MISLEADING OR DECEPTIVE CONDUCT CLAIMS
PRACTICAL HINTS FOR PRACTITIONERS

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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 tips to practitioners involved in litigating such claims, particularly in pleading 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 focusses on claims for damages.

B. 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 to plead a misleading or deceptive conduct claim, it is useful to bear in mind the following general principles about pleadings, as explained by J Dixon J in *Wheelehan v City of Clasey*[3] (at [25]):

> …
>
> (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*

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

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 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]

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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.
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].

(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* conduct. Good planning is necessary before finalising a pleading.

6. The need for precision has been emphasized time and time again. 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.)*

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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.

20 (2004) 218 CLR 592, [32].

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:

> *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*

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

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 was allegedly misleading and deceptive. 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 (e.g. wink, nod etc.);

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

    or a combination of these things.

Express or implied representation

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.

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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].

14. Where an *express representation* is pleaded, it usually alleges the particular words (whether written or spoken) 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 on the implied representation that the driver is a licensed driver and holds a valid driver licence (as to that, see below).

Oral representation

17. When misleading and deceptive conduct is alleged to arise from an oral representation, it is critical that the representation, as pleaded, can be proved.

18. Hence, care must be taken to identify the relevant witness who will give evidence of the alleged representation and the words allegedly spoken *before* commencing any claim. Before finalising any pleading alleging a critical oral representation, it is wise to prepare a proof of evidence and have the witness acknowledge that it is correctly expressed. That will often flush out any misunderstanding in the instructions and will reduce the risk of attacks on credit when, at trial, the oral evidence does not marry up with the pleaded representation.

19. The need for precision in pleading an oral representation was emphasized in a now frequently quoted passage of McClelland CJ in Eq in *Watson v Foxman*:[27]

> *… Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances. In many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition. Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.*

Silence / non-disclosure

20. Historically, allegations of misleading or deceptive conduct through non-disclosure were considered by reference to the existence of a perceived *duty* to disclose. That no longer represents the law.

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27 (1995) 49 NSWLR 315 at 318-319, cited with approval by the Full Court: *CCL Secure Pty Ltd v Berry* [2019] FCAFC 81 at [45] (McKerracher, Robertson and Lee JJ); *Innes v AAL Aviation Ltd* [2017] FCAFC 202; 259 FCR 246 at [92] and [125] (Tracey and White JJ), and [186] and [188] (Bromberg J); *Julstar Pty Ltd v Hart Trading Pty Ltd* [2014] FCAFC 151 at [73] (Dowsett, Rares and Logan JJ).

21. In *Demagogue Pty Ltd v Ramensky*,[28] 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.*

22. In *Miller & Associates Insurance Broking Pty Ltd v BMW Aust Finance Ltd*,[29] 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.*

23. In *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)*[30], 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;*
>
> *(3) Mere silence without more is unlikely to constitute misleading or deceptive conduct. <u>However, remaining silent will be misleading</u>*

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28 (1992) 39 FCR 31, 40.
29 [2010] HCA 31, [19].
30 [2015] FCA 342 at [388].

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.

24. Hence, 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.

25. 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.

26. 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*[31] and *Thong Guan Plastic and Paper Industries SDN BHD v Vicpac Industries Australia Pty Ltd*.[32]

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31 (1992) 39 FCR 97, 114.

32 [2010] VSC 11, [123]-[125].

27. The above must be viewed in the context of a general proposition that parties to commercial negotiations would not ordinarily be entitled to expect that the other will "*explain every conceivable business risk*" arising from the proposed dealing: *Whittle v Filaria*.[33]

Context

28. It is almost always necessary to consider the broader context in which the alleged conduct occurs in seeking to ascertain whether the conduct is truly misleading and 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.*[34]

29. Further, "*[t]he meaning of words is usually sensitive to context. When spoken words are alleged to have legal consequences, it is generally necessary that there be precision in both the pleading and proof of the words alleged to have been spoken*.": *Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd.*[35]

30. 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.

31. In *Lezam Pty Ltd v Seabridge Australia Pty Ltd*, Sheppard J said:[36]

> *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...*

32. 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

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33 [2004] ACTSC 45, [200].
34 (1982) 149 CLR 191, 199.
35 [2020] FCA 1672, [604] (per Wheelehan J).
36 (1992) 35 FCR 535 at 541. See also *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 7)* [2008] FCA 1364, [152]-[156].

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 the transaction; instead reliance was placed on the updated financial information provided during due diligence. The effect of due diligence in sale transactions on the question of reliance is discussed further below.

33. 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*.[37]

34. 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

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

36. However, not all financial transactions are regarded as occurring in trade or commerce. In *Concrete Constructions (NSW) Pty Ltd v Nelson*[38], Mason CJ,

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37 (1985) ATPR 40-547.
38 (1990) 169 CLR 594.

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*".

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

38. The ACL now extends to regulate conduct in trade and commerce by natural persons; not merely corporations.

39. 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*[39] and *Macks v Viscariello*[40].

40. 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*;[41]

    (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*;[42]

    (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,*[43] but where the statement is made by an

39 (1983) 53 ALR 107.
40 [2017] SASCFC 172, [221].
41 [2008] NSWSC 64; (2008) 216 FLR 126; (2008) 66 ACSR 95; (2008) 26 ACLC 301, Barrett J.
42 [2018] NSWSC 314.
43 (1983) 53 ALR 107.

estate agent selling land it will be in trade and commerce: *Williams v Pisano*.[44]

41. 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*.[45] 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*).[46] 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:

(a) correspondence between solicitors prior to the commencement of legal proceedings: *Franklin House Ltd v ANI Corp Ltd*;[47]

(b) statements made in connection with bringing or settling legal proceedings: *Stockland (Constructors) Pty Ltd v Retail Design Group (International) Pty Ltd*;[48]

(c) statements in a without prejudice meeting to resolve dispute: *Rosenbanner v Energy Cost*.[49]

G. FUTURE MATTERS

42. A critical distinction arises between a representation of *present fact* and a representation in respect of a *future matter*.

43. 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.

44. However, with a representation in respect of a future matter, there rests at least some onus on the respondent to adduce evidence of reasonable grounds

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44 [2015] NSWCA 177.
45 [2002] VSC 354, [39].
46 [1990] VR 257, 273 and 292.
47 [1998] NSWSC 175.
48 [2003] NSWCA 84.
49 [2009] NSWSC 43.

for the representation, failing which it is deemed to be misleading and deceptive: s.4, ACL.

