



**ANDERSON RICE** *Lawyer*



---

## Anderson Rice News Winter 2008 Edition

---

### *In this Edition:*

**Article:** *Litigation Law Alert*

Michael Coldham - Partner, Litigation, Insurance & Workplace Relations

**Case Note:** *Commissioner of Taxation v Reliance Carpet Co Pty Ltd [2008] HCA 22*

Caitlin Tierney - Lawyer, Litigation, Insurance & Workplace Relations

**Legislative Update:** *National Employment Standards: In Action Since 16 June 2008.*

Edward Liu - Lawyer, Workplace Relations & Commercial Law

**Case Alert:** *Bayswater Car Rental Pty Ltd v Department of Employment and Consumer Protection [2008] WASCA 43*

Matthew Jacobs - Articled Clerk, Litigation, Insurance & Workplace Relations

*\*This bulletin is for general information purposes only and should not be used or relied upon as an alternative to obtaining detailed legal advice. Anderson Rice disclaims liability of any kind whatsoever to any reader of this bulletin who acts in reliance wholly or partly upon its contents.*

**Editor**

Caitlin Tierney

Lawyer, Litigation, Insurance & Workplace Relations

ANDERSON RICE | Newsletter

---

Level 10, 555 Lonsdale Street  
Melbourne Vic 3000 Australia  
PO Box 14099  
Melbourne  
AUSDOC DX 177  
Melbourne Mail Centre 8001  
Tel (03) 9672 2666  
Fax (03) 9642 0271  
Email [lawyers@andrice.com.au](mailto:lawyers@andrice.com.au)  
[www.andrice.com.au](http://www.andrice.com.au)



---

## Litigation Law Case Alert

Michael Coldham

### *Jaber v Rockdale City Council* [2008] NSWCA 98

---

Civil Liability for councils, sports administrators, outdoor recreation managers and land managers is a difficult and time consuming issue. Land Managers around the country have to manage their assets in such a way to deal with civil liability issues. The recent New South Wales Supreme Court of Appeal decision of *Jaber v Rockdale City Council*, 28 May 2008, provides an excellent summary of obvious risk and dangerous recreational activity. For the outdoor, sports, insurance industry and underwriters this decision provides information that is useful in setting rules, rates and determining what action should be taken in relation to a claim.

#### **Background**

On 5 October 2003 Bilal Jaber, then 19 years old, dived headfirst from a pylon or bollard located on a wharf at Dolls Point under the care, control and management of the Rockdale City Council. Jaber struck his head on the seabed, sustaining significant injuries to his cervical spine. Jaber proceeded to sue the Council for negligence, alleging that it was in breach of its duty of care, in failing to adequately warn persons that it was dangerous to dive from the wharf.

The proceedings were heard on 18 June 2007 by his Honour Judge Robison who rejected Jaber's claim and entered a verdict and judgment for the Council. It is from that decision that Jaber appealed.

Between the ages of 15 and 19 years Jaber had attended the area where the accident occurred on approximately six occasions for family picnics. On each occasion he had observed people diving from the wharf. However the day of the accident was the first occasion that he actually ventured onto the wharf and dived from it.

It was not contested that the wharf was under the care, control and management of the Council. At the entrance to the wharf, being the point where the wharf and pier meet, and facing the shore was a single pictorial sign indicating that diving from the wharf was prohibited. However, that sign was not visible to people approaching the wharf by swimming from the beach (as did Jaber) and gaining access to the wharf deck via the steps.

On the day of the accident, and after playing soccer for a time, Jaber decided to go for a swim. He entered the water from the beach with the pier approximately six metres to his right. He swam out towards the end of the pier and observed people diving from the wharf. Having decided to dive from the wharf himself, he swam around the end beyond the extremity of the wharf and approached the steps. After gaining access to the lower steps, he ascended the steps, climbed onto the bollard at the top of the steps and dived head first into the water, striking his head on the seabed. He sustained a three-column fracture through the C5 vertebrae with minimal displacement and a burst fracture of C7 with posterior displacement of the bony fragment into the vertebrae foramen.

