

MISLEADING OR DECEPTIVE CONDUCT CASES

IN THE SUPREME COURT OF VICTORIA

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1. Judges of the Supreme Court of Victoria commonly decide whether a person has engaged in misleading or deceptive conduct in trade or commerce. Misleading or deceptive conduct claims are not the exclusive province of the Federal Court, and never have been. Misleading or deceptive conduct claims, whether alone or in combination with alternative or related causes of action, are mainstream commercial law cases in the Court.
2. There are very many judgments of the Federal Court and of the Supreme Courts of the Australian States and Territories, which consider the meaning, operation and application of the misleading or deceptive conduct statutory provisions which proscribe such conduct.¹ Ormiston J in July 1990 in *Futuretronics International Pty Ltd v Gadzhis*, in a *Fair Trading Act 1985* (Vic) case concerning dummy bidding at real estate auctions,² referred to an Australian Law Journal article by French J, in which his Honour identified 386 judgments concerning misleading or deceptive conduct as at August 1988.³ There are 28 High Court cases which have considered misleading or deceptive conduct issues substantively, or decided related issues, and which are of current practical application.⁴ One hesitates to speculate as to the total number of cases today.

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¹ *Trade Practices Act 1974* (Cth) (“the TPA”) ss 52, 82, 87; *Fair Trading Act 1999* (Vic) ss 9, 159; the *Australian Consumer Law*, being Schedule 2 to the *Competition and Consumer Act 2010* (Cth), (“the ACL”), ss 18, 236, 237, 238, 243, from 1 January 2011 (the ACL applies as a law of the State of Victoria pursuant to s 8 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic)); the *Corporations Act 2001* ss 1041H, 1041I, 1325; the *Australian Securities and Investment Commission Act 2001* ss 12DA, 12GF, 12GM.

² [1992] 2 VR 217 at 235.

³ French J (as French CJ then was) *A Lawyer’s Guide to Misleading or Deceptive Conduct* (1989) 63 ALJ 250 at 250.

⁴ *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191; *Gould v Vaggelas* (1984) 157 CLR 215; *Yorke v Lucas* (1985) 158 CLR 661; *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1; *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; *Kizbeau Pty Ltd v W G & B Pty Ltd v McLean* (1995) 184 CLR 281; *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563; *Marks v GIO Australia Holdings* (1998) 196 CLR 494; *Kenny & Good Pty Ltd v MGICA* (1999) 199 CLR 413; *Effem Foods Pty Ltd v Lake Cumbeline Pty Ltd* (1999) 161 ALR 599; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591; *Campomar Sociedad, Limitada v Nike International Limited* (2000) 202 CLR 45; *Henville v Walker* (2001) 206 CLR 459; *I&L Securities v HTW Valuers* (2002) 210 CLR 109; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640; *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388; *Travel Compensation Fund v Tambree* (2005) 224 CLR 627; *Houghton v Arms* (2006) 225 CLR 553; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304; *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* (2010) 241 CLR 357 (“Miller”); *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486 (“Forrest”); *Google Inc v Australian Competition and Consumer Commission*

3. There are perhaps a number of reasons for such litigious activity. First, misleading or deceptive conduct claims have been useful for plaintiffs because in some situations, such claims can operate as a “gap filler”, freed from the strictures of common law or equitable causes of action, and can provide flexible forms of relief. Second, misleading or deceptive conduct claims have been successfully litigated concerning a wide range of economic activity. Third, increasing numbers of class actions have been brought where misleading or deceptive conduct claims have been made. Fourth, the regulatory authorities, the ACCC and ASIC, have been active in pursuing enforcement proceedings in the public interest. Fifth, the meaning of the words misleading or deceptive or likely to mislead or deceive, is somewhat opaque. Gibbs CJ in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* stated:⁵ “Those words are on any view tautologous”. Much judicial ink has been spilt in discerning principles which are effective to give the words a practical operation. Some of these principles have no direct basis in the statutory language and have given rise to difficulty of application.
4. The purposes of this paper are first, to provide an analysis of some misleading or deceptive conduct principles, with particular reference to recent issues in the High Court. Second, to consider some decisions of the Supreme Court. In recent years the Court, both in the Court of Appeal and the Trial Division, has decided some important misleading or deceptive conduct cases, particularly concerning causation/reliance/damages issues. Of course, High Court decisions are paramount and decisions of other courts are relevant. However, decisions of the Supreme Court of Victoria in misleading or deceptive conduct cases merit our attention.

What is misleading or deceptive conduct?

5. A short answer is that misleading or deceptive conduct occurs when a person leads another into error.⁶ However, the context is all important.⁷ There are no different categories of misleading or deceptive conduct,⁸ but issues arise in some contexts which do not arise in others. Where it is alleged that a public statement or advertisement is misleading or deceptive, or likely to mislead or deceive, the principal forms of relief typically sought are declarations as to contravention, and injunctions to prevent repetition. The information provided by the defendant is tested by reference to the reaction of hypothetical ordinary, reasonable readers as to what was the

(2013) 249 CLR 435 (“*Google Inc*”); *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 304 ALR 186 (“*TPG Internet*”); *Sidhu v Van Dyke* (2014) 308 ALR 232.