45. The provision (i.e. s. 4) has been described one which is "*designed to facilitate proof*": *Cummings v Lewis*.[50] It is an evidentiary provision; it does not shift the legal or persuasive onus of proof: *McGrath v Australian Naturalcare Pty Ltd*.[51]

46. In *Cash Bazaar Pty Ltd v RAA Consults Pty Ltd (No 2)*,[52] Steward J explained how s.4 of the ACL operates, and the *type* of evidence that must be adduced by the representor to displace the onus under s 4(2) of the ACL:[53]

> *[233] … In Australian Naturalcare Products Pty Ltd, Allsop J (as his Honour then was) explained the requirement [for the representor to adduce evidence for s 4 of the ACL] at 283 [191]-[192] in the following terms:*
>
> > *… the provision required evidence "to the contrary" to be adduced, that is evidence that tended to establish, or that admitted of the inference that there were, reasonable grounds for making the representation, before the deeming provision ceased to operate …*
> >
> > *If evidence is adduced by the representor that is said to be evidence to the contrary, it will be for the Court to determine whether it is to the contrary in the sense just discussed. If it is, the deeming provision will cease to operate …*
>
> *[234] In Ackers v. Austcorp International Ltd [2009] FCA 432, Rares J said at [357]:*
>
> > *The quality of the evidence adduced by the representor under s 51A(2) must be sufficient to be capable, if accepted, of amounting to providing the representor with reasonable grounds for making the representation at the time it was made. The Court must determine whether the evidence is "evidence to the contrary" so as to throw onto the representor the onus of proving that the representor did not have reasonable grounds for making the representation: Australian Naturalcare 165 FCR at 282-283 [191]-[192] per Allsop J. In the context of a trial, the representee will not need to lead evidence in chief on the issue since he, she or it can rely on the deeming in the provision which is only displaced by the representor adducing evidence to the contrary. That evidence, if*

50 (1993) 41 FCR 559, 568.
51 [2008] FCAFC 2, [192].
52 [2020] FCA 636 [ATH.600.091.0001].
53 [2020] FCA 636 at [233]-[238] [ATH.600.091.0001@0093-0096].

> *adduced, will lead to a case in reply. The court still has to decide whether the evidence relied on as being "to the contrary" adduced by the representor is capable of amounting to reasonable grounds for making the representation. Then, if it is so capable, the Court assesses whether the representee has proved, on the whole of the evidence, that the representor did not have reasonable grounds for making it.*
>
> *[235] … It is also well-established that no persuasive burden or onus falls upon respondents to prove that they had reasonable grounds. Rather, the rationale for the need for the representor to lead evidence to the contrary was explained by Mansfield, Greenwood and Barker JJ. In North East Equity Pty Ltd v. Proud Nominees Pty Ltd [2012] FCAFC 1; (2012) 285 A.L.R. 217 at [30] as follows:*
>
> *… Once evidence is adduced by a respondent in discharge of the evidential burden, the applicant must satisfy the dispositive burden of showing that the respondent did not have reasonable grounds for making the representation.*
>
> *[236] It is well settled that the fact that a promise is not performed or a prediction is not fulfilled does not of itself establish that the representor lacks reasonable grounds at the time of making such promise or prediction: Global Sportsman Pty Ltd v. Mirror Newspapers Pty Ltd (1984) 2 F.C.R. 82 at 88; Bill Acceptance Corporation Ltd v. GWA Ltd (1983) 50 A.L.R. 242 at 250 per Lockhart J. In Global Sportsman, Bowen C.J., Lockhart and Fitzgerald JJ. Relevantly said:*
>
> > *The non-fulfilment of a promise when the time for performance arrives does not of itself establish that the promisor did not intend to perform it when it was made or that the promisor's intention lacked any, or any adequate, foundation.*

47. Notwithstanding that the provision is only seen evidentiary 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 fact or a future matter. It may in fact be possible to frame representations of both, as to present fact and future matters.

48. 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*.[54]

49. 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,[55] 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.

50. 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.

51. 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*:[56]

> *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 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.*

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54 [1991] 2 Qd R 49, 58.
55 *Cummings v Lewis* (1993) 41 FCR 559, 568.
56 [2004] VSCA 81, [76]. See also *Cummings v. Lewis* (1993) 41 FCR 559 at 565-566.

H. FAULT

52. 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*[57] and *Parkdale Custom Built Furniture Pty Ltd v Paxu Pty Ltd.*[58]

53. 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

54. 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 directors; s.139B and 139C, *Competition and Consumer Act* 2010.

55. In *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 28)* (***Cargill***),[59] Elliott J explained:[60]

> *[3079] Section 139B(2) can be broken down into 3 component parts, each of which must be satisfied in order to attribute any of the Financial and Operational Performance Representations to Glencore (to the extent they were made by the persons identified for this issue).*
>
> *[3080] First, the court must consider whether the relevant individual (be it a person or a body corporate) engaged in conduct on behalf of Glencore.*
>
> *[3081] If this first question is answered in the affirmative, then the court must secondly turn to who engaged in the conduct. The relevant question is whether the conduct was engaged in by:*

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57 (1978) 140 CLR 216, 228.
58 (1982) 149 CLR 191, 197 and 198.
59 [2022] VSC 13.
60 [2022] VSC 13 at [3079] – [3081].

(1) A director, employee or agent of Glencore.

(2) Alternatively, any other person at the direction, or with the consent or agreement (express or implied) of a director, employee or agent of Glencore.

[3082] Thirdly, turning to the final component of section 139B(2), the court must be satisfied that the conduct, or the direction, consent or agreement (express or implied) given, was within the scope of authority (actual or apparent) of the relevant director, employee or agent of Glencore.

[3083] Turning to the first question, the phrase "on behalf of" has no strict legal meaning.[61] Rather, the meaning will depend on the circumstances of a particular case and it can apply to a wide range of relationships which involve, in some way, the standing of a person as auxiliary to or representative of another person or thing.[62] It has generally been accepted that, without being exhaustive,[63] conduct will be "on behalf of" a corporation if:[64]

(1) The individual – a director, employee or agent – engaged in the relevant conduct intending to do so for or as a representative of the corporation.

(2) Alternatively, the individual engaged in the relevant conduct in the course of the corporation's business affairs or activities.

…

[3086] Thus, for section 139B(2) to apply the individual must be a director, employee or agent,[65] or any other person, so long as she or he is acting at the behest of a director, employee or agent of the corporation.[66] The term "director" takes its

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61 *NMFM Property Pty Ltd v Citibank Ltd* (2000) 107 FCR 270, 549 [1240] (Lindgren J); *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 37.3 (Lockhart J, with whom Sweeney and Neaves JJ agreed); *R v Portus; Ex parte Federated Clerks Union of Australia* (1949) 79 CLR 428, 435.4 (Latham CJ).

