

Newsletter

Employees' liability for misleading or deceptive conduct

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On 13 December 2006 the High Court decided the case of *Arms v Houghton*. This unanimous judgment for the first time imposed a direct liability on employees to 3rd parties for misleading conduct in the course of their employment.

The brief facts were that Mr Arms wanted to set up an online wine distribution business. Mr Houghton worked for a company that provided advisory services to Mr Arms during the establishment of his business. Mr Houghton represented to Mr Arms on behalf of his employer that he required certain systems to implement his business and further that he would not be required to pay sales tax. Mr Arms relied on those representations but later found that they were not correct. He was then forced to restructure his business differently at a loss and pay sales tax. As a result the business was not viable.

The High Court reversed the decision of the Full Federal Court of Australia and found that Mr Houghton was liable for his misleading conduct and ordered that he personally pay Mr Arms' losses. The High Court determined that an employee (in his or her capacity only as an employee) could be liable under state legislation that prohibits a person, in trade or commerce, engaging in misleading and deceptive conduct.

As a result of this case we comment:

- Directors and officers liability insurance policies should be checked to see if they extend to cover a claim for misleading and deceptive conduct in the course of employment.
- Both companies and employees should consider whether employment contracts or AWAs contain an indemnity by the company in respect to claims against employees for misleading or deceptive conduct.
- It may be that a "guilty" employee can be joined by the company in any action brought against the company in respect of the employee's misleading or deceptive conduct.

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