Misleading or Deceptive Conduct Claims

Practical Hints for Practitioners

Presenter: Christian Juebner

This paper was first presented on Friday, 23 March 2018 at the Law Institute of Victoria, 470 Bourke St, Melbourne.

Executive Summary

The purpose of this paper is to provide an overview of the law of misleading or deceptive conduct under the Australian Consumer Law (**ACL**) and to provide some practical guidance to practitioners involved in litigating such claims.

This paper focusses on misleading or deceptive conduct in the context of commercial dealings between parties, rather than representations made to the world at large through advertising or similar mediums. Further, insofar as remedies are concerned, this paper discusses claims for damages rather than the various other remedies that may be available to an injured party.

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A. INTRODUCTION

1. The purpose of this paper is to provide an overview of the law of misleading or deceptive conduct under the Australian Consumer Law (**ACL**) and to provide some practical guidance to practitioners involved in litigating such claims.

2. This paper focusses on misleading or deceptive conduct in the context of commercial dealings between parties, rather than representations made to the world at large through advertising or similar mediums. Further, insofar as remedies are concerned, this paper discusses claims for damages rather than the various other remedies that may be available to an injured party.

B. TYPICAL ELEMENTS OF CAUSE OF ACTION

3. The cause of action in a typical claim can be broken down as follows:

   (a) that a **person**;

   (b) in **trade or commerce**;

   (c) engaged in **conduct**;

   (d) which was **misleading or deceptive** or likely to mislead or deceive;[1]

   and that

   (e) **because of** the conduct;

   (f) a **person** suffers **loss or damage**.[2]

C. PLEADINGS GENERALLY

4. Before considering specifically how a misleading or deceptive conduct claim should be pleaded, it is useful to bear in mind the following general principles, as explained by J Dixon J in *Wheelehan v City of Clasey*[3] (at [25]):

   …

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1 ACL, s.18.
2 ACL, s.236.
3 [2013] VSC 316.

(b) *the function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial;*[4]

(c) *the cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence).*[5] *The expression 'material facts' is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action;*[6]

(d) *as a corollary, the pleading must be presented in an intelligible form – it must not be vague or ambiguous or inconsistent.*[7] *Thus a pleading is 'embarrassing' within the meaning of r 23.02 when it places the opposite party in the position of not knowing what is alleged;*

(e) *the fact that a proceeding arises from a complex factual matrix does not detract from the pleading requirements. To the contrary, the requirements become more poignant;*[8]

(f) *pleadings, when well-drawn, serve the overarching purpose of the Civil Procedure Act 2010 (Vic);*[9]

(g) *a pleading which contains unnecessary or irrelevant allegations may be embarrassing – for example, if it contains a body of material by way of background factual matrix which does not lead to the making out of any defined cause of action (or defence), particularly if the offending paragraphs tend to obfuscate the issues to be determined;*[10]

(h) *it is not sufficient to simply plead a conclusion from unstated facts.*[11] *In this instance, the pleading is embarrassing;*

(i) *every pleading must contain in a summary form a statement of all material facts upon which the party relies, but not the evidence by which the facts are to be proved (r 13.02(1)(a));*

(j) *the effect of any document or purport of any conversation, if material, must be pleaded as briefly as possible, and the precise words of the*

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4 The function of defining issues for trial is required from an early stage. Otherwise, discovery and other interlocutory process are likely to be misdirected: *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd & Ors* (1996) ATPR 41-522 per Burchett J at 42,679.

5 A reasonable cause of action or defence is one with a real chance of success, assuming the correctness of the allegations of fact in the challenged pleading.

6 *Australian Automotive Repairers' Association (Political Action Committee) Inc v NRMA Insurance Ltd* [2002] FCA 1568 [13], citing *Bruce v Oldhams Press Ltd* [1936] 1 KB 697, 712-713.

7 In *Environinvest*, the pleading was struck out because it was confusing, often circular, sometimes inconsistent and contained no coherent narrative.

8 *SMEC* at [8].

9 *SMEC* at [9].

10 *SMEC* at [28]–[31]. In *SMEC*, Vickery J remarked (at [5]) that good pleading calls for 'judgment and courage to shed what is unnecessary'.

11 *Trade Practices Commission v David Jones (Australia) Pty Ltd & Ors* (1985) 7 FCR 109, 114.

document or the conversation must not be pleaded unless the words are themselves material (r 13.03);[12]

(k) *particulars are not intended to fill gaps in a deficient pleading. Rather, they are intended to meet a separate requirement – namely, to fill in the picture of the plaintiff's cause of action (or defendant's defence) with information sufficiently detailed to put the other party on guard as to the case that must be met.*[13] *An object and function of particulars is to limit the generality of a pleading and thereby limit and define the issues to be tried;*[14]

(l) *a pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it;*[15]

(m) *extensive cross-referencing of facts in a pleading may render parts of the pleading unintelligible;*[16]

(n) *in an application under r 23.02, the court will only look at the pleading itself and the documents referred to in the pleading;*[17]

(o) *the power to strike out a pleading is discretionary. As a rule, the power will be exercised only when there is some substantial objection to the pleading complained of or some real embarrassment is shown;*[18] *and*

(p) *if the objectionable part of the pleading is so intertwined with the rest of the pleading so as to make separation difficult, the appropriate course is to strike out the whole of the pleading.*[19]

D. PLEADING MISLEADING OR DECEPTIVE CONDUCT

5. It is important to be *precise* in framing the alleged contravening conduct (whether as a representation or otherwise). In short, near enough is generally not good enough. Put another way, a plaintiff must make good the *pleaded* conduct, not some *similar*

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12 In *Gunns Ltd & Ors v Marr* [2005] VSC 251, Bongiorno J remarked (at [52]) that the paragraphs in the pleading 'contain quotations from newspapers, websites and correspondence which are inappropriate in form'.