The primary judge found that Jaber dived into the water from a height of two to three metres above its surface and that the depth of the water into which he dived was such that when he stood up after striking the bottom, his head and shoulders were above the surface of the water. His Honour also found that at the time the accident occurred (sometime before 1.30 pm) the tide was neither at its highest nor lowest point.

The primary judge also found that Jaber:



- (a) trod water from time to time as he swam towards the steps for the purpose of ascertaining the depth of the water and that he did so before he climbed on to the steps;
- (b) was mindful that a sufficient depth of water was needed before he could commence diving;
- (c) was aware of the potential danger of not being certain that the depth of water was sufficient to enable him to dive safely;
- (d) did not know the exact depth of water into which he was diving;
- (e) knew that if he hit his head on the bottom, he could be very badly injured, killed or confined to a wheelchair; and
- (f) had turned his mind to those dangers at the time.

Tobias reviewed much of the existing law and noted that in *Falvo v Fallas Basten JA* observed that there were three ways of considering whether the risk of harm was significant of which the first and third are presently relevant. The first was to assume that any risk would be significant because the results of it eventuating were likely to be catastrophic. The third was to look at the particular circumstances of the case. His Honour rejected the first approach as it could result in the phrase “significant risk of physical harm” not being satisfied where the risk was miniscule albeit the harm very serious.

His Honour preferred the third approach, stating,

*If, as I believe to be the case, the word “significant” in the context of the subject definition means a risk which is not merely trivial but, generally speaking, one which has a real chance of materialising, then the subject activity was clearly capable of involving a significant risk of physical harm. This is consistent with the third approach referred to by Basten JA in [144] of his judgment and which I would respectfully adopt as the correct approach to a case of the present kind ... I am conscious of the observations of Ipp JA that “significant” means a standard somewhere between a trivial risk and a risk likely to materialise. A real chance of the risk materialising lies somewhere between these two standards although*

*probably closer to the second than the first. I accept that there is merit in not seeking to define the term with precision, as its application requires a normative judgment in light of the particular facts and circumstances of each case. However, I see no danger in adopting as no more than a general guide that the risk should have a real chance of materialising for it to qualify as significant. But I emphasise that such a standard, which as I have said lies between the extremes articulated by Ipp JA, is to be regarded as what it is — no more than a general guide.*

*It will thus be appreciated that I prefer the approach of Ipp JA that, in determining whether the relevant recreational activity involves a significant risk of physical harm, one must identify that activity at a relatively detailed level of abstraction by including not only the particular conduct actually engaged in by the respondent but also the circumstances which provide the context in which that conduct occurs.”*

The relevant standard lies somewhere between a trivial risk and one that is likely to occur. Importantly, ‘significance’ is to be informed by the elements of both risk and physical harm. The context in which the appellant found himself was that he had observed other persons diving from the wharf but there was no evidence that he had observed them diving from the particular bollard from which he himself dived or in the direction that he dived.

In the present case, it could not be said that the risk of physical harm was in the circumstances trivial; nor was it one which would inevitably eventuate. Although, it would seem that there was a real chance of the risk materialising if, persons were to misjudge the depth of the water. Furthermore, the nature of the physical harm that could be sustained if the risk materialised was acknowledged by the appellant to be extremely serious: in fact, catastrophic.

These factors discussed and relied on by the appellant do not lead to any different conclusion. All of them point to the risk of the appellant sustaining physical harm, by diving from an enhanced height into water of



unknown depth, as being significant. The chance of the risk of physical harm materialising was real.

The primary judge was correct to characterise the appellant's activity as a "dangerous recreational activity" within the meaning of s 5K of the CL Act. As his injuries were a result of the materialisation of what was an obvious risk of a dangerous recreational activity engaged in by him, it follows that by virtue of the provisions of s 5L(1) of the CL Act, the Council is not liable in negligence for the appellant's injuries. On this

further ground, the appeal fails.

