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Asia Employment Law: Quarterly Review

2013-2014

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Asia's legal and human resources advisors are often required to function across multiple jurisdictions. Staying on top of employment-related legal developments is important but can be challenging.

To help keep you up to date, our firm produces the **Asia Employment Law: Quarterly Review**, an e-publication covering 15 jurisdictions in Asia. It is updated every quarter.

In this fifth edition, we flag and provide comment on anticipated employment law developments during the first quarter of 2014 and highlight some of the major legislative, consultative, policy and case law changes expected during the rest of the year.

This publication is a result of ongoing cross-border collaboration between 15 law firms across Asia with whose lawyers our firm has had the pleasure of working with closely for many years. For a list of contributing lawyers and law firms, please see the [contacts page](#).

We hope you find this edition useful.

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LOOKING BACK

Building and Construction Industry (Improving Productivity) Bill introduced into Federal Parliament

The Coalition Government elected to office on 7 September 2013 introduced the *Building and Construction Industry (Improving Productivity) Bill 2013* into Federal Parliament. One of the first bills to emanate from the new Government, this proposed legislation reflects the Coalition's desire to tackle unlawful conduct by trade unions in the construction industry as a major priority.

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The Bill proposes to expand the scope of regulation of the building industry by including the transportation or supply of goods to building sites and offshore resources platforms; re-establish the Australian Building and Construction Commission with strong investigatory powers; and impose new limits on unlawful industrial action and picketing with higher penalties for non-compliance.

A Senate Committee considering the Bill is due to report at the end of March. The Government is unlikely to obtain Parliamentary support for passage of the Bill until after the composition of the Senate changes on 1 July 2014. However, there will be increased pressure on the Labor Opposition and Greens to pass the Bill before 1 July in light of recent corruption allegations against the Construction, Forestry, Mining and Energy Union which have been widely reported in the Australian media.

[More...](#)***Fair Work (Registered Organisations) Amendment Bill*** introduced into Federal Parliament

Also high among the Coalition Government's legislative priorities is a new scheme of regulation for Australian trade unions and employer organisations (although the Bill implementing this scheme is mostly directed at unions, in response to corruption scandals in the Health Services Union and now the CFMEU).

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The *Fair Work (Registered Organisations) Amendment Bill 2013* proposes to increase the financial, disclosure and transparency obligations of officials within registered unions and employer bodies; significantly increase the penalties for serious breaches of officers' duties; and create a new regulatory agency, the Registered Organisations Commission, to oversee the new laws. These changes are largely modelled on the system of regulation for companies and corporate directors under the *Corporations Act 2001* (Cth). The Bill was passed by the House of Representatives on 12 December 2013, and is now being considered by a Senate Committee.

On 10 February 2014, the Government announced the establishment of a Royal Commission to inquire into union governance and corruption. Former High Court of Australia Judge, The Honourable John Dyson Heydon QC AC, will lead the inquiry and will be asked to report to the Government by the end of 2014.

[More...](#)**Federal Court prevents Toyota from holding workforce ballot on enterprise agreement changes**

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In *Marmara v Toyota Motor Corporation Australia Limited* [2013] FCA 1351, Justice Bromberg of the Federal Court of Australia found that the company had breached the 'no extra claims' clause in its enterprise agreement by seeking changes to the agreement which it considered necessary to remain competitive.

The decision, handed down the day after Holden announced it would close its Australian manufacturing operations in 2017, appears to have deprived Toyota of access to the agreement variation provisions under the *Fair Work Act 2009* (Cth). These provisions enable parties to vary enterprise agreements during their term, using a consensual process including an opportunity for employees to vote on any proposed changes.

Justice Bromberg subsequently issued an injunction preventing a ballot on the proposed agreement variations from taking place. However, Toyota has appealed against the judge's decision and the Federal Government has indicated it will intervene in support of the appeal. (*cont*)

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The Holden closure and Toyota decision triggered a debate, which continued into the new year, over appropriate levels of government assistance for Australian manufacturing industry. In late January, the Government announced it would not provide further funding to ensure the continued survival of struggling fruit processor SPC Ardmona (owned by Coca-Cola Amatil). The Prime Minister and Employment Minister have indicated that companies in this situation must reduce employment entitlements under their enterprise agreements, before seeking further public funding.

