

HIGH COURT CONFIRMS EMPLOYEE LIABILITY

A landmark High Court decision, handed down last December, confirms that employees can be held personally liable for misleading advice given in the course of their employment.

Facts of the case

The case – *Houghton v Arms* [2006] HCA 59 – involved two employees of a website consultant, WSA Online Limited (“WSA”), and their advice to a wine entrepreneur, Mr Arms. Arms wished to create a web-based service for the direct marketing of products of independent wineries.

Arms believed that direct “cellar door” sales would attract sales tax at a much lower rate and would avoid the need for the payment by the wineries of the margin, usually in the order of 30 per cent, required by agents or distributors when sales were effected by retail outlets. WSA was engaged to provide advice and services on web site design, construction and administration. A WSA employee (“Student”) was described in the dealings with Mr Arms as “WSA Online project manager” and he introduced his fellow employee, Mr Houghton, to Mr Arms as the “guru of interactive website design and development”.

Mr Houghton told Mr Arms that he was aware of a financial

transactions product called “ANZ e-Gate” which would be “perfect” for the requirements of Mr Arms’ business. This facility would enable customers to pay by means of all major credit cards with funds clearing directly into the account of the relevant winery, in return for the payment by the winery of a small transaction fee.

But Mr Houghton had made a mistake in describing the operation of the facility, and in fact the company would have to arrange for each participating winery to become a “merchant” accredited by the ANZ Bank, and for separate merchant accreditation to be obtained of credit card providers.

When Arms learned this his company had already enrolled about 30 wineries and its web site was to be launched within five days. In that time it was impossible for him to arrange for compliance with the conditions necessary for wineries to become individual merchants.

To preserve the credibility and goodwill of his business, Arms converted his business into a retailer with a mark-up or commission limited to the 5 per cent which he had told the wineries they would be charged. Sales tax was now payable at a higher rate on the transactions because the retailer was Arms’ company, not the wineries.

Arms operated his business in this fashion at a loss for 12 months before adopting a new business structure. He claimed to have lost the sum of \$58,331 from the seven month “set back” – and the Court agreed. But since WSA had by this time gone into liquidation, Arms sought damages from the employees.

Issues

The appellants argued, among other things, that they as individuals were not “for themselves” acting “in” trade or commerce, as distinct from acting in the trade or commerce of the company. If successful, this argument would have cleared them of any obligation under section 9 of the Victorian *Fair Trading Act* (the equivalent of section 52 TPA).

The Court held that “It is not to the point that Mr Houghton and Mr Student themselves were not business proprietors or that their activities were an aspect or element of the trade or commerce of WSA (and of Australian Cellar Door) ... [they] nevertheless engaged in conduct in the course of trade or commerce and were thus within the ambit of the FT Act.”

The Court also noted that “the status of an individual as an employee does not divest that person of personal liability for wrongful acts committed while an employee.”

HIGH COURT CONFIRMS EMPLOYEE LIABILITY (continued)

Implications

The exposure of employees to the risk of personal penalties under the TPA and equivalent State Acts is well established. This case confirms, if there was ever any doubt, that an employee may also face the prospect of an award of damages for misleading or deceptive conduct that he or she undertakes in the course of employment.

Several commentators have pointed out that while this may always have been the position, liability has generally been placed on the employer. Industrial lawyer Brian Belling said on ABC Radio (AM Program, 16/12/06) that “typically and historically, liability would sit with the employer who would be vicariously liable for their actions and typically employees would get off the hook.”

Obviously the fact that the employer in this case was in liquidation had a bearing on the plaintiff’s decision to pursue the employees. But there does not appear to be anything to prevent anyone who claims to have been harmed by misleading advice from following the same course, regardless of the financial position of the employer on whose behalf the advice was given.

In fact, one can imagine this multiple-defendant approach being adopted simply as a means of putting additional pressure on the employer to settle the matter. The main message from *Houghton v Arms* is therefore very simple: council

employees who give advice need to be especially careful that the advice is sound – their personal risk exposure has been underlined by this case.

