

# Misleading or Deceptive Conduct – Overview & Case update

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1

## Presentation Overview

- A.** Elements of Misleading or Deceptive Conduct (ACL, ASIC Act & Corporations Act)
- B.** Common Claims of Misleading or Deceptive Conduct
- C.** Defences to Misleading conduct

*Recent cases of note will be discussed in each topic.*

2

## Elements of Misleading or Deceptive Conduct – s.18 ACL

- ▶ 'A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.'
- ▶ Conduct should be examined in context as a whole – was it misleading or deceptive or likely to mislead or deceive? Does it have a tendency to lead another into error?
- ▶ *Objective test*, standard of a reasonable person of the class to which the conduct was directed.
- ▶ Intention or mindset of person engaged in conduct is not relevant unless statement relates to their state of mind.
- ▶ Must be a nexus between conduct and the misconception or deception. Was the misconception caused by some other event?

3

## 'In trade or commerce'

### Pre- ACL

- ▶ 1990 HCA: 'Conduct... towards persons, be they consumers or not with whom it (or those whose interest it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character.'  
*Concrete Constructions (NSW) P/L v Nelson (1990) 169 CLR 594*

### Post ACL

- ▶ *Murphy v Victoria* [2014] VSCA 238: pre-ACL case law on the meaning of 'in trade or commerce' applies to the ACL.
- ▶ No need to be 'in business' at the time of representation, can be conduct in the course of establishing or undertaking a business enterprise: *Taylor v Crossman (No 2)* FCAFC 11

4

## Could without prejudice discussions be 'in trade or commerce'?

- ▶ *"It seems to me that if, in the course of "without prejudice" negotiations, a party to those negotiations engages in conduct which is misleading or deceptive or likely to mislead or deceive.. And as a result the other party to the negotiations relying, for example, upon the misleading or deceptive conduct suffers loss, proof of the negotiations should not be rendered impossible by the "without prejudice" rule... A party cannot, with impunity, engage in misleading or deceptive conduct resulting loss to another under the cover of "without prejudice" negotiations."*

*Quad Consulting Pty Ltd v David R Bleakley and Associates Pty Ltd*  
[1990] FCA 455 per Hill J.

5

## Could without prejudice discussions be 'in trade or commerce'?

### ***Martin v Norton Rose Fulbright (No 11) [2020] FCA 1641 & [2021] FCAFC 216 (26 Nov 2021 Appeal)***

- ▶ Partnership dispute. Aug 2016 - Former fixed profit share partner Martin launched a general protections claim in the Fair Work Commission against NRF following his dismissal.
- ▶ Around 20 September 2016 NRF filed FCA action seeking prohibition orders that FWC lacked jurisdiction to determine the dispute.
- ▶ Martin brought a separate FCA action alleging that in mid September 2016 NRF engaged in deceit, misleading or deceptive conduct and abuse of process. Alleged NRF stated in without prejudice communication to Martin's lawyers that it would not proceed to file prohibition proceeding so as to secure opponent's consent to an adjournment of Fair Work Commission conciliation conference.
- ▶ Kerr J held that NRF committed tort of deceit but NOT misleading or deceptive conduct as the communication in this litigation was not 'in trade or commerce'.
- ▶ Kerr J At [212]: *".. The representations at issue were advanced with respect to the commencement of a proceeding that was intended to be brought in this Court. They were also advanced in relation to proceedings already on foot in the FWC...The representations were plainly not "an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character." ... they cannot properly be characterised as having been made in "trade or commerce".*
- ▶ Full Court Appeal(26 Nov 2021): Agreed that there was no m & d conduct by NRF. But overturned trial judgment and held no deceit by NRF. Incorrect factual assumptions and inferences drawn by trial judge as to deceptive conduct or intent of lawyer. Hindsight logic

6

## Does the location of the conduct matter?

- ▶ If conduct occurs within Australia then the ACL applies.
- ▶ If conduct occurs outside Australia then extraterritorial provisions may bring the conduct within the ACL.
- ▶ S5(1)(c) of *Competition and Consumer Act 2010* provides that the ACL extends to engaging in conduct outside Australia by:
  - ▶ Bodies corporate incorporated or carrying on business within Australia;
  - ▶ Australian citizens; or
  - ▶ Persons ordinarily resident within Australia.