The discussion of the materialisation of an obvious risk is important for sports administrators, outdoor recreation business and land management agencies. My lecturing on this subject at Deakin and La Trobe Universities has attempted to highlight that the legal system in Australia has gone to great lengths to protect such freedoms and preserve participation levels, despite potential risks and costs involved.

**For further information contact:**



**Michael Coldham**  
Partner  
[mrc@andrice.com.au](mailto:mrc@andrice.com.au)

**[Top](#)**



## The treatment of GST on forfeited deposits paid under land sale contracts.

Caitlin Tierney

*The High Court remains to provide further interpretation of substantive Goods and Services Tax issues.*

In a recent decision in the High Court of Australia on 22 May 2008, a unanimous judgment found that GST will be payable where a deposit held by a vendor for the sale of commercial property is forfeited, when the contract has been terminated owing to default by the purchaser. Whilst it is now clear that there will be no refunds for GST which has been paid on forfeited deposits under standard land contracts, this case has nonetheless revealed the inherent uncertainty remaining in this field, and the need for greater judicial clarity in the future.

### **Background**

In December 2001, the Vendor Company named Reliance Carpet Co Pty Ltd granted the purchaser named 699 Burke Road Pty Ltd an option to purchase commercial property in Camberwell, Melbourne, for the price of \$2,975,000. An option fee of \$25,000 was paid, and subsequently on 10 January 2002, the parties entered into a contract of sale, with an upfront deposit of \$297,500 being paid. Both the Vendor and Purchaser were registered for GST.

The balance of this purchase price was due and payable by the settlement date of 10 July 2003, however the Purchaser failed to complete settlement by this date. On 11 July 2003, the Purchaser was issued 14 days notice to complete the transaction, after which Reliance proceeded to rescind the contract and forfeit the 10% deposit to Reliance. Subsequently in 2004, Reliance was then assessed as liable to pay GST on this forfeited 10% deposit.

Reliance proceeded to lodge an objection with the Commissioner of Taxation, which was disallowed. However the Commission then went on to fund the matter as a test case in the Administrative Appeals Tribunal (AAT), for a review of this objection. The disallowance of the objection was affirmed by the AAT, namely because it was seen that an execution of the

contract and payment of the deposit by the Purchaser amounted to a taxable supply, with GST therefore being payable on the forfeited deposit.

Reliance thereafter successfully appealed this decision to the Full Federal Court, where it was determined:

- There was no taxable supply upon forfeiture of the deposit, because the contract was rescinded.
- The deposit was not consideration for a taxable supply.
- The Commissioner's argument that Division 99 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) provides that there was a supply per the language in section 99-5, was not affirmed.

Concerned about the broader ramifications of such a decision, the Commissioner resultantly agreed to treat the appeal to the High Court as a test case, paying Reliance's legal costs of the appeal.

### **The Decision**

The appeal was unanimously allowed, with the High Court affirming the Commissioner's contention. The forfeited deposit, upon failure by the Purchaser to perform its obligation under the contract, and thus leading to rescission for breach of contract, was deemed to be treated by the Act as consideration for a taxable supply subject to GST. This was in line with the GST Act's extended definition of supply, and hence the Court affirmed that Reliance's execution of the contract constituted supply, in that it entered into an obligation to do certain things under the contract such as pay rates, taxes and insurance premiums. Further the deposit in itself granted the Purchaser rights over the said Property, such as requiring the Vendor to



transfer the Property upon settlement, had it taken place. Further, it was held that a vendor of land makes a supply to a purchaser when a contract for sale is entered into. It was accepted that a deposit serves many functions, one of which is that it is a part of the purchase price and taken as security for performance of the contract by the purchaser. Thus consideration was met, as the deposit sufficed as security for contractual performance.

### ***Guidance & Future Implications***

This decision has made clear that a number of issues remain grey in this area surrounding GST and forfeited deposits. For instance, the High Court in its findings, did not make any broader observations as to the nature of GST, other than commenting that it is a tax on supplies as opposed to a tax on consumption. It also failed to offer any direction as to the interpretation of GST, and rather its mere analysis of a sale contract may read as a tacit refusal to take a commercial or substance approach to its interpretation.

