

“VISION IN THE WORKPLACE”

Issue Fifty, August/September 2010

In this issue of Vision in the Workplace, we look at the “silent giant” of the *Fair Work Act 2009 (Cth)*, adverse action, and update you on the recent changes made to minimum wage rates, penalties, loadings and thresholds. We also look at a recent decision of Fair Work Australia pertaining to enterprise agreements and undertakings. We further report of the Labor Governments proposed Paid Paternity Leave Scheme and the Australian Building and Construction Commissioner’s first launch of a prosecution of sham contracting. Lastly, we report that the New South Wales Supreme Court has recently confirmed the validity of “cascading” restraint of trade provisions.

Beware of “Adverse Action” Claims

The *Fair Work Act 2009 (Cth)* (**‘the Act’**) contains various general protections of employee rights such as workplace rights, the right to engage in industrial activities, the right to be free from unlawful discrimination and the right to be free from undue influence when negotiating individual arrangements.

In particular, Division 3 of Part 3-1 of the Act protects an employee’s “workplace rights”. Section 341 of the Act defines “workplace right” to include the right to benefit under workplace laws (such as the Act) or workplace instrument (such as an enterprise agreement or contract of employment), the ability to participate in court proceedings under a workplace law or instrument and the ability to make a complaint in relation to an employee’s employment.

Section 340(1) of the Act provides that a person (such as an employer), must not take “adverse action” against another person (such as an employee) because such other person has a “workplace right”. In this regard, section 342 of the Act provides examples of what constitutes “adverse action”. Examples include dismissing an employee or otherwise altering the position filled by the employee to the employee’s detriment, refusing to employ an employee and discriminating against a current or prospective employee. It is important to note that adverse action by employers can be made against both current employees and prospective employees.

Accordingly, employers need to be very cautious when dealing with employees, particularly where they have made an employment complaint. As noted above, dismissing an employee falls within the ambit of “adverse action”. In this regard, “high income employees” (those earning over \$113,800 per annum, currently) and employees still completing their probationary/qualifying periods, who are normally barred from applying for an unfair dismissal remedy, may utilise section 342 of the Act as an alternative to an unfair dismissal remedy.

Caution also needs to be displayed when dealing with independent contractors as section 342(1) of the Act notes that an independent contractor may commence adverse action proceedings where the principal, who has entered into a contract for services with the independent contractor, terminates the contract.

For more information on adverse action please contact Nick Stevens, Megan Bowe or Liza Isho.

Changes to Wages, Penalties, Loadings, Thresholds

As reported in our June 2010 edition of *Vision in the Workplace*, the Minimum Wage Panel of Fair Work Australia has handed down its first decision, increasing the minimum wage for employees in the national workplace relations system, to

\$569.90 per week (\$15.00 per hour from 1 July 2010) (**‘the Decision’**). From 1 July 2010, changes were also made to penalties, loadings and some allowances under the federal modern awards (**‘the Modern Awards’**). Accordingly, it is prudent for employers to check the Modern Award applying to their employees to ensure they are providing the right pay, penalties, loadings and allowances in order to avoid sanctions from the Fair Work Ombudsman.

Furthermore, the high income threshold is indexed annually (**‘the Threshold’**). The Threshold was previously \$108,300 and has now been increased to \$113,800, effective from 1 July 2010. As you may be aware, the Threshold acts as a cap for employees applying for an unfair dismissal remedy. In this regard, avenues for unfair dismissal remedies are now available to a greater number of aggrieved employees as employees with guaranteed annual earnings less than \$113,800 per annum may commence unfair dismissal proceedings.

If you would like assistance in confirming whether you are paying the correct wages, penalties, loadings and allowances under a Modern Award, or assistance with dismissing employees, please do not hesitate to contact us.

Complex Undertakings Compromise Approval of Agreement

Commissioner Lewin of Fair Work Australia has refused to approve an enterprise agreement (**‘the Agreement’**), stating that it “*did not pass the better off overall test.*” (**‘the BOOT’**) Commissioner Lewin had previously instructed the Fair Work Agreement Team to commence research into the Agreement as a result of his concerns the Agreement did not satisfy the BOOT and, to assess the undertakings the employer gave in respect of those concerns.

After receipt of the employer’s further undertakings in response to these concerns, Commissioner Lewin still refused to approve the Agreement. Commissioner Lewin stated that the undertakings provided by the employer:

- “*would lead to substantial changes in the terms of the Agreement*”
- “*would not, in any event, address all of the disadvantages arising from the comparison of the Agreement*” and the relevant Modern Award; and
- were termed in a way which was “*inherently complex, require significant interpretation, are ambiguous...constitute entirely new and different terms and conditions...*”

Commissioner Lewin declined to approve the Agreement for these reasons. This decision highlights the need to prudently draft agreements and stringently compare the terms of the agreement to the relevant Modern Award to confirm the terms result in employees being better off overall under an agreement than if they were to be covered by the Modern Award alone.

If you require assistance negotiating an enterprise agreement and completing the BOOT assessment, please contact Nick Stevens, Megan Bowe or Liza Isho.