13 *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 per Mason CJ and Gaudron J at 286.

14 *Clarke* at [9].

15 *Knorr v CSIRO & Ors (No 2)* [2012] VSC 268.

16 In *Gunns*, Bongiorno J noted (at [20]) that the particulars to the amended statement of claim under attack incorporated allegations of approximately 40 other paragraphs, requiring the defendants to navigate through a labyrinth of allegations. His Honour refused leave to file the amended statement of claim in the proposed form.

17 Rule 23.04 and *Day v William Hill (Park Lane) Ltd* [1949] 1 KB 632.

18 *Clarke* at [11].

19 *Davy v Garrett* (1878) 7 Ch D 473.

conduct. Good planning is necessary before finalizing a pleading. The need for precision has been emphasized time and time again.

6. In *Butcher v Lachlan Elder Realty Pty Ltd*,[20] Gleeson CJ, Hayne and Heydon JJ observed:

> *In this Court, the purchasers emphasised the proposition that the expression "conduct" in s 52 extends beyond "representations". That proposition is sound. But the purchasers cannot claim any advantage out of an extension of "conduct" beyond "representation" in this case, since their case as pleaded was one based on representations to them by the agent. (Footnote omitted.)*

7. In *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd*[21] French CJ and Kiefel J observed:

> *The cause of action for contravention of statutory prohibitions against conduct in trade or commerce that is misleading or deceptive or is likely to mislead or deceive has become a staple of civil litigation in Australian courts at all levels. Its frequent invocation, in cases to which it is applicable, reflects its simplicity relative to the torts of negligence, deceit and passing off. Its pleading, however, requires consideration of the words of the relevant statute and their judicial exposition since the cause of action first entered Australian law in 1974.* ***It requires a clear identification of the conduct said to be misleading or deceptive****. Where silence or non-disclosure is relied upon, the pleading should identify whether it is alleged of itself to be, in the circumstances of the case, misleading or deceptive conduct or whether it is an element of conduct, including other acts or omissions, said to be misleading or deceptive. (Footnote omitted.)*
>
> [Emphasis added]

8. In *Barnes v Forty Two International Pty Ltd*[22] Siopis J said that:

> *In this case, the respondents' claim for misleading or deceptive conduct was based solely on the fact that the appellants had made two specific false representations. It is recognised, of course, that a claim alleging misleading or deceptive conduct can be founded on conduct other than the making of a misrepresentation. However, where such a claim is made, it must be distinctly pleaded, and a party will not be able to rely on the claim alleging a false representation to run a wider misleading or deceptive conduct claim.*

9. In *Australian Parking and Revenue Control Pty Ltd v Reino International Pty Ltd*[23], Perry J said:

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20 (2004) 218 CLR 592, [32].
21 (2010) 241 CLR 357, [5].
22 (2014) 316 ALR 408, [8].
23 [2016] FCA 744, [73].

> *In short, the pleading at paragraph [21] of the ASOC fails to grapple in any meaningful way with the generally expressed implied representations at paragraph [11] so as to sufficiently reveal the basis of the implied misleading or deceptive representation case against PT Consultants. Paragraph [21] states a conclusion without sufficient information about the relevant "conduct" and why it is (or is likely to be) misleading and deceptive so as to give PT Consultants fair notice of the basis of the claim. It is no answer to submit, as does Australian Parking, that these are matters peculiarly within PT Consultants' knowledge. If the pleading is speculative, it has no place in a statement of claim as I have already said. If the allegations are based upon inferences, then the basis on which the inferences are drawn should be properly pleaded so that PT Consultants is aware of the case which it is asked to meet.*

10. In *Swiss Re International SE v David Simpson,*[24] Hammerschlag J stated:

> *Where plaintiffs, in a proceeding such as this, wish to make significant charges of misleading or deceptive conduct with potentially very significant consequences, it is incumbent on them to articulate their case with precision.*

E. IDENTIFY THE CONDUCT

11. Although most misleading or deceptive conduct claims are pleaded by reference to alleged *representations*[25], *conduct* can extend beyond representations: *Butcher v Lachlan Elder Realty Pty Ltd.*[26]

12. The starting point in any proposed misleading or deceptive conduct claim is to identify the conduct that is intended to be relied upon. Usually the conduct will be pleaded as a representation (express or implied). It may arise from:

    (a) something written;

    (b) something oral;

    (c) a gesture;

    (d) silence when the situation called for something to be explained,

    or a combination of these things.

Express or implied representation

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24 [2018] NSWSC 233, [35].

25 And it had previously been held that a representation was needed: *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, 202.

26 (2004) 218 CLR 592, at [32], [103] and [179].

13. Even though the concept of *conduct* is broader than the concept of a *representation*, most misleading or deceptive conduct cases continue to be pleaded by reference to alleged *representations*. That is unsurprising since conduct generally manifests by representing something. It is the essence of what the conduct represents that must be identified.

14. Where an *express representation* is pleaded, it usually alleges the words spoken or written (or their substance). An *implied representation*, on the other hand, is the representation (or message) conveyed by conduct.