7

## What amounts to 'conduct in Australia'?

- ▶ Wide interpretation of what will amount to conduct in Australia.
- ▶ Making representations via email, fax, telephone outside of Australia but received within Australia has been held to be conduct within Australia: *Bray v f Hoffman-La Roche Ltd* [2002] FCA 243 & *Paper Products Pty Ltd v Tomlinsons (Rochdale) Ltd (No 2)* (1993) 44 FCR 485
- ▶ Foreign online game distributor who had customers in Australia who downloaded content from their websites and used virtual chat logs – amounted to conduct in Australia: *ACCC v Valve Corporation (No 3)* [2016] FCA 196
- ▶ Case law analysing conduct focuses on the location of the receipt of the representation.

8

## What establishes 'carrying on business in Australia'?

- ▶ 'Activities undertaken as a commercial enterprise in the nature of a going concern, that is activities engaged in for the purpose of profit on a continuous and repetitive basis':  
Hope v Bathurst City Council (1980) 144 CLR 1
- ▶ No need to have a place of business in Australia to be 'carrying on business'.
- ▶ If a foreign company has subsidiary or a business agent in Australia, the degree of involvement of the external company in the local entity may be such that the local entity is not independent. Courts will examine the relationship between the foreign and local company and determine whether the local entity is agent and/or independent to determine if foreign company is 'carrying on business in Australia'.
- ▶ Factors relevant to relationships between foreign and local companies in *ACCC v Yazaki Corp (No 2)* [2015] FCA 1304 include: significant control over local entity; control through board of directors; general authority of local company to enter contracts for foreign entity; separate financial accounts; use of branding; separate assets; separate premises and employees.
- ▶ *ACCC v Valve*: foreign online gaming company was 'carrying on business in Australia' due to many local consumers and local computer servers to provide access to local gamers.

9

## 'Carrying on business in Australia'

***Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd*** [2013] VSCA 237 at [400]-[408] :

- ▶ Vic Court of Appeal considered appeal argument that Prudentia (an Australian company) was carrying on business in Australia, through conduct of its foreign subsidiary outside of Australia. Subsidiary of Prudentia that was based in Singapore was the purchaser of a piece of land in Dubai and it was the Singaporean company that was alleged to have breached the ACL.
- ▶ Ct of Appeal upheld trial judgment finding that the conduct of the Singaporean wholly owned subsidiary was not "carrying on business in Australia" as it had not engaged in commercial activity in Australia, and the critical conduct occurred in Dubai.
- ▶ The Court of Appeal emphasized that the location of the trade and commerce occurred in Dubai and not between Australia and Dubai.

10

## What is misleading or deceptive?

- ▶ Question of fact to be determined from the circumstances. Must view the conduct as a whole. All relevant information should be taken into account.
- ▶ Does the conduct induce or is it capable of inducing error? Must do more than cause confusion.
- ▶ Test: What did the reasonable consumer of the relevant class understand the words used, in their context, to mean? : *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93.
- ▶ Not misleading unless it leads the claimant or class of persons into error: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44.
- ▶ 'Likely to mislead or deceive' – makes it unnecessary to prove actual causal connection to deceit/misled persons.

11

## A. Elements of Misleading or Deceptive Conduct – ASIC Act

- ▶ Section 12DA ASIC Act –
  - (1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.
- ▶ 'financial service' is defined in s12BAB – a person provides a financial service if they:
  - (a) provide financial product advice;
  - (b) deal in a financial product;
  - (c) Make a market for a financial product;
  - (d) operate a registered scheme;
  - (e) provide a custodial or depository service; or
  - (f) operate a financial market or clearing and settlement facility
- ▶ s12BAB(6) – Legal advice **is not** financial product advice.

