STEVENS & ASSOCIATES LAWYERS

April 2022

A VISION IN THE WORKPLACE

Our April edition of Vision includes:

- Changes to National Employment Standard Announced in 2022 Budget;
- Wage Underpayment Targeted:
  - Should Wage Theft be Criminalised?
  - 7-Eleven's $98 Settlement for Misleading Franchisees
- Application of Landmark High Court Decisions.

Changes to National Employment Standards Announced in 2022 Budget

On 29 March 2022 Federal treasurer Josh Frydenberg announced that the Morrison Government's (**the Government**) 2022 budget (**the Federal Budget**) would be extending Paid Parental Leave (**PPL**) to support new parents. Mr Frydenberg revealed that the government was engaging with key stakeholders in amending the National Employment Standards (**NES**) to boost redundancy payouts to women and to extend unpaid leave entitlements to foster and kinship carers.

The Government has promised to provide $346.1 million over 5 years from 2021-22 to improve economic security for women by enhancing the PPL scheme. The purpose of the change is to protect women who are the primary earner and do not currently have access to employer-funded PPL. As it stands, the government will provide the primary carer of a new baby up to 18 weeks leave paid at the minimum wage and their partner can receive two weeks of payment. The mother of the child must have an income of less than $150,000 to be eligible for government PPL.

Under the proposed scheme, new parents will be able to choose how they split their 20 weeks of PPL. The PPL Scheme would enable parents to take leave at any time within 2 years of the birth or adoption of a child and the threshold would be expanded from $150,000 (mother's income) to a household income of $350,000 per annum. The government has estimated that nearly 2,200

more families will become eligible when the changes are enacted.

To combat the low numbers of men going on parental leave, the Government has announced that fathers will be able to take government PPL in conjunction with employer-funded leave. All singles will also be entitled to the full 20-weeks of PPL. In the 2021 financial year less than 90,000 fathers used the two weeks of Dad and Partner Pay. Of those using Government PPL and accessing employer funded schemes, 99.5% for the former and 88% for the latter were women. The Government believes that the proposed changes will give families more of a choice in who cares for the baby.

A proposal to amend the NES was also put forward in the Federal Budget. The proposed amendment relates specifically to boosting of redundancy payouts for women. IR Minister Michaelia Cash said that the changes would "*ensure fairness and equity in redundancy payments more fairly reflect average working hours over the course of a person's employment*". Amendments to redundancy calculation methods under the National Employment Standards in the Fair Work Act 2009 (Cth) would ensure that redundancy payments more accurately reflect average working hours over the course of a person's employment, the Government has claimed. As at publication, the Government is yet to implement any changes to the NES and is *"consulting with key stakeholders"* according to the minister. The proposal also features extra unpaid leave entitlements which may be implemented to foster and kinship carers to "*recognise the contribution foster and kinship carers make to vulnerable children"*.

If you have any questions about how the Federal Budget may affect your employment, do not hesitate to contact Nick Stevens, Daphne Klianis or Josh Hoggett.

Wage Underpayment Targeted

Should the Federal Government Criminalise Wage Theft?

There is pressure on the Federal Government to outlaw wage theft as an anti-competitive

practice following a Senate inquiry on unlawful unemployment. A majority report by the Economics References Committee released last week by Labor, Greens and Independent Senators made 19 recommendations to stop the unlawful underpayment of employees (**the Report**). Critically, the Report prioritised amendments to the Fair Work Act which would criminalise wage theft. Such a move was abandoned last year by the Morrison Government due to opposition in the Senate.

The report follows a series of high-profile underpayment cases which point to the inadequacy of the current legislative and regulatory framework. This inadequacy is further highlighted by PwC's estimation that 13 per cent of Australia's total workforce were affected by underpayment in 2020, with certain industries such as hospitality being harder hit. "*Non-compliance with Australia's minimum employment laws has become pervasive, as well as 'endemic' in certain sectors, and [this] highlights the need for government action*," the report said.

One of the key reasons for recommending to outlaw wage theft is to repair fair competition among companies. Research fellow at the Melbourne's Centre for Employment and Labour Relations Law, Iain Campbell, pointed out the anti-competitive nature of wage theft as it gives business models centred on underpayment an unfair financial advantage. This is to the detriment of other competing businesses who are reluctant to underpay their employees. Otherwise, more and more companies may turn to underpayment to stay competitive, as highlighted by the National Foundation for Australian Women who stated that when "*wage theft gets hold as an industry model, competition means that it forces down wages across the board, so that wage undercutting becomes widespread and normalised*".

This call for the criminalisation of wage theft comes in the wake of several high value cases in the area such as the recent $98 million class action lawsuit awarded against 7-Eleven.

7-Eleven's $98 Settlement for Misleading Franchisees

What Happened?

Following accusations of misleading franchisees over wage costs, convenience store franchise 7-Eleven has settled a class action for $98 million approved by the Federal Court. The class action was launched by franchisees of the chain in 2018 who alleged that 7-Eleven misled prospective franchisees about labour costs. This resulted in many franchisees only being able to turn a profit if they underpaid staff, contributing in

part to a widespread underpayment of staff across the organisation.

7-Eleven has claimed that this settlement was reached without admission of fault and was inclusive of legal costs. The Court is yet to determine the distribution of the settlement amount, including the portion that will be allocated to legal fees and the litigation funder's commission.