15. The following example highlights the distinction:

> *Party A enters into an agreement with Party B pursuant to which Party B will manufacture shoes for Party A. The agreement contains a term that Party B will charge Party A for the shoes at "factory cost plus reasonable cost of sampling, testing, agent and Hong Kong office fees".*
>
> *There was no express term in the agreement and no express representation made in the negotiations to the effect that Party B had, or would put in place, systems capable of calculating prices in that manner.*
>
> *However, by negotiating and agreeing such a term, Part B impliedly represented that it had systems capable of calculating prices in that manner. See Madden International Ltd v Lew Footwear Holdings Pty Ltd (2015) 50 VR 22, [16].*

16. By way of further example, it would be most unusual for a taxi driver to make express representations as to his authorisation to drive passengers. However, each time a taxi driver arrives in response to a booking to collect a passenger, it may well be said that the taxi driver (and the taxi company) *impliedly represents* that the driver is a licensed driver and holds a valid driver licence. The representation arises from the conduct in responding to a call, arriving in a taxi to collect the passenger, agreeing to drive the passenger for a fee and the fact that it would be unlawful to carry a passenger if the driver held no relevant licence. Even though the passenger will not have consciously turned his or her mind to the issue whether the taxi driver is appropriately licensed, they will in all likelihood still establish the element of reliance (as to that, see below).

Non-disclosure

17. Historically, allegations of misleading or deceptive conduct through nondisclosure were considered by reference to the existence of a *duty* to disclose. That no longer represents the law. In *Demagogue Pty Ltd v Ramensky*,[27] Gummow J said:

> *The use of the term "duty" is apt to suggest a necessary connection with the general law, which does not exist and is not required by the statute; cf Lam v Ausintel Investments Australia Pty Ltd (1990) ATPR 40-990 at 50,880-1. I agree with what was said by Samuels JA in Commonwealth Bank of Australia v Mehta (1991) 23 NSWLR 84 at 88:*
>
> > *"(S)ilence is not misleading only where there is a duty to disclose at common law or in equity. It may simply be the element in all the circumstances of a case which renders the conduct in question misleading or deceptive."*
>
> *See also Lee Gleeson Pty Ltd v Sterling Estates Pty Ltd (1991) 23 NSWLR 571 at 582, per Brownie J.*

18. In *Miller & Associates Insurance Broking Pty Ltd v BMW Aust Finance Ltd*,[28] French CJ and Kiefel J said:

> *The language of reasonable expectation is not statutory. It indicates an approach which can be taken to the characterisation, for the purposes of s 52, of conduct consisting of, or including, non-disclosure of information. That approach may differ in its application according to whether the conduct is said to be misleading or deceptive to members of the public, or whether it arises between entities in commercial negotiations. An example in the former category is non-disclosure of material facts in a prospectus.*

19. In *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)*[29], White J stated:

> *The principles relevant to this part of ASIC's claim are settled. Many of the principles were discussed in Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd [2010] HCA 31; (2010) 241 CLR 357, in particular, at [16]-[21] (French CJ and Kiefel J). I take the applicable principles to be as follows:*
>
> *(1) Conduct involving silence or omission may, in some circumstances, constitute misleading or deceptive conduct;*
>
> *(2) In considering whether conduct is misleading or deceptive, silence is to be assessed as a circumstance like any other;*

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27 (1992) 39 FCR 31, 40.
28 [2010] HCA 31, [19].
29 [2015] FCA 342 at [388].

> (3) *Mere silence without more is unlikely to constitute misleading or deceptive conduct. However, remaining silent will be misleading or deceptive* ***if the circumstances are such as to give rise to a reasonable expectation that if some relevant fact does exist, it will be disclosed****;*
>
> (4) *A reasonable expectation that a fact, if it exists, will be disclosed (sic) will arise when either the law or equity imposes a duty of disclosure, but is not limited to those circumstances. It is not possible to be definitive of all the circumstances in which a reasonable expectation of disclosure may arise but they may include circumstances in which a statement conveying a halftruth only is made, circumstances in which the representor has undertaken a duty to advise, circumstances in which a representation with continuing effect, although correct at the time it was made, has subsequently become incorrect, and circumstances in which the representor has made an implied representation.*

20. Hence, the question is whether there is something which gave rise to a *reasonable expectation of disclosure*, by reason of the dealings between the parties, rather than a *duty of disclosure*. The distinction is subtle. In each instance, a factual enquiry is necessary to ascertain whether, based on the dealings between the parties, a reasonable expectation of disclosure has arisen.

21. An example where such expectation would arise is where a purchaser of a business asks a vendor whether the landlord of the rented business premises had sought to exercise any rights in respect of breaches of the lease and where the vendor (truthful at the time of the response) replied that there had been none. If subsequently the landlord provided the vendor with a notice to quit arising from breaches, the prospective purchaser would have good grounds to argue that, by reason of the earlier question and answer, there was a reasonable expectation of disclosure of the notice to quit prior to the entry into the sale agreement. Any failure to advise of the service of the notice to quit would almost certainly constitute conduct, by silence, regarded as misleading or deceptive.

22. For examples where statements were true at the time they were made, but were rendered false or misleading through subsequent events, see *Winterton Construction Pty Ltd v Hambros Australia Ltd*[30] and *Thong Guan Plastic and Paper Industries SDN BHD v Vicpac Industries Australia Pty Ltd*.[31]

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30 (1992) 39 FCR 97, 114.
31 [2010] VSC 11, [123]-[125].

23. The above must be viewed in the context of a general proposition that parties to commercial negotiations would not ordinarily been entitled to expect that the other will "*explain every conceivable business risk*" arising from the proposed dealing: *Whittle v Filaria*.[32]

Context

24. It is almost always necessary to consider the broader context in which the alleged conduct occurred in seeking to ascertain whether the conduct is truly misleading or deceptive. It has been said that "*where the conduct complained of consists of words, it would not be right to select some words only and to ignore others which provided the context which gave meaning to the particular words*": *Parkdale Custom Built Furniture Pty Ltd v Paxu Pty Ltd.*[33]

25. By looking at the context, the alleged impugned statement may be qualified or clarified so as not to render it misleading or deceptive. Conversely, the context may cause a statement to be rendered misleading or deceptive.