12

## A. Elements of Misleading Conduct – Corporations Act

### Section 1041H:

- ▶ (1) *'A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.'*
  - ▶ (2) *this includes but is not limited to-*
    - (a) dealing in a financial product*
    - (b) (i) issuing a financial product*
    - (b) (ii) publishing a notice in relation to a financial product;*
    - (b) (iii) making, or making an evaluation of, an offer under a takeover bid or a recommendation relating to such an offer;*
    - (b) (x) carrying on negotiations, or making arrangements, or doing any other act, preparatory to, or in any way related to, an activity covered by b(i)-(x).*
    - (b) (iv)-(v) applying to and permitting a person to become a standard employer-sponsor of a superannuation entity;*
- (and other conduct related to superannuation entities, retirement savings accounts).*

13

## ASIC v Mayfair Wealth Partners & Ors [2021] FCA 247 (Anderson J)

- ▶ Allegation of M&D conduct under s1041H Corps Act and s12DB and 12DA ASIC Act
- ▶ Representations made to investors that:
  - ▶ promissory notes called "M+ Fixed Income Notes" were comparable to, and of a similar risk profile to, bank term deposits.
  - ▶ on maturity the products would be repaid in full.
  - ▶ Products designed for investors seeking certainty and confidence in investments which carried no risk of default.
- ▶ In reality the Mayfair Products exposed investors to significantly higher risk than bank term deposits and were not comparable. The defendants had the ability to extend time for repayment, so they were not necessarily repaid in full when expected. Investment carried higher risk than represented.
- ▶ Mayfair & other defendants did not defend proceeding.
- ▶ ASIC led expert evidence as to the nature of the financial products and their true risk profile, as well as the liquidators report as to the ability of Mayfair to repay the products as advertised.

14

## A. Elements of Misleading Conduct – Corporations Act (cont).

- ▶ “in this jurisdiction” – does not require all conduct in Australia: *ABN Amro Bank NV v Bathurst Regional Council* [2014] FCAFC 65

### What sort of conduct is captured?

- ▶ An announcement to the stock exchange re the value of company's shares on the exchange falls within s1041H(1) – *McKerlie v Drillsearch Energy Ltd* (2009) 72 ACSR 288
- ▶ Announcements at press conferences have been “in relation to a financial product” when concerning ASX listed shares: *ASIC v Fortescue Metals Group Ltd (No 5)* [2009] FCA 1586
- ▶ Providing false information to company auditors of listed public company falls under s1041H: *ASIC v Sino Australia Oil and Gas Ltd (In Liq)* [2016] FCA 934

15

## A. Elements: Causation - proving loss caused by contravention

- ▶ Proving loss that flows from contravention can be more difficult than proving the contravention!
- ▶ s236 (ACL)- Loss must be “by reason of” the prohibited conduct.
- ▶ “But For” is not the test – as courts accept this as too simplistic to assess causation for this contravention.
- ▶ Establishing reliance is a means of proving causation, but not a necessary element: *Abigroup Contractors Pty Ltd v Sydney Catchment Auth* [2004] NSWCA 270.
- ▶ The Suffering of loss as a result of reliance completes the link between breach and compensable damage: *HM&O Investments v Ingram* [2012] NSWSC 958
- ▶ Reliance is a subjective assessment of what occurred in the circumstances.
- ▶ Reliance may include action or inaction as a result of the contravening conduct: *What would the plaintiff have done if it was aware of the undisclosed facts/truth?* (*Caffey v Leatt-Hayter (No 3)* [2013] WASC 348 at [337] per Beech J. NB. Evidence of this counterfactual from the plaintiff can be self-serving and tainted with hindsight!
- ▶ Reliance not required for 3<sup>rd</sup> party who suffers loss as a natural and direct result of contravention. I.e. Trader who stocks misleading product.