⁵ (1982) 149 CLR 191 at 198.

⁶ *Ibid*; *Miller* (2010) 241 CLR 357 at 368 [15] per French CJ and Kiefel J; *Google Inc* (2013) 249 CLR 435 at 465 [92] per Hayne J.

⁷ *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 319 [26] per French CJ.

⁸ *Google Inc* (2013) 249 CLR 435 at 467-468 [102] per Hayne J.

dominant message⁹ conveyed to them. It is enough for relief to be granted that the statement or advertisement has a tendency¹⁰ to lead such persons into error. It is not necessary for the court to find that it is more likely than not that the readers were led into error, and it is enough that there is a real and not remote possibility of the reader being misled or deceived.¹¹ However where the impugned conduct concerns public or private statements and the plaintiff seeks to avoid a transaction entered into because of the statements, the plaintiff ordinarily will not obtain relief if it does not prove that the misleading statements were acted upon by it to its detriment in entering into the transaction. Nevertheless, general principles govern all contexts.

6. Perhaps the most useful statement of principles determining whether contravening conduct has occurred is that of McHugh J in *Butcher v Lachlan Realty Pty Ltd*,¹² as summarised by Macaulay J in *Vouzas v Bleake House*:¹³

- Whether the conduct is misleading or deceptive is a question of fact.
- In determining whether a contravention of s 52 has occurred the task is to examine the relevant course of conduct as a whole in the light of the relevant surrounding facts and circumstances.
- It is an objective question that the court must determine for itself.
- The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct.
- Where the alleged contravention relates primarily to a document, the effect of the document must be examined in the context of the evidence as a whole.
- The court must have regard to all the conduct of the (maker) in relation to the document including the preparation, distribution, and any statement, action, silence or inaction in connection with the document. (citations omitted)

7. To these principles can be added ones stated by French CJ, Crennan and Kiefel JJ in *Google Inc*,¹⁴ which may be summarised as follows:

⁹ *TPG Internet* (2013) 304 ALR 186 at 190 [20], 194 [40] and 195 [45], per French CJ, Crennan, Bell and Keane JJ; *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 85 [102]-[103] per curiam.

¹⁰ *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 319 [25] per French CJ; *TPG Internet* (2013) 304 ALR 186 at 196 [48], [49], 197 [51], [53] per French CJ, Crennan, Bell and Keane JJ.

¹¹ *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 87 per Bowen CJ, Lockhart and Fitzgerald JJ (“*Global Sportsman*”); *Miller* (2010) 241 CLR 357 at 368 [15] per French CJ; *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc* [2012] VSCA 91 at para [60] per Nettle JA.

¹² (2004) 218 CLR 592 at 625 [109], approved in *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 341-2 [109] per Gummow, Hayne, Heydon and Kiefel JJ.

¹³ [2013] VSC 534 at para [107].

¹⁴ (2013) 249 CLR 435 at 443-444 [6]-[9], per French CJ, Crennan and Kiefel JJ; see also generally *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* [2012] VSC 239 at paras [351]-[354] per Croft J and *Telstra Corporation Ltd v Singtel Optus Pty Ltd* [2014] VSC 35 at paras [30]-[33] per Elliott J.

- The words “likely to mislead or deceive” make it clear that it is not necessary to demonstrate actual deception to establish a contravention.
 - Where there is an issue as to the effect of conduct on a class of persons such as consumers who may range from the gullible to the astute, the court must consider whether the ordinary or reasonable members of that class would be misled or deceived.
 - Conduct causing confusion and wonderment is not necessarily co-extensive with misleading or deceptive conduct.
 - It is not necessary that the defendant intends to mislead or deceive. Contravention can occur even though the defendant acted reasonably and honestly. (citations omitted)
8. Hayne J in *Google Inc* emphasised that all misleading or deceptive conduct cases involve the application of the statutory text to the particular facts, and warned that:¹⁵

“Because it is the statutory text which controls, there is no little danger in attempting to extrapolate from the decided cases to a rule of general application.”

Nevertheless, there is much to be gleaned from the decisions on the facts in the recent trilogy of High Court cases *Forrest*, *Google Inc* and *TPG Internet*, particularly concerning the way in which judges decide misleading or deceptive conduct cases. In *Forrest*, the impugned conduct involved letters sent by a company to the Australian Stock Exchange, and media releases; in *Google Inc*, the display on computers of Google search engine results and in *TPG Internet*, television, newspaper and website advertisements. No evidence was led in the trials in these cases from members of the public that they had been led into error. Hayne J in *Google Inc* further stated:¹⁶

“The generality with which s 52 was expressed should not obscure one fundamental point. The section prohibited engaging in *conduct* that is misleading or deceptive or is likely to mislead or deceive. It is, therefore, always necessary to begin consideration of the application of the section by identifying the conduct that is said to meet the statutory description “misleading or deceptive or ... likely to mislead or deceive”. The first question for consideration is always: “What did the alleged contravener do (or not do)?” It is only after identifying the conduct that is impugned that one can go on to consider separately whether that conduct is misleading or deceptive or likely to be so.” (emphasis in original)

French CJ stated in *Campbell v Backoffice Investments Pty Ltd*:¹⁷

“Characterisation is a task that generally requires consideration whether the impugned conduct viewed as a whole has a tendency to lead a person into error ... it involves consideration of a notional cause and effect relationship between the conduct and the state of mind of the relevant person or class of person. The test is necessarily objective” (citations omitted).

