

### “VISION IN THE WORKPLACE”

Issue Forty-nine, June 2010

In this edition of *Vision in the Workplace*, we report that the *Paid Parental Leave Bill 2010 (Cth)* has finally been passed by the Senate, introducing Australia’s first government-funded paid parental leave scheme. We also report on some recent cases from the Federal Court of Australia, the Supreme Court of Victoria and Fair Work Australia which deal with Company Directors being sued for over two million dollars, restraint of trade provisions and the proper construction of what constitutes the “inherent requirements” of a job. We also note that a Decision has been handed down by the Minimum Wage Panel of Fair Work Australia which increases the Minimum Wage for national system employees. Finally, we are delighted to congratulate our Paralegal, Liza Isho, on her recent Admission as a Solicitor of the Supreme Court of New South Wales.

#### **Paid Parental Leave Passed!**

You may recall from our May 2010 edition of *Vision in the Workplace* that the *Paid Parental Leave Bill 2010 (Cth)* (**‘the Bill’**) was released. On 17 June 2010, the Bill was passed in the Senate and has established Australia’s first paid parental leave scheme due to commence from 1 January 2011 (**‘the Scheme’**).

Accordingly, employers will be required to provide their eligible employees with the statutory entitlement of up to a maximum of eighteen (18) weeks paid parental leave, calculated at the national minimum wage, which was recently reviewed and will become \$569.90 per week (**‘the Entitlement’**). [Please see over the page for *Minimum Wage increase article...*]

The key features of the Bill which we have previously reported on have not been amended. However, a new section 99A has been inserted by the Senate which states that the Entitlement is *“in addition to any other obligation the employer may have in relation”* to parental leave. Accordingly, any entitlement to paid parental leave that your employees are eligible for, under any industrial instrument or other law, are still payable to the employee, in addition to the Entitlement.

In relation to paid parental leave schemes found in company policies, Leader of the Government in the Senate, the Hon Christopher Evans, stated that *“where a policy forms part of an employment contract or other industrial instrument”* the Entitlement is *“additional to parental leave benefits provided under the policy.”* The Hon Christopher Evans further stated that *“where the policy is applied in a purely discretionary way”* then the employer still maintains *“the ability to vary its own policy”*.

Again, we remind you that the Bill empowers the Fair Work Ombudsman to commence investigations and proceedings where employers are found to have contravened the civil penalty provisions of the Bill. Accordingly, penalties of up to a maximum of \$6,660 for individuals and \$33,000 for corporations can be imposed.

If you would like more information of the Bill, advice on preparing for the Scheme and/or reviewing any company policies which provide for paid parental leave, please contact Nick Stevens or Megan Bowe.

#### **Unions Sue Company Director Personally for over \$2,000,000.00**

The Australian Workers Union and the Australian Manufacturing Working Union (**‘the Unions’**) are seeking claims in the Federal Court of Australia for over two million dollars worth of entitlements believed to be owed to fifty-seven (57) of the Unions’ members who were made redundant (**‘the Entitlements’**). The Unions are claiming against a Company Director personally after the Company went into liquidation in January 2010. The Unions claim that their members were made redundant in November 2009 and are owed the Entitlements pursuant to their enterprise agreements.

The Unions are relying on a, rarely used, provision of the *Fair Work Act (2009) (Cth)*, namely section 550(1), which states that *“a person who is involved in a contravention of a civil remedy provision is taken to have contravened that section.”* Accordingly, the Unions are seeking to hold the Company Director personally liable for the Entitlements, via another entity in which he is the sole director.

Notably, the Legal Representatives for the Unions have stated that *“with this litigation, we are aiming to pierce the corporate veil which has traditionally been able to shield the personal assets of company owners.”*

Watch this space!

#### **Congratulations Liza!**

Stevens & Associates Lawyers would like to congratulate their Paralegal, Liza Isho, for her recent Admission as a Solicitor of the Supreme Court of New South Wales.

Liza has been assisting Stevens & Associates Lawyers as a Paralegal for over two (2) years, Nick proudly moved Liza at her Admission Ceremony. Stevens & Associates Lawyers look forward to working with Liza in her capacity as a Solicitor upon her return from a well earned trip to the United States in August.



## Directors Restrained from Working for Competitor

Justice Croft of the Supreme Court of Victoria (**'the Court'**) has prevented, by means of an interlocutory order, two (2) Company Directors (**'the Directors'**), who advised their Company that they intended to leave its employ to work for a competing firm (**'the Competitor'**), from working for the Competitor (**'the Order'**).

