



# Redfern Legal

Redfern Legal Centre's bi-monthly e-bulletin

June 2013

Welcome to the June 2013 edition of *Redfern Legal*, bringing you legal updates and developments from our key practice areas and news of the work of Redfern Legal Centre (RLC). Please note that cases cited in legal updates are not always RLC matters.

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## LEGAL UPDATES

### Domestic violence

#### Aboriginal women jailed for making false statements

Aboriginal women who are victims of domestic violence have been sentenced to prison in Western NSW for making false statements to police according to a report in *The Australian*. RLC's Susan Smith was interviewed for the article.

Journalist Natasha Robinson has uncovered 20 cases in which women, one as young as seventeen, withdrew their allegations of abuse by partners or ex-partners and were then prosecuted for making false statements to police.

Three of the women received jail terms "that were among the heaviest recorded in recent years for such offences" according to the report.

RLC's Sydney Women's Domestic Violence Court Advocacy Service (WDVCAS) clients often describe the pressure placed on them by the defendant or by family or community members to withdraw their allegations of abuse. One recent client was approached by the defendant's solicitor and told that she would be the one responsible for sending the defendant to jail unless she withdrew her allegations. Others who have made statements to police at the time of

### RLC media

RLC has had its first column published in the *South Sydney Herald*. This month we wrote on **Changes to Succession of Tenancy policy for Housing NSW tenants**.

the assault and have later withdrawn them say they were less fearful of the police response than they were of the defendant's retaliation should the charges go ahead.

The President of the Australian Law Reform Commission, Rosalind Croucher, is quoted in *The Australian* as saying she would be concerned if vulnerable women were being prosecuted after withdrawing domestic violence allegations.

"There is a need to make sure that prosecutors and police 'get' the dynamics of family violence. Our research and consultations indicate that at times, there is a need for better understanding and recognition of the dynamics and that withdrawal, from a victim's point of view, may not necessarily be of their own volition."

### Proposed changes to compensation for victims of crime

The *Victims Rights and Support Bill 2013* was introduced into Parliament on 7 May 2013. Under the proposed new scheme, victims will be assigned a support coordinator at Victims Services who will assess their individual needs and then assist with their claims.

Under the proposed new scheme, victims may be eligible for some or all of the following:

- Counselling – an initial ten hours of counselling with a further 12 hours if required.
- Immediate needs assistance – including assistance in relocating to a safer location; implementation of safety measures (for example changing locks); and emergency medical and dental expenses. The evidence required will be either a police or medical report, plus evidence of expenditure if claiming expenses. Immediate needs assistance to be capped at \$5,000.
- Financial assistance – including reasonable travel expenses; medical and dental expenses; assistance with the cost of living (including rent assistance, furniture,

## RLC events and projects

### RLC invites you to a special evening with Justice Virginia Bell AC



Friends and supporters of RLC are invited to join us for evening drinks to hear The Honourable Virginia Bell AC speak and reconnect with RLC. Attendance is free but we will be asking for donations on the night.

RLC has experienced significant funding cuts and we urgently need to raise money to ensure we continue to provide access to justice for vulnerable groups in our community. Please come along and support the Centre.

**Date:** Thursday 1 August 2013

**Location:** Herbert Smith Freehills, MLC Centre, Martin Place Sydney

**Time:** 5:30pm – 7pm

**Cost:** Attendance is free but we will be asking for donations on the night.

RSVP essential, as places are limited. To register for the event visit <http://redfernlegalcentre.eventbrite.com.au/#>

If you are unable to attend the event, please consider making an **online donation** to support the work of RLC.

This event is generously hosted by Herbert Smith Freehills. We look forward to seeing you all there.

### Visit from Senator Penny Wright

RLC welcomed a visit from Senator Penny Wright in April. Senator Wright dropped in for a coffee and a chat about the importance of providing access to justice to the local community. Senator Wright is a long-standing supporter of Community Legal Centres.



### Law Week 2013

As part of Law Week 2013 RLC connected with the community by inviting public housing residents in our local area down to Redfern Wrap Around, a monthly event at Redfern Community Centre where local residents can access all the services they need in one place.

child care and household bills - capped at \$5,000 for those who were not employed at the time of the crime); justice related expenses (capped at \$5,000); and loss of actual earnings (capped at \$20,000). The evidence required will be a police report and evidence of injury plus evidence of expenditure if claiming expenses. Total limit of financial assistance will be \$30,000.

- Recognition payment – there will be four categories of award based on the offence and the nature of the violent act, with payment ranging from \$15,000 for financially dependent family members of homicide victims to \$1,500 for victims of indecent assaults. A police report and evidence of injury will be needed to establish eligibility.

