Message from the Editor

by Adam Salter, Perth Office

In this edition of the *Update,* we first report on the Fair Work Ombudsman's ("FWO") use of the new reverse onus of proof laws in relation to record keeping and pay slip obligations. Next, we report on the increase in wage growth over the last year. We then describe the Australian Council of Trade Unions ("ACTU") proposal to increase the minimum wage by 6 percent. Next, we discuss the reform proposals and government response to the final report of the Migrant Workers Taskforce ("MWT"), which was released on 7 March 2019. Finally, we discuss the recent decision of *Adamczak v Alsco Pty Ltd (No 4)* [2019] FCCA 7, in which an adverse costs order was awarded against Mr Adamczak who failed to accept reasonable offers of settlement put to him by his employer in circumstances where the employer had set out the weaknesses of his case prior to making those offers.

In the Pipeline—Highlighting Changes of Interest to Employers in Australia

FWO Uses New Reverse Onus of Proof Laws Against Sushi Operator

The FWO has recently brought proceedings against A&K Property Services Pty Ltd ("A&K Property Services"), a company which operates two sushi fast food outlets in Queensland. The FWO alleges underpayment of $19,467 and seeks an order for back-payment of $7,416, which is the amount that A&K Property Services had not yet rectified.

The FWO alleges that A&K Property Services underpaid minimum ordinary hourly, weekend penalty, and overtime rates, and failed to provide superannuation and accrue annual and personal leave entitlements to nine employees between October and December 2017. The FWO also alleges that A&K Property Services failed to keep proper time and wages records, and failed to issue pay slips to employees.

The FWO will apply s 557C of the *Fair Work Act 2009* (Cth) for the first time. Under the new provision, which is available for conduct occurring after September 2017, employers will not avoid litigation on the

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CONTACT

Adam Salter
Perth
asalter@jonesday.com

basis of insufficient evidence or record-keeping failures. Section 557C reverses the onus of proof, requiring that employers that have not complied with record keeping or pay slip obligations disprove allegations of underpayment in court, unless they can provide a reasonable excuse.

The test case has been instituted in the Federal Circuit Court, and A&K Property Services faces penalties of up to $63,000 per contravention. The company directors also face penalties for their alleged involvement in the contraventions.
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Highest Wage Growth Since 2014

Data recently released by the Australian Bureau of Statistics ("ABS") shows that wage growth in the private sector has risen to 2.3 percent per year, marking an improvement from the December quarter in 2017 when growth was merely 1.9 percent. It also marks the highest growth in the private sector since the December quarter in 2014.

According to Bruce Hockman, chief economist of the ABS, improved labour market conditions have contributed to the increased wage growth that has been observed in the majority of industries. Callam Pickering, Asia-Pacific economist with Indeed, also explained that wage growth was assisted by tight labour market conditions and the increase in minimum wages.

Growth in public sector wages surpassed the private sector, with the former experiencing an increase of 2.5 percent. Hockman explained that public sector growth has been exceeding private sector growth for the past four years.

According to Pickering, wage growth is unlikely to rise above 3 percent until the underutilisation rate (a broader measure of the unemployment rate) falls below 11 percent (it currently sits above 13 percent). Shane Oliver, chief economist at AMP Capital, added that if it were "not for the acceleration in minimum wage increases, wages growth would still be running at around 2 percent".
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ACTU Seeks to Increase Minimum Wage by 6 Percent

The ACTU is calling for a 6 percent increase in the national minimum wage, which would translate to an extra $43 per week for Australia's lowest-paid workers. The call is part of a proposal seeking to lift all full-time workers out of relative poverty over the next two years.

Relative poverty is defined by the Organisation for Economic Cooperation and Development as 60 percent of median earnings. The current minimum wage is $18.93 per hour, or $719.20 per week, which is approximately 54 percent of median earnings. The minimum wage would need to be increased by 10.7 percent, or $72.80 per week, to lift all full-time workers out of relative poverty this year. The ACTU has instead called for the Fair Work Commission ("FWC") to "close the gap" with increases over the next two years.

The ACTU suggests that the FWC increase the minimum wage by 6 percent this year, with an additional increase of 5.5 percent in 2020. These figures assume a 1.5 percent increase in the median wage next year.

The submission comes after opposition leader Bill Shorten declared that the upcoming federal election would be a "referendum on wages". Last year, the ACTU sought a 7.2 percent increase in the minimum wage. The FWC's minimum wage panel awarded a 3.5 percent increase, the biggest rise since 2010.
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MWT Releases Final Report into Worker Exploitation

The final report of the MWT was released on 7 March 2019. The MWT explored many forms of worker exploitation, including wage underpayment and "cash-back" arrangements, pressure on migrant workers to work outside visa restrictions, non-provision of leave and superannuation entitlements, tax avoidance through cash payments, misclassification of employees as contractors, and unsafe working conditions. The MWT report was released along with the federal government's response to its reform proposals, which are outlined below.

The MWT report recommended the introduction of criminal sanctions for the most serious forms of

exploitation. The report found that the current system for regulation, based on civil liability, was unable to tackle "serious and systemic underpayments of workers". The government response provided that it will consider the circumstances and the most appropriate legislative vehicle for applying criminal penalties to serious and deliberate exploitation.

