

“VISION IN THE WORKPLACE”

Issue Forty-two, April-May 2009

In this edition of Vision in the Workplace, we highlight the Royal Assent given to the *Fair Work Act 2009*, note certain provisions which will commence on 1 July 2009, and look at the introduction of the *Industrial Relations Amendment (Jurisdiction of the Industrial Relations Commission) Bill 2009* which amends the *Industrial Relations Act 1996 (NSW)*. We also look at a recent decision of the Australian Industrial Relations Commission regarding a dismissal prior to completing the investigation, and a decision of the Federal Court of Australia as to what “matters pertaining” means.

Fair Work Keeps Rolling Out!

The Governor General has given Royal Assent to the *Fair Work Bill 2008*, now the *Fair Work Act 2009* (**‘the Act’**), which may impact significantly on your industrial relations strategy. Specifically, from 1 July 2009, some important provisions of the Act will commence operation such as:

- Bargaining - the Act's provisions relating to workplace agreements, and as such the obligation to bargain in good faith, will commence. However, the test which workplace agreements must pass will not change until 1 January 2010. Moreover, the Act also provides employees who are parties to Australian Workplace Agreements (**‘AWA’**) or Individual Transitional Employment Agreements (**‘ITEA’**) to enter into Conditional Termination Agreements (**‘CTA’**), allowing these employees to participate in the collective bargaining process for a new collective agreement. Further, if a new collective agreement results from that bargaining the AWA or ITEA will automatically terminate.
- Unfair Dismissal - the exemption for businesses with 100 employees or less will end. Specifically, small business employers, being those with less than 15 employees, will only be protected for the first twelve (12) months of employment.
- Fair Work Australia (**‘FWA’**) - The commencement of FWA marks the end of an era (or many era's). FWA will operate in place of the Australian Industrial Relations Commission, the Australian Fair Pay Commission, Workplace Ombudsman and the Workplace Authority, becoming a “one-stop shop” for employment and industrial matters.

For advice or assistance in developing your industrial and employment strategy in preparing for these changes, please contact Nick Stevens or Alicia Mataere.

Chief Industrial Magistrate Power to Transfer to Industrial Relations Court of New South Wales

The *Industrial Relations Amendment (Jurisdiction of the Industrial Relations Commission) Bill 2009* (**‘the Bill’**) was introduced to State Parliament on 25 March 2009. The Bill seeks to amend the *Industrial Relations Act 1996 (NSW)* (**‘the Act’**) by referring jurisdiction of the Chief Industrial Magistrate (**‘CIM’**) to the Industrial Relations Court of New South Wales. Mr. Barry Collier, MP, stated the Bill “responds to the adverse impacts of the insidious WorkChoices regime on the New South Wales industrial relations system by transferring the work of Industrial Magistrate’s to the Industrial Relations Commission.”

Specifically the Bill will abolish the position of CIM transferring the civil jurisdiction of the position to the Industrial Relations Commission of New South Wales and where appropriate designated Local Courts. Additionally, Chief Industrial Magistrate Hart will transfer to the Local Court becoming a Local Court Magistrate. The Bill will also see the Industrial Court of New South Wales dealing with all breaches of industrial instruments. Moreover, whilst the Bill transfers powers to the Industrial Court, it will also allow Commissioners and Deputy President’s of the Industrial Relations Commission of New South Wales to conciliate and, where necessary, make orders for applications seeking the recovery of remuneration and other amounts arising from an employment relationship. Additionally, the smaller OH&S prosecutions which the CIM dealt with and which limited the amount of penalty that could be imposed to \$55,000.00 appears to have been abolished. Accordingly, the jurisdiction will no longer determine the amount of penalty that may be imposed.

We will keep you updated with developments of the Bill.