62 *R v Toohey; Ex parte Attorney-General (NT)* (1980) 145 CLR 374, 386.3 (Stephen, Mason, Murphy and Aickin JJ), cited in relation to the *Trade Practices Act* in *NMFM Property Pty Ltd v Citibank Ltd* (2000) 107 FCR 270, 549 [1240]; *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 37.3, cited in relation to the *Competition and Consumer Act* in *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408, [298] (Gleeson J).

63 *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199, [55] (Keane JA, with whom Williams JA and Atkinson J agreed). See also *Bennett v Elysium Noosa Pty Ltd (in liq)* (2012) 202 FCR 72, 131 [205] (Reeves J).

64 *NMFM Property Pty Ltd v Citibank Ltd* (2000) 107 FCR 270, 550 [1244], cited in *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* (2016) 250 FCR 136, 153 [78]-[80] (Davies, Gleeson and Edelman JJ) and in *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* [2018] FCA 1408, [299]. See also *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199, [55]-[59].

65 Thereby satisfying s 139B(2)(a).

66 Thereby satisfying s 139B(2)(b).

meaning from the Corporations Act 2001 (Cth).[67] *Neither "employee" or "agent" is defined and so their ordinary meanings will apply.*

[3087] Answering the third question requires the court to examine the authority of the individual (as director, employee, agent or "other person"). In short, the conduct of the director, employee or agent, or the conduct of the "other person" together with the direction, consent or agreement in question, must be within the scope of the person's actual or apparent authority, both of which take their meaning from common law. The legal principles underpinning actual and apparent authority are well established.

56. More importantly maybe, an employee or director engaging in misleading and deceptive conduct (despite doing so in the course of their employment), will generally also be personally liable as principal contravener.

57. In *Badger v John Kagelaris Pty Ltd* (***Badger***),[68] the Court considered whether a director of a company who sent emails containing alleged misrepresentations acted as a conduit for the company, or was personally liable as a primary contravenor. The Court stated:[69]

A director of a corporation who engages in conduct on its behalf also engages in conduct for which he or she can be directly liable under the ACL. That liability is a product of their own conduct which they engaged in as a director. There is no need to find "separate conduct", being conduct engaged in other than in the capacity as director, to conclude that a director who engages in conduct for a company also can attract primary and personal liability for that conduct: CH Real Estate Pty Ltd v Jainran Pty Ltd; Boyana Pty Ltd v Jainran Pty Ltd [2010] NSWCA 37, at [101]-[105]; Arktos Pty Ltd v Idyllic Nominees Pty Ltd [2004] FCAFC 119, at [13]; Houghton v Arms (2006) 225 CLR 553; [2006] HCA 59.

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67 Section 9 of the *Corporations Act* defines "director" of a company or other body as a person who is appointed to the position of a director, or is appointed to the position of an alternative director and is acting in that capacity, regardless of the name that is given to their position. "Director" also means, unless the contrary intention appears, a person who is not validly appointed as a director if they act in the position of a director, or the directors of the company are accustomed to act in accordance with the person's instructions or wishes.

68 [2019] NSWSC 1792.

69 [2019[NSWSC 1792 at [110].

58. The Court in *Badger* cited the judgment of the Full Court of the Federal Court of Australia in *Arktos Pty Ltd v Idyllic Nominees Pty Ltd*,[70] where Carr, Tamberlin and RD Nicholson JJ said (in relation to the *Fair Trading Act*):[71]

> *The authorities show that a director of a corporation who acts on its behalf in the course of trade or commerce also acts for himself in trade or commerce and, if the corporation is liable under a State Fair Trading Act for their conduct, they also attract primary liability under the same statute … That is supported in particular by the provision in s 84(2) of the TPA and s 82(2) of the FTA that conduct engaged in on behalf of a body corporate by a director within the scope of actual or apparent authority is deemed 'also' to have been engaged in by the body corporate. It is not correct, as the case for the third respondent asserted, that the principle recognised in these authorities is applicable only when there is a finding of 'separate conduct' by the director; that is, conduct other than in the capacity of director or agent. It is accepted in J D Heydon, Trade Practices Law, Law Book Company, Sydney, 1989 at 18.350 that corporate officers acting in the course of their employment, or in the scope of their authority as agents causing the corporation to be liable under s 84(2) also have personal liability. It is added there that in normal circumstances such officers will be knowingly concerned in the conduct: s 75B(c).*
>
> *[citations omitted]*
>
> *See also Houghton v Arms [2006] HCA 59; (2006) 225 CLR 553.*

59. Liability may also attach where a person was "involved" in the misleading or deceptive conduct of the principal, 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.

60. 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*.[72] It is not necessary to prove that the relevant person knew the conduct to be misleading.

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70 [2004] FCAFC 119.
71 [2004] FCAFC 119 at [13].
72 (1985) 158 CLR 661, 670.

61. 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),*[73] 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 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.*

62. 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*.[74] That is important insofar as pleading the allegations is concerned. If they are both to be deployed, they should be pleaded in the alternative.

J. CAUSATION

63. 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.

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

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73 [2009] FCA 134.
74 (1985) 158 CLR 661, 671.

(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.[75]

65. In *Protec Pacific Pty Ltd v Steuler Services GmbH & Co KG*[76] the Court of Appeal[77] identified the following principles relevant to causation and loss in the context of misleading or deceptive conduct:

> *There are several relevant principles governing the issues of causation and loss under s 82 of the TPA that are important to keep in mind:*
>
> *(1) A plaintiff is entitled to recover as damages a sum representing the prejudice or disadvantage it has suffered in consequence of its altering its position under the inducement of the misrepresentations made by the defendant;*[78]
>
> *(2) Under s 82(1) of the TPA, as under the common law, a plaintiff can only recover compensation for actual loss or damage incurred, as distinct from potential or likely damage;*[79]
>
> *(3) In determining whether a plaintiff has suffered loss or damage under s 82(1), it is usually necessary to compare the position that the plaintiff is in having been misled, with the position it would have been in but for the misrepresentation; by undertaking this comparison a court can determine whether the plaintiff is worse off as a result of relying upon the misrepresentation made by a defendant;*[80]
>
> *(4) Section 82 requires identification of a causal link between loss or damage and conduct done in contravention of the Act;*[81] *the question of causation is relative to the purpose of s 82, applied to the circumstances of a particular case;*[82]
>
> *(5) Determining the question of causation will often involve considering how much worse off the plaintiff is as a result of*

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75 *The Law of Misleading or Deceptive Conduct*, Third Edition, Lockhart [10.9].

76 [2014] VSCA 338 [540]-[541] (Kyrou J).

77 Tate, Santamaria and Kyrou JJA.

78 *Toteff v Antonas* (1952) 87 CLR 647, 650 (Dixon J) ('*Toteff*'). Although *Toteff* was a case in deceit, the principles have been applied to proceedings under s 52 of the TPA.

79 *Wardley* (1992) 175 CLR 514, 525 (Mason CJ, Dawson, Gaudron and McHugh JJ), referring to *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506.