Implications which may be drawn from this decision include that prudent vendors may request of purchasers in the future, that a deposit is calculated on a GST inclusive basis, so to cover the potential liability that could arise if and when their purchasers do not complete but rather breach the contract, resulting in a forfeited deposit. Moreover, the decision may extend to commercial arrangements above and beyond mere land contracts, such as sale of business agreements and possibly even menial hotel bookings and airline tickets.

Having rejected Reliance's argument that a sufficient nexus between the forfeited deposit and supply was lacking, it seems clear that the High Court has taken a more lax approach, finding that consideration is satisfied merely when 'in connection with' supply, as opposed to the GST Act's more burdensome test that supply be made 'for' consideration. It remains to be seen whether the Federal Court will heed this decision in future decisions concerning such underpinning GST issues.

**For further information contact:**



**Caitlin Tierney**  
Lawyer  
[cat@andrice.com.au](mailto:cat@andrice.com.au)

[Top](#)



## National Employment Standards

Edward Liu

On 16 June 2008 and after some 129 submissions by industry groups and from the general public since 14 February 2008,<sup>1</sup> the final version of the NES was released by the Federal Government.<sup>2</sup> These 10 Standards prescribe the absolute minimum entitlements of all Australian employees and they cannot be excluded by a modernised award.<sup>3</sup>

In summary, the 10 NES are:

1. Maximum 38-hour hours of work per week but employers may require employees to work reasonable additional hours;<sup>4</sup>
2. Parent or Carer of a child may request for flexible working arrangements. To be eligible for making such a request, employees must have at least 12 months of continuous service; the same qualifying period applies to “regular” casual employees.<sup>5</sup>
3. The employee must have at least 12 months of continuous service to qualify for 12 months of Unpaid Parental Leave; which

can be extended by another 12 month if the employer agrees.<sup>6</sup>

4. Four weeks of Annual Leave for full-time employees and five weeks to award-defined shift workers. Employees may cash out annual leave depending on the terms of an award.<sup>7</sup>
5. 10 days of paid Personal / Carer’s Leave. Two days of unpaid Carer’s Leave per occasion thereafter, and two days of Compassionate Leave per occasion needed.<sup>8</sup>
6. Community Service Leave accounts for jury service or voluntary emergency management. Employers are required to pay an employee for the first 10 days of jury service only.<sup>9</sup>
7. Nationalising the Long Service Leave schemes has proved to be difficult. Entitlements are envisaged to change in the future when a consistent national standard is agreed between the States and the Federal government.<sup>10</sup>
8. Eight national Public Holidays exist (New Year’s Day, Australia Day, Good Friday; Easter Monday; Anzac Day; Christmas Day; Boxing Day, the Queen’s birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory); together with days designated in States and Territories. An employer may make a reasonable request for an employee to work on a public holiday.<sup>11</sup>

<sup>1</sup> New National Employment Standards Released, 16 June 2008, Media Release by the Hon Julia Gillard MP, Minister for Education, Minister for Employment and Workplace Relations, Minister for Social Inclusion and Deputy Prime Minister: <http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/NewNationalEmploymentStandardsReleased.htm>

<sup>2</sup> A full copy of the NES can be downloaded from: [http://www.workplace.gov.au/NR/rdonlyres/1955FD28-3178-44CD-9654-56A3D5391989/0/NationalDiscussionPaper\\_web.pdf](http://www.workplace.gov.au/NR/rdonlyres/1955FD28-3178-44CD-9654-56A3D5391989/0/NationalDiscussionPaper_web.pdf)

<sup>3</sup> Section 3 Relationship between National Employment Standards and modern awards, NES.

<sup>4</sup> Division 2 maximum Weekly Hours, NES.

<sup>5</sup> Division 3 Requests for Flexible Working Arrangements, NES.

ANDERSON RICE | Newsletter

<sup>6</sup> Division 4 Parental leave and related entitlements, NES.

<sup>7</sup> Division 5 Annual Leave, NES.

