Commercial Dispute Resolution Newsletter

December 2007

Further delays to changes to OH&S legislation

It is now nearly 3 years since the New South Wales Government first promised reforms to the State's OH&S Laws. Recently, Premier Morris Iemma indicated that the new laws would be passed by Parliament by the end of this year. However, he has now indicated that is unlikely to happen.

The draft *Occupational Health & Safety Amendment Bill 2006* was introduced last year but was postponed and referred to the Honourable Paul Stein, QC in circumstances where employers and unions were unable to agree on central aspects of the legislation.

The Stein Report was completed in April this year but has not been publicly released. Indications are that the delays are due to talks within the Government and continuing review of the proposed legislation to seek consensus between business, unions and government.

In a move to further increase pressure on the State Government to implement the changes, the opposition leader Mr Barry O'Farrell recently introduced a private member's bill. Our review of that bill suggests that it is in essentially identical terms to the bill introduced by the Government last year.

The primary thrust of the proposed amendments to the *Occupational Health & Safety Act 2000* are to remove the strict liability obligation of employers and replace it with a test requiring them to do all things "reasonably practicable" to ensure safety in the workplace. Both bills suggest that where the legislation requires a person to ensure, so far as is reasonably practicable, health and safety, that will mean a person is required:

(a) to eliminate risks to health and safety so far is as reasonably practicable

(b) if it is not reasonably practicable, to eliminate risks to health and safety, to reduce the risk to the lowest risk reasonably practicable.

In determining what is reasonably practicable in relation to ensuring health and safety, the proposed legislation requires consideration of the following:

(a) what the person concerned knows, or ought reasonably to know, about the hazards giving rise to the risk concerned

(b) the likelihood of the risk eventuating

(c) the degree of harm that would result if the risk eventuated

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(d) *what the person concerned knows, or ought reasonably to know, about any ways of eliminating or reducing the risk*

(e) *the availability and suitability of ways to eliminate or reduce the risk, and the cost of eliminating or reducing the risk.*

We will report further in the new year on any developments with the proposed amendments to OH&S legislation.

CBP has an experienced expert team to deal with Occupational Health & Safety issues including advising on how to comply with Occupational Health & Safety obligations generally and to act and advise in the event of WorkCover investigation or prosecution. For further information contact Antony Riordan or Sophie Hedley in the Commercial Dispute Resolution Division.

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Dismissal arising from an employee filing a complaint to a union constitutes unlawful termination

Employers should be aware of a recent decision of the Federal Court of Australia (*Claveria v Pilkington Australia Limited* [2007] FCA 1692 7 November 2007). This unlawful termination decision deals with a breach of section 659(2)(e) of the *Workplace Relations Act 1996* (Cth) (**WRA**) which has received little initial consideration to date. In particular, section 659(2)(e) of the *WRA* prohibits employers from dismissing employees for "*filing a complaint … with a competent administrative authority*". It has generally been assumed that this provision deals with circumstances where an employee filed a complaint with an external agency; however, this decision suggests otherwise.

Facts

In this case, the employment of an employee, Mr Claveria, was terminated for performance reasons by Pilkington Australia Limited (**Pilkington**) after 13 years of service. Prior to the termination of his employment, Mr Claveria had contacted his union and alleged that he was being bullied and subjected to surveillance by his manager.

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Upon the termination of his employment, Mr Claveria filed a claim for unlawful termination under section 659(2)(e) of the WRA, asserting that his employment had been terminated as a result of his filing a complaint with his union.

At the hearing, although Pilkington asserted that Mr Claveria had been summarily dismissed for performance reasons, Pilkington admitted that Mr Claveria's filing a complaint with his union had been factored into its decision to summarily dismiss him. That said, Pilkington disputed the assertion that a union constitutes a "competent administrative authority" for the purposes of section 659(2)(e) of the WRA.

Findings

After conducting an exhaustive analysis of the legislative intent of section 659(2)(e) of the WRA, the Federal Court found that the union in this instance was a "competent administrative authority". The Federal Court arrived at that assessment given that the union was able to deal with complaints and given that it had standing under the relevant enterprise agreement with Pilkington with respect to rights of entry, suspected breaches and complaints under occupational health and safety laws. The Federal Court concluded that the union was more than a mere partisan player given its role in the investigation of workplace issues.

In addition, the Federal Court found that part of the reason for Mr Claveria's summary dismissal was the fact that he had brought a complaint to his union. As such, the Federal Court found that Pilkington had breached section 659(2)(e) of the WRA and held that Mr Claveria's termination was unlawful. The Federal Court reinstated Mr Claveria in November 2007 following his termination in January 2007. In addition, Pilkington was ordered to pay a fine of $10,000 for breaching the provisions of the WRA.

Consequences of findings

It will not be the case that every time an employee seeks assistance from a union that his/her subsequent termination would be unlawful under the WRA. An examination of the facts, the nature of the complaint, the role of the union and the nature of the relevant industrial instruments in each complaint will be required. However, employers need to be aware that a complaint to a union, which has investigative

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and administrative functions pursuant to an industrial instrument, may mean that an employee has protection from termination. In particular, employers who are involved in a deteriorating relationship with an employee who may be a member of a union should be mindful of this decision.

