



Anderson Rice News Autumn 2008 Edition

In this Edition:

Anderson Rice News: Recent Appointments

Article: *Do sports bodies owe a duty of care to participants?*

Michael Coldham - Partner, Insurance, Litigation & Workplace Relations

Case Note: *SMEC Holdings Ltd v Boniface* [2007] NSWSC 1402

Caitlin Tierney - Articled Clerk, Commercial Litigation, Insurance & Workplace Relations

Legislative Update: *Changes to Work Choices Under the New Federal Government*

Chris Pollard - Senior Associate, Workplace Relations & Commercial Law

[Top](#)



Anderson Rice News

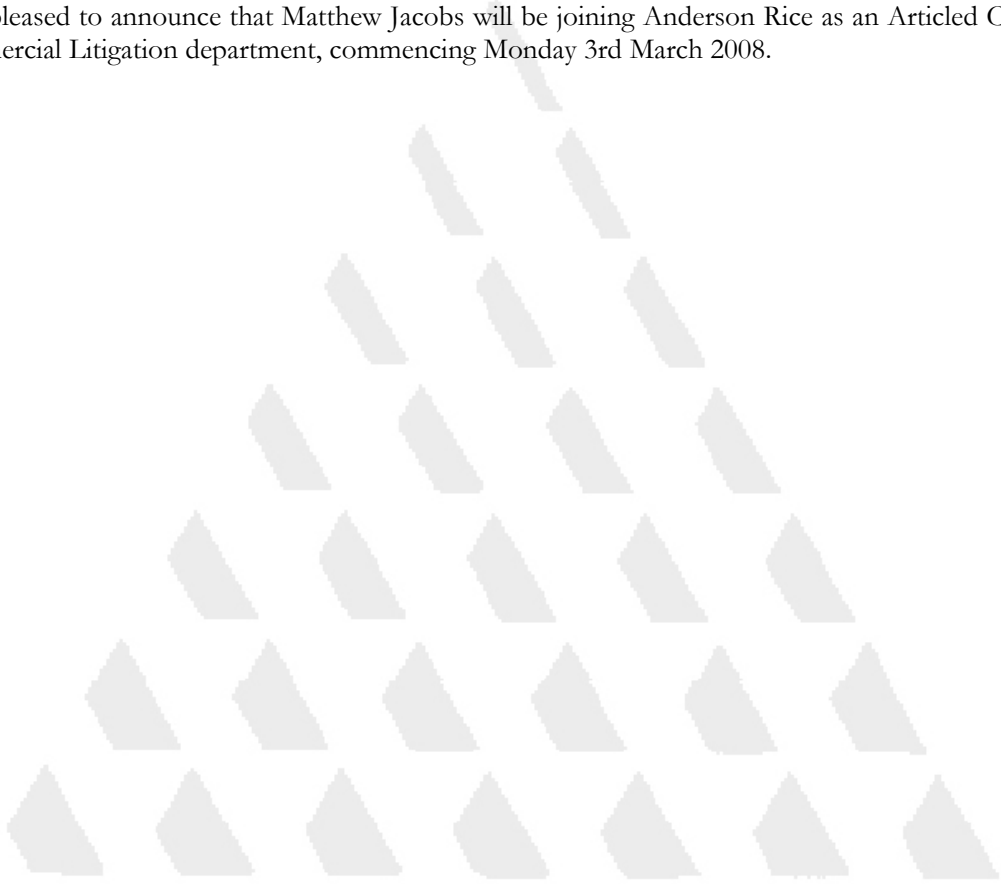
Recent Appointments

Edward Liu

The Commercial department at Anderson Rice welcomes the appointment of Edward Liu, a third year commercial lawyer. Edward commenced at the firm on Tuesday 26th February 2008.

Matthew Jacobs

The firm is pleased to announce that Matthew Jacobs will be joining Anderson Rice as an Articled Clerk in the Commercial Litigation department, commencing Monday 3rd March 2008.



[Top](#)



Green v Country Rugby Football League of NSW Inc [2008] NSWSC 26

Michael Coldham

Do Sports Bodies owe a Duty of Care to Participants?

In the recent NSW decision of *Green v Country Rugby Football League of NSW Inc* [2008] NSWSC 26, the role of the administrative body was discussed on the issue of a general duty of care towards all sportspeople participating in their sport.

One of the questions related to the constitution of the regulating body and what action it had taken to make rules and regulations with respect to the activity of that sport for the protection of its sports men and women against unreasonable or severe injury.

