JONES DAY

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MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

IN THIS ISSUE

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MESSAGE FROM THE EDITOR

In this edition of the *Update*, we comment on the recent merger of the Construction, Forestry, Mining and Energy Union with the Maritime Union of Australia and the Textile Clothing and Footwear Union of Australia and report on the commencement of the notifiable data breaches scheme, which imposes additional obligations on businesses regulated by the *Privacy Act 1988* (Cth). We also discuss the High Court of Australia's recognition of "personal payment orders", which may be made if such orders are "reasonably necessary for or facilitative of" a pecuniary penalty order. Finally, we consider a case in which the Fair Work Commission confirmed that lawyers are able to assist their clients in the lead-up to a hearing.

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

FAIR WORK COMMISSION APPROVES UNION MERGER

On 6 March, the Fair Work Commission approved the merger of the Construction, Forestry, Mining and Energy Union ("CFMEU") with the Maritime Union of Australia ("MUA") and the Textile Clothing and Footwear Union of Australia. Two employer groups, the Australian Mines and Metals Association and Masters Builders Australia, have appealed the Commission's decision. However, in the absence of a successful appeal, the new merged entity, the Construction, Forestry, Maritime, Mining

and Energy Union ("CFMMEU"), will come into existence on 27 March. As the CFMEU and the MUA are two of Australia's most prominent, militant unions, employer groups anticipate that the merger will result in an increasing number of disruptions in Australian workplaces with CFMMEU members.

COMMENCEMENT OF THE NOTIFIABLE DATA BREACHES SCHEME

On February 22, the *Privacy Amendment (Notifiable Data Breaches) Act 2017* (Cth) ("Amendment Act") came into effect. Under the Amendment Act, entities regulated by the *Privacy Act 1988* (Cth) ("Privacy Act") must notify the Office of the Australian Information Commissioner and affected individuals if there has been an eligible data breach.

There are two types of "eligible data breaches":

- When there has been unauthorised disclosure or access to personal information that would likely result in serious harm; and
- When personal information is lost in circumstances where unauthorised disclosure or access to such information is likely to occur, or a reasonable person would conclude that such unauthorised disclosure or access would be likely to result in serious harm.

The Amendment Act imposes additional obligations on businesses (including some employers) regulated by the Privacy Act. These provisions could oblige employers to give notice of eligible data breaches involving the unauthorised access to or disclosure of employee personal information in certain circumstances.

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

HIGH COURT IMPLIES POWER FOR COURT TO MAKE "PERSONAL PAYMENT ORDERS"

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union **[2018] HCA 3**

Factual background. The Australian Building and Construction Commission ("ABCC") brought proceedings against the CFMEU and Mr Myles, the then Vice President of the CFMEU's Construction and General Division, in the Federal Court of Australia. The ABCC alleged that the CFMEU and Mr Myles had contravened s 348 of the *Fair Work Act 2009* (Cth) ("FW Act"), a civil remedy provision, which prohibits a person from organising or taking, or threatening to organise or take, any action against another person with intent to coerce another person to engage in industrial activity.

The events giving rise to the proceedings took place at a construction site in Victoria in 2013. Mr Myles requested that there be a CFMEU delegate on the site. The site manager did not agree that this was necessary, as there was a delegate of another union, which was a party to the relevant enterprise agreement, already on the site. Mr Myles and other CFMEU members then blockaded the entrance to the site with parked cars, which prevented the delivery of wet concrete. Large quantities of concrete were spoiled and the concrete that had been poured before the blockade began had to be demolished and disposed.

The Federal Court held that the CFMEU had contravened s 348, and imposed pecuniary penalties on both the CFMEU and Mr Myles. Justice Mortimer also made a "non-indemnification order" under s 545 of the FW Act, which prohibited the CFMEU from directly or indirectly indemnifying Mr Myles against the pecuniary penalties.

The CFMEU and Mr Myles successfully appealed this decision to the Full Court of the Federal Court. The ABCC subsequently appealed to the High Court of Australia. The key issue before the High Court was the lawfulness of the "non-indemnification order", and whether an order prohibiting the CFMEU from indemnifying Mr Myles should have been made under s 546 of the FW Act.

Legal Background. Section 545 of the FW Act relates to orders that may be made by particular courts. This section provides that the Federal Court may "make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision". This provision was relied on by the Federal Court as the source of power to make the "non-indemnification order".

