



Redfern Legal

Redfern Legal Centre's bi-monthly e-bulletin

September 2011

Introducing Redfern Legal

Welcome to the first edition of *Redfern Legal*, the Redfern Legal Centre's (RLC) e-bulletin. This bi-monthly publication will provide you with legal updates in our six practice areas as well as news about the work of RLC.

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Employment law

Facebook post constitutes serious misconduct

Fair Work Australia has found that what an employee writes on their personal Facebook page can constitute a good reason for dismissal. Damien O'Keefe was employed as a "Geek Guy" by a company operating the Townsville franchise of The Good Guys, a home appliance retailer. Mr O'Keefe believed that his employer had not fully paid his commissions. He posted an update on Facebook, which contained a threat against the company, and was expressed in language that constituted an offensive insult to a female staff member.

Mr O'Keefe admitted to his employer that he wrote the offensive post, and that the threat was specifically directed against the female operations manager. However, he argued that the Facebook post was only available to be read by his "friends" and that it was not an open public statement.

In deciding that Mr O'Keefe's dismissal was valid, Deputy President Swan noted that some of Mr O'Keefe's "friends" were employees of the company. Mr O'Keefe took no steps to stop those people from reading his post. DP Swan decided that there was now a blurred boundary between work and home, and that Mr O'Keefe's Facebook post was serious misconduct justifying dismissal.

RLC Tip: Keep work comments away from your Facebook page!

For the full text of the decision, see: www.fwa.gov.au/decisionssigned/html/2011fwa5311.htm.

RLC in the media

12 August 2011: Remember the Sydney riots?

RLC police powers lawyer, David Porter, on over-policing as a contributing factor in tension between disaffected youth and police forces: www.newmatilda.com/2011/08/12/remember-sydney-riots

1 June 2011: The riddle of the crossed telephone lines

RLC submission cited which says vulnerable people are particularly at risk of exploitation by the telecommunications industry: www.smh.com.au/technology/technology-news/riddle-of-the-crossed-telephone-lines-20110531-1fess.html

20 May 2011: Move on powers extended

RLC lawyer, David Porter, says extended police powers to order drunk people to "move on" are unnecessary and fail to address the causes of alcohol related violence: www.2ser.podomatic.com/entry/2011-05-20T19_46_41-07_00. See also www.smh.com.au/nsw/greater-police-powers-unfair-to-ill-homeless-20110519-1ev21.html

RLC on Twitter

Follow us at www.twitter.com/RLC_CEO

RLC blogging

RLC CEO Joanna Shulman was a recent guest blogger for the equality reform project: www.equalitylaw.org.au/_webapp_1396527/Sharing_the_burden_in_the_fight_for_equality

For more on RLC's media work, visit www.rlc.org.au/news-html.html

Tenancy and housing law

New Act reduces CTTT discretion

The *Residential Tenancies Act 2010* (NSW) came into force on 1 February 2011. One significant change is that the Consumer, Trader and Tenancy Tribunal (CTTT) no longer has the discretion to refuse an application for termination based on no grounds, unless it is invalid or retaliatory. Unfortunately, this even applies to social housing, and some community housing providers have started to use no grounds notices.

The reasons that a notice may be retaliatory have been broadened (s 115) and the CTTT seems more willing to make orders refusing termination for these reasons. This is perhaps in part because they can no longer take other circumstances into account before deciding to evict a tenant.

Tenants can now take proactive steps and apply to the CTTT if they believe their notice is invalid or retaliatory (ss 111, 115). Under the previous Act, tenants had to wait until the notice expired and the landlord applied to the Tribunal before they could make these arguments, leaving them at risk of short eviction periods if they were unsuccessful.

RLC Tip: We are seeing many successful applications by tenants to have termination notices dismissed for being retaliatory. Factsheets on the Act can be found at www.tenants.org.au.



Sarah Bell and Lord Mayor Clover Moore at Parliament House for the Boarders & Lodgers Legal Kit launch.

Police and government accountability

New Act for public access to government information

NSW no longer has a freedom of information act. Since 1 July 2010, the *Government Information (Public Access) Act 2009* (NSW) (GIPA) has been the relevant legislation. The Office of the Information Commissioner (OIC) has special powers and responsibilities in relation to GIPA, including oversight and complaints handling.

RLC Tip: To assist the public in using the Act, the OIC publishes a number of brochures, factsheets and forms that provide a useful overview of the new rights to information in NSW. See www.oic.nsw.gov.au/oic_public_community/publictools.html.

RLC publications and submissions

Boarders & Lodgers Legal Kit Launched

The Inner Sydney Tenants' Advice and Advocacy Service at RLC has produced a legal kit for boarders and lodgers with a funding grant from the Lord Mayor Clover Moore MP Salary Trust and with assistance from our pro bono partners, the Mallesons Stephen Jaques Human Rights Law Group. The kit was launched by Clover Moore (left) during National Homelessness Week on 4 August at Parliament House.

