



Redfern Legal

Redfern Legal Centre's bi-monthly e-bulletin

February 2012

Welcome to the first edition of *Redfern Legal* for 2012. This publication brings 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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Discrimination and human rights

Corporate hardship? The King v Jetstar decision

In the *King v Jetstar Airways* decision handed down on 13 January 2012, Justice Alan Robertson of the Federal Court rejected a claim by Sheila King that Jetstar unlawfully discriminated against her by refusing to provide passage on a flight from Adelaide to Brisbane. While accepting that the airline had discriminated against her on the basis of her disability, Robertson J accepted Jetstar's defence of "unjustifiable hardship".



Photo by [Sheba_Also](#)

Mrs King has a physical disability and uses a wheelchair. She booked a Jetstar flight online but upon calling to confirm the availability of personal assistance to board the flight, she was informed that she could not travel on that flight as two other passengers using wheelchairs were already booked

RLC in the media

Drug detection dogs have 80% failure rate

In late November 2011, the Minister for Police provided answers to a series of Questions on Notice asked by David Shoebridge, MLC, on police drug detection dog searches.

In 2011 (until 30 September), 14,102 people were searched by police following a reaction from a drug detection dog. Of these, 11,248 were found to have no illegal drugs in their possession. The story was covered in print and radio.



RLC wrote to *The Sydney Morning Herald* (SMH), emphasising that drug detection dogs are not detecting evidence of any offence known to NSW law. RLC considers that warrantless drug detection dog operations provide no reasonable basis for police officers to perform a search. Even after only one shift working with a drug detection dog, the 80% failure rate means that no reasonable police officer would expect to find drugs in the possession of a person stopped by a dog.

Unfortunately, Acting Deputy Commissioner David Hudson made it clear in the SMH that contact with drugs is the criteria used for exercise of police powers, rather than reasonable suspicion of the commission of a criminal offence.

See RLC's [media page](#) to read its letter to SMH.

on that flight. Jetstar imposed a limit of two passengers requiring wheelchair assistance per flight on services using A320 aircraft. Mrs King had to re-book with a different carrier.

The principle issue addressed in the case arose under s 24(1) of the *Disability Discrimination Act 1992* (Cth) – whether Jetstar unlawfully discriminated against Mrs King by not providing her with a “service” on the grounds of her disability. Robertson J found that a person without Mrs King’s disability would have been allowed to make a booking to fly. Accordingly, Jetstar’s actions were direct discrimination under the Act. (Indirect discrimination was not found to be made out on the basis that the relevant conduct by Jetstar was to refuse Mrs King the service constituted by the particular flight, and not to impose a term or condition on the travel.)

However, s 24(2) of the Act provides the defence that it is not unlawful to discriminate against a person on the grounds of that person’s disability if the provision of goods or services would impose unjustifiable hardship on the service provider. Robertson J accepted Jetstar’s argument that it is a low cost carrier that operated on a business model predicated on quick turn-around times. On A320 flights, the designated turnaround time was only minutes more than the time it took to assist passengers requiring a wheelchair to embark and disembark. The court accepted that due to the structure of the aircraft, operationally, Jetstar could not provide additional places to passengers requiring assistance without increasing its turnaround times, which would have a substantial adverse profit impact.

Additionally, Robertson J considered that in contrast to this considerable detriment, the benefit to Mrs King of a change in policy would have meant that she did not have to suffer discrimination or arrange alternate travel, but that there was no evidence of any benefit accruing to any other person. Accordingly, Robertson J held that the defence of unjustifiable hardship was made out.

Joanna Shulman, who provided advice to Mrs King, says the ruling demonstrates that Australia’s discrimination laws are not effectively protecting the rights of people with disabilities. Urgent reform is needed to ensure that the Act is able to enforce its objective of eliminating discrimination against persons on the grounds of disability.

RLC Tip: RLC worked with other Community Legal Centres around Australia to prepare a **submission** on behalf of the National Association of Community Legal Centres in response to the Government’s Discussion Paper on Consolidation of Commonwealth Anti-Discrimination laws.

Domestic violence

Privacy, social media and the law

This matter, observed recently by an RLC volunteer in the Downing Centre Local Court, highlights the potential for social media technology to be misused to do incalculable damage to a person’s reputation.

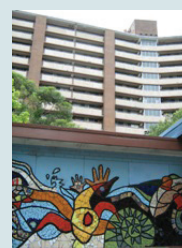
The 20-year-old male defendant, who was a qualified accountant and had no previous convictions, was charged with publishing an indecent article under s 578 of the *Crimes Act 1900* (NSW). He pleaded guilty and was sentenced to six months home detention.

RLC publications and submissions

The Housing NSW Repair Kit

The Inner Sydney Tenants’ Advice and Advocacy Service at RLC has produced a step-by-step guide for public tenants to assist them to get repairs done. Housing NSW tenants and community workers have been complaining for some time about the difficulties in getting repairs done and see this as a priority issue.