Section 546 of the FW Act relates to pecuniary penalties. This section provides that the Federal Court may order a person to pay a pecuniary penalty if it is satisfied that the person has contravened a civil remedy provision.

Decision. The majority of the High Court held that s 546 of the FW Act expressly empowered the Federal Court to order a person to pay a pecuniary penalty. From this express power arose an implied power of the Federal Court to make such orders as are "reasonably necessary for or facilitative of" a pecuniary penalty order. In this case, the implied power under s 546 of the FW Act permitted the Federal Court to order that Mr Myles pay a pecuniary penalty personally and not seek or accept indemnity from the CFMEU (known as a "personal payment order").

Chief Justice Kiefel observed that the principal purpose of a pecuniary penalty order was specific and general deterrence. Her Honour stated, "the greater the sting or burden of the penalty, the more likely it will be that the contravener will seek to avoid the risk of subjection to further penalties and thus the more likely it will be that the contravener is deterred from further contraventions; likewise, the more potent will be the example that the penalty sets for other would-be contraveners and therefore the greater the penalty's general deterrent effect." The High Court held that there was the implied power in s 546 to make orders as are "reasonably necessary for or facilitative of" the accomplishment of the deterrent effect of pecuniary penalty orders.

The High Court held that the power to make a "personal payment order" lay in s 546 not s 545. That is, the Federal Court could have ordered Mr Myles to pay a "personal payment order" under s 546, but was not permitted to make a "non-indemnification order" under s 545.

Lessons for employers. If a pecuniary penalty order is imposed on an individual, the Federal Court is empowered to make such other orders that are reasonably necessary for or facilitative of the pecuniary penalty order. This means that a union may be barred from indemnifying its members who have been penalised. The High Court's decision will likely have the effect of discouraging union members from breaching the FW Act.

CLARIFICATION ON THE ROLE LAWYERS CAN PLAY IN THE FAIR WORK COMMISSION

***Stringfellow v Commonwealth Scientific and Industrial Research Organisation* [2018] FWC 1136**

Factual background. Dr Stringfellow applied to the Commission for an unfair dismissal remedy against his former employer, the Commonwealth Scientific and Industrial Research Organisation ("CSIRO"). The CSIRO's lawyers filed a 'Notice of Representative Commencing to Act', which advised that they were commencing to act for the CSIRO. Dr Stringfellow sought directions from the Commission prohibiting the CSIRO from being represented by a lawyer during preliminary hearings, and prohibiting the CSIRO from obtaining legal advice in the lead-up to the final hearing.

Legal background. Under s 596 of the FW Act, a person may only be represented in the Commission by a lawyer or paid agent with the Commission's permission 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.

Rule 12(1) of the *Fair Work Commission Rules 2013* allows a party to be represented by a lawyer when preparing and lodging written applications or written submissions, when corresponding with the Commission, and when participating in a conciliation or mediation process. However, r 12(1) is subject to a direction made by the Commission under r 12(2).

Decision. Deputy President Clancy did not make the proposed direction prohibiting the CSIRO from being represented by a lawyer. He agreed with a previous decision (*Fitzgerald v Woolworths* [2017] FWCFB 2797), which found that the discretion available to the Commission under r 12(2) cannot be used to limit a party obtaining legal advice, as legal advice is not "representative activity" under r 12(1). Accordingly, the CSIRO was permitted to obtain legal advice.

In relation to the proposed direction prohibiting the CSIRO from being legally represented during the 'submission stage' in the build-up to the hearing, Deputy President Clancy considered that the circumstances in this case did not warrant a direction by the Commission preventing legal representation under r 12(1). As such, a direction was not made limiting the CSIRO's ability to seek legal representation during the lead-up to the hearing.

Lesson for employers. This case indicates to employers that engaging with lawyers for the purpose of writing submissions, lodging applications and corresponding with the Commission are exempt from the general prohibition on legal representation in the Commission. Unless an alternative direction is made by the Commission (which is unlikely), lawyers are able to be involved in proceedings during the lead-up to a hearing.

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QUESTIONS

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AMSTERDAM	CLEVELAND	HONG KONG	MIAMI	PERTH	SILICON VALLEY
ATLANTA	COLUMBUS	HOUSTON	MILAN	PITTSBURGH	SINGAPORE
BEIJING	DALLAS	IRVINE	MINNEAPOLIS	RIYADH	SYDNEY
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