unfair dismissal proceedings. Finally, we comment upon a decision of the Federal Court of Australia in which significant civil penalties were imposed on an employer and the employer's HR manager in relation to the underpayment of employees.

IN THIS ISSUE

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

WOOLWORTHS COMMITS TO WORKING WITH TRADE UNION IN RELATION TO SUPPLY CHAIN STANDARDS

On 22 November 2017, the Woolworths Group released a statement in which the company committed to working collaboratively with the National Union of Workers ("NUW") and other interested stakeholders "to identify and address human rights risks in fresh food supply chains in Australia".

Woolworths agreed to implement a pre-qualification programme for labour-hire providers to ensure that all labour providers who wish to operate in its supply chains comply with labour and human rights standards. Woolworths also agreed to support workers in its supply chains being educated about their workplace rights, including their right to join a labour union of choice; to have access to an effective grievance mechanism to ensure that human rights violations are reported, investigated and remediated; and to be protected if they report human rights violations.

The commitment followed discussions between Woolworths, the NUW and the Australasian Centre for Corporate Social Responsibility ("ACCSR"). It appears that in response to Woolworths' statement, a number of ACCSR-sponsored resolutions on labour rights to be discussed at Woolworths' annual general meeting were withdrawn.

Separately, the NUW has negotiated new enterprise agreements covering approximately 2,000 workers at Woolworths' distribution centres in Victoria and New South Wales with annual pay rises of around 4 per cent per year. Prior to the negotiation of these enterprise agreements, the NUW had won support to take protected action ballots at its Victorian distribution centres.

NUW TO LAUNCH AUSTRALIAN-FIRST CLASS ACTION FOR ALLEGEDLY UNDERPAID WORKERS

The NUW will lodge a class action on behalf of thousands of allegedly underpaid independent contractors who worked for four contract and marketing companies, namely Aida Sales & Marketing Pty Ltd, Credico Australia Pty Ltd, Global Interactive Group Pty Ltd and PCA Group Pty Ltd. The companies are alleged to have represented some of Australia's major corporates and charities, including Telstra, Optus, AGL, Astron and The Red Cross.

It is expected that the class action will be lodged in the Federal Court of Australia this December under section 539 of the *Fair Work Act 2009* (Cth) ("FW Act"). In addition, the class action will be the first Australian class action to rely upon section 550 of the FW Act, which provides that a person who is "involved in" a contravention of the FW Act is held responsible for that contravention. This means that if any of those corporates or charities that were represented by the contract and marketing companies were "involved in" the alleged underpayments, they will be liable under the FW Act. We discuss section 550 of the FW Act in more detail in our article "Employer and HR Manager Penalised for Underpayment of Wages" below.

ECONOMIC DEVELOPMENTS

ABS PUBLISHES WAGE PRICE INDEX FOR THE SEPTEMBER QUARTER 2017

On 15 November 2017, the Australian Bureau of Statistics ("ABS") published the Wage Price Index ("WPI") Report, which measures changes in the price of wages and salaries in the Australian labour market, for the September quarter 2017.

In the September quarter 2017, both the public and private sector WPIs rose 0.5 per cent. Throughout 2017, the private sector rise to the September quarter 2017 was 1.9 per cent and the public sector rise was 2.4 per cent. The private sector rise of 1.9 per cent is consistent with the 1.8 per cent rise recorded in both the March quarter 2017 and the December quarter 2016. Rises in 2017 ranged from 1.2 per cent for the mining industry and 2.7 per cent for health care and social assistance, and arts and recreation services.

An increase of 2 per cent per annum was recorded for hourly rates of pay (including bonuses) in the private sector.

In a statement relating to the WPI Report, ABS Chief Economist Bruce Hockman said: "The higher wage growth in the September quarter was driven by enterprise agreement increases, end of financial year wage reviews and the Fair Work Commission's annual minimum wage review".

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

EMPLOYER DENIED LEGAL REPRESENTATION IN UNFAIR DISMISSAL PROCEEDINGS

***Taylor v Startrack Express* [2017] FWC 6083**

Factual Background. Mr Taylor applied to the Fair Work Commission for an unfair dismissal remedy against his former employer, Startrack Express. Startrack's lawyers filed a notice seeking the Commission's permission to represent Startrack in the proceedings. Mr Taylor, represented by the Transport Workers' Union of Australia ("TWU"), opposed the application.

Legal Background. Under section 596 of the FW Act, a person may be represented in a matter before the Commission by a lawyer or paid agent with the Commission's permission only if:

- in view of the complexity of the matter, representation will enable the matter to be dealt with more efficiently;
- the person is unable to represent himself, herself or itself effectively, and it would be unfair not to allow the person to be represented; or
- taking into account fairness between the persons in the matter, it would be unfair not to allow the person to be represented.