The case note reads:

"TORTS -- negligence -- Sport -- rugby league -- scrum collapse -- catastrophic injury -- where plaintiff sixteen years old -- where plaintiff playing hooker -- where plaintiff playing in unrestricted age competition -- where plaintiff younger, smaller and lighter than opposing front row players -- where plaintiff had long, thin neck -- where plaintiff's physical characteristics made him more susceptible to scrum injury -- where plaintiff suffered tetraplegia upon scrum collapse -- liability of Country Rugby League -- where Country Rugby League administered sport in relevant part of New South Wales -- whether Country Rugby League should have required medical examinations prior to registering players -- whether Country Rugby League failed adequately to warn players of risk of injury -- whether Country Rugby League failed adequately to disseminate information to participants about the risk of injury to players with certain characteristics who play in certain positions -- whether Country Rugby League liable for failure to disseminate information to

participants about neck-strengthening exercises -- whether Country Rugby League ought to have prevented players of certain physiques from playing in certain positions -- where evidence that de-powering scrums significantly reduces risk of scrum injury -- whether Country Rugby League liable for failure to de-power contested scrums earlier -- whether Country Rugby League ought to have instructed referees to de-power scrums -- whether Country Rugby League owed plaintiff a non-delegable duty of care -- whether Country Rugby League ought to have changed rules of rugby league -- where plaintiff's coach unaccredited -- whether Country Rugby League ought to have allowed team to participate only if coach accredited...

WARNINGS -- Whether Country Rugby League had a common law duty to warn player or his parents of risk of spinal injury in rugby league games."

The Constitution of the CRL stated that it would amongst other things:

- Encourage, foster and control the game of Rugby League football throughout the State of New South Wales ...
- Regulate and control the operation of all Constituent Bodies and affiliates.
- Determine the terms and conditions upon which persons may play for Constituent Bodies.
- Administer laws relating to rugby league football and to take such actions as may be necessary to achieve uniformity in such laws.



- Impose fines or penalties ... for any breach of the Constitution or the Rules and Regulations of the League or the laws relating to rugby league football
- Regulate and control the activities of players, coaches and referees of the League in any activity associated with rugby league football

On 7 May 1994 the plaintiff, then a 16-year-old school boy was playing in the position of hooker in a game of rugby league. In the course of a scrum he suffered a fracture of his cervical spine, resulting in tetraplegia. He claimed damages for negligence from the second defendant, Country Rugby Football League of NSW Inc ("CRL").

The claimant alleged that given his young age, slight build, low weight and his having a long thin neck, CRL should have ensured he was not selected to play in the position of hooker, especially given his team was playing against an open age team with front row players of much greater stature and weight, and that front row players, especially hookers, had previously, to its knowledge, suffered severe spinal injuries.

The issue to be determined in the case was whether CRL, as alleged, was liable in negligence. The parties agreed that if a finding was made in favour of the plaintiff, he should be awarded damages of \$6,500,000. The parties also agreed that the case is not affected or governed by the Civil Liability Act 2002.

The issue of long necked boys playing in scrums was well discussed in the case of Agar and the non delegable duty of the NSW education department. This case however highlights the issues that administrators need to consider in the management of sport generally.

Although Walmsley AJ found there was no negligence by the CRL the case examined all the issues involving administration and duty of care. Could have CRL provided a rule de-powering the scrum which could have prevented this tragic accident? Would have the clubs followed and

policed the rule to ensure the safety of their teams?

The Australian Netball Association faced the issue with Trudy Gardner. Gardner was the captain of a netball team the "Adelaide Ravens". The Ravens competed in the national netball league competition administered by the Association. She was under contract to the South Australian Netball Association, obliging her to participate in its training program and scheduled games.

On 8 May 2001 Gardner learned that she was pregnant. She advised her doctor of her wish to keep playing netball during the early stages of her pregnancy, and her obstetrician advised that there was no medical reason preventing her from continuing to play. She played a competitive match on 1 June 2001.

On 17 June 2001 the national association imposed an interim ban preventing pregnant women playing in the national league. Gardner was advised of the ban on 27 June 2001. She advised the team president that she was pregnant, and was told that the ban prevented her playing in the match that evening.

On 2 July 2001 Gardner filed a complaint with the Human Rights and Equal Opportunity Commission. On 17 July 2001 Gardner made application for an interim injunction in the Federal Magistrate's Court to maintain her right to play pending resolution of her complaint. Gardner alleged that she suffered distress as a result of the imposition of the ban, and that it had caused her loss of income and sponsorship moneys. The Association submitted that damages would be an adequate remedy if her complaint were upheld.