¹⁵ (2013) 249 CLR 435 at 467 [100].

¹⁶ (2013) 249 CLR 435 at 464-465 [89].

¹⁷ (2009) 238 CLR 304 at 319 [25]; see also *Butcher v Lachland Elder Realty Pty Ltd* (2004) 218 CLR 592 at 625 [109] per McHugh J.

Whether conduct is misleading or deceptive is an objective matter

9. Precise identification of the impugned conduct in the plaintiff's statement of claim is essential. The conduct in respect of which the plaintiff seeks relief will be conduct of the defendant. However whether the defendant's conduct is characterised by the court as having been misleading or deceptive depends upon what was conveyed by that conduct to the intended audience, being the plaintiff, or members of the relevant class of the public, or others. The understanding of the reader/recipient of the information which the plaintiff contends was misleading or deceptive, as determined by the court, is critical. The court must determine what was communicated to the reader/recipient. If the information was not conveyed or communicated to anyone, then the sender will not have engaged in misleading or deceptive conduct even if the information was false and incorrect.¹⁸ If what was communicated was not believed, or the person knew the truth, then the defendant will not have engaged in misleading or deceptive conduct.¹⁹
10. In some cases the pleader's task will be straightforward. The plaintiff may complain that particular statements by the defendant in a written document meant to it just what they said, were clear and unambiguous as to their meaning and, so understood, falsely represented material facts. The defendant may not dispute what the plaintiff alleges as to the meaning of the impugned statements, but run other defences. Even here, the statements must be considered by the court as to what they conveyed to the plaintiff in the context of the document read as a whole, and of all of the circumstances surrounding the communication of the document by the defendant to the plaintiff.
11. In other cases the message, or meaning, conveyed by the impugned statements, informed by the contents of the document as a whole, the means of communication and the surrounding circumstances, may be alleged to differ from the literal words used, and may be hotly in contest. In *Forrest*, there was very detailed consideration by the Court as to what the words "binding contract" in a public statement by a company conveyed to readers. Concerning advertisements, in *TPG Internet* the Court determined a dispute as to what was the dominant message conveyed by the advertisements to relevant members of the public, particularly in the context of the way in which the advertisements were communicated. In *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc*,²⁰ Nettle JA, Warren CJ and Cavanough AJA agreeing,

¹⁸ *Woodcroft-Brown v Timbercorp Securities Ltd (in liq)* [2013] VSCA 284 at para [227] per Warren CJ, Buchanan JA and Macaulay AJA.

¹⁹ *Gould v Vaggelas* (1985) 157 CLR 215 at 238 per Wilson J; *Campbell v Backoffice Investments Pty Ltd* (209) 238 CLR 304 at 320 [28] per French CJ; *Taylor v Gosling* [2010] VSC 75 at para [141] per Hargrave J.

²⁰ [2012] VSCA 91 at paras [37]-[134] per Nettle JA.

fundamentally disagreed with the findings of the trial judge, Pagone J, as to what various statements on a website concerning health treatments conveyed to readers. The trial judge held that the impugned statements were not misleading or deceptive, whereas the Court of Appeal judges held that the statements communicated a different message, and on that basis were misleading or deceptive.

12. With the court's focus being not only upon what the defendant did, but also upon what that meant to the intended audience, as the basis for the court then deciding whether the impugned conduct has a tendency to lead audience-members into error, the objective²¹ nature of the fact-finding task of the court is clear. The court decides all these facts, in the context of all the surrounding circumstances. The court decides who the members of the intended audience were. It matters not that in a case concerning public statements, no evidence is led from any members of the public as to what they made of the statements, or whether they were led into error. The court decides what the statements conveyed to ordinary reasonable members of the relevant section of the public, and then whether the statements had a tendency to lead them into error. The plurality in *Forrest* stated that:²²

“... the inquiry into how an ordinary or reasonable member of the intended audience would receive a message is of its nature hypothetical”.

The court tests the plaintiff's hypothesis and then decides whether it is made out as a matter of fact. At least before questions of causation or reliance are reached, where the plaintiff alleges that statements made by the defendant directly to it were misleading or deceptive, the court will decide what a reasonable person in the position of the plaintiff would have understood from the statements.²³ Here the court's decision on liability will not depend upon the evidence of relevant witnesses called on behalf of the plaintiff about his or her understanding, although such evidence obviously will be taken into account.

