

## Update on Labor's Proposed IR Legislation

The newly elected Federal Labor Government has indicated it will move to introduce its planned Industrial Relations reforms "as soon as is humanly possible" according to the Workplace Relations Minister Julia Gillard. It is understood that the Federal Government intends to have an industrial relations transition bill ready to put before parliament when it resumes at the start of February 2008. It remains to be seen what resistance, if any, the legislation will face from the Opposition and minor parties when it is eventually introduced to the Senate.

It is important to note that the Coalition will retain its majority in the Senate until 30 June 2008 and thus will retain the power to block the proposed legislation during this period. The Federal Opposition Leader Brendan Nelson has indicated that the Opposition will not commit itself either way until it has had the opportunity to review the proposed legislation. Mr Nelson did however indicate that the Opposition would give particular attention to the proposed amendments to the Unfair Dismissal provisions of the Workplace Relations Act (1996). In the event that the proposed legislation receives bi-partisan support from the Parliament it is likely that the Transition Bill will be enacted in March or April of 2008.

It is highly unlikely that the Government will enter into negotiations with the Opposition concerning any "watering down" of the proposed amendments prior to the new Senate coming into place in July 2008. At this point, the Coalition will lose its Senate majority and the Government will be in a position to pass the legislation with the support of the Greens and at least one of the two Family First and Independent Senators. It appears highly likely that the Government will receive the support of the minor parties to pass the legislation at this point if it has not already done so.

Whilst a number of the major reforms expected to form part of the proposed legislation, such as the 10 "National Employment Standards" and the new award system will not come into effect until January 2010, the government has indicated that, during the "transitional phase" it will engage extensively with the business

community and its own Business Advisory Group before publishing an exposure draft of the substantive legislation for public comment. This "transitional phase" is also the period during which the Australian Industrial Relations Commission will be charged with the responsibility of carrying out a two year award simplification process.

The Government's "Policy Implementation Plan" concerning its workplace relations policy released on 28 August 2007 states that its intention is for the substantive legislation to be enacted during the course of 2009. This period will also see the framework put into place for the various new administrative and institutional arrangements, most notably Fair Work Australia.

By the end of 2009 the Government has envisaged that the award simplification process will be complete and ready for the implementation of the new award system at the commencement of 2010. The end of 2009 will also mark the nominal expiry date for all Individual Transitional Employment Agreements.

The Government has set its sights on 1 January 2010 as effectively the date of the "changeover" to the new Industrial Relations system. As noted previously this is the date that the Government expects the new award system and the National Employment Standards will commence operation. At the same time, the new Industrial umpire, Fair Work Australian will begin to operate. At this point the transition to the new system will be effectively complete, save for the expiry of the last Workchoices Australian Workplace Agreements on 31 December 2012.

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# Employer Found to be Liable for Employee's Shooting of Co-Worker Outside of the Workplace

The Federal Court has confirmed on appeal that company policies can provide employees with enforceable contractual entitlements, which in the event of breach, could entitle them to damages.

The NSW Court of Appeal has upheld a decision of the District Court that an employer was in breach of its duty of care by reason of its failure to actively address a worker's ongoing violent acts in the workplace. The Court of Appeal also upheld the finding that the employer was liable for the employee's subsequent shooting of another employee, notwithstanding that the incident took place just outside the grounds of the workplace itself.

From the time he commenced work with the employer in 1999, the employee had been involved in a number of both verbal and physical altercations with a number of his co-workers at the Gittani Stonemasonry Factory. In the month that he commenced employment, the employee became involved in an argument with a fellow employee and witnesses testified that he was seen to be "screaming and yelling" at his fellow employee.

In early 2000, only some two or three months following the first incident, the employee became involved in an altercation with another co-employee. On this occasion the court heard that the employee physically intimidated the co-employee and made threats of violence towards him. This incident was reported by the co-employee to his boss. Despite the reporting of the incident no action was taken by the employer concerning the behaviour of the employee in question.

The Court then heard that in about May 2000 the employee launched an unprovoked attack on another co-employee, on this occasion striking them in the face with his fist. In that particular incident the employee also picked up a heavy object with the apparent intention of striking the co-employee before others intervened. The victim of the attack exhibited a swollen and closed eye and approached his employer requesting that the matter be reported to the police. The employer discouraged this course of action and once again took no active disciplinary action against the employee.

In about December 2001, the same co-worker who had been punched in the previous attack was again threatened by the employee. At this point the employee, appearing angry, left the factory without permission, where he was heard to say that he would be waiting outside. At the conclusion of the shift when the co-worker went to his car, the employee approached his car and shot him three times, causing serious injuries to the co-worker.

The injured employee sought damages and it was found in the District Court that the employer was in breach of his duty of care to the employee as a result of its failure to dismiss

the worker after the second incident, when the employee was physically assaulted the first time. The employer was again found to be in breach after the second incident prior to the shooting by failing to adequately investigate what had occurred and not alerting the employee to the threat made against him.

The Court found that a reasonable employer in such a situation would have exhibited a zero tolerance approach to violence in the workplace and that it was liable to pay the injured employee the sum of \$861,197 in damages.

The decision was appealed by the employer who argued that no duty of care existed to protect the injured employee from an "unforeseen" act of violence that not only took place outside work hours, but on public property outside the workplace. The employer argued that by making it clear to the violent employee that their behaviour was unacceptable, they had fulfilled their duty of care towards the injured employee.

The appeal was unanimously dismissed by the full bench of the Court of Appeal. Justice Hodgson singled out the incident where the employer actively discouraged the injured employee from reporting the first assault to the police, despite the employee's insistence, saying that:

"it is clear that what the employer actually did fell short of being an appropriate response and did constitute a breach of the employer's duty of care".

Despite accepting that the actual circumstances of the employee being shot were not reasonably foreseeable:

"what occurred was sufficiently the kind of thing that was foreseeable, to prevent it from being too remote".

Notably, Justice McColl found that the non-delegable duty owed by employers to employees:

"may extend to protecting them from the criminal behaviour of third parties, including fellow employees".

It could be inferred that by referring to "the criminal behaviour of third parties", the Court is referring to violent acts causing the injury of employees by anyone from an aggressive customer in a retail workplace to a person committing an armed robbery of a store. Careful consideration should be given by employers to the broad reaching implications of this decision when assessing the risk of violence in the workplace and the active implementation of preventative measures to maintain a safe working environment for their employees.



The Partners and Staff of Kemp Strang take this opportunity to wish you and your families a very safe, merry Christmas and a prosperous New Year.

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