

“VISION IN THE WORKPLACE”

Issue Forty-Four, June-July 2009

In this edition of Vision in the Workplace, we look at a judgment of the Federal Court of Australia awarding an Employee compensation for an Employer’s failure to adhere to a grievance procedure set out in an Australian Workplace Agreement. We also highlight developments in the National industrial relations and occupational health and safety systems and, outline further developments in excessive executive termination payments. We also take this opportunity to report that the Honourable Mr. Robert McClelland MP, the Attorney-General and Federal Member for Barton, officially opened our new offices this month.

New Remedy for Sacked Workers

The Federal Court of Australia has awarded an Employee, made redundant, compensation on the basis that the Company employing him breached the grievance procedure as set out in their Australian Workplace Agreement (‘AWA’). Compensation of \$274,288.00 was awarded to the Employee, being an amount covering the salary the Employee would have earned until the completion of the Project being worked on, less amount earned in alternative employment during this period, less a 10% discount taking into account the contingency that the Employee’s contract may have been validly terminated prior to the completion of the Project.

The Employee commenced employment with the Company in various capacities between 2002 and 2006. In October 2006, his employment was terminated by the Company for lack of available work in the Employer’s specialised field of work. The Employee maintained that there was no justification for his redundancy and that the Company breached the grievance procedure as set out in his AWA.

Justice Tracey stated the Company “made no attempt” to give effect to the grievance procedure. Further, the Employee argued that there was a positive obligation on the Company to observe the staged grievance procedure once concern had developed about the Employee’s conduct. Conversely, the Company contended that obligation to follow the grievance procedure only arose once the Company had “decided to take disciplinary action against an employee by reason of its concerns about the employee’s behaviour.”

Tracey J agreed with the Employee stating “although the clause does not commence with a statement of obligation, it provides it will operate in a particular manner” and that the Employee was right to conclude that the Company “committed itself to implementing these measures.”

An implied term of trust and confidence was not recognised by Tracey J as there was doubt that it would add anything to the Company’s “contractual obligations having regard to the protective procedures incorporated expressly” by the grievance procedure.

Tracey J noted that “as is often the case with industrial agreements drafted by non-lawyers, the language of the AWA lacks the precision one would expect to find in a commercial contract.” Accordingly, this case highlights that prudent drafting of employment agreements, most notably grievance procedures, are crucial in protecting Employers from adverse actions commenced by employees. For more information on your dispute handling obligations and/or drafting employment agreements, please contact Nick Stevens or Alicia Mataere.

The Attorney-General Opens Our New Offices

On Monday 20 July 2009, Stevens & Associates Lawyers were honoured to have the Honourable Mr. Robert McClelland MP the Attorney-General and the Federal Member for Barton, officially open our new offices.

The occasion was commemorated with a plaque (see photo’s), great food, drinks and company. The Attorney-General also reminded the crowd which had gathered of the importance of integrity in the legal profession, especially for opponents. On this note, the Attorney-General praised Stevens & Associates Lawyers and Nick Stevens, noting their integrity and professionalism.



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

National Industrial Relations and OHS System Edge Closer

Tasmanian Workplace Relations Minister, Lisa Singh has announced the Tasmanian Government's in-principle support to referring its industrial relations ('IR') powers to Canberra. Ms. Singh has stated that the Referral Agreement would make it clear that local government "can remain where they want to be under the Federal system." She also noted that the implications of referring private sector IR power to the Federal Government includes workers benefiting from access to Modern Awards with simpler, nationally consistent wages, loadings and penalty rates.

Further, Queensland also gave in-principle support to joining the national IR system. Queensland IR Minister Cameron Dick "indicated his Government's in-principle support" but "subject to a number of issues being resolved." This makes Queensland the fourth State after Victoria, South Australia and Tasmania to refer its private sector IR powers to the Federal Government.

As for New South Wales, State IR Minister John Hatzistergos MP "has indicated that NSW would not determine its position on referral until the remaining elements of the Fair Work legislative reforms were enacted."

Western Australia is conducting a review of its IR system and has not yet committed to joining a national system. Deputy Prime Minister and Minister for Employment Relations, Education and Social Inclusion, Julia Gillard, stated that "as we work to achieve this national reform, it's important that Western Australia is in a system which will be better for business in that State and also for the working people."

We will keep you posted on all developments regarding the national IR system. In the meantime, if you have any questions regarding the implications of a national IR system on your workplace do not hesitate to contact Nick Stevens or Alicia Mataere.

Meanwhile, on the Occupational Health and Safety ('OHS') front, the National OHS Review Panel ('the Panel') has been seeking to introduce uniform OHS laws. In further developments, Deputy Prime Minister and Minister for

Employment Relations, Education and Social Inclusion, Julia Gillard, has reintroduced the *Safe Work Bill* into parliament which was laid aside last year after amendments the Senate insisted on were rejected by Ms. Gillard. Further, the Workplace Relations Ministers Council ('the Council') has expressed their support for the uniform OHS law.

The Council considered the recommendations of the Panel and accordingly decided on the structure and content of the Model OHS Act ('the Model Act') to be adopted by the Commonwealth, State and Territory governments. In a

communiqué released by the Council, the following points were highlighted. The Model Act:

- will include enhanced duty of care provisions to ensure all persons who conduct a business/undertaking will owe a duty of care to *all* workers and other persons;
- maintains that a breach of the duty of care amounts to a criminal offence and entails significant penalties;
- will provide for consultation obligations on the person conducting the business/undertaking; and
- provides protection from discrimination, victimisation and coercion over OHS matters and these "go beyond what is currently available through anti-discrimination and other laws"

Significantly, the Council has agreed that prosecutors will bear the onus of proving an offence beyond reasonable doubt. This removes the reverse onus which currently applies in both New South Wales and Queensland.

Western Australia ('WA') has expressed some reservations. WA Treasurer, Mr. Troy Buswell stated that WA "supported the position of nationally harmonised laws but would not support the introduction of an OHS regime which would adopt inferior standards to the existing State regime."

We will keep you posted on all developments! So watch this space...

Progress in Excessive Executive Termination Payments

As you may recall from last month's Vision in the Workplace Newsletter, the *Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009* ('the Bill') has been introduced to strengthen and clarify the regulatory framework pertaining to termination payments and benefits offered to company directors and executives.

In further developments, the Government has introduced amendments to give shareholders greater powers to scrutinise and reject termination benefits of company directors and executives. In this regard, a broader definition of "benefit" has been introduced and includes the following:

- a payment or other valuable consideration;
- any kind of real and personal property;
- any legal or equitable estate or interest in real or personal property;
- any legal or equitable right; and
- any other 'benefit' specified by Regulations.

For more information on the Bill or your executive employment agreements, specifically the current restrictions on executive and director termination payments, please contact Nick Stevens or Alicia Mataere.

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

GPO BOX 1925, SYDNEY NSW 2001

TELEPHONE: 02 9222 1691 | FACSIMILE: 02 9232 5388



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