STEVENS & ASSOCIATES
LAWYERS

"VISION IN THE WORKPLACE"

Issue Fifty-seven, November 2011

In this edition of *Vision in the Workplace*, we remind you of Stevens & Associates Lawyers' Lunch Seminar, which will be held on Thursday, 1 December 2011. We look at the introduction of the *Superannuation Guarantee (Administration) Amendment Bill 2011* which will gradually increase compulsory employer superannuation contributions from 9% to 12%. We next examine a decision of the Federal Court of Australia in which an employee was awarded approximately $85,000 in compensation, which included $7,500 compensation for the hurt and humiliation the employee suffered as a result of adverse action taken against him by his employer. Finally, we discuss a recent interlocutory decision of the Supreme Court of New South Wales which enforced restraint clauses in the employment contracts of two former executives, highlighting the importance of restraint clauses in protecting sensitive business information.

Compulsory Superannuation to Increase to 12% by 2020

On 2 November 2011, the Federal Government introduced the *Superannuation Guarantee (Administration) Amendment Bill 2011 (Cth)* ('**the Bill**') to move an increase in compulsory employer superannuation payments from 9% to 12% which is included in the *Mineral Resources Tax Bill (Cth)* ('**the MRT Bill**').

The Bill is expected to come into effect on 1 July 2013 and will gradually increase the compulsory employer superannuation payments until they reach 12% in 2020. In the Second Reading Speech of the Bill, the Hon Bill Shorten MP, Minister for Financial Services and Superannuation ('**the Minister**') explained that the "*Superannuation Guarantee charge percentage will be increased gradually and modestly with initial increments of 0.25 percentage points on 1 July 2013 and 1 July 2014. Further increments of 0.5 percentage points will apply annually up to 2019-20, when the [Superannuation Guarantee] rate will be set at 12 percent.*"

The Bill also abolishes the current Superannuation Guarantee age limit of seventy (70) years of age and lifts the limit to seventy-five (75) years of age. Further, the Minister states in the Second Reading Speech that the MRT Bill "*pays for the tax concessional treatment of the additional 3 percent Superannuation Guarantee - with workers retirement contributions taxed at 15 percent instead of their marginal personal income tax rate.*"

Watch this space! We will keep you posted on any developments. In the meantime, if you would like advice on your superannuation obligations, please contact Nick Stevens, Megan Bowe or Liza Isho.

Employer Pays Employee approx. $85,000 in Compensation for taking Adverse Action

A significant decision of the Federal Court of Australia has established that when adverse actions are taken against employees due to their exercise of a workplace right, the adversely affected employees will have the full protection of the *Fair Work Act 2009* (**'the Act'**), even if they exercised the workplace right prior to the Act coming into operation on 1 July 2009.

The decision involves an aircraft mechanical engineer ('**the Employee**') employed by an aviation company ('**the Company**'). The Employee made a complaint, by email, to senior managers and his supervisor that he was not being paid for overtime, nor for the agreed minimum 173 hours per month. Soon after making the complaint, the Employee was informed that he was required to work overtime when a maintenance check on a plane was

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Invites you to a special lunch seminar at The Grace Hotel, Sydney on Thursday, 1 December 2011.

"The O'Farrell Government's Vision for Industrial Relations in NSW"

Free Lunch Seminar
With Guest Speaker,
The Honourable Greg Pearce MLC,
Minister for Finance & Services & Minister for the Illawarra, presenting the O'Farrell Government's Vision for Industrial Relations in NSW

Industrial Relations in NSW is now encompassed within Mr Pearce's Portfolio as Minister for Finance & Services

Where: The Grace Hotel
77 York Street, Sydney

When: Thursday, 1 December 2011

Time: 12 Noon (for 12:15pm start) to approx. 2:00pm
Lunch included

Please contact David Wells on (02) 9222 1691 or dww@salaw.com.au by Monday, 28 November 2011 to book your seats.

Bookings Essential as seats are filling up fast!

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rescheduled. However, after the Employee was advised by his supervisor that he would not be paid overtime for the additional hours, the Employee left work without authorising the release of the plane, and was subsequently suspended on full pay pending an investigation into the incident.

The Company later terminated the Employee in May 2009, by way of redundancy, but was forced to reinstate the Employee under the terms of a Federal Court consent order, after the relevant union claimed the Employee was unlawfully discriminated against on the grounds of his union membership.