The Company seeks to enforce various restrictive covenants contained in the Directors' sale agreement, unitholders deed and employment agreement (**'the Instruments'**). The restrictive covenants within the Instruments purported to prevent the Directors from working for an entity/person other than one within the group of employers in which the Company was a party to (**'the Group'**), competing with a entity/person within the Group or, canvassing, inducing, encouraging or enticing the custom of any client of an entity/person in the Group, without prior consent. Accordingly, the Company sought the Order to maintain the "*status-quo*" while the Court considers the dispute between the parties which commenced from 19 July 2010.

The restraints in each of the Instruments varied in length, from three (3) months to two (2) years. Furthermore, the employment agreements required the Directors to provide two (2) years' notice, should they wish to resign before 30 June 2014 (**'the Notice'**). In this regard, the Directors argued that the Notice was "*harsh, unjust and unfair*" and that effectively, it was a "*quasi restraint provision which was void for public policy reasons.*" On the other hand, the Company argued that the Notice was reasonable as it allowed the Company to "*adjust their affairs so as to minimise the impact of the termination*".

In granting the Order, Justice Croft reasoned that there is a "*serious question to be tried in relation to the proper construction of the restraint and associated provisions*" within the Instruments. Justice Croft also reasoned that "*no relevant hardship would be suffered*" by the Directors by the grant of the Order and that "*the relative prejudice*" that would be caused to the Company by the departure of the Directors are "*likely to be serious as a result of possible further director and staff departures and also as a result of financing difficulties*". Further, the Company offered to continue to pay the Directors at their current rates, as a condition of the Order, irrespective of whether they attend work.

This case highlights the significance of restraint provisions in protecting the goodwill of a business. Furthermore, it raises the point that where there is equality of bargaining power between two (2) parties to a restrictive covenant, the restraint may likely be upheld. Watch this space for updates on this case. If you would like information or advice on drafting or reviewing restraints provisions, please contact Nick Stevens or Megan Bowe.

### Minimum Wage Increase

The Minimum Wage Panel of Fair Work Australia has handed down its first Decision, which sees an increase in the minimum wage for employees in the national

workplace relations system, to \$569.90 per week (\$15.00 per hour) (**'the Decision'**). Formerly, the minimum wage was \$543.78 per week (\$14.31 per hour), and had been so since 2008. Accordingly, the new minimum wage has increased the former minimum wage by \$26.12 per week and \$0.69 per hour.

The Decision takes effect from the first full pay period on or after 1 July 2010 and will affect the current minimum wages under Modern Awards.

For further information on the Decision and to confirm whether your wage rates are correct or affected by the Decision, please contact Nick Stevens or Megan Bowe.

### Full Bench Confirms Meaning of "inherent requirements of the job"

A Full Bench of Fair Work Australia (**'FWA'**), Vice President Lawler, Senior Deputy President Kaufman, O'Callaghan and Commissioner Williams (**'the Full Bench'**), have quashed an earlier decision of Senior Deputy President Kaufman who found that an employee, who could not lift weights above five (5) kilograms, had been unfairly dismissed (**'the First Decision'**).

The Full Bench stated that Senior Deputy President Kaufman's conclusion that there was no valid reason for the employee's dismissal as the employee was "*able to, and had been, performing the inherent requirements of his restricted duties...involved error*". The Full Bench stated that when employers are assessing an employee's ability to perform the inherent requirement of a role, "*it is the substantive position or role that must be considered and not some modified, restricted duties or temporary alternative employment that must be considered*".

The Full Bench also confirmed that a dismissal may still be valid although it is "*harsh, unjust or unreasonable*". Further, the Full Bench disagreed with Senior Deputy Kaufman's conclusion that dismissing the employee after he had been "*satisfactorily working with his disabilities for the best part of a year*" was harsh, unjust or unreasonable. The Full Bench stated that while this was "*clearly relevant to whether the termination was harsh, unjust or unreasonable, [it] is not, of itself, sufficient to justify the conclusion that the dismissal was harsh, unjust or unreasonable.*" It is necessary to consider a "*broader range of circumstances with particular reference to the extent to which the continued employment of [the employee] would have constituted an unreasonable burden on [the employer] or other employees in the context of the consequences of the dismissal for [the employee]*".

The Full Bench, in finding that the First Decision was "*affected by error*", referred the employee's unfair dismissal claim to Vice President Lawler.

If you would like advice or assistance in managing employee dismissals please contact Nick Stevens or Megan Bowe.

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