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Workplace View

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New Year Legal Round Up for Employers

The pace of change of Australian workplace laws picked up in 2012 after a relatively peaceful 2011. We have highlighted below some of the key areas employers should now be alert to as we move into 2013.

Fair Work Amendment Act 2012 (Cth)

We have previously reported on the significant review of the workings of the *Fair Work Act* 2009 (Cth) (**FW Act**) which was completed in late 2012. The *Fair Work Amendment Bill 2012* was passed by parliament on 28 November 2012. The *Fair Work Amendment Act* 2012(Cth) (**Amendment Act**) brings into force the following key changes from 1 January 2013:

Changes to Fair Work Australia

- changes to the structure and powers of Fair Work Australia including a change of name to the Fair Work Commission (**FWC**);

Enterprise agreements

- employers are prevented from making an enterprise agreement with a single employee;
- 'opt out' clauses in enterprise agreements are prohibited and existing 'opt-out' clauses become unlawful;
- union officials are prevented from being bargaining representatives (even in a private capacity) for employees not eligible to be members of their union;
- notice of employee representational rights (which must be sent to all employees who will be covered by a proposed enterprise agreement) must now be in a prescribed form contained in the regulations without amendment;
- an applicant for a scope order need only take 'all reasonable steps' to notify the other relevant bargaining representatives of the concerns which have motivated the application;

Protected action

- clarification has been provided as to which union members are able to vote on and participate in protected industrial action and the conduct of protected action ballots - including allowing for electronic voting and requiring ballots to be conducted expeditiously;

Claims following termination of employment

- the time limit for making both unfair dismissal claims and general protections claims (adverse action) arising from dismissal are now aligned so that an application must be made within 21 days from the date of termination;

- increased powers for the **FWC** including the power to dismiss an application based on unreasonable behaviour by the applicant (i.e. fails to attend a conference) and to award costs against parties, lawyers and other agents who have acted unreasonably or speculatively; and

Superannuation

- Changes giving the **FWC** greater powers in relation to default superannuation funds in modern awards will take effect in 2014. These changes give the **FWC** the power to select which funds are eligible to be default funds under modern awards. Funds must firstly make an application to be a default fund. The **FWC** will assess whether the fund offers a service that is in the best interests of employees under the award. A minimum of 2 and maximum of 10 funds will then be selected (in some circumstances the maximum number can be increased).

Modern Awards - Review 2012

The scheduled review of modern awards to follow the first 2 years of the FW Act's operation is still underway and will continue into 2013.

Some modern awards were not subject to applications for review, some reviews have been finalised, some review decisions are on appeal and some review decisions are yet to be handed down.

The review of the *Manufacturing and Associated Industries Award 2010* was finalised with minor variations to the Award made, while a variation to the *Clerks – Private Sector Award 2010* proved controversial and is now under appeal by unions due to changes to the definition of afternoon and night shift work. Some modern awards, for instance the *Building and Construction On-Site Award 2010*, remain under review following significant input from various stakeholders.

Additionally, the Full Bench of the Fair Work Commission is considering applications in relation to items such as penalty rates, public holidays and apprentices which will affect multiple awards when the decisions are handed down.

We recommend keeping track of the modern award review process as it applies to awards which may cover your business because the final determinations by **FWC** may vary different awards.

Work Health and Safety

Harmonisation of health and safety laws

From 1 January 2013, both South Australia and Tasmania joined the national harmonised Work Health and Safety regime which provides uniform occupational health and safety laws across Australia. This leaves Western Australia and Victoria as the only states continuing with their existing respective state occupational health and safety laws outside the national regime of the Model Work Health and Safety Act, Regulations and Codes of Practice.

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Workplace Bullying

We have previously reported on the November 2012 report entitled '*Workplace Bullying: We just want it to stop'* (**Report**) by the House of Representatives Standing Committee on Education and Employment which made 23 recommendations to improve the regulation of workplace bullying.

One of the Report's key recommendations was to use the harmonised Work Health and Safety regime as the legal framework to regulate work place bullying. To implement this, the Report recommended:

- adopting the legal definition and minimum standards set out in Safe Work Australia's draft Code of Practice entitled *Managing the Risk of Workplace Bullying* (**Draft Code**), as part of the Work Health and Safety Regulations; and
- establishing a national advisory service for practical and operational advice in relation to bullying.

Specific legislation implementing the Draft Code in the Work Health and Safety Regulations is expected to be introduced in 2013.

Gender Equality

The *Workplace Gender Equality Act* 2012 (Cth) (**the WGE Act**) commenced on 6 December 2012 and implements a different reporting regime for employers in relation to workplace gender diversity.

The aim of the WGE Act is to modernise the regime set up by its predecessor, the *Equal Opportunity for Women in the Workplace Act 2001* (Cth) (**EOWW Act**).

The new law focuses on the reporting of outcomes of gender equality for both women and men in the workplace, rather than focusing on the proportion of women employed. The WGE Act applies to higher education institutions and all non-public-sector employers (whether incorporated or not) with over 100 employees in Australia.

The WGE Act will require employers to report annually on set gender equality indicators (**GEIs**) and meet minimum standards by 2015. The annual reporting periods runs between 1 April to 31 March each year, with reports required to be lodged with the agency responsible for administration of the Act, the Workplace Gender Equality Agency.