26. In *Lezam Pty Ltd v Seabridge Australia Pty Ltd*, Sheppard J said:[34]

> *Obviously the evidence needs to be looked at as a whole and put in context. There may be cases in which it will be found that later statements, whether written or oral, replace those made earlier or affect or modify them in some way...*

27. By way of example, in the context of a sale of business the initial information memorandum offering the business for sale may contain erroneous information concerning the business's financial performance. However, as part of the due diligence process, the prospective purchaser may be provided with further information which updates and corrects the misleading information provided in the information memorandum. In that instance, the conduct as a whole (being the conduct of providing the information memorandum and the subsequent clarification through due diligence) is unlikely to be misleading or deceptive. Alternatively, it could be argued that no loss has arisen because of the misleading conduct in providing the information memorandum since it was not relied upon in the decision to proceed with

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32 [2004] ACTSC 45, [200].
33 (1982) 149 CLR 191, 199.
34 (1992) 35 FCR 535 at 541. See also *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 7)* [2008] FCA 1364, [152]-[156].

the transaction; instead reliance was placed on the updated financial information provided during due diligence.

28. Conversely, the fact that an express statement may be literally true does not necessarily mean that it is not rendered, by its context, to be misleading. For example, a true statement that a particular company had a paid up capital of $750,000 was held to be misleading or deceptive because it was directed to a person relatively inexperienced in business, who would have understood the statement to mean that the company was "*adequately supported by large cash capital contributed by persons who had bought shares*", which was not true: *Porter v Audio Visual Promotions Pty Ltd*.[35]

29. Therefore, insofar as context is sought to be relied upon either to establish misleading or deceptive conduct or, alternatively, to defend an allegation of misleading or deceptive conduct, the contextual facts must be proved and therefore should be pleaded. They are material facts which go to the question of liability.

F. TRADE OR COMMENCE

30. It is often not seriously in dispute that the relevant conduct occurred in trade or commerce.

31. However, not all conduct that occurs in the business world is regarded as occurring in trade or commerce. In *Concrete Constructions (NSW) Pty Ltd v Nelson*[36], Mason CJ, Deane J, Dawson J and Gaudron J referred in a joint judgment to the need to construe the words *in trade or commerce* in such a way that there is not imposed "*by a side-wind, an overlay of Commonwealth law upon every field of legislative control into which a corporation might stray for the purposes of, or in connection with, carrying on its trading or commercial activities*".

32. Their Honours observed (at 604) that:

> *What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of*

35 (1985) ATPR 40-547.
36 (1990) 169 CLR 594.

those activities or transactions which, of their nature, bear a trading or commercial character.

33. As a general rule private dealings are not in trade or commerce and are not subject to the ACL and its statutory equivalents: *O'Brien v Smolonogov*[37] and *Macks v Viscariello*[38].

34. Examples of conduct in the business world that have been held not to have occurred in trade or commerce include:

(a) statements made during board meetings by officers and employees of a company to directors: *New Cap Reinsurance Corp Ltd v Daya*;[39]

(b) discussions among the directors or shareholders of a company as to the compliance or non-compliance of the *companies' accounts with generally accepted accounting principles; Vanguard Financial Planners Pty Ltd & Anor v Ale & Ors*;[40]

(c) a private sale of land by an individual not being part of a business of selling land and the land not having been used for a business purpose: *O'Brien v Smolonogov.*[41]

35. Importantly, solicitors who undertake a significant role in the actual conduct or completion of commercial transactions (such as mergers and acquisition advice or financing advice) will be regarded as acting in trade and commence: *LT King Pty Ltd v Besser*.[42] Historically it had been thought that advice in respect of litigation was not regarded as being given in trade or commerce: *Little v Law Institute of Victoria and Others (No. 3*).[43] However, that no longer represents the law. The conduct of lawyers in litigation, but outside of court, has been held to amount to trade or commerce by:

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37 (1983) 53 ALR 107.
38 [2017] SASCFC 172, [221].
39 [2008] NSWSC 64; (2008) 216 FLR 126; (2008) 66 ACSR 95; (2008) 26 ACLC 301, Barrett J.
40 [2018] NSWSC 314.
41 (1983) 53 ALR 107.
42 [2002] VSC 354, [39].
43 [1990] VR 257, 273 and 292.

(a) correspondence between solicitors prior to the commencement of legal proceedings: *Franklin House Ltd v ANI Corp Ltd*;[44]

(b) statements made in connection with bringing or settling legal proceedings: *Stockland (Constructors) Pty Ltd v Retail Design Group (International) Pty Ltd*;[45]

(c) statements in a without prejudice meeting to resolve dispute: *Rosenbanner v Energy Cost*.[46]

G. FUTURE MATTERS

36. A critical distinction arises between a representation of *present fact* and a representation in respect of a *future matter*. With representations of present fact, the plaintiff bears legal and evidential onus to demonstrate, on the balance of probabilities, that the conduct was misleading or deceptive.

37. However, with a representation in respect of a future matter, the evidential onus (but not the legal onus) is reversed. The representation is taken to be misleading unless the defendant establishes by admissible evidence that the defendant had *reasonable grounds* for making it; s.4, ACL.