<sup>8</sup> Division 6 Personal / Carer’s Leave and Compassionate Leave, NES.

<sup>9</sup> Division 7 Community Service Leave, NES.

<sup>10</sup> Division 8 Long Service Leave, NES.

<sup>11</sup> Division 9 Public Holidays, NES.



9. Termination of employment with notice and Redundancy Pay must be calculated in accordance with the length of employment.<sup>12</sup> Similar to the current regime, notice can be waived in prescribed circumstances such as summary dismissal, termination during probation or qualifying period, casual or seasonal employee.<sup>13</sup> For redundancy pay, employers with less than 15 employees at the time of termination are exempted.<sup>14</sup>
10. The Fair Work Information Statement must be given to every employee so to inform them of the above Standards, modern Awards, agreement-making, freedom of association and role of Fair Work Australia.<sup>15</sup>

The proposed effective date for the NES is 1 January 2010, however they have been in action since 16 June 2008 when Ms Gillard, Minister for Employment and Workplace Relations wrote to the Australian Industrial Relations Commission (AIRC) and enclosed the NES for the AIRC's use in the award modernisation process.

In response to the Minister's requests, on 20 June 2008, the AIRC released its decision on the award modernisation process. The decision identified priority industries and occupations, provided a model award flexibility clause and a timetable for the completion of award modernisation.<sup>16</sup> The priority industries include: coal mining industry, glue and gelatine industry, higher education industry, hospitality industry, metal and associated industries, mining industry, private sector clerical occupation, racing industry, rail industry, retail industry, rubber, plastic and cabling industry, security

industry, textile, clothing and footwear industry and vehicle manufacturing industry.

In summary, more industrial relations changes are underway and, until 1 January 2010, the AFPCS is still good law.

**For further information contact:**



**Edward Liu**  
Lawyer  
[ecl@andrice.com.au](mailto:ecl@andrice.com.au)

[Top](#)

<sup>12</sup> Division 10 Notice of Termination and Redundancy Pay, NES.

<sup>13</sup> Section 64, NES.

<sup>14</sup> Section 62, NES.

<sup>15</sup> Division 11—Fair Work Information Statement, NES.

<sup>16</sup> A copy of this Decision can be found at: <http://www.airc.gov.au/awardmod/databases/general/decisions/2008aircfb550.htm>.



## Does the expression 'Conditions Apply' suffice to avoid liability for misrepresentations in advertising?

Matthew Jacobs

*Bayswater Car Rental Pty Ltd v Department of Employment and Consumer Protection [2008] WASCA 43*

Amongst the many ways vendors have sought to limit their potential liability under Australia's consumer protection legislation, use of the phrase "conditions apply" in their advertising - to warn the viewer/reader that the offer being made is subject to specified conditions - is probably the most common.

It is therefore important for vendors to have a proper understanding of the precise legal effect of this expression (and others like it). In particular, it is important that they understand the extent to which such statements will be effective in protecting them against liability for misrepresentations that might arise through the promotion and/or advertising of their products.

A recent Western Australian Court of Appeal decision reinforces the traditional judicial approach - to interpret such clauses narrowly and place the onus of ensuring that a purchaser knows *and understands* all relevant terms and conditions squarely on the shoulders of the representer (i.e. the vendor-company, service-provider or advertiser).

### ***Bayswater Car Rental Pty Ltd v Department of Employment and Consumer Protection***<sup>17</sup>

In this decision, the Western Australian Full Court of Appeal held that the words 'conditions apply', used in conjunction with representations about good(s) or service(s) will not put the consumer on notice to make inquiries as to what conditions might apply to the offer being made. Section 12(g) of the Western Australian *Fair Trading Act* operates (as it does under the Victorian Act) to prohibit a person, "in trade or commerce, in connection with the supply or possible supply of goods or services, from

making a false representation concerning the price of those goods or services."

In this case the infringing misrepresentations related to the advertised price of a seven day car rental package during a particular period. The Department alleged that the rental company's newspaper advertisements had misled consumers into believing that the discounted rates would apply during the Easter holiday period, when in actuality they were excluded from applying during this period under the contract of sale.