16



## A. Elements: Causation - proving loss caused by contravention

- ▶ A plaintiff's failure to take reasonable care can be considered by court in assessing damages for contravention: s137B (CCA); s12GF(1B) ASIC Act.
  - ▶ *Valcorp Aust Pty Ltd v Angas Securities Ltd* [2012] FCAFC 22 – damages claimed by lender for securities loaned after a misleading valuation. Damages reduced by 50% as lender had been indifferent to the borrower's capacity to repay and didn't take reasonable care.
- ▶ Loss which is caused by a superseding event is not recoverable.
- ▶ Plaintiffs have an obligation to mitigate the loss consequent upon the breach: *Henjo Investments P/L v Collins Marrickville P/L (No 2)* (1989) 89 AR 539.
- ▶ Plaintiff must prove the true value of transaction and scope of their loss compared to representation of value: *Keys Consulting P/L & Scaturchio v Cat Enterprises P/L* [2019] VSCA 136
- ▶ The Defendant bears the onus of proving the plaintiff's failure to mitigate and the benefits obtained by plaintiff from the transaction: *Monroe Schneider & Assoc v Raberem P/L* (1991) 33 FCR 1
- ▶ *Bateman v Slayter* (1987) 71 ALR 553 – trading losses incurred by plaintiff in operating a business were accepted as damages flowing from reliance on misleading representations even though losses were worsened by collapse of Australian dollar: *'The test of liability for losses is whether they flowed directly from the breach, not whether there was no other contributing factor.'*

17

## B. Common Claims of Misleading or Deceptive Conduct

- ▶ Advertising
- ▶ Sale of Business
- ▶ Passing off
- ▶ Consumer Products
- ▶ Health & Beauty Products
- ▶ Professionals

18

## Regulators vs private citizens – different misleading claim focus

- ▶ Claims brought by regulators (ACCC, ASIC) – focus is often misleading advertising, ie:
  - ▶ *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 – misleading advertising campaign about “unlimited ADSL2+ for \$29.95 per month”. This was actually only available if bundled with phone (for extra \$59.95/mth). HCA held “dominant message” test is central to any assessment of whether advertisements are misleading or deceptive and qualifying statements must be sufficiently clear and prominent so as not to mislead consumers.
  - ▶ *ACCC v viagogo AG* [2019] FCA 544 ; [2020] FCA 1423 – viagogo was a Swiss based online ticket re-seller for events. It advertised using the words “Buy Now, viagogo Official Site”. “only 5 tickets left”. Held – use of word “official” misled consumers they were purchasing authorised tickets. Quantity of available tickets was incorrect and price didn’t reveal hidden fees. Penalty: \$7M in pecuniary penalties per Moshinsky J ruling.

19

## Regulators vs private citizens – different misleading claim focus

- ▶ Claims pursued by private citizens often focus upon business transactions that go awry:
  - ▶ Sale of business – misleading & deceptive statements
    - ▶ Since 1985 decision of *Bevanere P/L v Lubidineuse* (1985) 59 ALR 334 – Full Fed Ct held s52 (as it then was) although frequently focused on public representations, could also cover private representations such as in sale of business.
  - ▶ Recent sale of business misleading or deceptive conduct cases
    - ▶ *Keys Consulting P/L & Scaturchio v Cat Enterprises P/L* [2019] VSCA 136 – sale of a sign installation business (total price of purchase \$450K over installments), alleged m&d representations in sale process and business worthless. CtA: upheld misleading finding from County Court but allowed appeal on other grounds and found plaintiff bears onus to prove the loss suffered between amount paid for business and true value. Here plaintiff had not proven the loss and true value of business.
    - ▶ *Shah v Hagemrad* [2018] FCA 91 – misleading statements as to income of business in sale of franchise business. Disclaimer in the information pack did not protect seller from impact of misrep.
    - ▶ *Jewelsloo Pty Ltd v Sengos* [2016] NSWCA 309 – turnover figures of business provided prior to sale, but the plaintiff/appellant could not establish loss as the price paid for business was heavily discounted due to unreliability of business trading data.