Forrest v Australia Securities and Investments Commission

13. In *Forrest*²⁴ the manner in which ASIC pleaded its case, and conducted the court proceeding, was strongly criticised by the plurality. Is there any significance in that for other cases? I suggest that there is. ASIC pleaded that the relevant company, Fortescue Metals Group Ltd, represented to reasonable investors that the company had entered into a binding contract with other companies,

²¹ *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 625 [109]; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 319 [25] per French CJ.

²² (2012) 247 CLR 486 at 512 [59], per French CJ, Gummow, Hayne and Kiefel JJ.

²³ *Vouzas v Bleake House Pty Ltd* [2013] VSC 534 at para [105] per Macaulay J, citing *North East Equity Pty Ltd v Proud Nominees Pty Ltd* (2010) 269 ALR 262 at 272 [46]-[48], per Sundberg, Siopis and Greenwood JJ.

²⁴ (2012) 247 CLR 486.

and had a genuine and reasonable basis for making that statement. The allegation was that the company had not entered into a “binding contract”, and knew or ought reasonably to have known that the parties had not agreed on all the necessary terms. The plurality identified two aspects of confusion in the pleading. First, the allegation of the lack of a genuine basis for the statement about the contract was tantamount to an allegation of commission of the tort of deceit, of fraudulent misrepresentation, whereas to allege that Fortescue should have known that the statements had no basis was tantamount to an allegation of negligent misrepresentation.²⁵ Second, ASIC alleged a (mis)representation of fact, but in effect also a (mis)representation of opinion, because it was alleged that the representation made had no reasonable basis.²⁶

14. True it is that it was not necessary for ASIC to allege or prove that the company, or its chairman Mr Forrest, intended to mislead or deceive investors. However, it was a matter for ASIC whether to go further and allege intentional misleading or deceptive conduct by the company and Mr Forrest, properly pleaded and on a proper evidential foundation. Had such a stronger allegation been made and proven, no doubt that would have been relevant concerning appropriate penalties.

Statements of opinion

15. The second aspect of confusion is perhaps of greater significance. Although not found in the statutes, there is a distinction concerning misleading or deceptive conduct between statements of fact and statements of opinion. In an oft-cited, and applied, statement by Bowen CJ, Lockhart and Fitzgerald JJ in *Global Sportsman*, the Full Federal Court said:²⁷

“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. Similarly, that a prediction proves inaccurate does not of itself establish that the maker of the prediction did not believe that it would eventuate or that the belief lacked any, or any adequate, foundation. Likewise, the incorrectness of an opinion (assuming that can be established) does not of itself establish that the opinion was not held by the person who expressed it or that it lacked any, or any adequate, foundation.

... An expression of opinion which is identifiable as such conveys no more than that the opinion expressed is held and perhaps that there is a basis for the opinion. At least if those conditions are met, an expression of opinion, however erroneous, misrepresents nothing”.

16. If the court decides that the opinion-maker ought be taken to have been understood by the relevant reader/recipient to have made an express, or implicit, representation that there was a

²⁵ (2012) 247 CLR 39 at 501 [22], per French CJ, Gummow, Hayne and Kiefel JJ.

²⁶ (2012) 247 CLR 39 at 502 [24].

²⁷ (1984) 2 FCR 82 at 88.

reasonable basis for the opinion, then the maker will have engaged in misleading or deceptive conduct if there was no reasonable basis for it. For example, if a professional real estate valuer values a property for mortgage lending purposes, the valuer will convey to the prospective lender that the valuer's opinion is based on reasonable grounds. The court will decide whether the plaintiff lender is correct concerning its allegation that the (over)valuation which it relied upon in making the loan, was not made on reasonable grounds. It will be unusual for the defendant not to in fact have held the expressed opinion.

17. The plurality in *Forrest* held that the impugned statements conveyed to the intended audience what the parties had done, namely made the agreements, and said that they had done that, but nothing further, and did not communicate anything about the legal enforceability of the agreements.²⁸ Such statements were correct and hence were not misleading or deceptive. It was unnecessary to draw any fact/opinion distinction, as explained in the following passage of the judgment:²⁹

“The Full Court's conclusion hinged on the use of the word "contract" or "agreement" in each of the impugned statements. The Full Court assumed that, by using one or other of those terms, the impugned statements conveyed to their intended audience a message about the legal quality (as determined by reference to Australian law) of the contract or agreement referred to in the relevant communication. And the relevant legal quality was identified as future enforceability in the event of a dispute between the parties. That is, the Full Court assumed that the words "contract" and "agreement" necessarily conveyed a message about legal enforceability in an Australian court. But that is too broad a proposition. First, it is necessary to examine the whole of the impugned statements to see the context in which reference was made to the making of a contract or agreement. Second, it is necessary to undertake that task without assuming that what is said must be put either into a box marked "fact" (identified according to whether an Australian court would enforce the agreement) or into a box marked "opinion" (identified according to whether the speaker thought that an Australian court could or would enforce the agreement).”

18. The second point made here should not be taken by us to mean that the fact/opinion distinction no longer exists, particularly as that point was made in the context of a confusing pleading where both representations of fact and of opinion, were alleged. If the pleader squarely alleges that:
- (a) a representation was made by the defendant to the plaintiff/s;
 - (b) which was of the defendant's opinion; and
 - (c) the defendant conveyed or communicated to the intended audience, the representee/s, that the opinion was based on reasonable grounds;
 - (d) when there were no such reasonable grounds -

²⁸ (2012) 247 CLR 486 at 508 [43], 510 [50].