This case highlighted what we would regard as taking the right advice. The National Association received advice that it was dangerous for new mums with unborn children to play Netball and on receiving the advice made an Interim National Ban. The issue was taken to the Federal Court by Gardner who succeeded.



The National body by its action were in our view carrying out their duty of care to their sport. Had they not taken that action and an unborn child was injured or died, the consequences of the sporting activity under its control could have been quite severe not only to the mother and child but to the organisation.

All Sporting Bodies have a general duty of care

towards those that participate in their chosen activity. Although these cases have differing outcomes they highlight the need for administrators to be aware *and* to take positive action.

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[Top](#)



Circulating workplace emails: the risk of defamation and damages.

Caitlin Tierney

Is the distribution of your workplace publication likely to cause others harm?

In a recent decision of the New South Wales Supreme Court on 5 December 2007, Justice Carolyn Simpson made a \$1.6 million order in damages against an employee for having authored and distributed anonymous emails which were seen to disrepute his otherwise 'functioning, reputable and successful' employer company and its directors. This case highlights the need for employees to select their content carefully when creating any correspondence to be circulated in the workplace. Moreover, it emphasises the computer forensics available to employers so to trace and screen the origin and content of workplace emails.

Background

In a contested jury trial conducted in 2005, Mr Glen Boniface was found by way of jury, to have anonymously authored and internally circulated repeated emails defaming his former employer, private engineering company Snowy Mountains Engineering Corporation Holdings Ltd (SMEC). More specifically, this defamatory material was found to be directed towards three company directors and executives in particular.

Mr Boniface's employment with SMEC as Project Finances Manager, took place between 1995 and 17 January 2001, at which point it was eventually terminated. During this period, Mr Boniface had been found on two occasions to have held and internally circulated pornographic images from his office computer. Such discoveries that a breach of SMEC's Internet Policy had taken place on behalf of Mr Boniface, occurred in December 1997 at which point the issue seemingly subsided, and again in January 2001 as which point he was dismissed. It was in this period that unease first emerged towards Mr Boniface and his role as Chairman on the SMEC Board of Members. By the end of 2001 he was no longer Chairman, nor a director on the Board.

From November 2000 to January 2001, it was established that Mr Boniface defamed the company and directors in nine separate instances

ANDERSON RICE | Newsletter

by way of a series of anonymous email messages distributed internally within SMEC. These were found to assert links of corrupt activities, bribes and rorts with actions of SMEC.

The Appeal

Upon Mr Boniface's appeal to the New South Wales Court of Appeal in 2006, he denied that all but one email had been published by himself. Whilst the Court did set aside the judgment regarding the allegedly perverse ninth publication for lack of proof of publication, it did however reject all other defences, upholding the jury verdict regarding all other publications. Mr Boniface was therein ordered to pay 95 percent of the Plaintiff's costs of appeal.

SMEC Holdings Ltd v Boniface [2007] NSWSC 1402

The present case concerned the remaining eight publications in dispute, with Mr Boniface pleading the same defences to each- namely qualified privilege, comment, and likelihood of harm suffered. The Court found that Mr Boniface was not entitled to the benefit of the defence whereby each email imputation was published under qualified privilege. It was felt that Mr Boniface had not established that there had been a reciprocal duty to provide as maker, and interest to receive as recipient, communications which were of a matter of substance as opposed to mere gossip, curiosity or news. Moreover, it was felt that Mr Boniface had no regard for the bona fide nature of his serious allegations against SMEC and its employees, and was rather motivated by revenge against SMEC.

As regards Mr Boniface's second defence that each email imputation amounted to comment, the Court found that this defence failed at large for all publications in question. This is because Mr Boniface failed to prove that his opinions asserted in the emails were reasonably based on facts accurately stated. This distinguished his email publications as containing mere

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statements of fact as opposed to expressions of opinion or comment.

Finally, Mr Boniface's defence that the circumstances of his email publications were not likely to cause harm to the people defamed was also unsuccessful. It was considered rather that the recipients of such emails would not be unlikely to place any trust or weight in their content, and that given the repeated and very serious nature of accusations alleging illegal conduct within SMEC, it would be 'impossible to think that they did not have some impact upon some recipients'.

