



Redfern Legal

Redfern Legal Centre's bi-monthly e-bulletin

April 2012

Welcome to the second edition of *Redfern Legal* for 2012, bringing you legal updates and developments from our six practice areas and news of the work of Redfern Legal Centre (RLC). Please note cases cited in legal updates are not always RLC matters.

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Domestic violence

Domestic violence in rural communities

RLC's Sydney Women's Domestic Violence Court Advocacy Service (SWD-VCAS) client, Catherine Smith, and her daughter Vickie, recently attended the 56th session of the UN Commission on the Status of Women in New York City, which focused on the empowerment of rural women. Catherine and Vickie addressed an event on 'The Impact of Domestic Violence Against Rural Women' and spoke of their ordeal at the hands of their violent and abusive husband and father, Kevin Smith, and about the years of police inaction. Kevin Smith is presently serving a 17-year custodial sentence for crimes against Catherine and her children.



Photo by [NathanaelB](#)

Catherine told the audience "I come from a remote farming community in Australia. You would think I would be safe in my own home. Women in Australia have been portrayed as equal to men and I suppose we are in lots of ways – except when it comes to safety in our own homes".

Speaking on International Women's Day, Sex Discrimination Commissioner Elizabeth Broderick said that steps needed to be taken to improve awareness of specific barriers faced by victims and survivors of domestic and family violence in rural areas of Australia:

"The barriers that all women face in finding assistance when they are living with domestic and family violence are particularly exacerbated in rural areas ... among other things they face geographical isolation, a limited number of shelters, limited education and

RLC in the media

Death of Roberto Curti

The death of Roberto Laudisio Curti after being tasered by NSW Police has generated a significant degree of public interest. RLC solicitor David Porter has been interviewed by a number of media outlets, and RLC has received inquiries from other people who have been tasered by NSW Police.

The NSW Police investigation into Mr Curti's death is being overseen by the NSW Ombudsman. It is expected that the State Coroner will then hold its own inquest.

RLC continues to hold concerns about the effectiveness and impartiality of NSW Police investigating its own involvement in incidents resulting in fatalities. In October 2011, the Deputy State Coroner delivered findings in the inquest into the death of Adam Salter, stating that the Police investigation in that case was "an inadequate and apparently prejudiced Critical Incident Investigation chiefly directed ... to avoid embarrassment to Police."

RLC hopes that the recent attention given to these deaths leads to a truly independent system for the investigation of police conduct in NSW.

See a video news report [here](#).

Police Accountability Twitter feed

Follow the new Twitter of RLC Police Accountability solicitor, David Porter, [@RLC_Police](#).



employment opportunities, difficulties in accessing justice, health, communications and other services and difficulties in implementing prevention initiatives ... the right to live free of violence is not dependent on where a woman lives – so our responses shouldn't be either".

RLC Tip: RLC and Sydney WDVCS continue to lobby for a model of domestic violence intervention based around domestic violence specialist court lists, which could be implemented in all courts across NSW. RLC maintains that the development of specialist court lists would be a means of promoting consistency of outcomes, improving the ongoing safety of victims and would carry specialist knowledge into the general community.

Victims Compensation Scheme review

The Department of Attorney General and Justice has contracted PricewaterhouseCoopers to develop a profile of victims eligible for compensation in NSW and to examine alternative ways to provide support and rehabilitation services to victims of violent crime. The review will also undertake a comparative assessment of compensation schemes in other jurisdictions and internationally and consider recent reviews conducted in those jurisdictions. Sydney WDVCS has been consulted as part of the review, which is expected to be completed by late June.

RLC Tip: Closing date for **Submissions** is 30 April 2012.

Evaluation of the Domestic Violence Intervention Court Model

An evaluation of the Domestic Violence Intervention Court Model (DVICM) by the NSW Bureau of Crime Statistics and Research, has found the program to have had "mixed success". The DVICM was designed as a program to improve the response of the criminal justice system to cases involving domestic violence at Campbelltown and Wagga Wagga Local Courts. The evaluation found the program did not affect the proportion of matters finalised on a plea of guilty; the proportion of matters finalised on a dismissal; or the proportion of offenders imprisoned or placed under supervision. However, the evaluation did find that the program reduced the time taken to finalise matters.

RLC Tip: See the full report [here](#).