²⁹ (2012) 247 CLR 486 at 506-507 [38].

then the court must initially decide whether or not the opinion on reasonable grounds representation was made.³⁰ So pleaded, the plaintiff's action would fail if no such representation was made, but would succeed if it was made, and no reasonable basis for the opinion existed at the time the opinion was communicated. The court does not examine the defendant's conduct at large, but rather in the context, *inter alia*, of what the plaintiff alleges was conveyed to the intended audience.

19. It is noteworthy that while Heydon J in *Forrest* agreed in the result, his Honour identified Fortescue's statement about there having been a "binding contract" as being an opinion, for which there were reasonable grounds.³¹ Heydon J regarded it to be a somewhat controversial issue whether a statement of opinion was misleading unless there was some basis for it.³² I suggest that the only controversy is a factual one for the court to determine, namely whether the impugned statement conveyed or communicated to the intended audience that the statement of opinion was based on reasonable grounds and then, if so, whether such grounds existed.
20. Whether a statement is one of opinion or fact depends on all the circumstances.³³ In *Grande Enterprises Ltd v Pramoko*,³⁴ Le Miere J stated:

The question whether there are reasonable grounds for making a particular representation is an objective not a subjective question. A genuine or honest belief on the part of the representor is relevant but not sufficient to show reasonable grounds: *Cummings v Lewis* (1993) 41 FCR 559, Sheppard and Neaves JJ at 565. For there to be reasonable grounds for a representation, including a representation as to intention and ability, there must exist facts which are sufficient to make the representation reasonable."

Representations as to future matters

21. Where the court holds that a representation of opinion on reasonable grounds was misleading or deceptive because of a lack of such reasonable grounds, that will have been so as at the time that the representation was made. A different, but related, scenario arises where the impugned representation concerns future matters. The representation may be in the nature of an opinion, a promise, a prediction, an expectation or something else. Of course, a future event that a person thinks or believes or expects will occur, may or may not occur later. A person who makes a representation about that to another may turn out to be right, or wrong, or partly either, when the future becomes the present. Some predicted events are practically certain to occur. Others

³⁰ *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 321 [33] per French CJ.

³¹ (2012) 247 CLR 486 at 521-522 [94], 528 [107].

³² *Ibid* at 521-522 [94].

³³ *Middleton v AON Risk Services Australia Ltd* [2008] WASCA at paras [22]-[23] per McLure JA, as McLure P then was; see also *Graininger v Williams* [2009] WASCA 60 at para [135].

³⁴ [2014] WASC 294 at para [63].

may possibly occur, or be unlikely, or be likely, to occur. Hence the importance of the statements referred to above in *Global Sportsman* to the effect that promises or opinions or predictions as to future matters are not, without more, misleading or deceptive if the promises or opinions or predictions are shown by later events not to have been correct. How could one know until the future event the subject of the representation occurred, or did not? There is nothing inherent in a representation concerning a future matter that means that the representation has a tendency to lead the representee into error.

22. However sections 51A(1) and (2) of the *TPA* intervened to deem a future matters representation to be misleading or deceptive if the defendant did not have reasonable grounds for making it, and to cast an evidential onus onto the defendant to adduce evidence to the contrary. That aligned future matters representations with representations of opinion based on reasonable grounds, in that the focus was directed to the correctness of the representations when they were made, not when the later events did or did not, occur. Concerning representations of opinion based on reasonable grounds, hindsight gleaned from later events must be put to one side by the court in deciding whether the opinion was made on reasonable grounds. For example, where a property valuer's valuation is challenged, evidence of subsequent sales is inadmissible on the issue whether reasonable grounds existed for the valuation as at the valuation date.³⁵ Hindsight is also to be put to one side by the court in deciding whether a future matters representation was misleading or deceptive.³⁶
23. Although s 51A did not create a cause of action for a plaintiff but only facilitated proof of a contravention of s 52(1), it had substantive legal effect because, where it applied, the plaintiff could succeed against the defendant because a future matters representation made without reasonable grounds was taken to be misleading, when otherwise the plaintiff could fail because of the above-cited statements in *Global Sportsman*. A future matters representation may or may not carry with it a representation that it was based on reasonable grounds. Section 51A operated in effect to deem the representor to have made such a representation, regardless of his or her intention. Where the representee/plaintiff complains, it has the benefit of a statutory benchmark against which the future matters representation has to be assessed: Whether it was based on reasonable grounds. The better view of ss 51A(1) and (2), expressed in *McGrath v Australian Naturalcare Products Pty Ltd*,³⁷ is that while the defendant must put on some evidence "to the contrary" of the plaintiff's lack of reasonable basis allegation, there is no legal or persuasive onus

³⁵ *Propell National Valuers (WA) Pty Ltd v Australian Executor Trustees Ltd* (2012) 202 FCR 158 at 161-162 [4]-[8] per Stone J; 179 [80] per Collier J.