20

## ACCC v *Employsure* [2021] FCAFC 142 Alleged misleading google 'ad words'

- ▶ Employure used Google Ads which appeared after a user typed the phrases "fair work commission", "fair work", fair work Australia:

Fair Work Commission Advice - Free Employer Advice  
[www.fairworkhelp.com.au/Fair-Work/Commission](http://www.fairworkhelp.com.au/Fair-Work/Commission) 1300 856 110  
 The Advice Service Line For Employers On The Fair Work Act. Call Us Now!  
 Employee Agreement Advice - Business Owner HR Advice - Free Specialist Advice - Confidential  
 "Very informative and helpful" - Feefo.com

Pay Rates for Your Staff	Unfair Dismissal Claims
Workplace Discrimination	Business Awards Advice

- ▶ These Google Ads appeared at top of each search page. Employure a private workplace relations consultancy. ACCC alleged the google ads amounted a m & d representation that Employure was affiliated with a government agency and either did mislead or was likely to mislead or deceive.
- ▶ Google Ad words also used 'dynamic keyword insertion' – targeted audience and adjusted text of advertisement to each viewer. Different individuals saw different tailored ads.
- ▶ At trial, ACCC evidence of people misled:
  - ▶ ACCC led evidence from 3 small business owners who contacted Employure through Google Ads and thought they were communicating with gov entity.
  - ▶ Employees often called Employure, thinking they were contacting Fair Work Commission.
- ▶ At trial Griffiths J held no misleading or deceptive conduct as he considered a reasonable business owner would understand that the helpline was operated by a private company and not a govt body. He considered small business owners were "intelligent" and "shrewd".

21

## ACCC v *Employsure* [2021] FAFC 142 (Appeal) (16 August 2021)

(Rares, Murphy and Abraham JJ)

- ▶ **Appeal allowed** – Held: m & d through use of "Google Ad words" – paid to Google to advertise under specific search terms / keywords. Phrases "fair work ombudsman", "Fair work commission", "fair work australia" and other search terms were used as Google Ad Words by private workplace relations consultancy.
- ▶ FCAFC held that these terms represented to business owners that Employure is or is affiliated with or endorsed by a government agency, and this was misleading or deceptive conduct or likely to mislead or deceive. (Overturned primary decision of Griffiths J)
- ▶ FCAFC held the target audience were business owners who were employers seeking employment advice online. These were generally small businesses and trial judge had erroneously considered these people would be "intelligent or shrewd".
- ▶ The FCAFC said that a broad range of business owners, wary and unwary, with varying levels of education and English would read these advertisements (at [136]). This broad range of persons was not considered by trial judge (at [141]).
- ▶ Significant repercussions for use of Google Adwords in Australia
- ▶ Penalty was remitted to trial judge (Griffiths J). ACCC sought \$5M in penalty but judge only imposed penalty of \$1M (29 Nov 2021). Reported that judge stated at penalty hearing: "If it assists you, when I saw the \$5M figure in your submissions I gagged"

22

## ACCC v Employsure [2021] FCAFC 142

*"In relation to allegedly misleading representations in advertisements it should be borne in mind that many readers will not study an advertisement closely, instead reading it fleetingly and absorbing only its general thrust. It is the impression or thrust conveyed to a viewer, particularly the first impression, that will often be determinative of the representation conveyed...."*

*In deciding whether or not an advertisement is misleading the Court must put itself in the position of the relevant consumer. It should be kept in mind that the relevant consumers would have read the advertisement in a quite different context and way to that in which the judge considers them in a court environment and in the quiet of chambers.*