RLC has long campaigned for legislation to cover boarders and lodgers and NSW is one of only two States across Australia that lack specific legislation. While the kit contains useful information for residents who are not covered by the *Residential Tenancies Act 2010* (NSW), it also highlights the inadequacies of available remedies for this marginalised group of society. Basic needs such as fixing hot water are far more difficult for those not covered by the Act. While a tenant can apply to the Tenancy Division of the CTTT for a simple order for repairs, a boarder must navigate a complex web of legislation and remedies from the General Division of the CTTT to the Equity Division of the Supreme Court of NSW.

The kit can be downloaded at www.rlc.org.au/publications/tool-kits.html.

Reconnecting the customer

RLC submitted a response to the Australian Communications Authority (ACMA) report *Reconnecting the Customer* advocating (amongst other things) increased powers being given to ACMA to set enforceable obligations on service providers.

Submission on the Bail Act

RLC participated in the NSW Law Reform Commission's review of the *Bail Act 1978* (NSW), lodging a wide-ranging submission, which looked at the practical problems and legal inconsistencies of current NSW law relating to bail. Remand rates in NSW have been increasing for the past 10 years and RLC welcomes a rethink of the law on bail.

Discrimination and human rights

Federal Court Decision on the Disability Standards for Education

Walker v Victoria [2011] FCA 258 (23 March 2011)

Alex Walker is a young person with Asperger's Syndrome, ADHD, dyslexia and learning disabilities. He made a disability discrimination complaint against the Victorian Department of Education and Early Childhood Development about his experiences in two of its schools.

The claim was made under the *Disability Discrimination Act 1992* (Cth), as it was before the 2009 amendments. It alleged direct discrimination, indirect discrimination, contravention of the Disability Standards for Education, and victimisation. After a lengthy hearing, Tracey J dismissed all aspects of the claim.

This was the first case where the Federal Court has considered the Disability Standards for Education. Tracey J found that the Department had fulfilled its obligations under the Standards by consulting with Alex and his parents about his enrolment and participation in education, and making reasonable adjustments.

Tracey J made the following comments about the Standards:

"... the purpose of the standards is to prescribe processes, such as consultation, which must be observed when determining how best to assist a disabled student. A failure to comply with one of the requirements does not give rise to discrimination within the meaning of the DDA. It gives rise to a contravention of s 32" (at [273]), and

"The Disability Standards require no more of a government agency such as the Department than that, where necessary, it be alert to the need to adjust its normal practices when dealing with a disabled student; to consider, in consultation with the student or his or her parents, what reasonable adjustments to normal practices should be made to assist the student, and then to decide whether a particular adjustment is necessary and, if so, implement it" (at [274]).

RLC Tip: To the disappointment of disability advocates, it seems that the court has taken a narrow rather than a broad and beneficial view of the Standards. To read the full judgment, go to www.austlii.edu.au/au/cases/cth/FCA/2011/258.html.

Domestic violence

Review of the Crimes (Domestic and Personal Violence) Act

The NSW Attorney-General is reviewing the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). The aim of the review is to determine whether the policy objectives remain valid and whether the terms remain appropriate for securing those objectives. A discussion paper has been released and RLC and the Sydney Women's Domestic Violence Court Advocacy Service (SWDVCAS) will be involved in the review through membership of the Apprehended Violence Legal Issues Coordinating Committee, Criminal Law Review Division, Department of Attorney General and Justice, and will also make a separate submission.

Submission on TIO Scheme discussion paper

RLC submitted a response to the Telecommunications Industry Ombudsman (TIO) Scheme discussion paper, stating that the review into the role and functions of the TIO is overdue given the consistently high level of TIO complaints and that reform will assist to improve consumer confidence in the telecommunications industry generally.

For all RLC submissions, see www.rlc.org.au/about-us/submissions.html.

RLC outreach

RLC works with diverse communities on credit and debt

RLC continues its project of reaching out to culturally and linguistically diverse communities to address unmet legal needs in relation to credit and debt. A core part of this project is the provision of legal education sessions to community organisations and their client groups from culturally and linguistically diverse backgrounds.

Sessions can be formal, informal, brief or detailed according to the needs of the group. Recent events have ranged from speaking to parents over toys at playgroups to a formal presentation to Spanish-speaking international students and strategic meetings with managers of community organisations.

To organise a session for your group, please contact Elizabeth Morley on (02) 9698 7277 or at elizabeth@rlc.org.au



Elizabeth Morley at the CALD playgroup.

RLC Tip: A copy of the Act can be accessed at www.legislation.nsw.gov.au. A Discussion Paper detailing issues for consideration in the review is available at www.lawlink.nsw.gov.au/clrd.

One of the main questions raised in the discussion paper is whether personal violence orders should remain in the Act. The closing date for submissions is 18 November 2011.

Credit, debt and consumer law

Case note: What wording should a default notice use?

Perpetual Trustees Victoria Ltd v Bianka Monas [2011] NSWSC 57W

Section 80 of the old *Consumer Credit (New South Wales) Code* (Code) stated that credit provider must not begin enforcement proceedings against a mortgagor unless the credit provider has first given the mortgagor notice in accordance with the requirements in s 80(3).