The rental company's contention was that the advertisement was incapable of being misleading because the ordinary reader would infer from the phrase 'conditions apply' - clearly displayed in legible font at the bottom each of the four ads in question - that one of the conditions would or may be that the rates did not apply. In other words, that the 'ordinary and reasonable consumer', upon reading the phrase, would seek to ascertain what the conditions were prior to purchase. This, so the argument went, put the consumer on notice of the possibility that the rates might not be available, rendering the representation conveyed by the ads that the rates *were* available incapable of being misleading.

It was held that in order to affect valid notice of the non-applicability of the advertised price to the relevant period "...it was necessary to do more than state 'conditions apply'.

"A consumer is not obliged or expected to make inquiries to ascertain whether a representation is correct."

The Court drew on the Federal Court's decision in *TPC v Optus*, which made it clear that it is not

<sup>17</sup> [2008] WASCA 43.



simply a matter of font size, location within the advertisement or the length of time for which the phrase is displayed. Merely coupling the words “conditions apply” to a misrepresentation is insufficient, without further explanation as to what the conditions are and how they operate, to correct the defect in the representation being made. As Justice Tamberlin put it in *Optus*, the use of the phrase was inadequate because “the reasonable viewer would not have appreciated that there was an exclusion which flew in the face of the dominant representation.”

In the view of the Full Court of Appeal, Johnson J was correct in overturning the Magistrate’s decision and upholding the Commission’s appeal. It endorsed her view that the Magistrate had misapplied *TPC v Optus* by failing to appreciate that:

“...irrespective of the size of the print, a disclaimer [‘some exclusions apply’] was still found to be inadequate for the purposes of alerting the target audience to a significant factor affective the advertised product (ie, that mobile to mobile calls were not excluded under a particular mobile phone plan).”

The Court also held that latter advice to those who make inquiry does not alter the misleading nature of an otherwise misleading representation.

### **Consequences for Vendors – If ‘conditions apply’, be clear, and above all, be specific**

This decision leaves vendors of goods and services with an obvious question in relation to representations they might wish to make about their products in advertisements – How can I guard against contravention of consumer protection legislation?

The starting point is to ensure that your advertising complies with the basic test outlined in *Oceanic Sun Line Special Shipping Co Inc v Fay*: It found that you must give clear and reasonable notice of the nature and effect of the limiting term limiting *itself*, as opposed to mere notice that a term or terms of the offer are limited in some unspecified respect. The recent High Court majority in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) argued that “to correct a [misleading] impression gleaned from the advertisement, it would be necessary for it to at least make an express clear statement, over a sufficient time span, in a reasonably sized print.”

So what should the rental company have done? The Court in *Bayswarter* does refer, by way of contrast, to previous advertisements which had been placed by the company in similar form, but which contained alongside the phrase ‘conditions apply’ the words ‘special N/A Dec Jan and Easter’. Whilst not expressly stated, it is possible to infer from this juxtaposition that the result may have been different had the company retained this extra information in its advertisements.

In light of the reasoning in this case and the authorities referred to therein, vendors must go beyond merely stating that conditions or exemptions apply and ensure that the phrase used is of sufficient specificity. A statement that unambiguously conveys to the ‘ordinary and reasonable consumer’ not just that an offer may be limited, but *how* it is limited, will help to preclude the possibility of a finding that the impugned representation is capable of amounting to an actionable misrepresentation.

### **For further information contact:**



**Matthew Jacobs**  
Articled Clerk  
[mzi@andrice.com.au](mailto:mzi@andrice.com.au)

[Top](#)

ANDERSON RICE | Newsletter

Level 10, 555 Lonsdale Street  
Melbourne Vic 3000 Australia  
PO Box 14099  
Melbourne  
AUSDOC DX 177  
Melbourne Mail Centre 8001  
Tel (03) 9672 2666  
Fax (03) 9642 0271  
Email [lawyers@andrice.com.au](mailto:lawyers@andrice.com.au)  
[www.andrice.com.au](http://www.andrice.com.au)