This handy kit comes with sample letters and shows tenants how to take the matter further, such as applying to the Consumer, Trader and Tenancy Tribunal (CTTT). As Housing NSW often does not comply with Tribunal orders to do repairs, the kit also advises tenants to request the CTTT Chairperson to refer matters of non-compliance for investigation and prosecution by the Office of Fair Trading.



The kit was printed with a grant from the Lord Mayor Clover Moore MP Salary Trust.

Download the kit [here](#).


Opportunities to consolidate NSW tribunals

RLC made a submission to the NSW Legislative Council Inquiry into Opportunities to Consolidate Tribunals in NSW.

On Friday 16 December 2011 Phoenix van Dyke from RLC’s tenancy service and Natalie Ross from RLC’s general legal service appeared before the Standing Committee on Law and Justice to give evidence for the Inquiry.

See the RLC [Submissions](#) page for more information.

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The defendant had known the victim since 2008. They had been in an "on-off" intimate relationship and lived together until mid-2011 when the victim moved out.

The defendant, upset and hurt at the breakdown of the relationship, stated later to police that he wanted to "hurt" the victim when he posted six nude photos of the victim on his Facebook wall. The photos, which displayed the victim's breasts and genitals, remained on Facebook for a period of three hours.

The victim complained to the police and the photographs were removed. However, some time later in the day, the photos reappeared on the defendant's Facebook wall. He was then arrested and charged by police.

In sentencing, the Magistrate stated that in the absence of any comparable recorded Australian case law, she was inclined to look at a 2010 decision in the Wellington District Court in New Zealand, where the defendant, Joshua Ashby, was sentenced and jailed for four months for posting a full-frontal nude picture of his ex-girlfriend on Facebook. In that case, Ashby had hacked into his ex-girlfriend's account, changed her privacy settings to open, and then also changed her password. Judge Beecroft made it clear in his sentencing that technology could not be used in such a way to do incalculable damage to a person's reputation.

In the Downing Centre Local Court case, in the absence of a victim's impact statement, the Magistrate surmised that the victim would have been embarrassed, humiliated and anxious, and whilst the Magistrate took into consideration the age of the defendant, his early plea of guilty and good criminal record, she wanted to send a clear message of deterrence to the wider community about abuse of social networking sites. Along with the six months home detention, the Magistrate made a final AVO order on behalf of the victim for a period of 12 months.

RLC Tip: If photographs or comments are posted about you on social media that are humiliating or degrading, get legal advice.

New sexual assault reporting option (SARO)

NSW Police now provide two ways for victims to report a sexual assault. The first and preferred method is to contact the nearest police station and make a formal complaint. The second option, if a victim prefers not to formally report, is to complete a sexual assault questionnaire online. A victim can choose to provide their details or report anonymously. This does not constitute a formal complaint to police to initiate a criminal investigation, but assists in information gathering, which may be used to help police develop strategies to target offenders. The details provided will be recorded on a secure and restricted NSW Police database, and kept securely at the office of the NSW Police Sex Crimes Squad.

RLC Tip: Watch a clip about the new option or read the online questionnaire at the NSW Police Force [website](#).

RLC outreach

Inadequate police briefing at Occupy Sydney

RLC has provided advice and assistance to a number of people involved in Occupy Sydney activities since October 2011.

RLC solicitor, David Porter, attended the rally held on 5 November 2011 as a legal observer, and has subsequently lodged a formal complaint under the Police Act 1990 (NSW) relating to the inadequate briefing of police dealing with the demonstrations.

The primary ground of complaint is that move-on directions were given to protesters. Move-on directions cannot be given to people involved in a genuine protest in NSW – it even has a specific section in the legislation – and every officer involved should have been briefed on this prior to being sent to any protest site.

This complaint highlights the reflexive, habitual use of police powers in NSW and the lack of responsibility and accountability in the exercise of those powers. The NSW Police Force is currently considering the complaint, and RLC awaits news of their investigation of the issues raised.



Photo by Newtown Graffiti

RLC case work

Pawnbroker charges man with disability 240% interest

RLC's client, Paul, is a man with a chronic mental illness. Although when he was younger Paul was employed full time and got a home loan, he has been on the disability pension for the last 10 years, supplemented with some casual work. Apart from his mortgaged flat, Paul's only asset was a

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Employment law

Employee consultation imperative in the face of redundancy

The recent decision by a Full Bench of Fair Work Australia (FWA) in *Jenny Craig v Margolina* [2011] FWAFB 9137 is a timely reminder to employers of the importance of consultation in the process of carrying out redundancies in the workplace.