The government also agreed to consider, based on the MWT's recommendation, a new offence where a person knowingly unduly influences, pressures or coerces a temporary migrant worker to breach a visa condition, and mechanisms to exclude employers from employing temporary visa holders for a defined period where they have been convicted by a court for underpaying migrant workers.

The MWT report recommended that the FWO be given the same information gathering powers as other business regulators such as the Australian Competition and Consumer Commission. The government agreed that the FWO should have equivalent enforcement powers and the appropriate resources and tools to effectively counter worker exploitation.

The MWT also recommended increases in the general level of penalties for breaches related to underpayment, to bring penalties into line with other business laws such as consumer laws. The government proposed to consider increasing penalties only after reviewing the deterrent effect of the increased penalties introduced by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) (Vulnerable Workers Act).

The MWT report proposed that accessorial liability should be extended to hold individuals and businesses to account for involvement in workplace law breaches. The report also recommended that the government establish a National Labour Hire Registration Scheme, focused on horticulture, meat processing, and cleaning and security, which would impose a low regulatory burden, but enable the deregistration of labour hire operators for contraventions.

The MWT accepted that most Australian employers comply with workplace laws, and that the government had responded with amendments introduced by the Vulnerable Workers Act. However, there remains a "culture of underpayment in some areas of the economy", and some industries and business models (such as franchising) can foster exploitative behaviours. The MWT considered that there is further opportunity to deter businesses from profiting through the underpayment of migrant workers, and to assist migrant workers with the recovery of underpayments.
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Hot off the Bench—Decisions of Interest from the Australian Courts

Employee Ordered to Pay $35,000 in Costs for Failing to Accept Reasonable Offer of Compromise. *Adamczak v Alsco Pty Ltd (No 4)* [2019] FCCA 7

Factual Background. This case involved an application for costs with respect to proceedings brought by Mr Adamczak against his former employer, Alsco Pty Ltd ("Alsco") and four of its employees. Mr Adamczak alleged that he was dismissed because he made bullying and harassment claims against four colleagues. In its defence, Alsco argued that Adamczak was dismissed for breaching the confidentiality provisions of the company's electronic mail policy.

The proceedings against the four employees were dismissed in August 2016. Alsco was successful in the May 2018 proceedings, where the substantive and operative reason for the termination was found to be Mr Adamczak's violation of the electronic mail policy.

Alsco subsequently filed an application for an award of costs on the basis that Mr Adamczak's failure to accept reasonable offers and settle proceedings was unreasonable conduct, which caused Alsco to incur unnecessary costs. Alsco had offered Mr Adamczak $60,000 in August 2016 and had increased its offer to $80,000 in September 2016. Alsco stated that the increased offer was made "purely in the interests of commerciality and resolution of the matter prior to incurring further costs". Alsco also indicated that, based on the weaknesses of Mr Adamczak's case, it considered the offer very generous. Alsco stated that if Mr Adamczak refused the offer, it would rely on the offer to pursue a costs order against him if Alsco was ultimately successful later in the proceeding. Later, Alsco offered $70,000, explaining that the decreased offer was a result of it having incurring further costs due to Mr Adamczak's continued pursuit of

the claim.

Mr Adamczak responded with counter offers of $185,000 and $179,500. The letter accompanying the second counter offer suggested that, if made public, the employer's failure to accept Mr Adamczak's offer could harm the employer's reputation.

Alsco rejected both counter offers and the matter proceeded to hearing, where Mr Adamczak failed in all aspects.

Legal Background. Parties to proceedings under the Fair Work Act ("FW Act") are generally required to bear their own costs regardless of the outcome. However, courts have discretion to award costs pursuant to s 570 of the Act.

Section 570 provides that "The party may be ordered to pay costs only if … the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs".

Decision. Mr Adamczak was ordered to pay Alsco's fees in the amount of $35,000.

Judge Brown recognised that costs in FW Act proceedings should only be awarded in rare cases and that the discretion in s 570 should be exercised very carefully. This is because there is often a great disparity between the resources of employer and employee in workplace disputes. Also, it is important not to consider an offer reasonable because of the benefit of hindsight.

In this case, the employer had set out the weaknesses of Mr Adamczak's case before it had made the offers to settle. Judge Brown considered the timing and quantum of the offers, as well as the knowledge of the offeree, as highly relevant to determining whether an acceptance or rejection is reasonable.

Lesson for Employers. Employers should consider the commercial benefit of making reasonable offers of compromise at the appropriate stage in a dispute. Engaging in genuine attempts to resolve matters outside of court by making reasonable offers, along with the threat of seeking orders for costs, could assist in faster and cheaper resolutions for all parties.

Although costs orders in FW Act proceedings are rare, s 570 provides the court with the discretion to make costs orders if satisfied that a party's unreasonable act or omission caused the other party to incur the costs. A refusal to accept a reasonable offer of compromise will be recognised as unreasonable in the right circumstances, even when the refusal was based on legal advice.
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