*(Rares, Murphy and Abraham JJ at [98])*

23

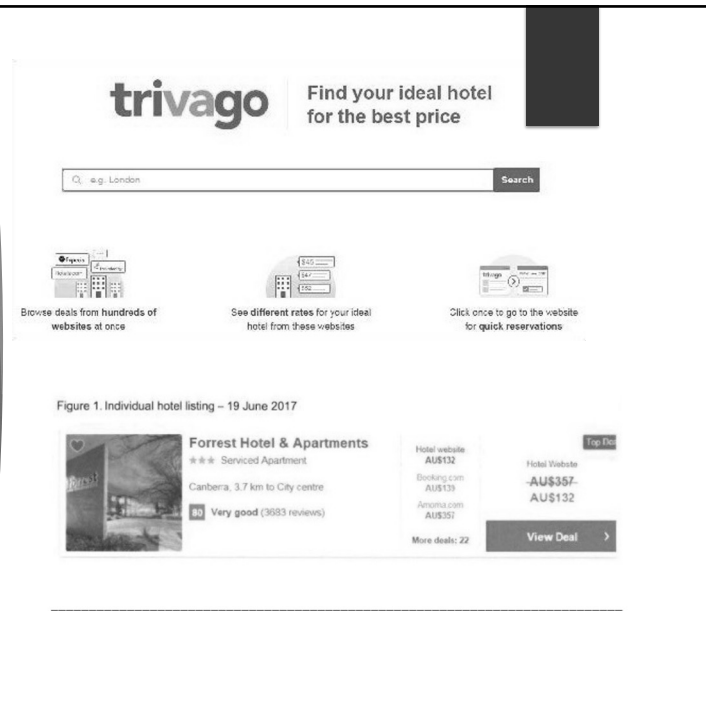
## Trivago NV v ACCC [2020] FCAFC 185

- ▶ Appeal considered by Middleton, McKerracher & Jackson JJ – upheld trial judge (Moshinsky J) decision in which it was held Trivago had misled consumers by representing its website would quickly and easily help users identify the cheapest rates available for a given hotel.
- ▶ Trial judge held Trivago had not disclosed its ranking system was based upon an algorithm that gave prominence to accommodation providers who paid Trivago a higher payment (cost per click ranking). This meant the most prominent offers were not necessarily the cheapest offers to consumers.
- ▶ Trial judge also held use of strike through prices and text in different colours was misleading because it compared standard room rates with luxury rooms.

24

## Trivago NV v ACCC [2020] FCAFC 185

- Challenge of experts as to the “Trivago Algorithm” effect – did Trivago give the “Top Position” to the cheapest price or were other factors (such as the click through cost paid considered)?
- Trial judge accepted an expert opinion that click through cost was the second most important algorithm factor (35-44% importance), in many cases top position was not the cheapest.
- 17 grounds of appeal
- Full court found there was no requirement for the ACCC / plaintiff to show that a “not insignificant number” of ordinary or reasonable class members were or were likely to be misled by the advertisements



25

## Trivago NV v ACCC [2020] FCAFC 185

- ▶ *"The suggestion that consumers understood Trivago to be giving an "opinion" as to what it believed to be the cheapest or best offer, rather than conveying a message of objective fact is entirely unfounded. Clearly, users of a search engine expect that the results displayed to them have been ranked and arranged in response to their search inputs and other relevant attributes of the hotel room, such that an objective assessment of the available offers is presented. Consumers would not anticipate that Trivago was expressing an opinion as to which was the most suitable hotel."*

(at [222])

26

## C. Defences to Misleading or deceptive conduct

- ▶ The “conduit defence”
- ▶ Contributory Fault
- ▶ Proportionate Liability
- ▶ Exemptions for media/publishers
- ▶ Time limits