STEVENS & ASSOCIATES LAWYERS

LEVEL 4, 74 PITT STREET SYDNEY NSW 2000

GPO BOX 1925, SYDNEY NSW 2001

TELEPHONE: 02 9222 1691 | FACSIMILE: 02 9232 0166



Liability limited by a scheme approved under the Professional Standards Legislation

Summary Dismissal Prior to Completion of Investigation held to be 'fair'

The Australian Industrial Relations Commission has justified an employer summarily dismissing an employee even though significant aspects of the employee's misconduct did not become apparent until *after* the Employee was dismissed.

Without authority, the Employee had accessed and made copies of information which President Giudice, Deputy President McCarthy and Commissioner Blair (**'the Full Bench'**) held as "*private, commercially sensitive and in some cases highly confidential*." Once the employee's employer noticed this unauthorised use of confidential information, they confronted the employee and summarily terminated the employment, although all the inquiries had not been completed.

At first instance, Commissioner Foggo held that the employer acted "*prematurely*" in confronting the employee and terminating his employment without completing all the inquiries. However, on appeal, the Full Bench held Commissioner Foggo "*did not properly take the results of the post-termination inquiries into account*."

On appeal, the Full Bench stated the termination was valid "*although not all the particulars were available*" and that the Employee was afforded procedural fairness as he was given an opportunity to respond to the allegation. The Full Bench noted that the degree of misconduct which was revealed by the post termination inquiries was "*very significant*" and as such could not be disregarded. The Full Bench did not bestow high regard to the fact that all inquiries had not been completed as the misconduct "*involved serious breach of trust*."

This case not only highlights the importance of procedural fairness in any dismissal but is also an example of how employers can enforce the protection of their confidential information. For assistance in managing the discipline of your employees please contact Nick Stevens or Alicia Mataere.

Federal Court finds that income protection insurance may not pertain to the employment relationship

A Union has claimed that an Employer had breached an Enterprise Agreement (**'the Agreement'**) by failing to implement an income protection insurance scheme which provided that the Employer insure its employees for income protection insurance for long term illness and injury at 75% of the employees salary (**'the Scheme'**).

The employer argued that the provisions of the Agreement which provided for the Scheme were void as such matters did not pertain to the employment relationship. The Union argued that the Scheme pertained to the employment relationship because income protection relates to an incident of employment, proposing that the fact that the Scheme may be implemented in situations irrelevant to the employment relationship does not mean that it does not pertain. Further, the Union claimed the Scheme applied as a reward for services in the same way that salaries are a reward for services.

His Honour Mr. Justice Cowdroy of the Federal Court of Australia held that the Scheme did not sufficiently pertain to the employment relationship because "*insurance benefits could be payable arising out of circumstances having no direct connection to the employee's relationship with the employer*" and as such the clause "*cannot be justified*". Further, Justice Cowdroy held that the clause could not be read down and as such was "*void in its entirety*."

Although this decision was pursuant to the provisions of the *Workplace Relations Act 1996 (Cth)*, the decision is significant for the *Fair Work Act 2009* which will require agreements contain matters pertaining to the employment.

This decision stresses the degree of directness that is required before a provision is held to "*pertain*" to the employment relationship. For advice and assistance on drafting your agreements please contact Nick Stevens or Alicia Mataere.

If you would prefer not to receive further newsletters from us, please either email dww@salaw.com.au with "unsubscribe" in the heading, or telephone the number below and speak to Dave Wells and we will remove you from our mailing list. This publication is intended only as a general overview of legal issues currently on interest to clients and practitioners. It is not intended as legal advice and should only be used for information purposes only. Please seek legal advice from Stevens & Associates Lawyers before taking any action based on material published in this Newsletter.

(Ph) 02 9222 1691 (Fax) (02) 9232 5888

STEVENS & ASSOCIATES LAWYERS

LEVEL 14, 14 MARTIN PLACE SYDNEY NSW 2000

GPO BOX 1925, SYDNEY NSW 2001

TELEPHONE: 02 9222 1691 | FACSIMILE: 02 9232 5388



Liability limited by a scheme approved under the Professional Standards Legislation