Ms Margolina was a senior Regional Leader for Jenny Craig Weight Loss Centres. Her position was made redundant after a restructure. No alternative position was available for Ms Margolina at a comparable level of pay, status and responsibility. Jenny Craig dismissed Ms Margolina on the grounds of redundancy.

Ms Margolina made an unfair dismissal application and argued that there was a more junior position available, which she would have accepted if given the opportunity. In response, Jenny Craig claimed that Ms Margolina was genuinely redundant. Management felt that it would have been an insult to Ms Margolina to offer her the more junior role. FWA accepted Ms Margolina's evidence that she would have accepted a loss of pay and responsibility in order to continue her employment with Jenny Craig.

This case is an important reminder from FWA of the narrowness of the "redundancy" defence available to employers in unfair dismissal matters. Consultation with employees who might be made redundant must be thorough and genuine. A failure to listen to employees during a real consultation process exposes an employer to significant risk of an adverse decision in FWA, even if the redundancy is motivated by appropriate operational factors.

RLC Tip: Employees may be able to make an unfair dismissal complaint even if they have been validly retrenched. Employers and employees should make sure they know the law in redundancy situations.

Tenancy and housing law

Landlords out of time to meet water efficiency standards

Tenants with individual water meters for their property have had to pay for water usage since the mid-1990s. However, s 39(1)(b) of the *Residential Tenancies Act 2010* (NSW) stipulates that water usage now only needs to be paid by tenants if the premises meet required water efficiency standards.



Photo by **oobrien**

The standards are set out in cl 11 of the *Residential Tenancies Regulations 2010* (NSW). They include rules about flow rates and leaking taps.

These water efficiency standards applied to any new tenancies entered into after the *Residential Tenancies Act 2010* came into force on 31 January 2011. Landlords of existing tenancy agreements had 12 months to comply with these standards. Tenants who

new car purchased for him by his mother after the death of his father.

Recently Paul has had numerous health problems and hospital admissions, stopping him from doing casual work and giving him additional expenses. Paul got into arrears with his home loan payments, and also with strata levies and utility bills. He could no longer get financial help from his mother as she developed dementia.

In 2009 and 2010, Paul got a series of small loans to try and deal with his various debts but it got to the stage where the finance company would not lend any more. Paul could not afford to register his car, and his telephone was disconnected. Paul then contacted a pawnbroker and pawned his one-year-old car, purchased by his mother for \$15,000, for a loan of \$5000.

The terms of the pawn broking agreement were that the car had to be redeemed within three months, and the interest rate was 240% per annum or \$1,000 a month.

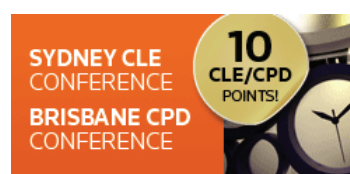
Paul came to RLC when he was unable to redeem his car at the end of the three-month period. Paul's car was sold by the pawnbroker, and after sale and storage expenses and the interest payments, there was no money returned to Paul from the sale.

RLC acted for Paul in a claim in the Local Court against the pawnbroker under the unjust contract provisions of the National Credit Code.

RLC argued that the pawn broker failed to make any inquiries about Paul's capacity to repay the loan, and that if reasonable inquiries had been made it would have been clear that Paul had no capacity to repay the loan.

RLC also argued that Paul was not reasonably able to protect his interests because of his mental illness, and that the interest and other charges were excessive in the circumstances.

The claim was settled with a payment to Paul by the pawnbroker.



moved into their rental properties before 31 January 2011, and whose landlords failed to install required water efficiency measures by 30 January 2012, no longer have to pay for water usage until premises meet the required standards.

RLC Tip: You are entitled to a copy of the water bill, so you can confirm the water usage charges.

Government and police accountability

Police keep “mugshots” even when charges dismissed

The Administrative Decisions Tribunal (ADT) of NSW recently handed down a decision in a test case run by RLC: *ACP v Commissioner of Police, NSW Police Force* [2011] NSWADT 249. This case concerned the retention of charge photographs (mugshots) by police after charges have been dismissed.

Despite past practices of destroying fingerprints and photographs of exonerated accused, the NSW Police Force refuses to destroy records created in failed prosecutions.

The primary difficulty with destruction of photographs is that this issue was overlooked in the drafting of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA) and its subsequent amendments. Indeed, between 2002 and 2006, even the power to destroy fingerprints was absent from the legislation, except for children.

The applicant, ACP, had successfully defended several assault charges and even been awarded costs. The applicant had also obtained the assistance of the Ombudsman to compel the police to destroy the fingerprints they had retained despite the unsuccessful prosecution.

The applicant approached RLC, and solicitors assisted him to make a request to destroy the photographs under the *Privacy Personal Information Protection Act 1998* (NSW) (PPIPA). NSW Police did not respond to requests made under PPIPA but instead provided a uniform response that LEPRA provided no specific power for the destruction of charge photographs.

