JONES DAY

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MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

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Adam Salter
Partner, Jones Day

MESSAGE FROM THE EDITOR

In this edition of the *Update*, we report on the exposure draft of the *Treasury Laws Amendment (Taxation and Superannuation Guarantee Integrity Measures) Bill 2018*. We then consider a decision of the High Court of Australia in relation to protected industrial action under the *Fair Work Act 2009* (Cth). Next, we discuss a decision of the Federal Circuit Court of Australia in which a sushi store was penalised almost $200,000 for underpayment of its employees. Finally, we consider a case in which the Fair Work Commission held that "casual conversion clauses" fell outside of the scope of "permitted matters" to be included in enterprise agreements.

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

PROPOSED LAW TARGETS EMPLOYERS WHO FAIL TO PAY SUPERANNUATION TO EMPLOYEES

On 24 January 2018, the Commonwealth Government released an exposure draft of the *Treasury Laws Amendment (Taxation and Superannuation Guarantee Integrity Measures) Bill 2018* ("Bill"). As currently drafted, the Bill would expand the powers of the Australian Taxation Office Commissioner ("ATO Commissioner") to target employers who fail to pay superannuation to their employees.

The Bill would broaden the Single Touch Payroll ("STP") reporting requirements such that these requirements would apply to all employers in Australia, regardless of the number of employees. The STP is the reporting platform through which employers provide the ATO Commissioner all payroll and superannuation information at the time these amounts are withheld or paid out to super funds.

The Bill would also empower the ATO Commissioner to issue written directions to employers if the ATO Commissioner reasonably believed that an employer had failed to comply with a superannuation obligation. The directions would require the employer to pay the amount of superannuation guarantee outstanding within a specified timeframe, as well as to undertake an education course, and to provide evidence of completing that course. A failure to comply with a written direction of the ATO Commissioner could be punishable by court-ordered penalties, as well as up to 12 months' imprisonment.

The Bill is intended to improve compliance with employers' statutory superannuation guarantee obligations. It is also intended to help ensure employees have at least a minimum level of superannuation support through contributions provided by their employer in respect of their employment.

Submissions in relation to the Bill are invited until 16 February 2018.

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

HIGH COURT OF AUSTRALIA CONSIDERS "UNPROTECTED" INDUSTRIAL ACTION

Esso Australia Pty Ltd v The Australian Workers' Union; *The Australian Workers' Union v Esso Australia Pty Ltd* [2017] HCA 54

Factual Background. In 2015, the Australian Workers' Union ("AWU") took industrial action against Esso Australia Pty Ltd at Esso's Bass Strait oil and gas operations. The AWU claimed that this was "protected industrial action" under the *Fair Work Act 2009* (Cth) ("Act").

Esso claimed that the AWU had contravened an order made by the Fair Work Commission in relation to a proposed Enterprise Agreement ("EA") to which the protected industrial action related. Esso argued that because the AWU had previously contravened an order of the Commission in relation to the proposed EA, the industrial action was not "protected" because of section 413(5) of the Act.

Legal Background. Protected industrial action can be taken by employers and employees only when they are negotiating an EA. If industrial action is "protected", the employer or employee taking the action is generally immune from civil liability under the law.

Section 413(5) of the Act provides that for industrial action to be "protected", persons organising or engaging in the action (including employees and/or the "bargaining representative") "must not have contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement".

Decision. Esso appealed to the High Court of Australia. Among other things, the High Court found that section 413(5) was intended to apply to past contraventions of orders. The High Court said that because the Act is predicated on participants "abiding by the rules, it is much more likely that the purpose of a provision in that form would have been to deny the immunity of protected industrial action to persons who had not previously complied with a pertinent order or orders and who had thereby demonstrated that they were not prepared, or prepared to take sufficient care, to play by the rules".

Accordingly, the majority of the High Court (Kiefel CJ, Keane, Nettle and Edelman JJ) upheld Esso's appeal, essentially finding that the AWU's industrial action would not be protected for the duration of the EA as it had previously breached an order from the Commission that related to that EA.

Lessons for Employers. Employers should be aware that industrial action will not be protected where the person seeking protection has previously contravened an order made by the Commission that relates to a proposed EA. Where an employer is affected by "protected industrial action", the employer should check to see whether the union has complied with all relevant orders of the Commission. If not, the union will be taking "unprotected industrial action", meaning the employer may be able to take action against the union

and/or employees to bring such unprotected industrial action to an end.

SUSHI STORE FINED FOR FAILURE TO COMPLY WITH FAST FOOD INDUSTRY AWARD

Fair Work Ombudsman v Kjoo Pty Ltd [2017] FCCA 3160

Factual Background. The Fair Work Ombudsman ("FWO") brought proceedings in the Federal Circuit Court of Australia for contraventions of the Act and the *Fair Work Regulations 2009* (Cth). The proceedings were brought against the operator of a sushi store, Kjoo Pty Ltd, its sole director/secretary, and its accountant/registered tax agent (collectively, the "respondents").