ACCC AUTHORISATIONS

In our last edition we reported on two applications for authorisation have been lodged by local government bodies. One, lodged by the Municipal Association of Victoria on behalf of a number of metropolitan councils, concerned collective tendering for bus shelter installation and maintenance services. The other was a proposal by a Sydney-based councils group for a joint tender process for all kerbside waste and recycling collection services in their local government areas.

Both applications were successful. Readers who are interested in the reasons for decision can find the relevant determinations on the ACCC website – www.accc.gov.au

ACCC ENFORCEMENT SNIPPETS – PART V

Ribena – Vitamin C

Pharmaceutical giant GlaxoSmithKline has admitted that claims about the Vitamin C content of its Ribena blackcurrant fruit drink products may have misled consumers.

ACCC Chairman, Mr Graeme Samuel said that the company “... has self-reported the discrepancies to the Australian Competition and Consumer Commission and provided court enforceable undertakings.”

Representations on the nutrition information panel of Ribena Ready to Drink fruit drinks claimed the products contained certain quantities of Vitamin C, when in fact they had significantly less Vitamin C; and advertising and packaging representations implied that Ribena fruit drinks contained four times the Vitamin C of comparable orange juice products, when this was not correct.

While this case is important to councils in its own right - especially in an era of concern about child obesity and nutritional issues – it teaches an important lesson from an overall compliance perspective as well.

Chairman Samuel described the process as “self-reporting”: this is not strictly accurate. In fact the Ribena exposure started with a science experiment in a New Zealand school. To quote AAP (March 28 2007):

“Auckland teens Anna Devathasan and Jenny Suo conducted a high school experiment in 2004, when they were just 14, which showed Ribena's ready-to-drink beverage had far less vitamin C than advertised.

The pair wrote to... GlaxoSmithKline, but say they were fobbed off, with no response to letters and only a brief reaction when they telephoned.”

So it seems that it was GlaxoSmithKline’s inadequate approach to complaint management that has seen its misleading marketing exposed on four continents, and a penalty of \$NZ217,500 imposed along with onerous obligations on both sides of the Tasman.

RANA Cancer Treatment

The ACCC instigated action against several NuEra companies some time ago, for misleading conduct in the marketing of cancer treatments. New charges have now been added, and are noted here to alert readers to the existence of tactics that appear to be aimed at highly vulnerable consumers.

The ACCC continues to allege that the NuEra companies have breached the Act by representing to persons suffering terminal illnesses (including cancer) and to their families that *The RANA System* can cure cancer, or reverse, stop or slow its progress or will prolong the life of a person suffering cancer, when this is not the case.

The RANA System was provided through programs costing up to \$35,000. It offered a variety of products and services including vitamin supplements, laetrile, cesium or high PH therapy, devices called parasite/energy zappers, Zen Chi Massages, Magnetic Pulsers, coffee enemas, ozone therapy, diets described as eating according to blood type, live blood analysis and thermal imaging. It is asserted to be based on accepted science, but the ACCC alleges this is not the case.

The ACCC's latest claims include allegations that the representations of concern were false or misleading and were also liable to mislead the public as to the nature, the characteristics and the suitability for their purpose of the goods supplied under The RANA System. It is also alleged that NuEra Health, largely through the agency of Mr Paul Rana, engaged in un-

conscionable conduct towards highly vulnerable and disadvantaged consumers when "signing them up" to pay for treatment under The RANA System.

Stores Online

Stores Online International, Inc. and Stores Online, Inc., two US-based companies, have refunded \$679,478.88 to 175 Australian customers after ACCC legal action. The refunds were paid to consumers who claimed to have been misled by representations made by Stores Online in promoting its home business e-commerce software packages.

The software products, which reportedly cost up to \$10,000, and customers were not given a cooling-off period.

ACCC Chairman Samuel described this as an "excellent outcome as all consumers who submitted a statutory declaration which complied with the terms of the settlement obtained a substantial refund which covered most of their outlay."

