

**Austruct Qld Pty Ltd v Independent Pub Group Pty Ltd [2009] QSC 1.**

**Facts**

Austruct Qld Pty Ltd ('Austruct') entered into an agreement with Munday Group Pty Ltd, which was subsequently assigned to Independent Pub Group Pty Ltd ('Independent'), for renovations to a hotel. Austruct sent a box containing trade certificates and previous invoices to the Project Architect, Mr Troung ('the Architect'). A similar box containing the same documentation with the addition of a payment claim, under the Building and Construction Industry Payments Act 2004 ('the BCIPA'), was also sent to Independent's Sydney office. The Sydney address was merely an address for service and was not a working office. Independent's principle place of business was in Adelaide.

Austruct telephoned the Architect to mislead him to think that no payment claim had been served in Sydney by misleading the Architect to believe that a full copy of the documents served in Sydney had been given to him.

Austruct deliberately failed to inform the Architect that the box of documents in Sydney contained a payment claim under the BCIPA. The Independent claimed that the actions of Austruct in misleading the Architect to believe that the Sydney box did not contain a payment claim was misleading and deceptive conduct in contravention of the Trade Practices Act 1974 ('the TPA' now the Competition and Consumer Act).

**Issues**

Does conduct contrary to the Competition and Consumer Act affect notices given under the BCIPA?

**Findings**

The court held that the conduct of Austruct was misleading and contravened section 52 of the TPA. Having regard for the conduct of Austruct but not wishing to deny Austruct the opportunity to have the payment claim adjudicated, the court sympathetically set aside the payment claim served by Austruct. This would then allow a fresh claim to be served and adjudicated in accordance with the BCIPA.

**Quote**

Dutney J held that:

*[54] "...In my view, had Mr Hyde not telephoned Mr Truong but merely sent him the bundle of documents and sent the payment claim with the identical documents attached to the registered office in Sydney, the consequences of any misapprehension as to the true nature of those documents would fall on the respondent, in other words, I do not consider silence would have been misleading. The question is therefore whether the telephone conversation between Mr Hyde and Mr Tuong resulted in any change in that position.*

*[65]...I am satisfied that it would be improper to permit the applicant to take advantage of the respondent's failure to deliver a payment schedule in circumstances where that failure was brought about by the applicant's misleading conduct."*

## **Impact**

A party issuing a payment claim must act honestly and not mislead. The provisions of the C&CA will be taken into account when the conduct of the party issuing the payment claim is examined. The provisions of the C&CA do impact on notices given under the BCIPA and misleading conduct can result in a payment claim being set aside.

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Jim Doyle  
1800 888 783

[jdoyle@doylesconstructionlawyers.com](mailto:jdoyle@doylesconstructionlawyers.com)  
[www.doylesconstructionlawyers.com](http://www.doylesconstructionlawyers.com)