80 *Toteff* (1952) 87 CLR 647, 650; *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 12 (Mason, Wilson and Dawson JJ) ('*Gates*'); *Marks* (1998) 196 CLR 494, 512-3 [41]–[42], 514–15 [48]–[52]; *Henville v Walker* (2001) 206 CLR 459, 470–1 [19]–[21] (Gleeson CJ), 509 [162] (Hayne J).

81 *Marks* (1998) 196 CLR 494, 512–13 [41]–[42] (McHugh, Hayne and Callinan JJ).

82 *Travel Compensation Fund v Tambree* (2005) 224 CLR 627, 639 [30] (Gleeson CJ).

entering into the transaction which the representation induced it to enter than it would have been had the transaction not taken place. This entitles the plaintiff to all the consequential loss directly flowing from its reliance on the representation, at least if the loss is foreseeable;[83]

(6) *Analysing the question of causation only by reference to what is, in essence, a 'but for' test has been found wanting in other contexts and it should not be treated as an exclusive test of causation under s 82 of the TPA either;*[84] *especially where there is more than one cause of the loss;*[85]

(7) *It is relevant to ask what the plaintiff would have done had it not relied on the representation;*[86]

(8) *As the judge recognised here, there are cases where if the contravening conduct had not occurred which misled the plaintiff, the plaintiff would not have embarked upon the project or transaction at all*[87] *(the 'no transaction cases'), and there are cases where if the plaintiff had not been misled it would still have embarked upon the project or transaction, but would have done so by entering into an alternative arrangement with the same party or a different party*[88] *('alternative transaction cases');*

(9) *A party that is misled suffers no prejudice or disadvantage unless it is shown that that party could have acted in some other way (or refrained from acting in some way) which would have been of greater benefit or less detriment to it than the course in fact adopted;*[89]

(10) *A court should not engage in speculation about multiple possibilities of past hypotheticals to which no specific evidence was directed;*[90]

(11) *Once the causal connection is established, there is nothing in s 82 of the TPA which suggests that the amount that may be recovered under that section should be limited by drawing some analogy with the law of contract, tort or equitable remedies;*[91]

(12) *If the defendant's breach has 'materially contributed' to the loss or damage suffered, it will be regarded as a cause of the*

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83 *Gates* (1986) 160 CLR 1, 14-15 (Mason, Wilson and Dawson JJ).

84 *Marks* (1998) 196 CLR 494, 512 [41]–[42]; *Wardley* (1992) 175 CLR 514, 533; *Chappel v Hart* (1998) 195 CLR 232, 255–6 [62]; *Travel Compensation Fund v Tambree* (2005) 224 CLR 627, 642–3 [45]; *Abigroup Contractors Pty Ltd v Sydney Catchment Authority [No 3]* (2006) 67 NSWLR 341 ('*Abigroup*').

85 *Henville v Walker* (2001) 206 CLR 459, 509 [163] (Hayne J).

86 *Gates* (1986) 160 CLR 1, 13 (Mason, Wilson and Dawson JJ).

87 *Henville v Walker* (2001) 206 CLR 459; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413.

88 *Gates* (1986) 160 CLR 1; *Marks* (1998) 196 CLR 494.

89 *Marks* (1998) 196 CLR 494, 514 [48]–[49].

90 *Abigroup* (2006) 67 NSWLR 341, 354-5 [59]–[61].

91 *Marks* (1998) 196 CLR 494, 503 [15] (Gaudron J), 510 [38] (McHugh, Hayne and Callinan JJ), 529 [102]–[103] (Gummow J).

loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage. As long as the breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not have brought about the damage;[92]

(13) In exceptional cases, where an abnormal event intervenes between the breach and damage, it may be right as a matter of common sense to hold that the breach was not a cause of damage. But such cases are exceptional.[93]

These principles have emerged from a significant line of authority.

66. These principles have been recently endorsed and applied in *Bolitho* at [1723],[94] *Liang* at [54]-[59],[95] and *Oliana Foods Pty Ltd* at [753].[96]

Reliance

67. 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*.[97]

(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*[98], 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 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

92 *Henville v Walker* (2001) 206 CLR 459, 493 [105]–[106] (McHugh J).
93 Ibid.
94 *Bolitho v Banksia Securities Ltd (No 18) (remitter)* [2021] VSC 666, [1723] (Dixon J).
95 *Liang v Chen* [2020] VSC 106, [54]-[59] (Lyons J).
96 *Oliana Foods Pty Ltd v Culinary Co Pty Ltd (in liq)* [2020] VSC 693, [753] (Connock J).
97 [2009] NSWCA 427, [40] per Macfarlan JA, Hodgson JA and Sackville AJA agreeing.
98 [2006] NSWCA 37.

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.[99]

[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*.[100]

(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*.[101] In *Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3)*,[102] Beasley JA (with whom Ipp and Tobias JJA agreed) stated:

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99 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.

100 [2010] VSCA 245, [106].

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

102 (2006) 67 NSWLR 341.

[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 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*;[103] *Ricochet Pty Ltd v Equity Trustees Executors & Agency Co Ltd*.[104] 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

103 (2001) 206 CLR 459, [61] per Gaudron J, [106] per McHugh J.
104 (1993) 113 ALR 30, 36 per Lockhart, Gummow and French JJ.

> *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.*

(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*.[105]

The impact of due diligence on reliance in a sale transaction

68. In *Elite Gold Pty Ltd v CM Holdings*[106], Tamberlin and Sackville JJ made the following observations in relation to a submission that a representation had the effect of "propelling" a person down the path of further inquiry, which is particularly relevant in the context of a purchaser's due diligence:

> *…It is suggested that, as a matter of principle, investigations by a representee which confirm or tend to confirm the representation cannot displace the operative effect of the initial representation so as to establish lack of reliance. In our view, this categorical statement of principle is not correct. Whether an applicant establishes reliance on a representation in a particular case must depend upon the circumstances. These will include the nature and extent of the investigations, if any, undertaken by the representee and the significance of those investigations for the decision ultimately made.*
>
> *For example, an estate agent may attribute a value to a particular property, falsely representing that his belief is based on a valuation by an independent valuer. The representee decides to make independent inquiries. To this end, the representee obtains valuations from several reputable valuers in which he or she has great confidence. The valuations support the value attributed to the property by the agent.*
>
> *In these circumstances it cannot be categorically said that a misrepresentation acts as an inducement to the representee simply because the misrepresentation caused the representee to verify the situation for himself or herself. In such circumstances, the conclusion may be open that the representee has acted on his or her own independent investigations to the exclusion of the representation have (sic) any operative effect on the ultimate decision. True it is that the enquiries and independent investigations may not have been made*

105 (2001) 206 CLR 459, [165] per Hayne J; [66] per Gaudron J; [140] per McHugh J; Gummow J agreeing with Hayne and McHugh JJ.