A more expansive definition of family violence

By Alexandra Tindale and Collette McFawn, Watts McCray Lawyers

Family violence is one of the greatest challenges for the family law system. It can take a variety of forms including physical violence, verbal abuse, social isolation, property damage and financial dependence.

Family violence is never acceptable, and is particularly relevant for the courts when deciding appropriate parenting arrangements for children. The primary considerations for courts when determining what is in the best interests of a child involve a "balancing" of the following primary considerations:

1. The benefit to the child of having a meaningful relationship with both of the child's parents; and

RLC publications and submissions

Review of the Crimes (Domestic and Personal Violence) Act 2007

The NSW Attorney-General is reviewing the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) to determine whether the policy objectives of the Act remain valid and whether its terms remain appropriate for securing those objectives. Sydney WDVCS has made a comprehensive **submission** to the review.

RLC community legal education

Helping the Helpers – supporting community workers to help clients

In March, RLC launched a new community legal education project, "Helping the Helpers – Supporting Community Workers to Help Clients". Upcoming sessions include:

- Accessing free legal advice – Thursday, 3 May
- Police complaints – Thursday, 7 June
- Sydney Women's Domestic Violence Court Advocacy Service – Friday, 27 July
- Money and debts – Thursday, 23 August
- Tenancy and domestic violence – Thursday, 13 September
- Fines – Thursday, 28 June

All sessions will be held at Redfern Legal Centre from 9.30am – 12.30pm and the cost is \$20. Email education@rlc.org.au to register. RLC warmly acknowledges the support of the City of Sydney for this project.

RLC case work

A win for tenants in the Tribunal

The Inner Sydney Tenants' Advice and Advocacy Service (ISTAAS) at RLC had a number of matters where a tenant vacated the premises after receiving a notice of termination for breach of the tenancy agreement. Although the tenants vacated in compliance with the *Residential Tenancies Act 2010* (NSW), the owners of the premises then sought compensation (in the form of rent until a new tenant was found) for the loss incurred because the tenant vacated during the fixed term of the tenancy.

In one of these matters, the Consumer, Trader & Tenancy Tribunal (CTTT) awarded compen-

2. The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The recent amendments concerning family violence made by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) are set to come into effect in early June 2012. As part of those amendments, the definition of family violence, as it is contained in the *Family Law Act 1975* (Cth), will be more expansive, such that family violence will be defined as behaviour that coerces, controls and causes someone to be fearful. In addition, the definition contains a “checklist” style set of examples of behaviour that may be captured by the definition.

RLC Tip: Where family violence is an issue in family law proceedings, it is essential that the relevant evidence is properly and precisely led before the court. For further guidance, see the *Family Violence Best Practice Principles* handbook recently released by the Family Court of Australia and the Federal Magistrates Court of Australia.

Discrimination and Human Rights

Discrimination on the basis of criminal record

Mr CG v NSW (RailCorp NSW) [2012] AusHRC 48

The President of the Australian Human Rights Commission has found that in 2009 RailCorp discriminated against a job applicant, Mr CG, when it decided not to offer him a position as a Market Analyst because of his criminal record. Mr CG had a conviction for mid-range drink driving in 2001 and a conviction for low-range drink driving in 2008.



RailCorp had submitted that the decision not to offer Mr CG the position because of his criminal record did not constitute discrimination because he was unable to perform the

inherent requirements of the position. RailCorp claimed that the inherent requirements of the Market Analyst position included compliance with its drug and alcohol policy, upholding its “safety first” values and RailCorp being able to have trust and confidence in its employees. RailCorp asserted that Mr CG’s criminal record prevented him from being able to fulfil these inherent requirements.

However, President Branson found that Mr CG was able to fulfil the inherent requirements of the position: his criminal offences had no connection with his employment; the offences had not occurred during work hours; no part of the role of Market Analyst required or involved driving a vehicle; and he was not required to engage in any safety critical activity related to the provision of rail transport services. She decided that excluding Mr CG on the basis of his prior drink driving convictions amounted to discrimination on the basis of his criminal record.

sation to the landlord. ISTAAS assisted this tenant in lodging a rehearing application. The Chairperson of the CTTT granted the rehearing. RLC’s pro-bono partners King & Wood Mallesons provided ISTAAS with legal advice on this issue, which was incorporated into the submissions presented at the rehearing.

