

“VISION IN THE WORKPLACE”

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In this edition of *Vision in the Workplace*, we examine the recent introduction of the *Work Health & Safety Act (NSW)* as part of the national occupational health and safety laws harmonisation process. We review a recent decision of the Federal Magistrates Court which found that a warning of disciplinary action, when part of a proper dismissal process, does not constitute adverse action. We also consider a decision by the Full Bench of Fair Work Australia which allows the incorporation of annual leave payments into a fixed hourly rate.

NEW OH&S Laws Effective

You may recall from previous editions of our “Vision in the Workplace” newsletter that NSW (along with other States and Territories) has been in the process of harmonising its occupational health and safety laws. From 1 January 2012, NSW joined Queensland, the ACT, Northern Territory and the Commonwealth in introducing new occupational health and safety laws, the *Work Health and Safety Act 2011 (NSW)* (**‘the WHS Act’**). The WHS Act remains unlegislated in Victoria and Western Australia, with bills before the parliaments of South Australia and Tasmania. Accordingly, the WHS Act has replaced the *Occupational Health and Safety Act 2000 (NSW)* (**‘the OHS Act’**).

There are several important changes that employers should be aware of now the WHS Act is operational. Under the OHS Act, the primary obligation to provide a safe workplace rested with “*the employer*”. However, under the WHS Act, the primary duty now rests with the “*person conducting a business or undertaking*” (**‘the PCBU’**) and has extended beyond the scope of providing a safe workplace for employees to also encompass apprentices, trainees, contractors and work experience students. Importantly the WHS Act ceases the requirement of strict liability against the employer as previously contained in the OHS Act which will allow more scope for PCBU’s to defend any prosecutions. These new regulations also include increased penalties, a change in penalty categories and jurisdictional changes that determine where prosecutions that fall under these new classifications will be heard.

The Explanatory Memorandum to the WHS Act notes that the term ‘PCBU’ is “*intended to be read broadly and covers businesses or undertakings conducted by persons including employers, principal contractors, head contractors and franchisors. All activity by the Commonwealth (other than the administration of the Northern Territory, the Australian Capital Territory and Norfolk Island) is intended to fall within the meaning of the term ‘business or undertaking’.*”

Federal Employment and Workplace Relations Minister Bill Shorten MP commented that the harmonisation of these regulations would save businesses operating at a national level around \$250 million per year, with productivity improvements worth up to \$2 billion per year further supporting employers.

If you would like more information on how the introduction of these new reforms will affect your business, please do not hesitate to contact Nick Stevens, Megan Bowe or Liza Isho.

Happy 2012 from Stevens & Associates Lawyers

Stevens & Associates Lawyers celebrated Christmas 2011 at the famous Sydney restaurant ARIA, where the team enjoyed a celebrity “kitchen room” private dining experience and met owner and Chef Matt Moran. We trust that you and your families had a happy and safe Christmas and New Year.



The firm’s paralegal Lauren Crossman recently left the team to pursue studies abroad in Oslo and we have welcomed a new paralegal, Jeremy Kurucz, to our team. Jeremy is currently studying Arts/Law at Macquarie University and brings substantial client skills from his past employment in the retail sector.



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Points of Interest

* In December 2011, the Federal Government announced a review into the *Fair Work Act 2009* (**‘the Act’**). Amongst other terms included in the terms of reference, the review will examine if the Act has achieved its objectives in the areas of simplicity, fairness at work and enterprise bargaining agreements. The review is due to be reported by 31 May 2012.

* On 11 December 2011, Prime Minister Julia Gillard announced changes to her Cabinet, resulting in changes to the employment and workplace relations portfolio. Bill Shorten MP has replaced Chris Evans MP as Minister for Employment, Workplace Relations, Superannuation and Financial Services.

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A Warning of Disciplinary Action does not constitute Adverse Action

In a recent decision of the Federal Magistrates Court, an employee has sought relief pursuant to s 340(1) of the *Fair Work Act 2009* (Cth) (**'the Act'**) due to alleged adverse action taken against him by his former employer after the employee made a complaint against a manager.

The employee was the manager of a retail store and, over the course of his employment had a disagreement with two managers and subsequently submitted complaints concerning their conduct. The employee claimed that the complaint investigation caused the employer to side with the two managers. Around a month later, the employer sought to transfer the employee to a location that the employee found inconvenient. When the employee refused to be transferred, the employer introduced a new performance management framework the employee was to meet in order to remain at his current store.

In the following weeks, members of management frequently visited the store to assess the employee's progress. The employee argued that these events sought to undermine his authority at the retail store and ultimately forced him into a position whereby resignation was the only option. The employee claimed that actions by his employer "*constituted constructive dismissal by making his position untenable, thereby forcing or giving him strong inducement to resign his employment, which he did.*"

Although Federal Magistrate Driver found that the employee had a workplace right to make a complaint about his manager, he also found that the employer's actions did not constitute adverse action. In particular, FM Driver found:

- Employer did not act in a manner that could be described as leaving the employee with no other option but to resign. The employer wanted to deal with the employee's performance issues to "*resolve them in consultation with [the employee], not to secure his resignation*";
- There was no threat of dismissal. The employee was informed that disciplinary action would be taken if he breached the employer's policies in future and this did not constitute adverse action;
- In relation to the performance management framework, "*a request to sign a document confirming the role of manager does not constitute adverse action*" as this action was not taken by the employer because the employee made a complaint;
- Suspending the employee on pay pending an investigation into the complaint did not constitute adverse action because the action was not taken because of the complaint:

- "*no decision on the validity of the complaints was made at the time of the suspension. Rather, the complaints were reserved for investigation.*"; and
- "*A warning of disciplinary action, including possible dismissal, as part of a principled disciplinary process*" does not constitute adverse action as it "*foreshadows a possible future determined as a consequence of possible future conduct.*"

Accordingly, the employee failed to demonstrate any unlawful adverse action against him. This case highlights that all circumstances, and not only acts of the employer, must be examined to determine whether adverse action is taken against an employee. Employers may take disciplinary action against an employee and the same may not constitute adverse action unless the disciplinary action is taken because of an employee's exercise of a workplace right.

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

Payment for Annual Leave can be incorporated into Hourly Pay

An employer recently made an application to Fair Work Australia (**'FWA'**) to approve an enterprise bargaining agreement under section 185 of the *Fair Work Act 2009* (Cth) (**'the Act'**). The enterprise agreement included a clause providing that employees are engaged on a fixed hourly rate "*which includes payment in advance for some entitlements*" to the National Employment Standards outlined in the Act (**'the NES'**), such as annual leave.

At first instance, the application to approve the enterprise agreement was dismissed as the above clause sought to exclude "*employees from receiving payment for their ordinary hours of work whilst on annual leave as required by [section 90] of the Act.*"

However, an appeal to the Full Bench of FWA resulted in the approval of the enterprise agreement, by majority decision. The Full Bench found the "*real difference between the conventional operation of the NES*" and the arrangement under the enterprise agreement was the "*timing of payments.*" The Full Bench found that "*there is no obligation in the NES to make a payment for annual leave at a particular time, although a delay in payment may be a different category. Even if there was an obligation to pay for the leave at the time it is taken, we do not believe that payment in advance amounts to the exclusion of the entitlement to payment.*"

For advice on annual leave requirements, the NES or enterprise agreements, contact Nick Stevens, Megan Bowe or Liza Isho.

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