For the first reporting period under the new WGE Act, to 31 March 2013, relevant employers must lodge a report in the format required under the old EOWW Act.

For the reporting period commencing April 2013 and from that date onwards, the report must set out compliance with the GEIs and be signed off by the CEO in addition to compliance with notice and access requirements.

Superannuation

Amendment Act

The Amendment Act also implements the Government's response to the Productivity Commission's report, *Report into Default Superannuation Funds in Modern Awards (**Superannuation Report**).*

The report followed an inquiry into the default superannuation funds used in modern awards. The aim of the inquiry was to come up with transparent and objective criteria for the selection and assessment of superannuation funds eligible for nomination as default funds specified in modern awards.

As part of the superannuation reforms implemented following the Superannuation Report, a number of changes relevant to employers will take effect from 1 July 2013. The changes include:

- increase in the super guarantee to from 9% to 9.25% (increasing to 9.5% from 1 July 2014 and 0.5% each year thereafter until 12% reached from 1 July 2019);
- removal of the super guarantee upper age limit – meaning employers will be required to make super contributions for eligible employees who are 70 years old or older;
- pay slips will need to report the amount and actual date of superannuation contribution payments paid to an employee; and
- the phasing in of new data and ecommerce standards for superannuation transactions and requirements that employers report to Government in respect of their super funds. The requirements will be mandatory from 1 July 2014 for employers with 20 plus employees and from 1 July 2015 for employers with less than 20 employees.

Personal liability for directors

Following changes to the *Taxation Administration Act 1953* (Cth), directors may be held personally liable by the ATO for their company's unpaid superannuation from 1 July 2012. Directors will no longer be able to discharge their director penalties by placing their company into administration or liquidation.

Timing of contributions

A recent Administrative Appeals Tribunal (**AAT**) decision (*Vershuer v FCT*) highlights the importance of ensuring superannuation contributions are correctly made prior to the end of the financial year. In that case, an employee had requested a salary sacrifice contribution be made to a complying superannuation fund in early June. Although the actual contribution was made by the employer well before year end, the funds were held by the superannuation provider in a "clearing account". On this basis, the AAT held that the contribution had not been "made", and the employee ended up with a 93% tax cost. In these circumstances the employer could also miss out on a tax deduction for the contribution.

It is important for employers to ensure that contributions are made well before year end, and provide all the information to the superannuation provider to enable the contributions to be allocated to the correct account before year end.

Living Away From Home Allowances and Fringe Benefits Tax

A Living Away From Home (**LAFH**) allowance is an allowance paid by an employer to an employee to compensate them for additional expenses incurred and any disadvantages suffered because they are required to live away from their usual place of residence in order to perform their work.

LAFH allowances have been a common and appealing element of employee remuneration packages

due to their exemption from income and fringe benefits tax liability. In most cases, these benefits have now become taxable.

There are limited circumstances in which tax concessions still apply. These will essentially be limited to “fly-in, fly-out” (or “drive-in, drive-out”) workers, or where employees are maintaining two homes in Australia for a period of up to 12 months.

The increased tax burden may fall on the employer where packages are not able to be restructured. There are limited transitional rules in place until 1 July 2014 for arrangements existing at 8 May 2012, but these transitional concessions may be lost if the employment arrangements are altered prior to 1 July 2014.

The transitional arrangements only apply to permanent residents of Australia or temporary residents maintaining a home in Australia. For many expatriates, the new rules applied from 1 October 2012. Employers may need to restructure their remuneration arrangements in order to avoid this adverse tax impact.

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Did you know…?

An employee's long term failure to comply with a grooming policy may not be enough to warrant a dismissal…

The Fair Work Commission (**FWC**) has reinstated an employee who failed to comply with his employer's grooming policy. Virgin Australia (**Virgin**) terminated the employee's employment after he refused, over a period of almost one-and-a-half years, to cut his hair to the length required by the policy.

The employee had argued that he should be allowed to keep his hair long because of a medical condition, body dysmorphic disorder. He provided medical certificates to Virgin in which his doctors certified that he had a medical condition and that keeping his hair long was a part of the treatment for that condition. However, on the employee's request the doctors did not provide Virgin with specifics of his condition.

As part of a compromise the employee wore a wig and tried different hairstyles for an extended period. However, these were only ever intended to be temporary solutions and eventually Virgin made the decision to terminate the employment. In defending its decision Virgin argued that as it was never made aware of the nature of the employee's illness, it was impossible to provide an adequate long-term response.

In holding that there was no valid reason for the dismissal, Cribb C said that the employee was doing his best to comply with the policy within the constraints of his medical condition. The fact that Virgin did not know the exact specifics of the condition was irrelevant – it still had medical evidence that the employee needed to keep his hair long. Cribb C also found that Virgin had allowed other employees to maintain long hair and that its managers had already made the decision to terminate the employment before commencing official termination proceedings.

This case just goes to show that sometimes the old adage – get a haircut and get a real job – doesn't always apply.

Implications for employers

Employers faced with similar circumstances (i.e. where an employee fails to comply with a policy for alleged medical reasons), should tread carefully when considering the termination of an employee's employment and seek legal advice. An Employer could be at risk of an unfair dismissal claim, a claim under the general protections division of the *Fair Work Act 2009* (Cth), or a disability discrimination claim under the state and federal disability legislation.

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