106 [1995] FCA 447.

but for the misrepresentation. However, that does not necessarily mean that the misrepresentation was an inducing cause, at the time the transaction was entered into, within the well known principles enunciated by Wilson J in Gould v Vaggelas (1985) 157 CLR 215 at 236. At the time the decision was made, the representee may have discounted completely the opinion expressed by the agent and placed no reliance whatsoever on the false claim that the opinion was supported by an independent valuation….

69. In *Lifehealthcare Distribution Pty Limited v Stewart Allen Nicholas*,[107] Hammerschlag J made the following comments which bear similarities to the present case:

> *…The 2006 Budget is to be contrasted with the sophisticated and comprehensive modelling and in-depth analysis carried out by Crescent, the significant investigations which the plaintiff carried out in its own right and the comprehensive due diligence carried out on its behalf by PWC. The plaintiff's due diligence included interviews with Admed's most significant customer, the DVA.*
>
> *The idea that a three-line budget was a cause of the plaintiff entering into a significant transaction, such as the Agreement, rather than its own judgment that Admed was a good prospect, based on the in-depth processes which it implemented, is fanciful.*
>
> *Even if the conversation recounted by Paul Mirabelle (and denied by the Nicholases) on 27 October 2005 occurred, Paul Mirabelle said that the plaintiff would confirm $2.2M EBIT in its due diligence. As Daren McKennay sought to reassure Lyn Nicholas on 28 November 2005, the material was sought to enable the plaintiff to better understand the business. The plaintiff's operatives reached that understanding from in-depth due diligence and their own analysis, not from Lyn Nicholas' three line budget…*

70. In *Lawless v Mackendrick (No 4)*,[108] Kenneth Martin J concluded as follows in relation to the issue of reliance:

> *…(14) That impression was expressly confirmed by Mr Lawless during cross-examination by counsel for the first defendant. Mr Lawless was referred to the terms of an express disclaimer at the back of the brochure (TB 84, page 324). It said:*
>
> > *… all interested parties should make their own independent investigation and enquiries concerning the relevant property known as 'Imperial Inn - 83 Avon Terrace, York' (see ts 330).*

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107 [2011] NSWSC 661, [294]-[296].
108 [2013] WASC 272, [213(14)].

Mr Lawless accepts he saw those words.

He was then asked in cross-examination (ts 330):

> *As an experienced businessman, whether you read [the disclaimer] in February 2000 or not, that was standard practice, wasn't it; if you're going to buy a business you need to take into account the trading performance of the business to assess whether or not it is worth what you may be looking at paying for?*

To which Mr Lawless replied:

> *Yes, I agree with that. My standard procedure is that I hire professionals to do that for me.*

Mr Lawless' admission negates any degree of reliance by Mr Lawless (and Curtin) upon the content of the July 1999 auction brochure. Further (ts 331) Mr Lawless confirmed a second time that he usually hired professionals to 'check things out' and, importantly to this case, that he did so with the Imperial Inn purchase by Curtin.

I conclude there was no prospect of Curtin, through Mr Lawless, being at all influenced by the auction brochure's bland and generalised terms about a 'thriving business', 'excellent business opportunity', or 'opportunity to make substantial profits'….

K. PROOF OF LOSS

71. The relevant provision which is engaged for the purpose of recovering compensation is section 236 of the ACL. This section relevantly states:

> *(1) If:*
>
> *(a) a person (the **claimant**) suffers loss or damage because of the conduct of another person; and*
>
> *(b) the conduct contravened a provision of Chapter 2 or 3;*
>
> *the claimant may recover the amount of the loss or damage by action against that person, or any person involved in the contravention.*

72. In *Keys Consulting Pty Ltd v CAT Enterprises Pty Ltd*,[109] the Court of Appeal emphasised that it is the plaintiff who bears the evidential onus of proving both

[109] [2019] VSCA 136 (Maxwell ACJ, Niall JA and Macaulay AJA) [ATH.600.001.0001].

the *fact* of loss and the *amount* of loss under s 236 of the ACL. The Court of Appeal stated as follows:[110]

> *[67] The statutory misconduct prohibited by s 18 of the ACL only gives rise to a cause of action for damages if, because of the conduct, a person suffers loss and damage.[111] The statutory actions for relief under ss 236 or 243 of the ACL require proof that the plaintiff suffered (or, in the case of s 234, is likely to suffer) loss and damage. Being an element of the cause of action, the legal burden of proof of that damage lies upon the plaintiff.*
>
> *[68] In claims for damages, the plaintiff must prove both the fact of loss and the amount of that loss before he or she can recover substantial damages.[112] If a plaintiff fails to prove either of those elements, he or she may recover nominal damages only where the claim is in contract, or the action fails altogether, where it lies in tort.[113]*
>
> *[69] However, it is well established that a mere difficulty in quantifying damages does not necessarily defeat the plaintiff's entitlement to a remedy against the wrongdoer. In appropriate circumstances, where some sort of actual loss has been established, the court must estimate the damages as best it can.[114] Addressing a claim for damages for breach of contract, Street CJ in Howe v Teefy[115] said:*
>
> > *The question in every case is: has there been any assessable loss resulting from the breach of contract complained of? There may be cases where it would be impossible to say that any assessable loss has resulted from a breach of contract, but, short of that, if a plaintiff has been deprived of something which has a monetary value, a jury is not relieved from the duty of assessing the loss merely because the calculation is a difficult one or because the circumstances do not admit of the damages being assessed with certainty.[116]*
>
> *[70] However, there is a distinction to be drawn between a situation that does not permit damages to be assessed with certainty, and one in which the plaintiff has simply failed to*

110 [2019] VSCA 136 at [67]-[75] [ATH.600.001.0001@0022-0026].

111 *ACL* ss 18, 236.

112 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 80 (Mason CJ and Dawson J), 99 (Brennan J), 118 (Deane J), 137-8 (Toohey J); *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237, 241 (Brooking J) ('*JLW*').

113 *JLW* [1994] 1 VR 237, 241 (Brooking J).

114 *Chaplin v Hicks* [1911] 2 KB 786, 792 (Vaughan Williams LJ); *Fink v Fink* (1946) 74 CLR 127, 143 (Dixon and McTiernan JJ); *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, 411-12 (Dixon and Fullagar JJ) ('*McRae*').

115 [1927] 27 SR(NSW) 301.