In *Perpetual v Monas*, Hoeben J held that there was no requirement for a s 80(3) notice issued to use the exact words of the section. Rather, the notice need only to "substantially" comply with the Code requirements.

Hoeben J did not define "substantial compliance", though it is clear that such notice should not include anything misleading and must communicate the essential elements of notice required under the Code. His Honour also held that where the credit provider did not meet the notice requirements, the borrower could not rely on s 80 as a bar to proceedings commenced following the issue of a non-compliant notice. Furthermore, where a credit provider has not met the notice requirements, the court may retrospectively authorise the commencement of proceedings without the need for a valid notice to be given to the borrower.

The Code has recently been replaced by the *National Consumer Credit Act 2009* (Cth) (NCCA). Section 88 of the NCCA, which is equivalent to s 80 of the Code, imposes more requirements in relation to the content of notices given prior to commencing enforcement proceedings against a mortgagor.

However, we expect that Hoeben J's findings regarding the substantial compliance approach, will apply equally under the NCCA. As is the case in regards to the Code, the NCCA does not provide a prescribed form to use in giving notice. Following the reasoning in *Perpetual Trustees*, notices issued under s 88 of the NCCA would not need to adopt the exact words used in the section.

RLC Tip: Always check a notice carefully to ensure that it complies with the requirements of the Code or the NCCA (depending on which applies). However, bear in mind that even if the notice does not use the exact wording of the relevant section, provided it complies substantially with the requirements of the Code of the NCCA, it will likely be effective.

RLC case work

Early response could have prevented 30 years of trauma

The Sydney Women's Domestic Violence Court Advocacy Service (SWDVCAS) has been working with Catherine Smith, a victim of horrendous domestic violence perpetrated over a period of 30 years by her husband, Kevin Smith. Catherine reported the violence to central western NSW police on at least 18 occasions, with little or no action ever being taken.

When Catherine's six children had finally all left home or were at boarding school, she escaped the family farm for the last time, but her husband continued to stalk her. In 2002, he kidnapped her son and his partner at gunpoint and forced them to reveal where Catherine was living. Smith was arrested when he was on his way to find Catherine with a gun, an electric cattle prod, gaffer tape, handcuffs and his handwritten Will in the boot of his car.

He was sent to Goulburn jail and on one occasion escaped for several days. When Smith was released from jail, in the belief that no one could or would protect her children and herself, Catherine bought a gun and went to the boarding house where he was living in an attempt to shoot him.

Catherine was arrested and charged with attempted murder, but at her trial it took the jury only 25 minutes to find her not guilty. The trial judge ordered that police investigate charges against Smith for the years of abuse. These charges went to court in July and Kevin Smith was found guilty of 17 of the 20 charges, including three counts of attempted murder and charges of sexual assault. Smith is yet to be sentenced.

For more information on Catherine Smith's story see www.abc.net.au/austory/specials/tildeath/default.htm.

To contact SWDVCAS, call Susan Smith on 0447 174 698.

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RLC events and projects

Training: Remedies for boarders and lodgers

The Inner Sydney Tenants' Service at RLC is offering training on the recently launched *Boarders & Lodgers Legal Information Kit* for community workers, advocates and solicitors. The training will familiarise participants with the kit and assist advocates to navigate the complex web of consumer legislation, common law principles and other remedies available to boarders and lodgers. The training will also give some examples of cases that have been successfully run in the tenancy and general divisions of the CTTT.

Date/Time: Tuesday, 4 October 2011 at 9.30-12.00pm

Venue: Upstairs at Redfern Town Hall, 73 Pitt Street Redfern NSW 2016

Cost: Free

RSVP: by Friday 30 September to Sue Thomas on (02) 9698 7277 or sue@rlc.org.au

New scheme for representation in unfair dismissal conciliations

RLC has begun a scheme in partnership with Clayton Utz to represent clients at unfair dismissal conciliation conferences. Approximately 80% of unfair dismissal applications resolve at conciliation, and until now RLC has had extremely limited resources to provide representation to clients with unfair dismissal matters.

The new scheme allows for clients who attend RLC's Tuesday night employment clinic to be offered representation in their conciliation. A client will be paired up with a solicitor from Clayton Utz seconded to RLC for the length of the matter. The seconded solicitor then provides detailed advice and advocacy during the conciliation, which is conducted over the phone.

This new scheme will improve our client's experience of unfair dismissal conciliations and lead to better outcomes. RLC anticipates that the scheme will reduce the average time taken for conciliations, which may lead to a systemic improvement in Fair Work Australia conciliations generally.

RLC represents CLC views at discrimination consolidation conference

The federal Attorney-General's Department has committed to consolidating federal discrimination laws into a single act. RLC has been working with a coalition of NGOs to urge the government to use the consolidation project as an opportunity to strengthen Australia's discrimination protections. Natalie Ross, one of RLC's discrimination lawyers, spoke about this issue at a recent conference on the consolidation project.

See www.equalitylaw.org.au/elrp/about/ for more information.

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