³⁶ *Auswest Timbers Pty Ltd v Secretary to the Department of Sustainability & Environment* [2010] VSC 389 at paras [47], [48] per Croft J.

³⁷ (2008) 165 FCR 230 at 242 [44] per Emmett J; 282-283 [191]-[192] per Allsop J.

cast onto the defendant to disprove the plaintiff's case. Hence, it is nevertheless for the plaintiff to prove its misleading or deceptive conduct case. A defendant which does not call any reasonable grounds evidence in a future matters case is just at a (likely fatal) forensic disadvantage in relation to the plaintiff, if the plaintiff has some direct or inferential evidence of a lack of reasonable grounds.

24. Sections 4(1) and (2) of the *ACL* in substance re-enacted ss 51A(1) and (2) of the earlier *TPA*. The new section 4(3) goes on, unnecessarily but perhaps helpfully, to provide in effect that where the defendant goes into evidence as to what its reasonable grounds were, then that does not mean that the defendant wins, or that the plaintiff is excused from proving its case. Section 4(4) also goes on to provide that s 4(1), in deeming a representation as to future matters to be misleading if the defendant does not have reasonable grounds therefor, "... does *not* imply that a representation that a person makes with respect to any future matter is *not* misleading merely because the person has reasonable grounds for making the representation" (emphases supplied). What s 4(4) seems to say then is that a future matters representation may be misleading, even if the maker had reasonable grounds for making it.³⁸ If so, then that sits oddly with s 4(1). If there are reasonable grounds then the deeming effect of s 4(1) will not apply and, I suggest, the future matters representation will not be misleading. If a future matters representation made on reasonable grounds can be misleading notwithstanding the existence of such grounds, it is difficult to identify from s 4(1) in what circumstances that could be so, or why.

25. The answer to all this perhaps emerges from the Explanatory Memorandum:³⁹

"In certain cases, Section 51A of the Act was interpreted in such a way to, by implication, provide that proving reasonable grounds is a substantive defence to an allegation of misleading conduct (citing *Quinlivan v Australian Competition and Consumer Commission*⁴⁰). To reverse the effect of such decisions, section 4 of the *ACL* states explicitly that it does not imply that a representation as to a future matter is not misleading merely because the person had reasonable grounds for making the representation."

26. *Quinlivan* concerned an enforcement proceeding against a director of a company where accessory liability under ss 75B(1) and 80(1) of the *TPA* was established at trial in relation to a future matters misrepresentation by the company. The Full Federal Court over-turned the decision of the trial judge and held that there was insufficient evidence that the director knew that the third party-sourced figures used were other than a reasonable basis for the representation as to future property growth rates. There were three strands to the Court's reasoning. First, the s 51A deeming provisions did not mean that actual knowledge of the

³⁸ *No TasWind Farm Group Inc v Hydro-Electric Corporation (No 2)* [2014] FCA 348 at para [43] per Kerr J.

³⁹ *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum, para 30.

⁴⁰ (2004) 160 FCR 1.

essential elements of the contravention by the company was not necessary for the purposes of ss 75B(1) and 80(1). Second, the s 51A(2) “reversal of onus” did not apply in respect of accessory liability. Third, it was implicit in s 51A(1) that where a corporation did have reasonable grounds for making a future matters representation, then there will have been no misleading or deceptive conduct by it. Hence, if the company was not liable, then there was no contravening conduct in respect of which a director could have been an accessory.⁴¹

27. We know clearly enough from s 4(3) that under ss 4(1) and 4(2), there is no reversal of the legal onus of proof onto the defendant. Consistently with that, the legislature seems to have intended by s 4(4) to provide that if the defendant did not know that the future matters representation lacked a reasonable basis, or believed that the representation was reasonably based, and hence had “reasonable grounds for making the representation”, then that does not mean that the plaintiff would fail in establishing that the defendant had engaged in misleading or deceptive conduct where the plaintiff proves that, objectively considered, the representation did lack reasonable grounds. Such an understanding of s 4(4) is consistent with the apparent legislative intent to reverse *Quinlivan*. If the future matters representation lacked reasonable grounds, but the defendant did not know that, or that the grounds for the representation were not reasonable ones, then s 4(1) still operates to deem the representation to be misleading. The deeming effect of s 4(1) concerns the reasonableness of the grounds for the representation, objectively ascertained, not whether the defendant knew or believed that the grounds were reasonable. I suggest that the legislature by s 4(1) did not intend, because of s 4(4), to introduce a new species of deemed misleading future matters representations where the representations were based on reasonable grounds, but on some basis other than where there were no reasonable grounds.

Google Inc v Australian Competition and Consumer Commission

28. In *Google Inc*,⁴² various companies made misleading or deceptive advertisements by causing them to appear on an internet-user’s computer screen in a sponsored link as a result of using the Google search engine. The trial judge found that Google had not made the representations conveyed by those advertisements. The High Court agreed. In the High Court no party sought to challenge the findings of the trial judge about what the advertisements represented, and that they were misleading or deceptive.⁴³ The facts in *Google Inc* squarely gave rise to the need for the Court to decide what conduct Google had engaged in. The advertisers were the authors of the sponsor’s link. Google did not in any authorial sense create the impugned links which it published or displayed. The display of the advertisements did not render Google the maker,

⁴¹ (2004) 160 FCR 1 at 4-6 [10]-[15] per Heerey, Sundberg and Dowsett JJ.