116 Ibid 305-6, quoted in *McRae* (1951) 84 CLR 377, 411.

produce evidence that was otherwise reasonably available. The plaintiff is entitled to have the court do the best it can in the former case, but not in the latter. Where a party is able to produce evidence about loss and damage, they must do so with as much certainty and particularity as is reasonable in the circumstances. This principle is long established.[117]

[71] Put succinctly, Devlin J said in Biggin & Co Ltd v Permanite Ltd:[118]

> *where precise evidence is obtainable, the court naturally expects to have it, [but] where it is not, the court must do the best it can.*[119]

[72] Along with other statements to the same effect, this principle was addressed and applied by Brooking J in JLW (Vic) Pty Ltd v Tsiloglou ('JLW'):[120]

> *A plaintiff cannot recover substantial as opposed to nominal damages unless he proves both the fact and the amount of damage. If he proves the fact of the loss but does not call the necessary evidence as to its amount he cannot be awarded substantial damages: he must put the tribunal in the position of being able to quantify in money the damage he has suffered. So juries in personal injuries cases are often directed that the plaintiff must prove to their satisfaction what he has suffered and will suffer and what is fair and reasonable compensation in respect of that. It is often said that the amount of the damage must be proved with certainty, but this only means as much 'certainty' as is reasonable in the circumstances. Where precise evidence is obtainable, the court naturally expects to have it; where it is not, the court must do the best it can.*[121]

[73] Although, in the passage cited above, his Honour was speaking of the application of these principles in respect of a breach of contract, on the issue of the certainty of proof of loss and damage, the same principles should apply equally in tort. Brooking J continued his analysis in JLW of the situations in which it was appropriate to insist on precise evidence and those in which estimation is permissible as follows:

> *There is no rigid dividing line between cases in which guesswork is permissible in assessing damages and cases in which it is not. The borderline between guesswork and rational assessment is itself indistinct,*

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117 *Ratcliffe v Evans* [1892] 2 QB 524, 532-3. See the very helpful analysis of this topic in *NCON Australia Ltd v Spotlight Pty Ltd [No 5]* [2012] VSC 604, [281]-[295] (Robson J).

118 [1951] 1 KB 422.

119 Ibid 438.

120 [1994] 1 VR 237.

121 Ibid 241 (citations omitted).

as is the line between evidence that is 'precise' (the Permanite Case dictum) and evidence that is not. In Enzed Holdings Ltd v Wynthea Pty Ltd, (to which Tadgell J has drawn my attention) the Full Federal Court thought the case to be one in which precise evidence of the loss was not obtainable, so that if the trial judge found that the Plaintiffs have suffered some loss he must do his best to quantify the loss even if 'a degree of speculation and guesswork' was involved.

Where the action is for damages for breach of contract and the plaintiff fails to prove any actual loss he may fall back on an award of nominal damages. (The plaintiff fails to prove actual loss for this purpose if he shows that he has suffered loss but fails to furnish material from which its amount may be arrived at.)[122]

[74] In Placer (Granny Smith) Pty Ltd v Theiss Contractors Pty Ltd ('Placer'),[123] *Hayne J – with Gleeson CJ, McHugh and Kirby JJ agreeing – also addressed the same distinction:*

Placer undoubtedly bore the burden of proving not only that it had suffered damage as a result of Theiss Contractors' breach of contract, but also the amount of the loss it had sustained. It goes without saying that it had to prove these matters on the balance of probabilities and with as much precision as the subject matter reasonably permitted.

It may be that, in at least some cases, it is necessary or desirable to distinguish between a case where a plaintiff cannot adduce precise evidence of what has been lost and a case where, although apparently able to do so, the plaintiff has not produced such evidence. In the former kind of case it may be that estimation, if not guesswork, may be necessary in assessing the damages to be allowed. References to mere difficulty in estimating damages not relieving a court from the responsibility of estimating them as best it can may find their most apt application in cases of the former rather than the latter kind. This case did not invite attention to such questions. Placer sought to calculate its damages precisely.[124]

[75] To summarise, it is useful to refer to what was said by Chernov JA, with whom Buchanan JA agreed, in Longden v Kenalda Nominees Pty Ltd:[125]

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122 Ibid 243 (citations omitted).
123 (2003) 196 ALR 257.
124 Ibid 266 [37]-[38] (citations omitted).
125 [2003] VSCA 128.

> *Thus, it is for the plaintiff to prove both the fact of loss arising from the defendant's breach and the amount of the loss. Moreover, the plaintiff is required to establish both matters with as much certainty and particularity as is reasonable in the circumstances. Consequently, where a plaintiff could have produced evidence of loss but has simply failed to do so, it ordinarily means that it has failed to prove its case on damages (so that, where the claim is based on breach of contract, the plaintiff would only recover nominal damages). There are, of course, situations where a plaintiff cannot adduce precise evidence of the amount of loss, in which case the court will do its best in that regard and will estimate the damages and, where appropriate, will engage in a certain amount of guesswork.*[126]

[underlined emphasis added].

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

74. 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.

75. In *Gates v City Mutual Life Assurance Society Ltd*,[127] 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*

126 Ibid [33] (citations omitted), a passage recently cited with approval in *MA & JA Triposi Pty Ltd v Swan Hill Chemicals Pty Ltd* [2019] VSCA 46, [73] (Kyrou, Kaye and Emerton JJA).

127 (1986) 160 CLR 1.

(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*.*

76. 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 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.*

77. In *The Commonwealth of Australia v Amann Aviation Pty Ltd,*[128] 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*

[128] (1992) 174 CLR 64.

> *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.*

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

79. In *Henville v Walker*[129], 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]

80. 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

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129 (2001) 206 CLR 459.

chance case, in *Sellars v Adelaide Petroleum NL*[130], 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.*

81. In *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 28)*,[131] Elliott J recently and conveniently set out the principles relevant to the assessment and measure of damages under s 236 of the ACL in the context of a sale of a business.[132] The relevant parts of the judgment (including citations) are set out below:

> *[3912] The starting point is consideration of the words of section 236 itself.*[133] *The question is simply has the plaintiff established it has suffered loss or damage because of the contravening conduct?*[134] *In assessing the loss, the court's approach must be flexible and best adapted to give the plaintiff an amount that will most fairly compensate for the wrong suffered.*[135]
>
> *[3913] The court is not constrained to principles of common law relevant to assessing damages in contract or tort.*[136] *However, in many cases the measure of damages in tort has*