38. The provision has been described one which is "*designed to facilitate proof*": *Cummings v Lewis*.[47] It is an evidentiary provision; it does not shift the legal or persuasive onus of proof: *McGrath v Australian Naturalcare Pty Ltd*.[48] Provided a defendant can point to evidence of reasonable grounds, the representation will not be regarded as misleading or deceptive.

39. Notwithstanding what was said in *McGrath* about the provision operating only as an evidentiary one, rather than one that substantively reverses the onus of proof, s.4 of the ACL provides a plaintiff with a powerful tool to deploy in a claim for misleading or deceptive conduct. Therefore, when seeking to frame the alleged representation, it is important to consider whether the representation should be framed as one of present

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44 [1998] NSWSC 175.
45 [2003] NSWCA 84.
46 [2009] NSWSC 43.
47 (1993) 41 FCR 559, 568.
48 [2008] FCAFC 2, [192].

fact or a future matter. It may in fact be possible to frame representations of both, as to present fact and future matters.

40. For example, in the context of a sale of business, representations may be made about present performance and anticipated future performance, enabling representations to be pleaded both as to present fact and future matters. In defending such an allegation, the defendant may point to advice received from professionals about the likely future profitability and that he or she had no reason to doubt their competence, so as to establish that the prediction was made on reasonable grounds: *Lake Koala Pty Ltd v Walker*.[49]

41. Although there has been some debate as to whether it is necessary to expressly plead s.4 of the ACL so as to enable a plaintiff to rely upon the reverse onus provision,[50] it is strongly recommended that the issue be expressly pleaded so as to prevent any allegation by the defendant at trial that they are taken by surprise, bearing in mind that they would be obliged to establish, by admissible evidence, the existence of reasonable grounds.

42. Sometimes, the invocation by a plaintiff of the reverse onus provision requires a significant strategic decision to be made at the outset. Where a defendant is faced with an allegation that it has made a representation in respect of a future matter which is misleading or deceptive, the defendant essentially needs to elect between:

    (a) denying the existence of representation; or

    (b) admitting that a representation as to a future matter was made, but asserting the existence of reasonable grounds for it.

43. A defendant who denies that a particular representation in respect to a future matter was made will usually find it difficult to allege, in the alternative, that if it was made there were reasonable grounds for it. That was observed in *Unisys Aust Ltd v RACV Insurance Pty Ltd*:[51]

> *Now while denial of the making of a representation does not per se preclude reliance on reasonable grounds for making it, it must surely make it more*

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49 [1991] 2 Qd R 49, 58.
50 *Cummings v Lewis* (1993) 41 FCR 559, 568.
51 [2004] VSCA 81, [76]. See also *Cummings v. Lewis* (1993) 41 FCR 559 at 565-566.

difficult for the representor to succeed; the question becomes one of reasonable grounds upon the basis of a finding that the representation was made without evidence of such from the maker.

H. FAULT

44. In order to succeed in a claim for misleading or deceptive conduct, it is not necessary for the plaintiff to show that the defendant intended to mislead or deceive. The prohibition is "*concerned with consequences as giving to particular conduct a particular colour*" and therefore "*nothing turns… upon the intent*": *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd*[52] and *Parkdale Custom Built Furniture Pty Ltd v Paxu Pty Ltd.*[53]

45. It follows that a claim in misleading or deceptive conduct may have greater prospects of success than a claim for negligent misrepresentation since it is not necessary to prove the existence of a duty of care.

I. LIABILITY OF AND FOR EMPLOYEES, AGENTS AND DIRECTORS

46. An employer or principal is deemed to have engaged in the conduct of its servants and agents done on its behalf within the servant or agent's actual or apparent authority. Likewise, a corporation is liable for the acts of its its directors; s.139B and 139C, *Competition and Consumer Act* 2010.

47. The more interesting question which arises is whether an individual, who acts on behalf of an employer, principal or company, is personally liable for the conduct. That is often an important question where the impugned conduct is engaged in by, or on behalf of, a company with limited assets and where it is desirable to pursue assets in the ultimate owner personally.

48. There are two *alternative* ways in which liability can be sheeted home to the individual employee, agent or director.

49. *First*, by contending that the person engaged (as principal) in the misleading and deceptive conduct. That requires consideration of whether the person "*merely acted*

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52 (1978) 140 CLR 216, 228.
53 (1982) 149 CLR 191, 197 and 198.

as a corporate organ, binding the company but not the person individually": *ASIC v Narain*[54]

50. *Secondly*, by alleging that the person was "involved" in the misleading or deceptive conduct by having aided, abetted, counselled, procured, induced (whether by threats, promises or otherwise) or been in any way, directly or indirectly, knowingly concerned in or a party to a contravention or having conspired with others to effect such contravention.

51. Where one is dealing with a single director company, where the director constitutes the alter ego of that company, demonstrating involvement will not usually be difficult.

52. In order to be liable through involvement, the plaintiff must demonstrate that the person had "*knowledge of the essential matters which go to make up*" the offence: *Yorke v Lucas*.[55] It is not necessary to prove that the relevant person knew the conduct to be misleading.

53. Importantly, it appears that the two avenues to attribute liability to individuals are, in fact, alternatives, so that there cannot be concurrent liability: *Yorke v Lucas*.[56] That is important insofar as pleading the allegations is concerned. If they are both to be deployed, they should be pleaded in the alternative.