Background

7-Eleven were first hit with wage theft allegations in 2015 when a media investigation found that workers were in many cases only making half the award rate and as little as $10 per hour. Multiple underpayment schemes were uncovered, most of which targeted foreign and vulnerable workers. For example, overseas students only legally permitted to work 20 hours per week were forced to work 40 hours per week while only being paid for 20. In 2018, one franchise was even found to be forcing some employees to repay part of their wages in cash back to the franchisee.

Such underpayment schemes can be attributed to 7-Eleven providing inaccurate information about businesses costs when selling franchises. Franchisees of the company have claimed that this deception is what has forced them to underpay staff to make ends meet. Stewart Levitt, the solicitor who ran the class action stated that the case 'essentially encapsulated claims by franchisees that they'd been sold a lemon.'

What now?

It's unclear how much of the settlement money will go directly to the claimants, however, it's predicted it will be about $55-60 million. Furthermore, 7-Eleven will continue to improve structural and technological systems as they have done over the past few years since the wage theft allegations to ensure their employees are being paid fairly. If you have any further questions about the increasing scrutiny on wage theft in Australia, please do not hesitate to contact Nick Stevens, Daphne Klianis or Josh Hoggett.

This matter emphasises the importance of businesses observing all their employment law obligations, which is why our firm is now offering a Modern Award Audit Package. This package has been developed to provide employers with 'peace of mind' by reviewing your Company's compliance with relevant Modern Awards and underlying employment law legislation and regulations. For more information on the Modern Award package please see our website **http://www.salaw.com.au/modern-award-audit/.**

Application of Landmark High Court Decisions

For over the past 20 years, companies have struggled with the question of who will be an employee and who will be an independent contractor. Previously, the courts would apply a 'multifactorial test' which would examine a range of indicia to examine the 'totality' of the employment relationship to decide whether the worker is an employee or an independent contractor.

Two very recent High Court decisions have clarified that the primary means by which the courts will use to decide whether a worker is a contractor or employee is the contract itself and its terms (the Landmark Decisions). We will now discuss a recent case in the Federal Circuit and Family Court of Australia (FCCA) which applies the Landmark Decisions.

Pruessner v Caelli Constructions Pty Ltd [2022] FCCA

Background

The Applicant claimed that he was employed by a construction company, Caelli Constructions Pty Ltd (the Company), in 2012 under an oral contract. As such, he claimed various employee entitlements such as leave, superannuation and redundancy payments. The Applicant provided factors of his engagement that supported an employment relationship such as: he worked on a full time and exclusive basis, he took directions from the Company, he was represented as part of the Company's business, and he bore no commercial risk for the work he undertook.

The Company denied that the applicant was an employee, claiming that it engaged Pruessner Holdings Pty Ltd (Pruessner Holdings), a company that involved the Applicant, his wife and other family members, to supply services from time to time under a contractor agreement. These services were provided by the applicant on behalf of Pruessner Holdings.

With no written contract in place in the matter, the judge said he was free to ascertain its terms by

looking at the parties' oral agreement and "post-contractual conduct".

Decision

FCCA Judge Alister McNab observed that he was "fundamentally. . . bound to follow the approach taken by the High Court" in those judgments. The decisions emphasise the primacy of the contract between the parties in determining the true relationship between them.

Judge McNab made reference to Personnel Contracting, which relevantly provides:

"The resolution of the central question requires consideration of the totality of the relationship between Construct and Mr McCourt, which must be determined by reference to the legal rights and obligations that constitute that relationship. Where the parties have entered a wholly written employment contract, as in this case, the totality of the relationship which must be considered is the totality of the legal rights and obligations provided for in the contract, construed according to the established principles of contractual interpretation. In such a case, the central question neither permits nor requires consideration of subsequent conduct and is not assisted by seeing the question as involving a binary choice between employment and own business."

Judge McNab found that there was no initial agreement that the Applicant would be employed by the Company.

In these unique circumstances of a lack of written agreement, post contractual conduct may be interpreted to determine the "whether a contract was formed, who the parties to the contract are and whether a particular term should be inferred" as well as the subject matter of oral contracts. Judge McNab found that the "subsequent conduct of the parties in relation to [Pruessner Holdings Pty Ltd] rendering invoices and supplying labour other than the [worker]. . . indicates that the arrangement agreed was that PH would supply labour to [the Company]".

Judge McNab acknowledged that some factors – the exclusive nature of the relationship, the "substantial" hours involved, the worker's authority to engage labour – pointed to the possibility of an employment relationship. However, given the Landmark Decisions the FCCA gave primacy to an agreement between Pruessner Holdings and the Company, rejecting arguments from the Applicant that he was in fact an employee.

The Takeaway

Despite the unique instance of an oral contract, this decision supports that the Court will look to the contract/agreement between the worker and

the company when determining whether a relationship with a worker is one of an independent contractor, or employee. McNab acknowledged in this case that the court is bound by the rulings of the Landmark Decisions and offers insight that in the instance of a written contract, the court will apply these accordingly in the future.

However, this decision also demonstrates that in the instance there is no written agreement in place between the parties, the court will still investigate the post-contractual conduct to ascertain the true nature of the relationship.

If you have any further questions about how the Landmark Decisions, and the newfound primacy of contractual terms, please do not hesitate to contact Nick Stevens, Daphne Klianis or Josh Hoggett.

This publication is intended only as a general overview of legal issues currently of interest to clients and practitioners. It is not intended as legal advice and should only be used for information purposes only. Please seek legal advice from Stevens & Associates Lawyers before taking any action based on material published in this Newsletter.