There will no longer be a Schedule of Injuries or minimum threshold. The proposed new scheme will be based on the

nature of the offence and victims will only need to show they have either a physical or psychological injury. There will be no need for victims to obtain a report from an Authorised Report Writer to prove psychological injury – a report from a counsellor will be acceptable. Solicitors will no longer be paid directly by Victims Services.

Until the new Bill is passed Victims Services are not accepting or processing any new applications for financial assistance or compensation. For more information, see the [Victim Services website](#).

**RLC Tip:** Victims can still contact the Victims Access Line on 1800 633 063 regarding counselling.

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## Employment

### Unfair dismissal by SMS: *Kaye v Fahd & Ors* FWC 1059

#### Background

The Fair Work Commission (FWC) has considered the termination of employment by SMS and how this can be a factor in unfair dismissal claims.

Ms Kaye worked for Versatile Ceramics (owned by Alex Fahd) until early February 2012 when she was instructed by her employer to work for More Ceramics Tiles (MCT) instead. Ms Kaye believed that these entities were under a group structure as they shared the same management (the Fahd family) and it was the usual practice for employees to travel between stores. In addition some entities shared the same mailing addresses and physical locations.

Ms Kaye had worked for Versatile Ceramics for 19 years when she was dismissed by SMS message:

"I am no longer contracting to MCT as of today, therefore your services are not required with immediate effect. Regards Alex."

Ms Kaye's dismissal by text message was the result of a convoluted family business group structure with no clear legal boundaries between each entity.

The respondents claimed that the applicant was not an employee but a consultant or a contractor. This was never discussed with Ms Kaye; however, it was discussed by Marco Fahd and Alex Fahd. Marco Fahd decided to contract Ms Kaye's services as a consultant to MCT and that MCT would pay a consultancy fee to Versatile Ceramics who would in turn pay Ms Kaye. At no time was Ms Kaye made aware of the arrangement.

FWC was critical of the respondents' attempt to classify Ms Kaye as a consultant, stating that the respondent was either "incredibly stupid, incredibly naïve or incredibly manipulative" to believe that labelling somebody a consultant and then creating a false document to that effect would give the label legal force.

#### Unfair dismissal by SMS

FWC had to be satisfied that the dismissal was harsh, unjust or unreasonable to satisfy s 387 of the *Fair Work Act*. The FWC decided that all the elements of s 387 were present in this case, in that:

- there was no valid reason given for Ms Kaye's dismissal;
- because there was no reason given, Ms Kaye was never notified of any reason;

- Ms Kaye could not respond to something of which she had no knowledge;
- because Ms Kaye was dismissed by SMS she had no support person;
- the respondents are not small business owners, they have had long experience in the industry and Ms Kaye was an employee of 19 years; and
- Ms Kaye was dismissed without any notice, for no reason and no warning and "the means of communicating her dismissal, by a brief SMS message, was brutal, gutless and outrageous".

FWC found that the applicant was indeed unfairly dismissed and the Commissioner stated, "I cannot recall a case where all the factors of s 387 have so tellingly weighed against an employer."

In regards to the termination of employment by SMS, the FWC gave support to the comments made in *Sokolovic v Modestie Fashion Australia Pty Ltd* [2011] FWA 3063.

"In this instance the notification of the reasons for dismissal was made by text message. I believe that this is an inappropriate means for notification of dismissal or reason(s) for dismissal. The employer suggested that text messaging was the most commonly used form of communication... There is of course no comparison that can be made between day-to-day communication about a variety of work and non-work-related matters and advice of termination of employment."

In deciding the case of *Kaye v Fahd & Ors*, the FWC made the following comments.

"Dismissal by SMS does not allow for the employee to refute or explain the reasons given for dismissal and this lack of procedural fairness is against natural justice. It also indicates that the employer lacks the courage of their convictions and it can be inferred that the employer does not have sufficient confidence in the basis for dismissal, which then leaves the dismissal open to a "strong and successful" challenge. Although there may be extreme circumstances where use of SMS to terminate employment may be appropriate, these are restricted to cases of possible employee violence or aggression where the employee undeniably committed gross and wilful misconduct."

#### Fair Work Amendment Bill 2013 (Cth)

RLC supports the *Fair Work Amendment Bill 2013* and provided comments in our [submission](#) in relation to aspects which are relevant to the experience of our clients, being the right to request flexible working arrangements and bullying in the work place.

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## Housing and tenancy

### Housing Payment Deduction Scheme

On 11 April 2013 the Commonwealth Government released an exposure draft of its *Social Security Legislation Amendment (Public Housing Tenants' Support) Bill 2013*. The Bill and some of the associated regulations introduce a Housing Payments Deduction Scheme, which would allow a social housing provider to deduct payments straight from a tenant's Centrelink payment if they are in rental arrears. The scheme is a response to the Government's White Paper on Homelessness, which criticised the number of cases where rental arrears led to termination of tenancies and homelessness.