⁴² (2013) 249 CLR 435.

⁴³ (2013) 249 CLR 435 at 455 [54].

author, creator or originator of the misleading information in the sponsored links.⁴⁴ Google search engine users would have understood that the representations made by the sponsored links were those of the advertisers and were not adopted or endorsed by Google.⁴⁵

29. Where the plaintiff alleges that the defendant made oral representations which were misleading or deceptive, but the defendant contends that the representations were not made at all, the court will apply a cautious approach and will test the plaintiff's evidence by reference to objective considerations such as uncontested evidence, compelling inferences and the inherent probabilities derived from all the relevant circumstances.⁴⁶

Australian Competition and Consumer Commission v TPG Internet Pty Ltd

30. In *TPG Internet*,⁴⁷ the issue was what advertisements conveyed. The advertisements in a prominent headline offered TPG Internet's Unlimited ADSL2+ internet service for \$29.99 per month. Less prominently, the advertisements stated that to acquire that service, the consumer was also obliged to rent a home telephone line from the supplier and to pay an additional \$30 per month for it. The trial judge found that the dominant message of the advertisements was that the entire cost of the internet service was \$29.99 per month, with no other charges and no obligation to acquire another service. The advertisements were misleading or deceptive because in fact the consumer had to pay \$30 per month more. The High Court agreed.⁴⁸
31. The Full Federal Court disagreed with the trial judge because the judges there considered that consumers must be taken to have read or viewed the advertisements with knowledge of the commercial practices of bundling and set up charges. The High Court disagreed with that, holding that the tendency of the advertisements to mislead was not neutralised by the Full Court's attribution of knowledge to members of the target audience that ADSL2+ services may be offered as a bundle.⁴⁹ The High Court held that it was no answer to whether the advertisement was misleading or deceptive that consumers who signed up for the package offered could be expected to fully understand the nature of their obligations to TPG Internet by the time they actually became its customers.⁵⁰ The Court held that the trial judge was correct in identifying the vice of the advertisements to be that they required consumers to find their way

⁴⁴ (2013) 249 CLR 435 at 458-459; [67]-[69] per French CJ, Crennan and Kiefel JJ.

⁴⁵ Ibid at 459-460 [70].

⁴⁶ *Kumar v Bathini* [2014] VSCA 77 at paras [35]-[56] per McMillan AJA, Nettle and Tate JJA agreeing; *Nominex Pty Ltd v Wieland* [2014] VSCA 199 at paras [51]-[64] per Nettle, Hansen and Beach JJA.

⁴⁷ (2013) 304 ALR 186; applied by Elliott J in *Telstra Corporation Ltd v Singtel Optus Pty Ltd* [2014] VSC 35; (No 2) [2014] VSC 108.

⁴⁸ (2013) 304 ALR 186 at 190[20], 194 [40] and 195 [45] per French CJ, Crennan, Bell and Keane JJ.

⁴⁹ Ibid at 195 [45].

⁵⁰ Ibid at 196-197 [50].

through to the truth past advertising stratagems which had the effect of misleading, or being likely to mislead them. The plurality stated:⁵¹

“Given TPG’s strategy, the primary judge was entitled to draw the inference that consumers might be enticed to enter into negotiations with TPG without appreciating that TPG’s services were, in fact, being offered as a “bundle”.”

The defendant’s intention

32. The High Court’s decision in *TPG Internet* is a strong one in relation to advertisements. The Court’s reasoning included the following statements, partly based on *Gould v Vaggelas*,⁵² indicating to us how evidence of a defendant’s intention can and should be taken into account:⁵³

“It has long been recognised that, where a representation is made in terms apt to create a particular mental impression in the representee, and is intended to do so, it may properly be inferred that it has had that effect. Such an inference may be drawn more readily where the business of the representor is to make such representations and where the representor’s business benefits from creating such an impression.

To say this is not to say that TPG acted with an intention to mislead or deceive: such an intention is not an element of the contravention charged against TPG, and there was no suggestion of such an intention in the ACCC’s case. There can be no dispute, however, that TPG did intend to create an impression favourable to its offer in the mind of potential consumers; and that it did intend to emphasise the most attractive component of its offer in order to do so.