The Commission may grant permission for a person to be represented by a lawyer or paid agent where a small business is a party to a matter and has no specialist HR staff while the other party is represented by an officer or employee of a trade union with experience in workplace relations advocacy.

Decision. Commissioner Cambridge stated that the proceedings were "fairly straightforward" and were not sufficiently complex so as to require lawyers to appear on Startrack's behalf. The Commission noted that Startrack was a large employer with a dedicated HR department, which comprised people with training in employment law and industrial relations.

The Commission concluded that the "default position" is that lawyers and paid agents are excluded from representing parties in Commission proceedings. As Startrack's lawyers had not satisfied the requirements in section 596 of the FW Act, the Commission refused to grant permission to Startrack's lawyers to represent Startrack in any capacity in the unfair dismissal proceedings (including as a "McKenzie friend", meaning a person who has no direct role in the proceedings but who assists an unrepresented litigant and who makes suggestions in relation to the calling and questioning of witnesses).

Lessons for Employers. This case is a reminder to employers that legal representation or representation by a paid agent in Commission proceedings is the exception, not the rule. Large employers may be required to rely upon their HR departments and employees in relation to representation in Commission proceedings.

EMPLOYER AND HR MANAGER PENALISED FOR UNDERPAYMENT OF WAGES

***Fair Work Ombudsman v NSH North Pty Ltd* [2017] FCA 1301**

Factual Background. The Fair Work Ombudsman ("FWO") brought civil penalty proceedings in the Federal Court of Australia ("Court") for contraventions of employment law obligations under the FW Act. The proceedings were brought against NSH North Pty Ltd ("NSHN"), a restaurant trading as New Shanghai Charlestown, and NSHN's sole director/shareholder, HR manager and store manager (collectively, "respondents").

The primary contraventions involved systematic failures to pay employees their proper entitlements under the Restaurant Industry Award 2010 ("Award"), including underpayment of $583,688.68 to 85 employees over a period of 16 months. The underpayment included failures to pay prescribed minimum rates of pay, casual loadings, penalty rates, overtime rates and superannuation contributions in accordance with the Award. The FWO also alleged contraventions relating to false employment records (including time and wage records) that were created and produced on behalf of NSHN and the respondents in response to a FWO notice to produce. The respondents admitted the key contraventions.

Legal Background. Under section 550 of the FW Act, a person who is "involved in" a contravention of a civil penalty provision is taken to have also contravened that provision. A person is "involved in" a contravention if the person has aided, abetted, counselled, procured, induced, conspired with others or been knowingly concerned in or party to the contravention. This is known as "accessorial liability".

In Australia, civil penalties attempt to put a price on contravention of the law. The penalties should be sufficiently high to deter further contraventions by the contravener and others who might be tempted to contravene the law. In addition, the penalties should send a message that contraventions of the law are serious and unacceptable, and they should be appropriate and proportionate to the contraventions viewed as a whole.

Decision. The Court held that NSHN had contravened the FW Act as alleged by the FWO and that the individual

respondents were accessorily liable for NSHN's contraventions. The Court ordered NSHN to pay employees their unpaid entitlements and also imposed a civil penalty in the amount of $301,920. In addition, the Court imposed civil penalties on the sole director/shareholder ($54,672), the HR manager ($21,760) and the store manager ($18,496).

The HR manager submitted that she was a holder of a 457 Visa sponsored by a related company of NSHN. She said that throughout her employment as HR manager, she was mindful that her residential visa status was dependent on her continued employment with NSHN. However, the Court dismissed the HR manager's submission that she was in a "parallel position of vulnerability" to that of the other NSHN employees because they were both from a non-English speaking background and also worked in Australia on 457 Visas. The Court said, "the comparison is not apt. A distinction must be drawn between vulnerability to being exploited, which is a position of victimhood, and supposed vulnerability by way of reduced ability to resist participation in illegal activity, which is a position of participation".

Lessons for mployers. This case demonstrates the FWO's and the Court's determination to address and impose significant civil penalties on employers and third parties (such as HR managers and store managers) who are involved in the underpayment of employees.

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

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QUESTIONS

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ALKHOBAR	CHICAGO	FRANKFURT	MEXICO CITY	PARIS	SHANGHAI
AMSTERDAM	CLEVELAND	HONG KONG	MIAMI	PERTH	SILICON VALLEY
ATLANTA	COLUMBUS	HOUSTON	MILAN	PITTSBURGH	SINGAPORE
BEIJING	DALLAS	IRVINE	MINNEAPOLIS	RIYADH	SYDNEY
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