RLC **submitted its opposition** to the scheme over concerns that the policy posed a real risk of causing further hardship (including homelessness) to the vulnerable people it was designed to protect.

Under the Bill as it was released, a public housing landlord could request deductions from tenants' social security payments when there is an outstanding liability due and payable or even when the landlord considers that there is a "risk" of non-payment or rent or liabilities by the tenant. This would include current rental payments, debts and even debts from a former tenancy. The amount of income deduction permitted would be capped at 35%.

RLC's submission was that the Housing Payments Deduction Scheme should not continue because the power to deduct directly from the tenant's Centrelink payment when there are arrears or even a risk of arrears is an excessive power conferred without appropriate review. The Bill only required the landlord to take "reasonable" steps to recover the debt – there was no requirement that the landlord go to the Consumer, Trader and Tenancy Tribunal (CTTT) to establish that the debt was payable.

RLC submitted that the power conveyed under the proposed Bill is too broad because:

- it is based on the provider's assessment of the tenant's liability or risk of liability;
- it does not require any determination by a court or tribunal to support that assessment; and
- it puts the onus on the tenant to challenge the liability or the risk of liability to pay.

RLC has seen many cases in which a public housing provider has requested an amount from a tenant by mistake or miscalculation, or has provided insufficient information for the tenant to determine whether or not they owed the amount. When faced with the risk of homelessness, many tenants simply try to pay outstanding amounts, even if they are in dispute.

RLC recommended that rather than the scheme go ahead, the resources should be directed towards preventative social measures that tackle the structural drivers of homelessness including support towards tenancy services and welfare rights advice services.

The Commonwealth Government considered the submissions (including RLC's submission) before the Bill was introduced to Parliament. On the basis of those submissions a number of changes were made to the Scheme, including:

- That debts falling under the scheme are now limited to rent, utilities, and arrears. Maintenance debts as a result of property damage were removed from the Scheme.
- Housing authorities accessing the Scheme must have appropriate tenancy management processes in place before qualifying for the Scheme.
- 'Reasonable action' to be taken before a deduction can be authorised now has minimum requirements, including:

- A written letter of demand for payment within a reasonable time;

- Tenant to be informed of their rights of review;

- Tenant to be informed of the intention to request an automatic deduction; and given an opportunity to make representations to the landlord before deductions begin; and

- Landlords are no longer entitled to deduct from tenants 'at risk' of arrears (a minimum of four weeks rent arrears was introduced).

A number of submissions were made arguing that the cap of 35% was excessive, and many referenced "rental stress" (a tenant who has to pay over 30% of their income towards rent is considered to be in rental stress). The Government considered these submissions, but decided that the cap represented a balance between stakeholder opinions.

Changes resulting from the consultation process are welcomed – and these are a significant step in the right direction – though RLC continues to oppose the Housing Payments Deduction Scheme.

### Case study: Overcharged for Repairs by Housing NSW

Michael (not his real name) lived in a Housing NSW property in Waterloo. About nine years ago he was charged \$7,500 for repairs to his property. Michael didn't think he was responsible for the charges, but he arranged a payment plan that was manageable for him at \$10 per fortnight on top of his usual rent.

Around Christmas last year, Michael received a letter from Housing NSW that read "FINAL WARNING" and stated that he owed \$1,100 for repairs. The letter contained no information about why the amount was due and Michael couldn't work out whether it was for the same debt he was already paying off.

Michael then received another letter from Housing NSW saying that the "FINAL WARNING" letter was sent in error. He then received four more letters over a three-month period seeking payment of the debt and threatening termination. Michael was unable to get any information from Housing NSW about what the debt was for.

When Michael finally received details about the alleged debt it was revealed that Housing NSW had no evidence of his liability to pay the outstanding amount. In fact, substantial charges for repairs had been mistakenly added to his original debt from nine years ago.

Michael was refunded a significant portion of the instalments he had been making for nine years. Despite tight financial circumstances, Michael had insisted on paying the instalments because he was concerned his tenancy would be at risk otherwise.

## Police and government accountability

### Privacy and CCTV footage

In May 2013, the Administrative Decisions Tribunal (ADT) handed down a decision that Shoalhaven City Council's CCTV system in the Nowra CBD was in breach of state privacy legislation. In *SF v Shoalhaven City Council*, the ADT ordered the Council to refrain from breaching the Information Privacy Principles. The ADT also ordered the Council to apologise to the applicant.