27

## “Conduit defence”

- ▶ A person may not engage in misleading or deceptive conduct if they merely pass on information supplied by another, where it is clear the person is not the source and they have not adopted it.
  - ▶ *Yorke v Lucas* (1985) 158 CLR 661
- ▶ Not actually a defence, but a conclusion based on the whole of the circumstances, eg:
  - ▶ A real estate agent not liable for an incorrect representation in a flyer, given the agent did not adopt or endorse the statement, the flyer included an express disclaimer, and purchasers were experienced and intelligent: *Butcher v Lachlan Elder Realty* (2004) 218 CLR 592
  - ▶ Google not liable for misleading “sponsored links”, which were authored by the advertisers and simply displayed by Google: *Google Inc v ACCC* (2013) 249 CLR 435

28

## “Conduit defence”

- ▶ However, once a conduit becomes aware that information is misleading, they should act promptly to remove it
  - ▶ See, eg, *ACCC v Allergy Pathway Pty Ltd (No 2)* [2011] FCA 74
- ▶ Where an intermediary adopts or endorses misleading representations they will be equally culpable, for example:
  - ▶ A defendant was liable for misrepresentations in a promotional brochure prepared by another, but which included its name 31 times and had been prepared with its approval: *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199.
  - ▶ A defendant was found to have adopted a CSIRO document by reproducing part of the document on its website and removing the CSIRO logo : *Granitigard Pty Ltd v Termicide Pest Control Pty Ltd* [2011] FCAFC 81
- ▶ A disclaimer is not a trump card, but it is one of the circumstances to be considered: *Butcher v Lachlan Elder Realty* (2004) 218 CLR 592

29

## Contributory fault

- ▶ **Competition and Consumer Act 2010 (Cth) s 137B**

[Where a person makes a claim for damages for conduct contravening s 18, and]

(c) *the claimant suffered the loss or damage as result:*

  - (i) *partly of the claimant's failure to take reasonable care; and*
  - (ii) *partly of the conduct of the other person; and*

(d) *the other person did not intend to cause the loss or damage and did not fraudulently cause the loss or damage;*

*the amount of the loss or damage that the claimant may recover ... **is to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.***
- ▶ Mirrored by ASIC Act s 12GF(1B)

30

## Contributory fault

- ▶ There must be a causal link between the claimant's failure to take reasonable care and its loss or damage.
  - ▶ Where the claimant's conduct can be characterised as the sole cause of loss or damage, there will be no causal connection between the breach of the Act and the loss of damage. Accordingly the claim will not be established: *Henville v Walker* (2001) 206 CLR 459 at [138].
- ▶ Depends on the circumstances:
  - ▶ A claimant's failure to verify representations did not constitute contributory fault where nothing to put claimant on notice of their falsity: *Jainrain Pty Ltd v Boyana* [2008] NSWSC 468.
  - ▶ Contributory fault found in a claim for misrepresentation in an information memorandum where the claimant had failed to properly coordinate inputs into its due diligence process: *Merost Pty Ltd v CPT Custodian Pty Ltd* [2014] FCA 97.

31

## Contributory fault

- ▶ Contributory fault available only for contraventions of ACL s 18 / ASIC Act s 12DA:
  - ▶ Not available under the ACL applied as a law of Victoria by the *Australian Consumer Law and Fair Trading Act 2012* (Vic).
  - ▶ Not available re other provisions involving misleading or deceptive conduct (eg ACL ss 29, 30, 31, 33, 34, 37).

32



## Proportionate liability

- ▶ Different regime for Commonwealth ACL claims (governed by CCA Pt VIA / ASIC Act ss 12GP – 12GW) vs Victorian ACL claims (governed by *Wrongs Act 1958* (Vic) Part IVA).
- ▶ Commonwealth approach:
  - ▶ Defendant's liability limited to "an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility...": CCA s 87CD(1) / ASIC Act s 12GR(1).
  - ▶ Court may have regard to comparative responsibility of a concurrent wrongdoer who is not a party to the proceedings: CCA s 87CD(3) / ASIC Act s 12GR(3)
    - ▶ Cf *Wrongs Act 1958* (Vic) s 24A(3)
- ▶ In other words, to recover 100% of their loss a plaintiff must sue each and every wrongdoer who contributed to that loss.