The rehearing was successful, as the Tribunal found that the notice of termination had never been withdrawn and the tenant acted on a valid notice, which was still on foot. Therefore the tenant did not abandon the premises and the landlord was not entitled to compensation. RLC is currently awaiting the written reasons for the decision.

RLC events and projects

Apology anniversary 2012

On 13 February 2008, the Federal Government apologised for “the laws and policies ... that have inflicted profound grief, suffering and loss on these our fellow Australians”. RLC invited local Aboriginal and Torres Strait Islander residents to attend a morning tea to commemorate the fourth anniversary of the Federal Government of Australia’s Apology on 13 February. RLC intends to hold this event every year.

See the RLC [media release](#) for details.



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In its findings the Commission recommended that RailCorp pay Mr GC \$7,500 in compensation for hurt, humiliation and distress and that RailCorp HR staff and management undertake anti-discrimination training to prevent similar discrimination occurring again.

RailCorp has not accepted the findings of the Commission and has declined to pay any compensation to Mr CG; nor has it accepted the recommendation that its HR staff and management undertake anti-discrimination training, although it has agreed to review its recruitment procedures.

RLC Tip: At a time when Crim Trac processes almost three million criminal record checks in a year (a five-fold increase over a decade), people affected by discrimination on the basis of an irrelevant criminal record need more than recommendations that can be ignored.

See the [submission](#) on the consolidation of Commonwealth anti-discrimination laws from the National Association of Community Legal Centres, which has recommended that irrelevant criminal record be included as a protected attribute with enforceable remedies.

Government and police accountability

Use of taser excessive

In February 2011, Local Court Magistrate Dunlevy dismissed charges against an Aboriginal man who had been tasered by NSW Police. The police use of the taser was found to be excessive and an impropriety. The accused, Phillip Bugmy, was tasered when he was already on his knees with his hands behind his head. All regular Police tasers carry automatic cameras to record each use of the taser. In the taser footage, the tasering officer can be heard threatening Mr Bugmy with being tasered a second time. This footage was viewed by both the Magistrate and an earlier internal Police review. What the Magistrate considered excessive, the Police review considered reasonable and justified.

RLC Tip: Such a questionable conclusion from an internal Police review raises concerns about the effectiveness of police investigating police.

See a report on the incident from [Lateline](#), as well as the NSW Police Force's [Taser Guidelines](#).

In "residual denial" until proven guilty

The NSW Police Force website contains a section named "For The Record", which contains official responses on selected issues. On 15 December 2011, the Police Force corrected some of the "misinterpretations" about [drug dog statistics](#).

One of these "misinterpretations" is the idea that the sniffer dogs can ever get it wrong. In their breakdown of statistics, the closest the Police Force comes to categorising a person as innocent is the concept of a "residual deny", described as "no actual drugs found and the person doesn't admit to having had contact with drugs, attributable to limited powers to conduct more intrusive searches and the person being untruthful about being in contact with drugs" (emphasis added).

With an official stance of this type, individual police may feel pressure to conduct searches in circumstances where they do not suspect they

Social Justice Day 2012

On 20 February, RLC celebrated Social Justice Day 2012 by hitting the streets and talking to people in the local community about what social justice meant to them.

RLC volunteer legal assistants spoke with people in the Botany local government area throughout the day about social justice and the great Australian concept of "a fair go".



People consistently responded that a "fair go" meant equality of opportunity, fairness, having a chance, and having a right. However, there was no confidence that the law gives everyone a fair go. People thought wealth meant a greater chance of getting a good result from the legal system.

People interviewed showed some reluctance and apprehension about approaching the legal system, including free legal services. This is consistent with research conducted by the Law and Justice Foundation of NSW, which shows that people ask friends and non-legal advisors, such as doctors, rather than approaching a lawyer. This shows that the legal profession, including RLC, has a lot of work to do around improving accessibility.



will find evidence of an offence – searches without lawful authority. The Police Force asserts that police use other observations in conjunction with dog responses to form the decision to search, but this is open to question.

RLC Tip: Contact RLC's Police Accountability service to get advice on whether you were legally searched.