54. Further, where involvement is intended to be relied upon, it is good practice to plead the material facts and particulars giving rise to the alleged involvement. In *Morris v Danoz Directions Pty Ltd (No 1),*[57] Perram J said:

> *It has been held that the corresponding rule in the old* Supreme Court Rules *(NSW) – Pt 16, O 1 r 1 – requires particulars to be given of knowledge allegations where that knowledge forms part of a claim made under s 75B: Idoport Pty Ltd v National Australia Bank Ltd [2000] NSWSC 599 at [43], [53]-[54] per Einstein J. I do not read those remarks as laying down a hard and fast rule that particulars of knowledge are always required where a claim under s 75B is made. As his Honour's remarks at [52]-[53] show, the basic consideration is the need to avoid a party being taken by surprise. There is, I think, a tension between O 12 r 1 which is pitched at a high level of generality and r 5(3) which deals specifically with knowledge allegations. Unassisted by r 1, one could read r 5 as creating a regime which explicitly permits*

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54 [2008] FCAFC 120.
55 (1985) 158 CLR 661, 670.
56 (1985) 158 CLR 661, 671.
57 [2009] FCA 134.

unparticularised pleadings of knowledge but couples that with an ability to order particulars of those allegations after the delivery of a defence. Rule 5(3) permits a departure from this where it is necessary to have particulars in order to enable a respondent to plead or for some other "special reason". This, to my mind, suggests that r 5(3) particulars are concerned not with notions of avoiding trial surprise (with which Einstein J was concerned in Idoport) but instead with the facilitation of the provision of a defence.

J. CAUSATION

55. In order to obtain an award of damages arising from misleading or deceptive conduct, it is necessary to show that loss and damage was suffered "*because*" of such conduct. That brings into play the concept of causation.

56. There are two distinct matters which must be established by way of causation:

(a) First, it must be shown that the error induced by the breach resulted in particular acts being done or refrained from (i.e. how the victim acted in reliance).

(b) Second, a sufficient link between the act or reliance and the loss or damage claim to must be proved.[58]

Reliance

57. The following may be said about reliance:

(a) Whether a plaintiff has relied on certain conduct is a subjective question; *Italform Pty Ltd v Sangain Pty Ltd*.[59]

(b) To speak of a need for specific evidence of reliance, or for evidence of a decision-making process, can lead to error. Reliance is often inferred from the factual matrix. In *Smith v Noss* [2006] NSWCA 37, Giles JA (with whom Beasley and Ipp JJA agreed) stated:

> *[26] Even where the misleading or deceptive conduct lies in disclosing something — making a representation which is false — the notion of reliance must be used with care. Causation will be established if there would have been inaction or some other action had it been known that the representation was false. Since the representee did not know the falsity of the*

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58 *The Law of Misleading or Deceptive Conduct*, Third Edition, Lockhart [10.9].
59 [2009] NSWCA 427, [40] per Macfarlan JA, Hodgson JA and Sackville AJA agreeing.

> *representation, again there is a hypothetical question, and in such a case the scope for the representee to give evidence of thought processes at the time may be quite limited and "reliance" may mean no more than that the representee would have acted differently had it been known that the representation was false. To speak of a need for explanation or for specific evidence of reliance, or for evidence of a decision-making process, can lead to error; the question is one of causation.*
>
> *[27] Secondly and more fundamentally, specific evidence of reliance is not essential for proof of causation. Such evidence may be one strand, perhaps an important one, in the factual skein, but causation may be found without it. So Wilson J said in Gould v Vaggelas (1985) 157 CLR 215 at 238 …*

(c) In *Smith v Noss,* Giles JA (with whom Beasley and Ipp JJA agreed) found that the trial judge had erred in dismissing the claim for misleading and deceptive conduct by erroneously finding that there was insufficient evidence of the decision making process of the plaintiff. Giles JA stated:

> *[36] On this understanding of his Honour's reasons, in my respectful opinion he was in error. Ms Smith had squarely said that, had she known the truth, she would not have entered into the partnership. It was not necessary in order to establish causation that she go further, on pain of failure in proof of causal connection. An analysis of the effect the representations had on Ms Smith was necessary, but it was an analysis for the judge on the evidence as a whole; and it was for his Honour even though Ms Smith had not engaged in it.*

(d) Where an implied representation is found to have been made about the ability of the representor to perform a particular obligation, it is sufficient for the purpose of establishing reliance that the representee did not doubt the capacity of the representor to perform the obligation. Relevantly, in *Casinos Austria International (Christmas Island) Pty Ltd v Christmas Island Resort Pty Ltd* (unreported, Owen J, WASC, BC9807255), Owen J found that there had been a pre-contractual implied representation to the effect that a hotel operator would operate a hotel in a proper and efficient manner and would obtain whatever expert assistance it needed to do so (at p.44). Owen J observed:

> *Counsel for the plaintiff submitted that there was simply no evidence that any person who could speak for the defendant relied on the representations at the time of entry into the contract in October 1993. It is true that neither Koesnendar nor Gani (the only persons who were called and who could have testified directly on the point) said that the representation was relied on. However, both said that they had no*

> *reason to doubt the competence of the plaintiff to operate the Hotel efficiently. I have little doubt that the plaintiff's reputation and experience in operating casinos played a larger part in the thought processes of the defendant's representatives. But I do not think that the Hotel management aspect was either irrelevant to, or of such little weight as to be immaterial to, the defendant's decision to engage the plaintiff for the entire Resort. I accept the proposition put by counsel for the defendant that direct evidence of reliance is not necessary and it can be obtained by way of inference: Dominelli Ford (Hurstville) Pty Ltd v Karmot Auto Spares Pty Ltd (1992) 38 FCR 471 at 482-83; Huntsman Chemical Company Australia Ltd v International Pools Australia Ltd (1995) 36 NSWLR 242 at 263, 266.*
>
> *I think there is sufficient in Koesnendar's evidence and that of Gani to justify the drawing of the inference that the defendant relied on the representation (in the form that I have outlined it) in entering into the Agreement.*[60]
>
> [emphasis added]