The *Privacy and Personal Information Protection Amendment (CCTV) Regulation 2013* has neutralised any practical impact of the decision in *SF v Shoalhaven City Council*. The Regulation exempts local councils from compliance with standards on the collection of personal information via CCTV cameras and the release of that information to the NSW Police Force.

The ADT found that the Council was allowed to install and operate CCTV for crime prevention purposes, but the ADT expressly did not find the Council was allowed to install and operate the cameras for law enforcement purposes.

Importantly, the ADT found that footage of a person going about their lawful business is not footage for a crime prevention purpose. It further found that the recordings made by the Council were excessive, inaccurate and incomplete.

The fresh amendment passed as a result of this decision means the Council will not have to change the way it operates (except to send the applicant an apology), but it is an important discussion of how much security members of the public receive in exchange for the loss of their privacy.

**RLC Tip:** See <http://www.oaic.gov.au/> for further information in relation to individual right to privacy.

## Discrimination and human rights

### Federal protection from discrimination for LGBTI communities

On 21 March 2013, the federal Attorney-General announced that the draft *Human Rights and Anti-Discrimination Bill*, consolidating all federal discrimination laws,

## Sydney Homeless Connect

**Sydney Homeless Connect** was held at Sydney Town Hall on 4 June. The RLC team spoke with many people experiencing complex legal and non-legal issues.

Many people attending the event had police complaints, credit and debt matters, had experienced discrimination, domestic violence or had tenancy problems. RLC organised for our Tenancy Team to represent one man at the Consumer, Trader and Tenancy Tribunal.

Overall this was a fantastic event with an excellent turn out. People in need of assistance were able to connect easily with the services they needed.



Image by Mission Beat

needed "deeper consideration" following the report by the Senate Legal and Constitutional Affairs Committee.

In the meantime, the Attorney-General has introduced the **Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth)** to give long overdue federal protection from discrimination to people in lesbian, gay, bisexual, transgender and intersex (LGBTI) communities.

The amendments create definitions for "sexual orientation", "gender identity", and "intersex status" and introduce these characteristics as additional grounds of unlawful discrimination. It will be unlawful for a person to be discriminated against on these new grounds in all areas of life recognised by the *Sex Discrimination Act 1984* (Cth) (SDA), including work, education, goods, services and facilities, accommodation, land, clubs and administration of Commonwealth laws and programs.

The term "marital status" will be replaced with a broader definition of "marital or relationship status" to cover same-sex de facto couples that were previously excluded from protection from discrimination on this ground.

Currently, the SDA has a number of exceptions to the prohibition of unlawful discrimination. The amendment will alter some of the existing exceptions to accommodate the new grounds of discrimination and adds two new exceptions.

The current exemption for religious bodies and educational institutions will be extended to the grounds of sexual orientation and gender identity, but not to the ground of intersex status.

The first new exception specifies that the inclusion of sexual orientation as a ground for unlawful discrimination will not affect the current position regarding same-sex marriage. The second new exception relates to requests for information and keeping of records that do not allow for identification as being neither female nor male.

Read RLC's [submission](#) on the amendments.

## Credit, debt and consumer complaints

### Winter energy bills expected to be high

The Energy and Water Ombudsman NSW (EWON) is running a "Winter Campaign" which aims to help consumers avoid the stress of electricity bill shock without missing out on the comfort of winter warmth.

EWON's Clare Petre notes that: "The combination of cold weather, less daylight and more rain means many of us use more power in our homes at this time of year by having heaters and electric blankets running as well as clothes dryers and we also keep the lights on for longer periods."

Ms Petre said that with energy price rises from 1 July 2013 increasing the cost of consumption, this year's winter power bills will be a double whammy for consumers.

**EWON's tips** for reducing your winter power bill include:

- be aware of energy use by knowing what appliances you have running and when;
- take steps to reduce energy use;
- know what rebates and bill assistance might be available to you; and
- plan for the bill to avoid falling into arrears when larger bills arrive.

**RLC Tip:** The National Home Energy Saving Scheme is a program aimed at helping people save energy and money. Call the HESS Helpline on 1800 007 001.

## RLC community legal education

### Connecting with our local Chinese Community: Healthy Living Expo

RLC and the Sydney Chinese Services Interagency took part in the Healthy City Living Information Expo in May. The event was held at Redfern Town Hall and around 200 members of the Chinese Community attended and participated in a range of lively activities.

RLC provided information about healthy financial management using "Money Management Snakes and Ladders", a game based on RLC casework that invites players to choose between good and bad money management decisions.



RLC Principal Solicitor, RLC volunteers and Local Member Alex Greenwich with members of our local Chinese community. Photo by South Sydney Community Aid.



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