

“VISION IN THE WORKPLACE”

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In this edition of Vision in the Workplace, we look at the *Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009* relating to director/executive termination payments and the introduction of the draft unfair contracts legislation which will significantly amend the *Trade Practices Act 1974 (Cth)*. We also look at the Paid Parental Leave Scheme which has been approved and a recent decision of the New South Wales Court of Appeal regarding an unfair contracts claim commenced by entrepreneurs.

A Bill to Curb Excessive Executive Termination Payments

The Hon Nick Sherry, Minister for Superannuation and Corporate Law has released an exposure draft of the *Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009* (**‘the Bill’**) which seeks to amend the *Corporations Act 2001* (**‘the Act’**) by strengthening and clarifying the regulatory framework pertaining to termination payments and benefits offered to company directors and executives.

The significant provisions of the Bill include:

- shareholder approval required where termination benefits for directors/executives exceed one years base salary. Currently, termination benefits can reach up to seven times a recipient’s total annual remuneration before shareholder approval is required;
- increasing coverage of regulations to senior executives and key management personnel, as opposed to the current coverage of directors only;
- shareholder votes on the approval of termination benefits *must* be held *after* the director/executive has departed from the company/position so that shareholders are in a better position to vote on the appropriateness of the termination benefit;
- an obligation is placed on directors/executives to immediately repay any unauthorised benefit; and
- hefty amendments to penalty provisions with an increase from 25 penalty units to 180 penalty units for a natural person and, an increase from 150 penalty units to 900 penalty units for a body corporate.

The Treasury will be receiving written submissions on the Bill until 2 June 2009. Furthermore, the Rudd Government has also requested that the Productivity Commission commence an inquiry into executive remuneration.

For more information on the Bill or its implication on your business and human resource strategy please contact Nick Stevens or Alicia Mataere.

Unfair Contracts Legislation Revealed

In further corporate news, the Federal Government has revealed its draft unfair contracts legislation which will significantly amend the *Trade Practices Act 1974 (Cth)*. Fundamentally, the draft legislation provides that any term in a *standard form contract* that is “unfair” will be void. Although the legislation is described as ‘consumer legislation’, its provisions will be far-reaching. For example, independent contractors will have a potential instrument to aid them in challenging clauses in their independent contractor agreements which are unfair.

In a media release, the Minister for Competition, and Consumer Affairs, the Hon Chris Brown MP, has stated that the provisions will “*be included in a Bill which is scheduled into be introduced in the Australian Parliament in June 2009.*”

The draft legislation renders a term in a standard form contract unfair where: “*it would cause significant imbalance in the parties’ rights and obligations arising under the contract; and it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by them.*” Furthermore, a Court will not have the power to amend any “unfair” provision. As such, assuming the Bill is passed, it will be crucial that cautious drafting be exercised in order to avoid the rigid application of the draft legislation which may result in unfair provisions being removed from contracts without being able to be re-written or amended.

Given the stringency of the draft legislation proper drafting is a prudent necessity. For more information on the draft legislation or drafting your contracts please contact Nick Stevens or Alicia Mataere.

Paid Parental Leave Approved!

You may recall from our October 2008 Vision in the Workplace that the Productivity Commission released a draft report on Paid Parental Leave with a

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recommendation for the introduction of a tax-payer funded 18 week paid parental leave scheme. The review has now been completed and approved. As such, from 1 January 2011, the primary carer of a child will receive a payment set at the Federal Minimum Wage (currently, \$553.78) a week for up to 18 weeks while they take leave for the birth of their child (**'the Scheme'**). An additional 2 weeks may also be granted to a father or same sex partner to be used within 12 months of birth.

However, people earning above \$150,000 will be excluded from the Scheme. Further, an Employee must work at least 10 months (**'the qualifying period'**) of the 13 months prior to the expected birth to be entitled to payments under the Scheme. During the qualifying period, the Employee must also have worked at least 330 hours.

Employers will not be required to pay superannuation on paid parental leave entitlements.

For more information on how the Scheme will affect your business and your obligations under the Scheme, please contact Nick Stevens or Alicia Mataere.

Review of Superannuation System Announced!

The Hon Nick Sherry, Minister for Superannuation and Corporate Law, has announced a review of our \$1.1 trillion Australian superannuation system (**'the Review'**) which *"will examine the structure, operation and efficiency of the superannuation system"* Nick Sherry stated in a media release.

Nick Sherry and a coalition of government and industry bodies have released a *Communiqué on the Australian superannuation system* which states that although the core elements of our superannuation system are *"strong and well regulated"* it is time to *"ensure our system continues to operate with efficiency and sustainability."*

Amid the Review, the Australian Industrial Relations Commission's (**'the AIRC'**) process for selecting default superannuation funds for Modern Awards will consequently come under scrutiny. Nick Sherry's spokesperson said he believed *"there ought to be a transparent selection criteria/process for default super funds"* as this would help the AIRC *"in its selection of default super funds in industrial awards."*

The Terms of Reference and details of the structure of the examination are yet to be released so watch this space!

Unfair Contracts Claim by Entrepreneurs Denied

The New South Wales Court of Appeal (**'the Court'**) has denied the owners of a Company, Mr. Gough & Mr. Gilmour (**'Gough & Gilmour'**), in their unfair contract claim because the entrepreneurial nature of their work could not be characterised as "industrial" work.

Gough & Gilmour had entered into a Dealership Agreement with another Company, Caterpillar of Australia Pty Ltd (**'Caterpillar'**) for the servicing of Caterpillar's equipment (**'the Agreement'**). After a breakdown in the relationship between the two companies, Caterpillar gave notice to terminate the Agreement and Gough & Gilmour commenced proceedings claiming compensation.

At first instance, Justice Boland of the Industrial Court of New South Wales (**'the Court'**) held the contractual arrangement between the companies was unfair and variation orders were made. Caterpillar's challenge of this decision was dismissed by a Full Bench. As such, Caterpillar appealed to the New South Wales Court of Appeal.

Section 106(1) of the *Industrial Relations Act 1996 (NSW)* (**'the Act'**) states that the Court can make an order to declare a contract void (in whole or part), or, vary any contract *"whereby a person performs work in an industry"* if the Court finds that the contract is unfair.

Accordingly, on appeal, Chief Justice Spigelman stated that entrepreneurial work performed by Gough & Gilmour was not *"work in an industry"* as required by section 106(1) of the Act as the work performed lacked the essential *"industrial element."* Chief Justice Spigelman stated that Gough & Gilmour were *"the only investors and occupied the senior managerial positions. They were entrepreneurs who conducted a business of significant scale."*

This case highlights that where you engage another company whose investments are on a significant scale and where the relationship between the two entities is not analogous to the employer/employee relationship then the work will not normally fall within the ambit of an "industrial" matter.

For more information on this decision or drafting contracts for your employees or contractors please do not hesitate to contact Nick Stevens or Alicia Mataere.

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