However in September 2009, just two months after the Employee was reinstated to his former position, the Company conducted assessments for all Perth-based engineers for the purposes of reauthorisation with Garuda Indonesia ('**GI**'), which provide licenses to employees of the Company to maintain their aircraft. The Company assessed the Employee as satisfactory in the technical category of the form but unsatisfactory on two categories which assessed his personal qualities, then refused to reauthorise the Employee with GI. The Company then terminated the Employee's employment on the basis that his license failed authorisation from GI, stating in the letter of termination to the Employee "*the extension of your [GI] Authorisation License has failed…A condition of your employment was that you have this license. This means you no longer meet the conditions of your employment.*"

Justice Barker of the Federal Court of Australia found that the Company's action in making and forwarding the negative personality report to GI constituted an adverse action under section 342(1)(c) of the Act, which states that "*an adverse action is taken by an employer against an employee if the employer alters the position of the employee to the employee's prejudice*". The Company submitted that the negative assessment was provided to GI with "*no reason in any way to injure or alter [the Employee's] position in his employment, or to cause his dismissal*". Justice Barker found that there is no requirement to "*identify an "intentional act" directed to an employee in order to find that there has been an alteration of position to an employee's prejudice*". His Honour confirmed that nowhere in sections 340 and 342 of the Act (dealing with workplace rights and adverse action) or elsewhere is there a "*requirement for the act to be intentional*."

Justice Barker also rejected the argument that the Employee could not rely on the exercise of a workplace right before the Act took effect on 1 July 2009, stating that the Act imposed *"no temporal limitation… on the time or period when a workplace right, as defined by the Act, should have been exercised."*

Justice Barker's decision also established that damages for hurt and humiliation could be awarded in adverse actions claims. The Company was ordered to pay the Employee $7500 (plus interest to be calculated) in compensation for the hurt and humiliation caused by lying about his performance and using the consequences of these lies to sack him, particularly in light of the fact that the Employee was an Indonesian citizen and a result of his redundancy, his visa became invalid and he was forced to leave Australia with his family. The total of $84,892.52 (plus interest) in compensation awarded in favour of the Employee also reflected $75,553.58 in lost pay and $839 for economic loss, plus interest to be calculated.

This decision sets out a number of principles in relation to adverse action claims. For advice on implementing performance assessments and making valid dismissals, and minimising potential adverse action claims, please contact Nick Stevens, Megan Bowe or Liza Isho.

Executives Forced to Resign from New Positions with Competitor

In interlocutory proceedings, Justice Nigel Rein of the Supreme Court of New South Wales ('**the Supreme Court**') ordered a former General Manager and Marketing Director ('**the Executives**') of an energy drink company ('**the Company**') to resign from their new respective jobs with a company which manufactures specific drinks that were described on a brochure on their website as "*a new generation of energy drinks*" ('**the Competitor**'), pending the hearing of the restraint against them.

Both the Executives had executed employment contracts with the Company which included post-employment restraint periods in which they were prohibited from being engaged with similar or competing businesses. The General Manager's contract stipulated that he would receive twelve months' gardening leave followed by a six-month restraint period upon termination of his employment with the Company, whilst the Marketing Director's contract included a twelve month restraint. Amongst other arguments, the Executives argued that the restraints had been "*ousted*" by a Deed of Release that "*superseded any obligations that might have existed under the contracts of employment…there being no reference [in the Deed of Release] to any restraint from working for any competition.*"

His Honour noted that that the Competitor was willing to undertake to exclude the Executives from its energy drink business in Australia until the expiry of their restraint on 30 November 2011 and that both the Executives "*agreed to give an undertaking in similar terms*". However, although the Supreme Court found that there would be a "*significant interference*" in forcing the Executives to resign with such a short amount of time until their restraint periods expire, it was nevertheless appropriate to enforce the restraint.

Post-employment restraint clauses are crucial from a business case risk perspective, particularly for senior employees who have had unrestricted access to sensitive, company-specific information, as well as customers and clients, and who could potentially affect the business' goodwill.

Watch this space; the actual proceedings in this case are scheduled for hearing before the Supreme Court again later this month. For advice on how restraint of trade clauses can protect sensitive business information and minimise future conflicts, please contact Nick Stevens, Megan Bowe or Liza Isho.

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