The applicant then applied to the ADT for review of the police force’s decision (or, more accurately, their refusal to make a decision). RLC argued that the photographs in question fell outside the limited immunity of the police force under s 27 of PPIPA, but was unsuccessful. The ADT applied a broad interpretation of the section in question.

This matter underscores the lack of remedy and the need for a legislative or regulatory provision to resolve the issue. This legislative oversight perpetuates unjust consequences on individuals who have had their names otherwise cleared.

RLC Tip: You are entitled to have your fingerprints destroyed if your charges are dismissed.

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RLC events and projects

Margaret Jones wins volunteer award

International Volunteer Day 2011 was a busy day for Margaret Jones as she was presented with the 2011 Senior Highly Commended Volunteer of the Year Award at Parliament House by the Hon Victor Dominello, Minister for Volunteering, and later the MP’s Volunteer of the Year Award by the Hon Tanya Plibersek.

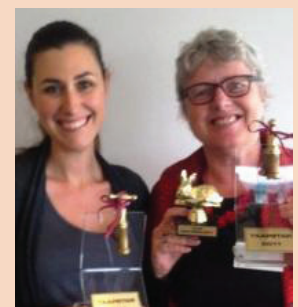
Part of Margaret’s prize included nominating a not-for-profit to receive \$500 which she chose to give to RLC. This \$500 came on top of \$200 Margaret had already given to the Centre as a reward for coming runner-up in another volunteer award, bringing the total to \$700.



Margaret Jones with the Hon Tanya Plibersek, Helen Campbell and Hilary Chesworth at International Volunteer Day 2011

Tenancy teams wins TAAP awards

RLC’s Inner Sydney Tenants’ Advice and Advocacy Service won several awards at the Tenants’ Advice and Advocacy Program Network Meeting. Phoenix van Dyke (right) won the TAAP Policy Award for her contributions to policy work and the TAAPSTAR Award for work at the Consumer, Trader and Tenancy Tribunal.



Natalie Bradshaw (left) won the People’s Choice Award for casework. Congratulations to ISTAAS!

Credit, debt and consumer law

Update: Class action against ANZ

On 22 September 2010, Maurice Blackburn Lawyers commenced proceedings in the Federal Court in a class action against ANZ Bank on behalf of 34,000 customers.

The class action seeks to challenge the validity of a variety of fees charged by ANZ, including fees for overdrafts, overdrawn accounts, dishonour fees and overlimit credit card accounts. Collectively, these fees are referred to as "exception fees".

The class action had an early win in the Federal Court on 5 December 2011, when Justice Gordon ruled that the late payment fees charged by ANZ were penalty fees and, consequently, had to be a genuine pre-estimate of damage, and could not be excessive.

However, other fees (including honour, dishonour, overlimit and non-payment fees) were considered by Justice Gordon not to be capable of being characterised as a penalty because they were fees charged for services delivered by ANZ.

Justice Gordon's decision that late payment fees were penalties meant that the class action could proceed to a hearing.

Appeal

On 22 December 2011, Maurice Blackburn filed an appeal in the Federal Court against Justice Gordon's findings that the other fees were not penalty fees.

Other banks

On 16 December 2011, Maurice Blackburn commenced proceedings in the Federal Court against NAB, Westpac, Citibank and the Commonwealth Bank.

Significance of the class action

Exception fees are small amounts of money charged by the banks for breaches of the contract between the bank and the customer. Each fee on its own is too small to be worth taking legal action against the banks to recover but, as a class action, the potential payout could involve significant amounts of money.

Although consumer groups have long questioned the legitimacy of these fees, it is only now that legal proceedings have commenced that some of the banks have stopped charging them.

Review with Watts McCray confirms value of Thursday Family Law advice session

RLC is pleased to announce that Watts McCray will continue to second, pro bono, a solicitor on Thursday afternoons so that RLC can deliver quality Family Law and Care and Protection advice to clients.

Watts McCray are well known for their speciality in Family Law and bring current knowledge and practical experience in this area of the law to our advice services. This has been a valuable addition to the suite of expertise RLC can offer to clients, particularly those experiencing domestic violence and those who are vulnerable and disadvantaged, faced with the breakdown of relationships and the risk of removal of children.

The service aims to give solid advice about the options, likely outcomes and processes so that people can make informed use of the justice and legal aid system (but does not undertake ongoing casework itself.) A review of the partnership has identified that it is operating well and we will be promoting its availability through local referring agencies and the community.



This class action could set an important precedent for other industries that charge penalty fees, and is a good example of the usefulness of class actions in instigating widespread change for the benefit of consumers, who might otherwise feel powerless to challenge big business.

RLC Tip: It is still possible to register for the class action, by visiting the [website](#).



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