In establishing the quantum of damages to be awarded, Justice Simpson had regard to the relative reputation established by both SMEC and its individual Directors. Given the success and large-scale foreign business clients developed by SMEC, their distinguished expertise in the industry, and the fact that their ongoing relationship was jeopardised by such email content, such email publications were thought to be sufficiently defamatory to both the company's and individuals' reputations. This was supported by the likelihood that one of SMEC's largest global business clients, the World Bank, undertook investigations into SMEC as a corollary of an email circulated by Mr Boniface

in February 2001. It was held that it was this email which prompted the World Bank into commencing an investigation into SMEC, in a bid to determine the accuracy of the content and assertions therein. Further, the three individual directors whom also jointly sued Mr Boniface were each found to be recognised for their expertise and high regard within the Australian engineering profession.

Implications

This case serves to remind both employees and their employers of the importance that any communications content in the workplace should be of a professional, bona fide and substantiated manner. Moreover, that any such communications should not necessarily be assumed to be of a confidential nature, but rather open for receipt by the workplace at large.

Where an employee fails to heed to appropriate email policy or publishes fanciful and defamatory email content jeopardising the reputation of its co-workers and employer, an employer and any co-workers suffering harm may both dismiss the employee and seek damages against them.

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[Top](#)



CHANGES TO WORKCHOICES UNDER THE NEW FEDERAL GOVERNMENT

Chris Pollard

As a new Labor Government was elected on 24 November 2007 its policy before the election was to make changes to the current Work Choices legislation. (Workplace Relations Act, 1996)

The ALP policy is called "Forward with Fairness"; however, it complies with the basic Work Choices structure, while constructing "fairer" restraints to some of the more extreme aspects of Work Choices.

MAIN FEATURES

A. FAIR WORK AUSTRALIA ("FWA")

The FWA will be a new "one stop shop" for Workplace Relations. It will exercise all the current functions of the Federal Government's Workplace Relations Department including the Workplace Authority, the Office of Employment Advocate and Australian Building Construction Commissioner. It will also enforce awards and do investigations and prosecutions. In addition, it will probably incorporate most of the functions of the Australian Industrial Relations Commission, especially in relation to unfair dismissal. It will interpret awards and agreements and will be responsible for reviewing wage movements every 12 months.

B. AWARDS AND AGREEMENTS

The Labor Government will double the Australian Fair Pay Conditions and Standards which are now currently four to ten. The current ones are annual leave, carer's leave, maximum ordinary hours of work and the minimum wage set by the Australian Fair Pay Commission. The Standards will now include:

1. 38 hour week plus reasonable additional hours;
2. 12 months unpaid parental leave with the ability to request an additional 12 months;

3. The right to request flexible work for parents;
4. 4 weeks annual leave per annum;
5. Personal, Carers and Compassionate leave;
6. Community Service leave;
7. Guaranteed public holidays;
8. Information statement;
9. Notice and Redundancy Pay;
10. Long Service Leave.

The Labor Government policy retains the current simplified Award system. Awards will contain "flexibility provisions", allowing for individuals agreements to be made between employers and employees. Also, awards will not apply to employees earning more than \$100,000.000 per year.

C. AGREEMENTS

All agreements will be subject to a "no disadvantage test" against the relevant award conditions. Collective agreements will also contain flexibility arrangements, whereby employers and employees can reach separate agreements. However, employers may be compelled to negotiate with a Union if one or more of its employees request it.

AWAs will be abolished under the Labor Government. The basis of this is that it is believed that the "flexibility arrangement clause" is in agreements and awards and this will provide the necessary basis for individuals to negotiate their own agreements.

D. UNFAIR DISMISSAL

Labor's policy is to enable more employees to access this remedy. However, it does not mark a return to the pre Work Choices system. If employees have been dismissed they can apply to the FWA on the following basis:



1. They have to be employed for more than 6 months by an employer with more than 15 employees;
2. They have to work for more than 12 months for an employer with less than 15 employees.

A single conference will be held as soon as possible as the claim is lodged and these will be usually within 7 days. There will be no formal cross examination or formal submissions. The FWA will decide the decision on the spot, if it cannot settle the matter. The only available remedy will be reinstatement and it seems that it is intended that Lawyers will not be encouraged to act at these hearings. This may sound appealing, but the hearing will be high risk for employers as it will be the only opportunity for them to avoid a statement order.

E. WHERE TO NOW?

The New Government will introduce a transition bill in the Parliament early next year however, it will probably have to wait for the new Senate to form in 1 July 2008 to push the whole Legislation through the Parliament.

F. CONCLUSION

At the end of the day, the Labor Government will retain most of Work Choice System including to cover all workers, Industrial action restrictions, and simplified awards and guaranteed Minimum Standards. As opposed to overturning Work Choices, the Labor Government will look to build on its foundation and soften the more controversial aspects.

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[Top](#)