On 10 February 2014, Toyota announced that like Holden, it will cease producing cars in Australia in 2017.

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Full Federal Court upholds unfair dismissal ruling in favour of novice Facebook poster

In *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157, the Full Federal Court upheld a Fair Work Commission (FWC) Full Bench decision that an employee was unfairly dismissed despite his posting of highly offensive comments about his managers on Facebook.

The Court held that the FWC had not made any jurisdictional error in its ruling that the employee should be reinstated (*Linfox Australia Pty Ltd v Stutsel* [2012] FWAFC 7097). The Full Bench had taken into account the employee's age; his 22 years of service with the employer and good employment record; and his inexperience in using Facebook and lack of understanding of its privacy settings.

In other decisions involving social media misuse by employees, the FWC has taken a harder line – finding that employees were lawfully dismissed for serious misconduct where their Facebook posts or Twitter comments (even outside the workplace) have damaged the employer's reputation or other business interests.

[More...](#)

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Who employs labour hire workers? Fair Work Commission rejects the concept of 'joint employment'

In *FP Group Pty Ltd v Tooheys Pty Ltd* [2013] FWCFB 9605, a Full Bench of the FWC held that FP Group was the true employer of workers it supplied to Tooheys under a labour hire arrangement.

In reaching this conclusion, the Full Bench rejected FP Group's argument that Tooheys was a joint employer of the workers, and held that the concept of joint employment has not been endorsed by Australian authorities. The Full Bench also held that the role of the FWC does not extend to developing the common law.

[More...](#)

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Full Federal Court finds Victorian Government's implementation of Construction Code lawful

In *State of Victoria v Construction, Forestry, Mining and Energy Union* [2013] FCAFC 160, the Full Federal Court overturned a number of earlier decisions of Justice Bromberg (including the imposition of A\$53,000 in civil penalties) to find that the State of Victoria did not breach the *Fair Work Act 2009* (Cth) through its implementation of the Victorian Government's Construction Code and Implementation Guidelines.

The Full Court decision legitimises the State Government's use of procurement policy to pursue industrial relations objectives, by requiring tenderers for government-funded building projects to comply with certain obligations (including not having "union-friendly" clauses in their enterprise agreements).

The CFMEU has lodged an application in the High Court of Australia for special leave to appeal against the Full Federal Court's decision.

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New anti-bullying laws take effect

The former Labor Government's amendments to the *Fair Work Act 2009* (Cth) commenced operation, enabling workers to seek orders from the FWC to stop workplace bullying. (*cont*)

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Although large numbers of bullying claims were anticipated, as at the end of January only 44 claims had been lodged with 6 of these withdrawn during the Commission's preliminary assessment process. However, many Australian workers were on annual leave during this period; and the level of claims is still expected to climb as people become more familiar with the FWC's new anti-bullying jurisdiction.

[More...](#)

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Some details emerge of Federal Government's proposed Paid Parental Leave scheme

One of the Coalition's key election policies was the introduction of a new Paid Parental Leave (PPL) scheme, providing mothers with 26 week's pay at their actual pay (capped at A\$150,000 per annum) following the birth of a child. This would replace the current PPL scheme, under which mothers receive 18 weeks' pay at the national minimum wage, from 1 July 2015.

Legislation implementing the new PPL scheme has not yet been introduced into Parliament. However, following speculation that the Government may attempt to override employers' existing PPL arrangements, the Social Services Minister indicated that employers will continue to be able to operate their own PPL policies to attract staff (with the new scheme applying as a minimum standard).

The revamped PPL scheme will be funded by a 1.5% levy on Australia's 3,000 largest companies, and for this reason has been unpopular with some business leaders.

[More...](#)

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