(e) The question of reliance will often be resolved by the court drawing an inference as to whether the plaintiff was sufficiently motivated by the impugned conduct in doing the allegedly reliant acts: *MWH Aust Pty Ltd v Wynton Store Aust Pty Ltd*.[61]

(f) Where there has been an alleged failure to advise, as opposed to the situation where a positive representation is made (i.e. misleading or deceptive conduct by silence), it is inappropriate to formulate the test for causation as a question of whether the representation was a real inducement for the person to whom the representation is made to act as he or she did: *Smith v Moloney*.[62] In *Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3)*,[63] Beasley JA (with whom Ipp and Tobias JJA agreed) stated:

> *[51] … in Smith v Noss [2006] NSWCA 37, this Court looked at the question of causation in the context of a failure to disclose a material matter. Giles JA (Beazley JA and Ipp JA agreeing) (at [25]) noted that in such a case it was not a natural use of the notion of reliance to say that there was reliance on the failure to*

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60 Ultimately, Owen J dismissed the claim for misleading and deceptive conduct on the basis that the representor had reasonable grounds for making the representations. The "reasonable grounds" issue does not arise in respect of the present proceeding at this stage of the inquiry.

61 [2010] VSCA 245, [106].

62 (2005) 223 ALR 101, [51] per Besanko and Vanstone JJ.

63 (2006) 67 NSWLR 341.

disclose. His Honour considered that causation could be found where it was established that disclosure would have caused inaction or action different from that which was in fact taken. His Honour referred to Smith v Moloney (2005) 92 SASR 498 at 514–515 where Besanko J and Vanstone J took the same approach in the case of a failure to advise. Their Honours there said (at 514–515):

> *"… [I]n a case where there has been a failure to advise, as distinct from the provision of incorrect advice, it is somewhat artificial to formulate the test of causation in terms of real inducement because the court is required to consider a hypothetical question, namely, what would the plaintiff have done had the defendant provided the advice he was bound to provide."*

[52] Giles JA added (at [26]) that even in the case of making a false representation, that is, an express, positive representation, causation will be established if it is shown that a person would have taken no action or some other action if it was known that the representation was false.

(g) It is not necessary for a plaintiff to establish that "but for" the alleged impugned conduct, it would not have acted upon it. All that is required is proof that the impugned conduct made some "*non-trivial contribution*" or "*materially contributed*" to the decision taken by the plaintiff to act in a particular manner: *Henville v Walker*;[64] *Ricochet Pty Ltd v Equity Trustees Executors & Agency Co Ltd*.[65] In *Henville v Walker*, Gleeson CJ stated:

> *[14] For there to be the necessary causal relationship between a contravention of s 52, and loss or damage, so as to satisfy the requirements of s 82(1), it is not essential that the contravention be the sole cause of the loss or damage. As Brennan J pointed out in Sellars v Adelaide Petroleum NL, where the making of a false representation induces a person to act in a certain manner, loss or damage may flow directly from the act and only indirectly from the making of the representation; but in such a case the act "is a link — not a break — in the chain of causation". In the present case there were two concurrent causes of the imprudent decision to buy the land and undertake the development project. The conduct of the respondents was one of those causes. That is enough.*

64 (2001) 206 CLR 459, [61] per Gaudron J, [106] per McHugh J.
65 (1993) 113 ALR 30, 36 per Lockhart, Gummow and French JJ.

(h) The plaintiff's level of care for its own interests is generally disregarded; there is no need for the plaintiff to establish that the alleged reliance was reasonable in the circumstances; *Henville v Walker*.[66]

Assessment of damages

58. If reliance is established, it is then necessary to considered what loss or damage was caused because of the misleading or deceptive conduct.

59. As a general proposition, a party which is the victim of misleading or deceptive conduct is entitled to be placed in the position in which it would have been had the misleading or deceptive conduct not occurred. Hence, the assessment is akin to assessments for the tort of deceit.

60. In *Gates v City Mutual Life Assurance Society Ltd*,[67] Gibbs J stated:

> *Actions based on ss.52 and 53 are analogous to actions in tort and the remedy in damages provided by s.*82(1) *appears to adopt the measure of damages applicable in an action in tort. That sub-section refers to loss or damage by the conduct of another that contravened a provision of Pt.IV or Pt.V; it therefore looks to the loss or damage flowing from the offending act of the other person. The acts referred to in ss.*52 *and* 53 *do not include the breach of a contract, and in awarding damages under s.*82 *for a breach of either of those sections, no question can arise of damages for loss of a bargain. The contractual measure of damages is therefore inappropriate in such a case. It has been held in the Federal Court in a number of* cases *that the measure of damages in tort, and not that for breach of contract, will apply in the assessment of damages under s.*82 *where there has been a contravention of s.*52 *or s.*53*: see Brown* v. *Jam Factory* (1981) 35 ALR 79*, at p* 88*; Mister Figgins* v. *Centrepoint* (1981) 36 ALR 23*, at p* 59 *and Brown* v. *Southport Motors* (1982) 43 ALR 183*, at p* 186*. This view is plainly correct. I have recently discussed the measure of damages in an action for deceit in Gould* v. *Vaggelas* (1984) 58 ALJR 560*, at pp* 561-563*; 56 ALR 31, at pp* 34-37*.*

61. Mason, Wilson and Dawson JJ said:

> *But this has been treated as a prima facie measure only, the true measure being reflected in the proposition stated by Dixon J. in Toteff v. Antonas (at p 650) in these terms:*
>
> > *"In an action of deceit a plaintiff is entitled to recover as damages a sum representing the prejudice or disadvantage he has suffered in*

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66 (2001) 206 CLR 459, [165] per Hayne J; [66] per Gaudron J; [140] per McHugh J; Gummow J agreeing with Hayne and McHugh JJ.

