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## Misleading and deceptive conduct & security of payment - Ensure you don't get caught

### Introduction

The Queensland Supreme Court has confirmed that those who engage in misleading and deceptive conduct in relation to the service of payment claims under the *Building and Construction Industry Payments Act 2004 (Qld)* (**Act**) are not entitled to rely on such conduct and the strictures of the Act to obtain a benefit which may not otherwise have existed (*Austruct Qld Pty Ltd v Independent Pub Group Pty Ltd* [2009] QSC 1).

On 13 November 2008, Austruct Queensland Pty Ltd (**Austruct**) had two options:

to deliver a payment claim under the Act and potentially become entitled to a statutory debt; or

to deliver a payment claim, and have a representative of Austruct telephone Independent Pub Group Limited (**Independent**) with the intention of misleading the Respondent (the Court ultimately held).

It chose the latter course and was unsuccessful.

### The conduct

In or around September 2008, disputes arose in respect of expenditure by Austruct and \$683,426.71 worth of invoices issued between 26 September and 31 October 2008 went unpaid. The expenditure related to the refurbishment of a hotel.

Disputes then arose in respect of that non payment and in respect of certain certificates allegedly not supplied by Austruct.

On 13 November 2008, Mr Truong of Independent, received by courier, a box of documents from Austruct at the usual address which Austruct had previously delivered invoices and documents to. That box contained a covering letter dated 12 November 2008, required trade certificates, copies of invoices and supporting documents which had previously been provided.

At the same time, Austruct delivered a similar, but not identical bundle to the registered office of Independent in Sydney. That box included a payment claim under the Act.

Following delivery of those two boxes, Mr Hyde of Austruct made a telephone call to Mr Truong, as agent for Independent, and on the findings of Justice Jutney of the Supreme Court of Queensland, the following exchange took place:

Mr Hyde asked if Mr Truong had received the box of documents;

Mr Truong advised he was surprised that he had received the box of documents without any email notification saying they were going to be delivered as had previously been the course of conduct and enquired whether copies of the documents had been delivered to Independent; and

Mr Hyde advised that a copy of the documents had been sent to the registered office in Sydney and that he was only giving Mr Truong the documents based on advice from his lawyers.

During cross examination, Mr Hyde admitted that he had deliberately decided to describe the documents as a folder of information, rather than alert Mr Truong to the fact that a payment claim had been served. It was elicited from Mr Hyde that he understood the operation of the Act and believed that if Independent did not become aware of it, Austruct would become entitled to the full amount of the claim. Whilst denying when asked directly that he intended to mislead Mr Truong, Mr Hyde agreed that he had quite deliberately chosen not to raise the fact of a payment claim with Mr Truong.

A representative of Independent gave affidavit evidence at the hearing that:

*“But for his having been told by Mr Truong that the documents in Sydney were the same as the documents Mr Truong had received, he would have arranged for the document to be immediately sent to him and he would have passed them on to his solicitors for advice.”*

## **Judgment**

Justice Jutney, in considering a claim under section 52 of the *Trade Practices Act 1974 (Cth)* (**TPA**), found that Independent had in fact been misled and deceived by statements made by Mr Hyde during the telephone conversation.

Justice Jutney commented as follows:

*“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 with Mr Hyde and Mr Truong has resulted in a change of that position.”*

His Honour took the view that the argument turned upon whether Mr Hyde told Mr Truong that what he had received was materially duplicated by what was sent to Sydney or not.

Following the reasoning of the Court of Appeal of New South Wales in *Bitannia Pty Ltd & Anor v Parkline Constructions Pty Ltd* [2006] NSWCA 238, Justice Jutney concluded that section 52 of the TPA could be used to prevent the entry of summary judgment pursuant to section 19(b)(2) of the Security of Payment Act, giving Queensland authority for the proposition that a claimant cannot take advantage of a respondent's failure to deliver a payment schedule in circumstances where that failure was brought about by the claimant's misleading conduct, as was the case here.