

## EMPLOYEE'S PERSONAL LIABILITY FOR MISLEADING & DECEPTIVE CONDUCT – IT IS POSSIBLE

### Background

On 13 December 2006, the High Court handed down its decision in *Houghton & Anor v Arms* which confirmed that an employee can be held personally liable for misleading and deceptive conduct under the provisions of state Fair Trading legislation.

In that matter, Arms commenced a business under the name "Australian Cellar Door" and sought advice from WSA Online Limited (**WSA**) with respect to the website for Australian Cellar Door. Houghton and Student, the defendants in the matter, were employees of WSA and advised Arms that in order for wineries to be able to use Arms' website, they would be required to complete a form for ANZ bank.

This required a lot more work and Arms lost thousands of dollars as a result of a seven month set-back.

Arms initiated proceedings against WSA, claiming contravention of s.52 of the *Trade Practices Act 1974* and against Houghton and Student, claiming contraventions of s.9 of the *Fair Trading Act 1999 (Vic)*.

Initially, Arms failed against Houghton and Student, however that decision was overturned by the Full Federal Court. Houghton and Student appealed to the High Court.

### High Court decision

The High Court was required to determine whether or not employees could be liable for misleading and deceptive conduct during the course of their employment.

The High Court found that employees could be personally liable even if they were acting as an employee of a company.

The High Court stated that Houghton and Student engaged 'in conduct in the course of trade or commerce and were thus within the ambit of the Act.'

### Implications

As a result of this Court decision, employees are now faced with the possibility of claims against them personally for conduct that is misleading and deceptive in the course of trade or commerce. This means that an employee's individual and personal assets may also be at risk, particularly where their employer has gone into liquidation or is bankrupt and the potential plaintiff needs someone to recover against.

In some circumstances, employers may choose to take action against their employee for independent misleading and deceptive conduct.

For employers, there is still the legal notion of vicarious liability, meaning that if a claim is brought against an individual employee for misleading and deceptive conduct, then the employee can take action against its employer, subject to vicarious liability principles and employee indemnity legislation.

### Summary

Employers should review and consider their current and future employment contracts to ensure that there is an indemnity in place for misleading and deceptive conduct.

Employees need to exercise caution in the representations they make in the course of a business activity so that neither they, nor their employer, are exposed.

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