130 (1994) 179 CLR 332.
131 [2022] VSC 13.
132 [2022] VSC 13 at [3912]-[39##].
133 *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 407 [44] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 526.4 (Mason CJ, Dawson, Gaudron and McHugh JJ).
134 *Henville v Walker* (2001) 206 CLR 459, 501-502 [130]-[132] (McHugh J, with whom Gummow agreed); *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 512-513 [42] (McHugh, Hayne and Callinan JJ). See also par 3916 below.
135 *ABN AMRO Bank NV v Bathurst Regional Council* (2004) 224 FCR 1, 186 [963] (Jacobson, Gilmour and Gordon JJ), citing *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2008) 73 NSWLR 653, 684 [171] (Ipp JA), *HYW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 667 [65] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ) and *Henville v Walker* (2001) 206 CLR 459, 502 [131] (McHugh J).
136 *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 403 [31] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Marks v GIO Australia Holdings Ltd* (1988) 196 CLR 494, 503-504 [17] (Gaudron J); 510 [38], 512 [40]-[41] (McHugh, Hayne and Callinan JJ), 529 [102]-[103] (Gummow J); *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 526.2 (Mason CJ, Dawson, Gaudron and McHugh JJ)); *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 14.8 (Mason, Wilson and Dawson JJ).

been considered appropriate.[137] *In tort, damages are awarded with the object of placing the plaintiff in the position they would have been had the tort not been committed.*[138] *In particular, where appropriate and helpful, the court can look to actions for deceit as analogous to claims for compensation pursuant to s 236,*[139] *but only as a guide.*

[3914] In the current proceeding, the measure of damages for tort of deceit provides helpful guidance for the court to ascertain the measure of damages under section 236 that will most fairly compensate Cargill Australia for its loss. Such an approach would essentially put Cargill Australia in the position it would have been in if not for the relevant conduct; namely not paying the purchase price of $420 million and not acquiring Joe White (but accounting for the benefit received by actually taking ownership of Joe White represented by ascertaining its real value).[140]

X.73.12 The common approach

[3915] In HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd, the High Court recognised that, when the acquisition of an asset is induced by misleading or deceptive conduct, the common approach to the measure of damages is the difference between the real value of the asset at the date of acquisition and the price paid for it.[141] *In effect, a plaintiff is entitled to recover the loss or expenditure incurred because of the conduct in question, but must account for any corresponding advantage gained. This approach has been described as "the rule in Potts v Miller".*[142] *The High Court explained that true or real value is distinct from market value:*[143]

> *[T]he test [of the rule] depends not on the difference between price and "market value", but price and "real value" or "fair value" or "fair or real value" or "intrinsic" value or "true value" or "actual value" or what the*

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137 See, for example, *Henville v Walker* (2001) 206 CLR 459, 470 [18] (Gleeson CJ); *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 6.8-7.1, 14.8 (Mason, Wilson and Dawson JJ). See also *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 348.6 (Mason CJ, Dawson, Toohey and Gaudron JJ).

138 *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 12.2 (Mason, Wilson and Dawson JJ). See also *Gould v Vaggelas* (1984) 157 CLR 215, 265.5 (Dawson J); *Toteff v Antonas* (1952) 87 CLR 647, 650.5 (Dixon J).

139 *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281, 290.9-291.2 (Brennan, Deane, Dawson, Gaudron and McHugh JJ); *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 14.7 (Mason, Wilson and Dawson JJ).

140 For convenience, unless indicated to the contrary, no distinction is made between Joe White and the Joe White Business in this part of the reasons.

141 (2004) 217 CLR 640, 656-657 [35] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ), referring to *Potts v Miller* (1940) 64 CLR 282. See also *Morellini v Adams* [2011] WASCA 84, [42] (McLure P, with whom Pullin and Newnes JJA agreed); *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281, 291.2 (Brennan, Deane, Dawson, Gaudron and McHugh JJ); *Toteff v Antonas* (1952) 87 CLR 647, 650.5 (Dixon J), 654.1 (Williams J).

142 *HTW Valuers (*Central *Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 656-657 [35] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ). See also *Potts v Miller* (1940) 64 CLR 282.

143 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 657 [36] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

asset was "truly worth" or "really worth" or "what would have been a fair price to be paid … in the circumstances … at the time of the purchase".

(Citations omitted.)

[3916] However, "the 'rule' is not universal or inflexible or rigid", and is only "a rule of practice".[144] *It is not the default position. The fundamental questions are: "what are the facts, do those facts establish a compensable loss and if so, what was its true measure?"*[145]

X.73.1.2.1 Determining true or real value

[3917] The distinction between true, or real, value and market value is "sometimes difficult to draw, but it is old and fundamental".[146] *The market value of the asset is the price which would be struck between "willing but not anxious buyers" and "willing but not anxious sellers".*[147] *The assessment must be undertaken "at the relevant time" and "in the person of the bargaining parties as on the critical date".*[148] *… In relation to market value, reference was made in the Cargill Parties' submissions to what was described as the "Falconer principle", that "evidence of future events is admissible not to prove a hindsight but to confirm a foresight.*[149] *The Viterra Parties pointed to the criticism that this formulation was an oversimplification of the principle and argued that its relevance to the current case was limited.*[150] *While it has been recognised that there is a risk in adopting this single phrase independent of context, the principles from Housing Commission of New South Wales v Falconer are relevant to the possibility of using subsequent events in determining market value.*[151] *While these principles relate to an assessment of market value, rather than true value, market value is a "starting point" to determine real value.*[152]

[3918] Market value will differ from true value if the market value is delusive or fictitious". Such a market value may be the result

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144 Ibid, 657 [35]. See more generally *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413, 459 [123] (Kirby and Callinan JJ, with whom Gummow J agreed at 449 [93]), for a case regarding negligence.

145 *ABN AMRO Bank NV v Bathurst Regional Council* (2004) 224 FCR 1, 188 [969] (Jacobson, Gilmour and Gordon JJ). See further par 3927 below.

146 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 657 [36] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

147 Ibid, 661 [46]; *Spencer v Commonwealth* (1907) 5 CLR 418, 432.2 (Griffiths CJ), 441.8 (Issacs J).

148 *Spencer v Commonwealth* (1907) 5 CLR 418, 432.4 (Griffiths CJ), 441.8 (Issacs J).

149 See *Challenger Property Asset Management Pty Ltd v Stonnington City Council* (2011) 34 VR 445, 461-463[35]-[38] (Croft J), quoting *Housing Commission of New South Wales v Falconer* [1981] 1 NSWLR 547, 558B-559C (Hope JA), 563F (Glass JA), 576B (Mahoney JA).

150 *Challenger Property Asset Management Pty Ltd v Stonnington City Council* (2011) 34 VR 445, 464 [40], citing *Minister Administering the Crown Lands Act v Illawarra Local Aboriginal Land Council* (2009) 168 LGERA 71, 88–91 [70]-[85] (Basten JA).

151 *Challenger Property Asset Management Pty Ltd v Stonnington City Council* (2011) 34 VR 445, 464 [41] (Croft J).