Credit, debt and consumer complaints

Responsibilities of a mortgage broker

Perpetual Trustee Company v Milanex Pty Ltd (in liq) [2011] NSWCA 367

The Court of Appeal recently handed down a decision clarifying the responsibilities of a mortgage broker when making representations to a mortgage manager. The borrower at the centre of this case was Mr Kotevski, a 74-year-old pensioner with very little education, business experience or literacy skills.

Facts

Mr Micic, a community member acquainted with Mr Kotevski, introduced Mr Kotevski to the mortgage brokers, Milanex Pty Ltd (Milanex) and assisted Mr Kotevski in completing a loan application. The loan application was for a 30-year loan for up to 80% of the value of Mr Kotevski's home, secured by a registered mortgage on that property.

Milanex referred the application to Good Home Loans Pty (GHL), who in turn prepared and forwarded the loan to Calibre Financial Services Pty Ltd (Calibre). Calibre acted as agent for the lender, Perpetual Trustee Company Ltd (Perpetual).

Perpetual eventually approved the loan, advancing Mr Kotevski \$221,935, most of which was in turn transferred to Mr Micic. After making a few repayments, Mr Kotevski defaulted. When Perpetual attempted to enforce the mortgage, Mr Kotevski sought relief under the *Contracts Review Act 1980* (NSW) (CRA) claiming the loan was unjust. Perpetual also cross claimed against Milanex, alleging that it had misled Perpetual about Mr Kotevski's circumstances in the loan application.

Primary judgement

Given Mr Kotevski's age, unsophisticated mental state, limited formal education and poor literacy skills, the trial judge found that Mr Micic had unduly pressured Mr Kotevski into the loan. Moreover, it was Mr Micic, rather than Mr Kotevski who had received the benefit from the loan. Even though Mr Kotevski had received independent legal advice, the trial judge found that the solicitor who provided it could not have been satisfied that Mr Kotevski fully understood the loan agreement or that he had entered into it voluntarily.

The trial judge also considered that the strong public interest in upholding contractual obligations was reversed by the blindness of Perpetual, Calibre and GHL, arguing that it could not be in the public interest to uphold a contract for a loan of \$224,000 repayable over 30 years to a 74-year old man whose only income was an aged pension and whose only significant asset was his home.

Community

The Muslim Legal Network

RLC's Elizabeth Morley and Natalie Ross recently met with Zaahir Edries of the Muslim Legal Network. The Muslim Legal Network is a forum for all Australian Muslim lawyers and law students.

It provides an avenue for Muslims in the legal profession to associate and provide mentoring and support for each other. The network also provides for the sharing of community concerns that may require action from the network as a representative body.

See the [website](#) for more information and contact details. RLC looks forward to future discussion.

Community Legal Centres NSW State Conference 2012, 8-10 May

This conference is a fantastic networking and professional development opportunity. It is open to anyone working in community and government organisations that are concerned with social justice, anti-discrimination, campaigning for change and representing disadvantaged or marginalised members of the community.

There is an exciting program of workshops, presentations and keynote speakers, including the Hon Michael Kirby AC, Ronald Merkel QC, Rodney Croome, Elizabeth Broderick and Tammy Solonec.

Click here for [registration](#) and further information.

Why not check out the Thomson Reuters **Workplace Insight** page? Whether you are an IR practitioner or an HR manager, you'll find news and information to help you stay up to date with the ongoing changes in the Australian workplace relations regime.



Ultimately, the court held that the loan agreement with Mr Kotevski was unjust and declared the agreement and the mortgage void. The court found that Mr Kotevski did not provide instructions to Milanex and did not sign the loan application documents. The trial judge also dismissed Perpetual's cross claim against Milanex. Perpetual appealed.

Court of Appeal judgment

In its appeal, Perpetual did not challenge the primary judge's finding in favour of Mr Kotevski, but rather his dismissal of Perpetual's cross-claim against Milanex. Perpetual claimed that Milanex had engaged in misleading or deceptive conduct. By submitting Mr Kotevski's application to them, they were representing that Milanex had instructions from Mr Kotevski and that he had signed the application documents.

The court upheld their argument and rejected Milanex's claim that GH's failure to discover the information was incorrect was an intervening cause of loss. The court said that even if GH acted carelessly, it was on the basis of Milanex's misrepresentations that GH submitted the application to Perpetual.