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Special care required in comparative advertising campaigns

Special care must be taken in a comparative advertising campaign as "half-truths" and unfair comparisons can quickly stray into misleading and deceptive territory. On a practical level, the owner of a product shown in an unfavourable light will be quick to defend their product from unfair comparison.

The provisions of the *Trade Practices Act* 1974 (the **Act**) relevant to comparative advertising disputes include those prohibiting "misleading or deceptive conduct" and "false or misleading representations". To avoid breaching these provisions, advertisers need to exercise caution, not only with respect to express statements, but also with respect to the "first impression" delivered by the advertisement and any "implied representation" contained within it.

Courts can remedy misleading comparative advertising by granting injunctions, ordering remedial action such as corrective advertising and the award of damages where the advertising causes identifiable loss. While court orders can include an order for corrective advertising; the purpose underlying such orders is protective, not punitive: see *TPC v Telstra Corporation Limited* (1993) ATPR 41-256 per Hill J.

The leading case of *Gillette Australia Pty Ltd v Energizer Australia Pty Ltd* [2002] FCAFC 223 concerned an advertisement which compared a Duracell battery (alkaline) to an Eveready Super Heavy Duty battery (carbon zinc). The advertisement included a statement that "with up to three times more power Duracell always wins".

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Energizer alleged that the advertisement breached the Act as it did not inform viewers that the Duracell battery was significantly more expensive than the Eveready battery, or that Eveready also had alkaline batteries in its range.

An interlocutory injunction was granted to Energizer. During the course of the proceedings, the television advertisement was significantly amended and, ultimately, the injunction was dismissed. During the appeal, Heerey J emphasised that while there is no special legal test applicable to comparative advertising, special care must be taken when using actual comparisons as there is more potential for "half truths", causing the advertisement to be misleading and fall foul of the Act.

On the other hand, where comparative advertising does not breach the Act, it fulfils the very purpose of competition legislation: promoting better informed consumer choices and competition. While the Court held in *Gillette* that the advertisement was not misleading or deceptive, whether the advertisement conveyed the impression that Eveready did not manufacture a comparable alkaline battery, was a difficult issue for at least two of the appeal judges to resolve.

In the recent case of *Telstra Corporation Limited v Sing Tel Optus Pty Ltd* [2007] FCA 824, Gray J considered an application for injunctive relief by Telstra who claimed that Optus had engaged in misleading and deceptive conduct by comparing the Optus "$49 CAP Plan" to the Telstra "$40 Phone Plan". In refusing an injunction, Gray J emphasised that an advertiser is entitled to choose with which product and features it makes a comparison "as long as it makes a truthful comparison".

This case should be approached with significant caution as it was dealt with on an interlocutory basis and the Court was not required to make a final decision on whether or not the advertisement breached the Act. The case should also be understood in the context of its facts. In the marketplace for mobile telephone plans, the principal point of comparison between products is price. The marketplace is populated by a large number of different plans that offer different pricing arrangements, which suit different circumstances. However, in other marketplaces there might be a large number of other comparators, for example quality, performance, technical specifications, prestige, place of manufacture and after sales service. Focusing on one point of comparison in

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a more diverse marketplace may create a greater risk of the advertisement creating a misleading or deceiving impression.

Sophie Hedley from our Commercial Dispute Resolution Division has over recent months represented King Furniture in proceedings against Dare Gallery. In August of this year Dare Gallery undertook an advertising campaign in which it made comparisons between King Furniture's Phoenix Modular sofa and Dare Gallery's Montreaux Modular Sofa.

On 5 December 2007, in *King Furniture Australia v Dare Gallery* [2007] FCA 1845, Buchanan J held that Dare Gallery's advertising contained representations as to the quality, warranty and place of manufacture of the sofas and that those representations amounted to misleading or deceptive conduct in breach of the *Trade Practices Act*. The Court ordered that Dare Gallery publish and pay for corrective advertising which is to be published in newspapers and broadcast on radio with "a similar prominence" and frequency as the offending advertisements.

Although an advertiser is not obliged to compare all relevant features of a competitor's products, there is a heavy responsibility to ensure that comparisons made and impressions given by the advertisement are accurate. While the law in this area is relatively settled, its application is not always clear - a reality that continues to be reflected in the "high stakes" litigation in this area. However, recent cases, such as the *King Furniture* case, indicate that the utmost care must be exercised when embarking upon a comparative advertising campaign.

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Kristen Lopes

Kristen Lopes is presently a senior associate in the Commercial Dispute Resolution Division with expertise in employment, industrial relations and human rights law.

Kristen regularly advises HR professionals, managers, executives and employers on legal issues arising in the workplace including employment contracts, the interpretation of awards and related instruments, privacy issues, termination and restructuring strategies, return to work and workplace policy matters. Kristen has a special interest in managing workplace discrimination and harassment issues. In 2004, Kristen was invited to present a paper at the Oxford University Round Table on discrimination in employment.

Kristen has represented clients in a large number of industries including the service, retail, financial, manufacturing, healthcare and electricity sectors. She also has extensive experience speaking at conferences and conducting seminars on workplace issues for employers and employer associations.

Kristen was previously a partner in a prestigious Canadian law firm where she helped build that firm's employment law practice to become one of the foremost employment law practices in Canada.

Kristen joined CBP in 2006 and from 1 January 2008 will become a partner of the firm.

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