152 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 659 [41] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

of market manipulation or some other improper practice on the part of the vendor,[153] or where the market operates under some material mistake.[154]

[3919] Whatever the precise position with respect to market value, true or real value can be determined with reference to subsequent events insofar as they shed light on the true value of the asset at the relevant date.[155] In Kizbeau Pty Ltd v W G & B Pty Ltd, the High Court stated that "although the value is assessed as at the date of the acquisition, subsequent events may be looked at insofar as they illuminate the value of the thing as at that date".[156]

[3920] Importantly, a distinction is drawn between subsequent events where the cause of loss is intrinsic and those where the cause of loss is extrinsic. The court must distinguish between causes of decline in value that are "intrinsic", or "inherent", in the thing itself, which should be taken into account, and causes that are "independent" or "extrinsic", which should not be taken into account to determine the true value.[157]

[3921] In Kizbeau Pty Ltd v W G & B Pty Ltd,[158] the nature of this distinction was traversed. The High Court stated that subsequent events arising from the nature or the use of the thing itself should be taken into account. For example, the takings of a business subsequent to purchase were generally relevant not only to prove a representation made before the acquisition, but also to prove the true value of the business as at the date of purchase.[159] This is true even when some difference exists between the conditions under which the business was conducted before and after purchase, subject to allowance being made for differences in conditions.[160] However, supervening events, such as a decline in takings caused by ineptitude or unexpected competition post-acquisition, should not be taken into account.[161]

…

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153 Ibid, 657-658 [37].

154 Ibid, 658 [37], 661 [45].

155 Ibid, 657-659 [37]-[39]; *Potts v Miller* (1940) 64 CLR 282, 299.6 (Dixon J).

156 (1995) 184 CLR 281, 291.2 (Brennan, Deane, Dawson, Gaudron and McHugh JJ), cited in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 658 [39] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ). See also *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426, 431.7 (Lord Macnaughten), cited in *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281, 294.7-295.2.

157 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 659 [40] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ), citing *Potts v Miller* (1940) 64 CLR 282, 298 (Dixon J). See also *ABN AMRO Bank NV v Bathurst Regional Council* (2004) 224 FCR 1, 188-189 [971] (Jacobson, Gilmour and Gordon JJ); *Morellini v Adams* [2011] WASCA 84, [44] (McLure P, with whom Pullin and Newnes JJA agreed).

158 (1995) 184 CLR 281 (Brennan, Deane, Dawson, Gaudron and McHugh JJ).

159 Ibid, 291.3.

160 Ibid.

161 Ibid.

X.73.1.3 Instances when Potts v Miller is not appropriate

[3928] It is fundamental that a plaintiff be compensated for loss suffered. The approach in Potts v Miller is not universal and is only 1 means of giving effect to this.[162] *Alternative approaches may be appropriate in a range of circumstances.*[163]

[3929] In determining which approach to adopt, the court must consider the facts of the case and what the true measure of compensable loss is.[164] *An alternative approach to assessing loss will be appropriate if required to properly compensate the plaintiff for their loss.*[165] *When considering tort cases, courts have stated that in certain circumstances an alternative approach will be appropriate if the plaintiff "incurs losses which are not represented by the difference between the price and the value of the business",*[166] *or if required "in order to give adequate compensation for the wrong done to the plaintiff after the transaction is complete",*[167] *or "when the overriding compensatory rule requires it".*[168]

[3930] Circumstances when an alternative approach may be appropriate include:

(1) Where the loss is a contingent loss, the appropriate date for ascertaining may be the date upon which the contingency materialised.[169]

(2) Where the misrepresentation continues to operate after the date of acquisition of the asset so as to induce the plaintiff to retain the asset.[170]

(3) Where the misrepresentation continues to operate and subsequent losses are directly attributable to the

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162 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 666-667 [63] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ), citing *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 265 (Lord Browne-Wilkinson with whom Lord Keith of Kinkel and Lord Slynn of Hadley agreed).

163 Ibid, 666-668 [63]-[66] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

164 *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, 188 [969] (Jacobson, Gilmour and Gordon JJ).

165 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 666-667 [63] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ), citing *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 265, 267.

166 *Gould v Vaggelas* (1984) 175 CLR 215, 221.8-222.2 (Gibbs CJ).

167 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 266F (Lord Browne-Wilkinson, with whom Lord Keith of Kinkel and Lord Slynn of Hadley agreed).

168 *Gould v Vaggelas* (1984) 175 CLR 215, 221.8-222.2 (Gibbs CJ); *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 266F (Lord Browne-Wilkinson), 284C (Lord Steyn, with whom Lord Keith of Kinkel and Lord Slynn of Hadley agreed).

169 *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 410 [55] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 532 [107] (Gummow J). See also *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 532, cited in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 655 [29] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

170 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 668 [66] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ), citing *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 267C (Lord Browne-Wilkinson, with whom Lord Keith of Kinkel and Lord Slynn of Hadley agreed).

impugned conduct itself and not extraneous factors.[171]

(4) Where the circumstances of the case are such that the plaintiff is, by reason of the impugned conduct, locked into the property.[172]

[3931] It is uncontroversial that determining the appropriate approach requires "consideration of factual questions going to the circumstances of the acquisition" and the relevant principles identified by the High Court in HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd.[173]

X.73.1.4 The "left in hands" approach

[3932] An alternative approach, in which the benefits of any subsequent resale may be taken into account is, for example, the "left in hands" approach. In an appropriate case, this may be utilised as the preferred approach to calculate the actual amount of loss or damage, or may be a means by which the soundness of another approach utilised to calculate the amount might be checked.

[3933] Under the "left in hands" approach, damages are calculated as whatever is left in the purchaser's hands at the time of the trial.[174] *The plaintiff is entitled to all their loss, subject to giving credit for any benefit that has been received, including proceeds from a subsequent sale of the asset.*[175]

[3934] A primary reason for adopting the Potts v Miller approach is the desirability of separating out losses resulting from extraneous factors subsequent to the purchase.[176] *However, it may be less appropriate to look primarily at the point in time of the acquisition if there are no losses resulting from extraneous factors to separate out, and the "left in the hands" approach may be more readily adopted.*[177]

[underlined emphasis added].

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171 *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, 188-189 [971], 191 [983] (Jacobson, Gilmour and Gordon JJ).

172 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 668 [66] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ), citing *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 267C (Lord Browne-Wilkinson with whom Lord Keith of Kinkel and Lord Slynn of Hadley agreed).

173 *North East Equity Pty Ltd v Proud Nominees Pty Ltd* (2010) 269 ALR 262, 295 [178], and see also 295 [176] (Sundberg, Siopis and Greenwood JJ).

174 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 666-667 [63]-[64] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

175 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 266G-267C (Lord Browne-Wilkinson, with whom Lord Keith of Kinkel and Lord Slynn of Hadley agreed).

176 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 667-668 [65] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

177 Ibid.

L. PRACTICE TIPS

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

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

(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.[178]

Christian Juebner SC
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Victorian Bar

[178] 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.