Key messages

As outlined in the CRA, in determining when a loan is unjust, the courts will look not only to the factual circumstances surrounding the provision of the loan, such as the economic, educational and literacy ability of the parties, but also to the broader public interest at stake.

Further, protection under the Act may be afforded to those who are duped into entering unjust contracts, even where independent legal advice may have been given. In addition, if a mortgage broker's representations have played some part in inducing another party to make an unjust loan, the broker will then be held liable for that party's loss.

RLC Tip: When assisting a vulnerable client, look carefully at the circumstance in which the loan was made.

Are you a former or current volunteer?

Survey request

As part of the upcoming Community Legal Centres NSW State Conference, RLC will be presenting a research paper titled, "Beyond the Gatekeepers of the Front Desk: Volunteers and Social Capital".

To inform the research, RLC requests current and former volunteer legal assistants, solicitors or other members of the community to complete a short [survey](#).

RLC is particularly interested in hearing from former volunteers so as to explore the long-term impacts of volunteering and whether volunteering influences any decision-making that may be made in a volunteer's professional work.

If you are a former volunteer who is also willing to be interviewed, please contact Chantel Cotterell on 9698 7277 or at placement@rlc.org.au.



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Housing and tenancy

HNSW repair campaign gaining momentum

RLC's Inner Sydney Tenants Advice and Advocacy Service (ISTAAS) has identified the lack of repairs by Housing NSW as a systemic issue, which disproportionately affects the most vulnerable tenants. Other services, such as Kingsford Legal Centre (KLC) have now taken on this important issue as an area of concern.

KLC's state wide discrimination legal service has proposed to assist those services not supported by community legal services. KLC will provide discrimination advice to tenants for whom the lack of repairs impacts on their disability. This new KLC initiative follows on from RLC's successful incorporation of discrimination complaints in a strategy to get Housing NSW to do repairs.



The Hon Clover Moore MP speaking at the launch of the HNSW Repair Kit.

In addition, ISTAAS has successfully launched the *The Repair Kit: Getting Housing NSW to Repair your Home*. Many public tenants attended the launch at Redfern Oval and several spontaneously took the microphone to talk about how the lack of repairs had impacted on their lives. The Hon Clover Moore MP, who launched the kit, spoke of how moved she was by their powerful stories.

ISTAAS now provides a drop-in service on the first Tuesday of every month from 10 am to 12 pm for Housing NSW tenants who want assistance with filling in an application to the CTTT for orders to get repairs done. ISTAAS workers help tenants to fill in the form, photocopy documents and discuss how to prepare for the hearing.

Download the Repair Kit [here](#).

RLC Tip: Tenants have to ring the Housing NSW Contact Centre and report their repair issue first before they can apply to the Tribunal for repair orders. Tenants should make sure to write down the day(s) and time(s) they called, as well as the call reference number.



Go to the Thomson Reuters [Journals Talk](#) page for information on our wide range of journals. You will also find sample articles, updates, practitioner information and community discussion on a range of topics.

Employment

Unfair Dismissal Representation Scheme

The RLC Dismissal Representation Scheme has been very successful in providing high-quality representation to clients who would not otherwise have had representation in unfair dismissal conciliations. Since July 2011, RLC and Clayton Utz have been operating a partnership to provide advice and representation in unfair dismissal conciliations.

Unfair dismissal conciliation conferences are generally conducted by telephone, which can be a daunting prospect for unrepresented applicants.

The client representation work in the scheme is done by solicitors employed by Clayton Utz, who are seconded to RLC for the purpose of the scheme. The seconded solicitors are not employment specialist solicitors, but have a range of commercial, corporate, and litigation experience. Before commencing with the scheme, the solicitors were trained by RLC employment solicitor, Megan Cameron, on unfair dismissal law and procedure and employment law generally.

The seconded solicitors have quickly developed skills in advising on and participating in unfair dismissal conciliation conferences.

Of the clients who have been assisted under the scheme:

- Most matters have resolved at conciliation;
- Some matters have been resolved between the employee and employer before conciliation;
- One matter has gone on to be prepared for arbitration.

RLC Tip: The primary lesson from the scheme to date is that unfair dismissal is rarely the only employment-related issue between the parties. It is surprisingly common for employees who have been unfairly dismissed to have been underpaid or discriminated against at work.

RLC is very grateful for the assistance and support provided by Clayton Utz in running this very successful scheme.



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