33

## Proportionate liability

- ▶ **First requirement:** an "apportionable claim"
  - ▶ Claim for damages under s 236 for economic loss or damage to property caused by conduct that contravened s 18: ACL s 87CB(1) / ASIC Act s 12GP(1)
  - ▶ I.e. Part VIA does not apply to claims for compensation under s 237 or contraventions of provisions other than s 18
- ▶ **Second requirement:** the parties are "concurrent wrongdoers"
  - ▶ "a person who is one of 2 or more persons whose acts or omissions ... caused, independently of each other or jointly, the damage or loss that is the subject of the claim": ACL s 87CB(3) / ASIC Act s 12GP(3)
    - ▶ Issue is not whether acts or omissions are jointly undertaken, but whether they produce the same outcome (or combine to do so): *Hadgelias Holdings Pty Ltd v Seirlis* [2014] QCA 177 at [20].
    - ▶ But may apply to two parties who jointly participate in a single act causing loss: *Williams v Pisano* [2015] NSWCA 177 at [82].
    - ▶ Does not apply where acts of a director are acts of a company, because there is only a single act: *Robinson v 470 St Kilda Road Pty Ltd* [2018] FCAFC 84 at [51].

34

## Proportionate liability

- ▶ **Application:** Court must apportion liability on the basis of what is "just": CCA s 87CD(1)(a) / ASIC Act s 12GR(1)(a)
  - ▶ The Court applies the law of apportionment developed in the context of contributory negligence, as follows:
    - ▶ The Court is required to make findings about:
      - ▶ (1) the degree of departure from the standard of care of the reasonable person, as regards the causative conduct of the concurrent wrongdoers; and
      - ▶ (2) the relative importance of the acts of the concurrent wrongdoers in causing the economic loss suffered by the plaintiff
    - ▶ The Court then conducts a 'comparative examination of the whole conduct' of each concurrent wrongdoer 'in relation to the circumstances in which the loss was sustained'
    - ▶ The total amount separately determined in respect of each concurrent wrongdoer will together equal the plaintiff's established entitlement.
- See *Babsctay Pty Ltd v Pitcher Partners (a firm)* [2019] FCA 480 at [48].

35

## Exemptions for media/publishers

- ▶ ACL s 19: s 18 does not apply to publication of a matter, other than an advertisement, by an "information provider"
  - ▶ ACL s 251: where a contravention committed by publication of an advertisement, it is a defence if the defendant proves that:
    - (a) the defendant is a person whose business it is to publish or arrange for the publication of advertisements; and*
    - (b) the defendant received the advertisement for publication in the ordinary course of business; and*
    - (c) the defendant did not know, and had no reason to suspect, that its publication would amount to a contravention of such a provision.*
- ▶ See *Google Inc v ACCC* [2013] HCA 1

36

## Time limits on actions for damages

- ▶ An action for damages under the ACL or ASIC Act must be commenced within 6 years of the cause of action accruing: ACL s 236(2) / ASIC Act s 12GF(2).
- ▶ Because damage is the gist of the action, time runs when it is suffered. This is a question of fact in all the circumstances:
  - ▶ Where an asset was purchased at an over-value due to misleading conduct, time began to run at the time of the contract: *HTW Valuers v Astonland Pty Ltd* (2004) 217 CLR 640.
  - ▶ Where the plaintiff had suffered a risk of loss or a contingent loss, time did not begin to run until the contingency was fulfilled: *Western Australia v Wardley Australia Ltd* (1992) 175 CLR 514.
  - ▶ Where an asset was purchased due to misrepresentations about likely takings, time did not begin to run until the loss was ascertained or reasonably ascertainable: *Karedis Enterprises Pty Ltd v Antoniou* (1995) 59 FCR 35.
    - ▶ Time had begun to run when a franchise business had been trading unprofitably for two years and the plaintiffs had been "complaining loudly" about it: *Om Business Group Pty Ltd v Nestle Australia Ltd* [2021] QSC 183