The respondents admitted the contraventions, which included failure to pay three employees prescribed minimum rates, and casual and weekend loading rates, in accordance with the *Fast Food Industry Award 2010* ("Award"). The employees were underpaid a total of $51,025.84 between September 2014 and July 2015. This amount had been back-paid prior to the proceedings. The respondents also admitted to failing to make and keep records, to provide pay slips to employees and to knowingly creating and producing false and/or misleading records in response to a FWO notice to produce.

The three employees were Korean nationals on 417 (working holiday) visas. Their employment was facilitated by an "Internship Agreement" between Kjoo and a private college in Korea.

Legal Background. Under section 546 of the FW Act, the Court has the power to order payment of a pecuniary penalty for each of the admitted contraventions. Civil penalties aim to promote compliance with the legislation by being sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene. Additionally, Australian courts have emphasised the need for general deterrence in the fast food industry, where employees are frequently employed on a casual basis and are vulnerable due to their age, limited education and limited English language skills.

Under section 550 of the FW Act, a person who is involved in a civil remedy provision is taken to have contravened that provision. This includes a person who has aided, abetted, counselled, procured or induced the contravention, or been in any way, directly or indirectly, knowingly concerned in or party to the contravention, or has conspired with others to effect the contravention. This is known as "accessorial liability".

Decision. The Federal Circuit Court held that the respondents had contravened the civil remedy provisions. Kjoo was ordered to pay a penalty of $161,760. Kjoo's director/secretary and notably also accountant/tax agent were accessorily liable and were ordered to pay $32,352 and $4,608, respectively.

The Federal Circuit Court also held that the "Internship Agreement" was not a "vocational placement" within the meaning of the Act, and so did not preclude the requirement to pay prescribed minimum rates in accordance with the Award.

Lessons for Employers. This case demonstrates the commitment of the FWO and Australian courts to addressing contraventions of the Act. The significant penalties imposed on both Kjoo and the involved third parties are intended to deter employers from underpaying their employees and from non-compliance with the Act.

COMMISSION CONSIDERS CASUAL CONVERSION CLAUSES FALL OUTSIDE SCOPE OF "PERMITTED MATTERS"

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union", known as the Australian Manufacturing Workers' Union (AMWU) v Visy Board Pty Ltd [2018] FWFB 8

Factual Background. The Australian Manufacturing Workers' Union ("AMWU") sought to enforce a casual conversion clause in an EA after the respondent ("Visy") refused to offer full-time employment to two labour hire workers. The workers had completed a continuous full-time period of three months' engagement at one of Visy's sites. Clause 16 of the applicable EA required Visy to offer full-time, permanent employment to casual employees where their engagement at a Visy site had continued for a continuous full-time period of three months.

At first instance, the Commission concluded that Clause 16 of the EA was not a "permitted matter" (as that term is used in the Act). The AMWU then appealed the Commission's decision. The key issue on appeal was whether the Commission had the power to determine the dispute. The Commission also considered whether Clause 16 of the EA was a "permitted matter", and accordingly whether that clause required Visy to offer employment to a labour hire worker.

Legal Background. EAs may be made about "permitted matters" within the meaning of the Act. "Permitted matters" include those matters pertaining to the relationship between an employer and the employees covered by the EA, as well as matters pertaining to the relationship between the employer and the employee organisation (i.e. union) covered by the EA.

In 2010, the Commission held that terms of an EA that contained a general prohibition on an employer engaging labour hire employees or contractors were not permitted matters. The Commission also held that terms relating to conditions about employing casual employees or engaging labour hire or contractors are permitted matters only if those terms sufficiently relate to employees' job security.

Decision. The Full Bench of the Commission held that Clause 16 was not a "permitted matter". The Commission referred to its 2010 decision, and said that this issue had been settled and that, accordingly, it lacked the jurisdiction to deal with the dispute. Terms restricting or qualifying an employer's right to use independent contractors are not permitted matters pertaining to the employment relationship.

The Commission distinguished this case from its decision in the 2005 *Murray Bridge* case, where a term of an EA partially prohibiting the use of labour hire employees by the employer was deemed to relate to the employment relationship. This was because the term was also designed to increase permanent employment by placing obligations upon the employer to engage more permanent employees.

Lessons for Employers. When drafting EAs with unions and other employee representatives, employers should be aware that the Commission cannot enforce clauses that are not permitted matters within the meaning of the Act. General clauses prohibiting employers from engaging labour hire employees or contractors will be unenforceable, unless they place additional obligations on the employer that relate to employees' job security.

We thank associate Katharine Booth, summer clerks Brigitte Gasson and Indiana Tappin, and paralegal Beverly Parungao 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.

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