While this may be true, it should be noted that the companies made no admissions as to liability, and no restrictions were placed on any future activities they might wish to undertake. *The Age* has reported that Stores Online events – which it calls "hard-sell seminars to market its expensive internet business software" – have been scheduled for Melbourne over coming weeks. Consumer Affairs Victoria director David Cousins said that consumers should be wary of the company and its products.

ACCC ENFORCEMENT SNIPPETS – PART IV

More union action

Previous editions have followed the ACCC's action against the CFMEU for alleged secondary boycott conduct, culminating in a penalty of \$100,000.

In January a new secondary boycott action was decided, this time involving the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU).

The ACCC alleged that in 2001, the CEPU made demands on Edison (IPM Operation and Maintenance Loy Yang Pty Ltd, formerly known as Edison Mission Operation and Maintenance Loy Yang P/L) which resulted in the company ceasing to acquire services from an electrical contractor it regularly used at the Loy Yang B site as that contractor did not have a union certified agreement.

The Court found that the CEPU had made its signing of a construction site agreement, which was needed to allow construction of the Peaker project to commence, subject to a number of demands including the requirement for contractors at the Loy Yang B site to have a current certified agreement with the union. The Court found that the CEPU not only instigated the agreement but also induced Edison to give effect to it.

Justice Young concluded "that the appropriate level of penalty which reflects the deliberate and serious nature of the contravention, the requirement of deterrence, and other factors...is \$125,000".

The CEPU had contested the matter, but the company involved followed a different course. A penalty of \$120,000 was imposed on IPM Operation and Maintenance Loy Yang Pty Ltd for entering into an arrangement containing a provision which had the purpose of preventing IPM from engaging electrical contractors who did not have an enterprise agreement with the CEPU to perform work at the power station. IPM also admitted that it had breached the Act by giving effect to the arrangement until November 2003.

Record RPM Penalty

On 8th February The Federal Court imposed penalties totalling \$3.4 million against four Jurlique companies and founder Dr Jurgen Klein. The court declared that the Jurlique companies and Dr Klein engaged in resale price maintenance in the sale of Jurlique products between 1991 and 2003.

Until late 2003 Dr Klein was the managing director of Jurlique, a group of Australian companies which manufactures and sells a range of premium skincare, cosmetic and herbal products. Dr Klein set a policy against discounting and was involved in all aspects of the conduct. The conduct was deliberate, was the result of a long-standing company policy and affected retailers in Australia and abroad.

The RPM conduct involved:

- attempting to induce retailers not to sell Jurlique products at prices less

than the prices specified by Jurlique

- entering and offering to enter into agreements for the supply of Jurlique products, one of the terms of which included that the products were not to be sold for prices less than a price specified by Jurlique
- withholding supply of Jurlique products for the reason that the retailer had sold the products at prices below the retail prices specified by Jurlique and
- using statements of prices that were likely to be understood as the price below which products were not to be sold.

The court also declared that one of the Jurlique companies, in operating its day spa stores, entered into an arrangement with Melbourne franchisees to fix prices for Jurlique treatments. The court granted injunctions for five years restraining Jurlique and Dr Klein from engaging in RPM conduct in relation to Jurlique products, and restraining J&J Franchising from engaging in price fixing in relation to Jurlique treatments. The court ordered the Jurlique companies to pay \$125,000 in costs.

Justice Spender declared that Dr Klein was knowingly concerned in the RPM and price fixing conduct of the Jurlique companies, and ordered him to pay a penalty of \$200,000, and \$20,000 in costs.

Baxter Appeal

Our October 2006 Update reported on litigation between the ACCC and Baxter Healthcare Pty Ltd. We noted then that “The case raises significant issues from a local government perspective. The central question is *what is a business activity?* If the broad aim of the NCP was to apply trade practices rules to all business activities, is there a basis for exempting government purchasing authorities and those who supply such authorities?”

On 9 February the High Court granted special leave for the ACCC to appeal findings by the Full Federal Court that Baxter Healthcare Pty Ltd was protected from the operation of the Act by Crown immunity. We will report on the progress of this appeal as it proceeds.

Queries about items in this publication may be made to your Compliance Officer; or contact Greg d’Arville at **crgESSENTIALS**, on 0414 250025.

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