Re-Elected Labor Government and Paid Parental Leave and Paid Paternity Leave

As reported in our May 2010 and June 2010 editions of *Vision in the Workplace*, the *Paid Parental Leave Bill* was passed on 17 June 2010 and establishes Australia's first paid parental leave scheme ('the **Paid Parental Leave**'). Given the recent re-election of the Gillard Labor Government, we note that Paid Parental Leave is still going ahead. Accordingly, from 1 January 2011, the primary carer of a child, born or adopted on or after 1 January 2011, will be eligible for up to eighteen (18) weeks of paid parental leave, afforded at the national minimum wage, currently \$569.90 per week. If a child is born or adopted before 1 January 2011, the primary carer of that child is not eligible to receive the Paid Parental Leave.

From 1 January 2011, employers may provide the Paid Parental Leave on a voluntary basis. If an employer chooses not to provide Paid Parental Leave payments between 1 January 2011 and 30 June 2011, the payments will be made by the Family Assistance Office. However, come 1 July 2011, employers must provide the Paid Parental Leave. In this regard, we note that employers can prepare themselves, from 1 October 2010, for the Paid Parental Leave by registering themselves on Centrelink's Business Online Services at, <http://www.centrelink.gov.au/internet/internet.nsf/businesses/index.htm> or by calling 13 1158.

In further developments, the re-elected Labor Government has announced that from 1 July 2012, it will also provide eligible working fathers and partners with two (2) weeks paid paternity leave at the national minimum wage, currently \$569.90 a week ('the **Paid Paternity Leave**').

Ms. Gillard has confirmed that the Paid Paternity Leave can either be taken on its own or in addition to other family payments, such as the Baby Bonus, the Paid Parental Leave and Family Tax Benefit. Furthermore, Ms Gillard has also confirmed that the Paid Paternity Leave can still be accessed even if the mother of the child is not accessing the Paid Parental Leave. Further, given that the Paid Paternity Leave is in addition to the Paid Parental Leave, the Paid Paternity Leave can be paid to the mother's partner at the same time that the baby's mother is receiving Paid Parental Leave.

To be eligible for the Paid Paternity Leave, the father/partner:

1. would have worked approximately one (1) day a week (330 hours) for at least ten (10) of the thirteen (13) months prior to the birth/adoption; and
2. earned less than \$150,000 in the previous financial year.

The income of the primary carer of the child will not count towards the income test.

For more information on the Paid Parental Leave and/or the Paid Paternity Leave, please contact Nick Stevens, Megan Bowe or Liza Isho.

STOP PRESS

As you are aware, the area of employment and industrial relations law is ever-changing. Recently, the New South Wales Supreme Court had reason to review the validity of "cascading" restraint clauses in contracts of employment in New South Wales.

With the exception of a few additional words, the restraint clause upheld by the Supreme Court was essentially the same as the "cascading" restraint of trade provision customarily prepared by Stevens & Associates Lawyers ('the **Restraint Provision**').

We note that decision of the Supreme Court does not affect the validity of the restraint clauses previously drafted by Stevens & Associates Lawyers. However, in order to ensure clarity, we will shortly write to clients who have adopted the Restraint Provisions and provide them with an amended version of the same which includes the additional words approved by the Supreme Court for inclusion in future contracts of employment.

If you have any questions regarding post-employment restraints, please contact Nick Stevens, Megan Bowe or Liza Isho.

ABCC Launches First Prosecution of Sham Contractor Arrangements

The Australian Building and Construction Commissioner ('the **ABCC**') on 26 August 2010 filed a Statement of Claim ('the **Claim**') in the Federal Magistrates Court alleging that a Company contravened section 900(1) of the *Workplace Relations Act 1996 (Cth)* ('the **WR Act**') in its dealing with form-workers in 2009.

Section 900(1) of the WR Act states,

"A person contravenes this subsection if:

- (a) a person is a party to a contract with an individual; and
- (b) the person makes a representation to the individual that the contract is a contract for services under which the individual performs work, or is to perform work, for the person as an independent contractor; and
- (c) the contract, as in force at the time of representation, is a contract of employment under which the person is an employer of the individual, rather than a contract for services under which the individual performs work as an independent contractor." [emphasis added]

Similar provisions are now found in section 357 of the *Fair Work Act 2009 (Cth)*.

The ABCC alleges in the Claim that "many aspects of the relationship pointed to the conclusion that the form-workers were employees", such as the form-workers were:

- paid a regular wage;
- paid superannuation benefits;
- accrued long service leave;
- supplied workers compensation insurance, uniforms, protective clothing and some tools by the company; and
- directed by the company on how the work should be carried out.

The ABCC also alleges in the Claim that the Company called a meeting with the form-workers and advised them that they were considered to be independent contractors and wanted to restructure the business so that they would be regarded "more openly as independent contractors" ('the **Meeting**').

Following the Meeting, the ABCC alleges that the form-workers received letters from the Company advising them that they were engaged as independent contractors and not employees.

The above matter is scheduled for a first directions hearing on 21 September 2010. As we see, the mere fact that an arrangement is described as a "contracting arrangement" does not mean that a Court of competent jurisdiction cannot find otherwise. Watch this space for updates on this matter!

For information and/or advice regarding independent contractor arrangements, please contact Nick Stevens, Megan Bowe or Liza Isho.

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