67 (1986) 160 CLR 1.

consequence of his altering his position under the inducement of the fraudulent misrepresentations made by the defendant."

As his Honour then pointed out, it is a question of determining how much worse off the plaintiff is as a result of entering into the transaction which the representation induced him to enter than he would have been had the transaction not taken place. This entitles the plaintiff to all the consequential loss directly flowing from his reliance on the representation (Potts v. Miller, at pp 297-298; Doyle v. Olby (Ironmongers) Ltd. (1969) 2 QB 158), at least if the loss is foreseeable (see Gould v. Vaggelas, at p 563; p 37 of ALR).

…

Because the object of damages in tort is to place the plaintiff in the position in which he would have been but for the commission of the tort, it is necessary to determine what the plaintiff would have done had he not relied on the representation. If that reliance has deprived him of the opportunity of entering into a different contract for the purchase of goods on which he would have made a profit then he may recover that profit on the footing that it is part of the loss which he has suffered in consequence of altering his position under the inducement of the representation.

62. In *The Commonwealth of Australia v Amann Aviation Pty Ltd,*[68] Dean J stated:

The general principle governing the assessment of compensatory damages in both contract and tort is that the plaintiff should receive the monetary sum which, so far as money can, represents fair and adequate compensation for the loss or injury sustained by reason of the defendant's wrongful conduct. The application of that general principle ordinarily involves a comparison, sometimes implicit, between a hypothetical and an actual state of affairs: what relevantly represents the position in which the plaintiff would have been if the wrongful act (i.e. the repudiation or breach of contract or the tort) had not occurred and what relevantly represents the position in which the plaintiff is or will be after the occurrence of the wrongful act (see, e.g., Livingstone v. Rawyards Coal Company (1880) 5 App Cas 25, at p 39; Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B) (1949) AC 196, at p 221; Butler v. Egg and Egg Pulp Marketing Board (1966) 114 CLR 185, at p 191). While the general principle is the same in both contract and tort, the rules governing its application in the two areas may differ in some circumstances.

63. The approach to the quantification of loss and damage in cases of misleading or deceptive conduct is not inflexible. It is not confined to an assessment of damages at common law, but rather informed by it. The amount of damages awarded is intended to do justice between the parties, having regard to the principle that the injured party ought to be placed in the position that he or she would have been in if

68 (1992) 174 CLR 64.

the misleading or deceptive conduct had not occurred. Importantly, the award of damages is not intended to confer a windfall.

64. In *Henville v Walker*[69], Gleeson CJ said the following in respect of relief under the TPA (at [18]):

> *S82 of the Act is the statutory source of the appellants' entitlement to damages. The only express guidance given as to the measure of those damages is to be found in the concept of causation in the word "by". The task is to select a measure of damages which conforms to the remedial purpose of the statute and to the justice and equity of the case. The purpose of the statute, so far as presently relevant, is to establish a standard of behaviour in business by proscribing misleading and deceptive conduct, whether or not the misleading or deception is deliberate, and by providing a remedy in damages. The principles of common law, relevant to assessing damages in contract or tort, are not directly in point. But they may provide useful guidance, for the reason that they have had to respond to problems of the same nature as the problems which arise in the application of the Act. They are not controlling, but they represent an accumulation of valuable insight and experience which may well be useful in applying the Act.* [Emphasis added]

65. In assessing the appropriate amount, the Court must have regard to a hypothetical, namely the situation which the plaintiff would have been in had the misleading or deceptive conduct not occurred. In a context of a loss of chance case, in *Sellars v Adelaide Petroleum NL*[70], Mason CJ, Dawson, Toohey and Gaudron JJ said:

> *Notwithstanding the observations of this court in Norwest, we consider that acceptance of the principle enunciated in Malec requires that damages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of breach of contract, tort or contravention of s 52(1), should be ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued. The principle recognised in Malec was based on a consideration of the peculiar difficulties associated with the proof and evaluation of future possibilities and past hypothetical fact situations, as contrasted with proof of historical facts. Once that is accepted, there is no secure foundation for confining the principle to cases of any particular kind.*

K. PRACTICE TIPS

66. If possible, before commencing a claim for misleading or deceptive conduct:

(a) identify with precision the representations (express or implied) and whether:

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69 (2001) 206 CLR 459.
70 (1994) 179 CLR 332.

(i) they are of present fact;

(ii) a future matter;

(b) consider the extent of the context that needs to be pleaded to make good the contention that the representation was misleading or deceptive;

(c) consider what evidence will be necessary to prove:

(i) the representation:

(ii) the reliance;

(iii) the loss and damage flowing,

in each case through witnesses and documents;

(d) if an oral representation is to be relied upon, obtain a signed proof of the person who allegedly perceived it because it will reduce the risk of subsequent amendment.[71]

Christian Juebner
Barrister
Victorian Bar

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[71] Amending a central representation will almost always have a significant negative impact on the case going forward. Maintaining credibility is critical and every care should be taken to avoid the need to make changes to any central allegation after the case commences.

The Law Institute of Victoria

470 Bourke Street Melbourne VIC 3000
GPO Box 263, Melbourne VIC 3001, DX 350 Melbourne

T: 03 9607 9311 **F:** 03 9602 5270 **W:** www.liv.asn.au
Authorised and published by the Law Institute of Victoria, 2017