

Update

Issue #1

Utilities



Utility Providers and the Duty of Care

Nationwide News claimed that the Northern Territory's Power and Water Authority (**PWA**) were negligent and in breach of a statutory duty of care for failing to take various measures to prevent a power surge which ultimately damaged electrical and telephonic plant equipment located at its business premises in Darwin. The case was recently decided by the Northern Territory Supreme Court.

The concepts that were debated in this case are relevant to entities operating in the electricity, gas and water industries.

Summary

Although the Court found that the PWA had not been negligent, because it had taken all reasonable measures, it found that the PWA was under a duty of care to avoid foreseeable damage being caused to those who are connected to its system.

The allegation that the PWA owed Nationwide News a statutory duty of care was rejected by the Court on the basis that the particular legislative provisions created no private rights.

Broader Application

The PWA was sued as the entity that was in control of the grid that supplied power to Nationwide News and in that sense the nature of the duty that was imposed upon it was similar to the duty that has long been recognised as being imposed upon road authorities: *Brodie v Singleton Shire Council* (2001) 206 CLR 512, *Thompson v Bankstown Corporation* (1953) 87 CLR. It is likely that the nature of any duty of care owed by a utility provider will bear a close relationship to the degree of control which that utility provider is able to exercise over the provision of the service.

The judgement does not provide any answers to the question of what it is necessary for a utility provider to do to satisfy any duty of care that it might owe.

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Disclaimer

The information contained in this newsletter is for general information only and should not be construed as legal advice. Formal legal advice relating to the particular circumstances should be sought in all situations.

For further information



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That question is highly contextual and will depend upon the position and responsibilities of the particular utility provider.

It seems likely that the finding that the PWA owed no statutory duty of care would be adopted in other statutory contexts. The basis of the decision was that the powers and functions that were conferred upon the PWA were granted for the benefit of the public generally and were therefore not actionable as private rights.

When considering this case it is important to bear in mind that the PWA operates as a vertically integrated entity, providing both transmission and distribution services in the Territory. Moreover, at the time, it was also the sole retailer.

You Pay If Its Misleading

In the latter part of 2005 Holden commenced a national campaign through television press and online advertisements which became known as the Holden Employee Pricing campaign. The banner was "You Pay What We Pay".

In general terms this offered customers Holden employee pricing for selected Holden vehicles. There was however a disclaimer to the ads excluding options and accessories notifying that standard dealer delivery and government charges would apply and that the deal was not available with other pricing or special allowances.

In fact Holden employees received discounts that were not available to the general public including on factory fitted options and accessories and on the dealer delivery fee. As well as this a special discount of between 25% and 29% on certain models was also available.

The Australian Competition and Consumer Commission expressed concerns that the ads were misleading because customers were not offered the same deals and in fact would pay roughly \$5,000.00 more for the same car that a Holden employee would buy during the same period.

The Commission felt that the misleading impression given by the ads was not cured by the disclaimers and other information in the ad. As a result Holden agreed to provide undertakings to the Commission that it would use its best endeavours to provide written notice to those who had purchased under the campaign and provide an opportunity to return their vehicles for a full refund inclusive of optional accessories, dealer delivery and government charges. As well, Holden undertook to improve its trade practices compliance program and to engage a third party with experience in trade practices to review compliance programs and report to the Holden board.

A clear message is that advertising should always tell the whole truth and nothing but the truth and that any disclaimers or fine print included in the ads will not necessarily overcome the impression created by the claims made in the ads.

The refunds apply up to 300 customers and will remain in force till 31 January 2009.