

EMPLOYMENT  
AND INDUSTRIAL  
CASE NOTE

MARCH 2007

Authorised by:  
Christopher Campbell  
Managing Partner  
QUINLAN MILLER & TRESTON  
GPO Box 2500  
Brisbane QLD 4001  
Telephone: 3223 6403  
E-mail: ccampbell@qmtlaw.com.au

**JAMES HOUGHTON & ANOR AND SIMON ARMS  
DECISION OF HIGH COURT OF AUSTRALIA,  
13 DECEMBER 2006 [2006] HCA 59**

This was a matter on appeal from the Federal Court of Australia and involved an interpretation of the *Fair Trading Act 1999 (Victoria)* and also dealt with aspects of the *Trade Practices Act 1974 (Cth)*.

**Impact for Employees**

Houghton and Student were employed by an organisation known as WSA Online Limited (WSA). Houghton and/or Student made representations to Arms about the facilities available through the ANZ Bank for Mr Arms' new business venture for which he had engaged WSA to provide advice and services on website design, construction and administration. As result of the advice Mr Arms operated his business at a loss for 12 months until June 2001 and was then able to operate under a different business structure and to profit making.

The Victorian *Fair Trading Act* provided in section 9:

- 1) *A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*
- 2) *Nothing in the succeeding provisions of this Part is to be taken as limiting by implication the generality of sub-section (1).*

A similar provision is contained in the Queensland *Fair Trading Act* at section 38.

The High Court found that Houghton and Student engaged in conduct in the course of trade or commerce and as a result were within the ambit of the *Fair Trading Act*. The High Court referred to a decision of *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594:

*In Concrete Constructions, Mason CJ, Deane, Dawson & Gaudron JJ, construed the expression "in trade or commerce" as referring only to conduct with the character of an aspect or element of trading or commercial activities or transactions.*

The representations to the effect that in order for Mr Arms effectively to operate the Auscellardoor website, he would not be required to obtain from the wineries any documentation other than a form with provision for banking details, undoubtedly were of this nature.

Further they stated:

EMPLOYMENT  
AND INDUSTRIAL  
CASE NOTE

MARCH 2007

Authorised by:  
Christopher Campbell  
Managing Partner  
QUINLAN MILLER & TRESTON  
GPO Box 2500  
Brisbane QLD 4001  
Telephone: 3223 6403  
E-mail: ccampbell@qmtlaw.com.au

*Statements made by a person not himself or herself engaged in trade or commerce may answer the statutory expression if, for example they are designed to encourage others to invest, or to continue investments, in a particular trading entity.*

And further:

*Mr Arms was engaging in trade and commerce under the name "Australian Cellar Doors" and by means of the Auscellardoor website. He enlisted WSA to provide services and advice for the purposes of his business. It was the business of WSA to provide such advice and services. 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) but not of "their" trade or commerce*

As a result of the decision the employees were fixed with the damages originally found against the employer company – in the sum of \$58,331.00. Interestingly the company was subject to a deed of company arrangement.

Subsequent action involving the *Trade Practices Act* and/or *Fair Trading Acts* may involve actions directly against employees, particularly where it may be thought that an employer will have difficulties paying any damages and may also create a situation where a sued company may join its employees as parties to the action.

Further information regarding the *Trade Practices Act* or *Fair Trading Act* as they apply to businesses including employers please contact our Employment and Industrial Team:

Christopher Campbell  
Managing Partner  
☎ 07 3223 6403  
✉ ccampbell@qmtlaw.com.au

Shelley Clark  
Solicitor  
☎ 07 3223 6405  
✉ sclark@qmtlaw.com.au

Rebecca Nichols  
Solicitor  
☎ 07 3223 6415  
✉ rnichols@qmtlaw.com.au