It cannot be denied that the terms of the message and the manner in which it was conveyed were such that the impression TPG intended to create was distinctly not that which would have been produced by an advertisement which gave equal prominence to all the elements of the package it was offering to the public. In this regard, it is significant that, as the primary judge noted, TPG considered deploying just such an advertisement and chose not to adopt it, evidently opting to continue with its headline strategy.” (citations omitted)

33. These statements sit comfortably with the famous statement by Dixon and McTiernan JJ in *Australian Woollen Mills Ltd v FS Walton*:⁵⁴

“The rule that if a mark or get-up for goods is adopted for the purpose of appropriating part of the trade or reputation of a rival, it should be presumed to be fitted for the purpose and therefore likely to deceive or confuse, no doubt, is as just in principle as it is wholesome in tendency. In a question how possible or prospective buyers will be impressed by a given picture, word or appearance, the instinct and judgment of traders is not to be lightly rejected, and when a dishonest trader fashions an implement or weapon for the purpose of misleading potential customers he at least provides a reliable and expert opinion on the question whether what he has done is in fact likely to deceive.”

⁵¹ Ibid at 197 [54].

⁵² (1985) 157 CLR 215 at 219, 237-238, 250-252 262.

⁵³ (2013) 304 ALR at 197-198 [54]-[57].

⁵⁴ (1937) 58 CLR 641 at 657 per Dixon and McTiernan JJ.

This statement in *Australian Woollen Mills* is often applied in passing off-type misleading or deceptive conduct cases, where the defendant is alleged to have misrepresented that its business, or goods or services, are associated with those of the plaintiff.⁵⁵

34. I suggest that these highlighted passages in *TPG Internet* and *Australian Woollen Mills* are consistent with the objective nature of the fact-finding process undertaken by judges in the context of all of the surrounding circumstances. The defendant may not intend to mislead or deceive members of the public in a fraudulent sense. However, the impugned conduct of the defendant can be found by the court to have been intended by it to work, to be effective, in the marketplace. If so the court can, and should, take that into account in determining what actual effect the defendant's conduct had upon the intended audience. There is no rule or formula that applies here. Rather, the intention of the defendant should be taken into account by the court where that is probative.

Silence and non-disclosure

35. Where false information is communicated by the defendant to the plaintiff, that conduct is likely to be misleading or deceptive in nature. The defendant's statutory contravention does not depend upon whether or not it knew that the information was false, or upon any non-disclosure by it of the fact that it was false. The conduct is misleading or deceptive because the plaintiff's conduct led the defendant into error, or because that was likely.
36. A different analysis is required where the information received by the plaintiff from the defendant was true, or substantially true, as far as it went, but could well be considered to have been false if the defendant had also communicated other information to the plaintiff when it did not do that. If so, how can the plaintiff successfully contend that it was led into error when what was communicated to it was substantially correct information and the contradictory information was not disclosed? The question is a difficult one to answer, particularly because the statutory prohibition of misleading or deceptive conduct does not impose any general duty of disclosure. Given that why is the defendant's conduct to be impugned because it failed to make a particular disclosure, and remained silent? Is the defendant obliged to anticipate what information the plaintiff needed to know from the plaintiff's viewpoint, and then to be at risk of the court finding that it has engaged in misleading conduct if all such information was not provided, but only some of it? On what basis is the plaintiff entitled to know from the defendant what it doesn't know otherwise?

⁵⁵ See, eg. *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354 at 367 [45]; 388 to 391 [117]-[133] per Weinberg and Dowsett JJ.

37. The starting point is that by reason of s 4(2) of the *TPA* and s 2(2) of the *ACL*, misleading or deceptive conduct can include refraining from doing an act, otherwise than inadvertently. A general answer to these questions was provided by Black CJ in *Demagogue Pty Ltd v Ramensky*:⁵⁶

“Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. To speak of “mere silence” or of a duty of disclosure can divert attention from that primary question. Although “mere silence” is a convenient way of describing some fact situations, there is in truth no such thing as “mere silence” because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed.”

The High Court in *Miller*⁵⁷ approved and applied the Full Federal Court decision in *Demagogue*. French CJ and Kiefel J acknowledged that the language of reasonable expectation was not statutory. However, they explained that the court looks to whether there was a reasonable expectation of disclosure as a practical aid to the objective characterisation of the non-disclosure as misleading or deceptive conduct, or not.⁵⁸

38. It will be observed that the court does not impose any “duty of disclosure” on the defendant arising from the particular circumstances of the case.⁵⁹ Rather, the focus is upon the position of the plaintiff. The question here is: In all the circumstances, should the plaintiff be taken to have had a reasonable expectation that particular further information would be disclosed by the defendant which information, had it been disclosed, would have changed the message conveyed by the information which the defendant did disclose into a misleading or deceptive message, and likely would have led to the plaintiff acting differently from the way it did, thereby avoiding loss or damage? If so, then the defendant’s conduct in remaining silent and not making the relevant disclosure will be characterised as having been misleading or deceptive. Obviously enough, the undisclosed information as to which the defendant was silent, and which the plaintiff contends would have made all the difference had it been disclosed, must have been in existence at the relevant time and been information at least available to the defendant then, if not in its actual knowledge. The information which was undisclosed at the relevant time will have come to light later, perhaps only as a result of the court compelling disclosure. The question remains: What is the basis upon which the court decides that the plaintiff ought be taken to have had a reasonable

⁵⁶ (1992) 39 FCR 31 at 32.

⁵⁷ (2010) 241 CLR 357.

⁵⁸ *Ibid* at 396 [19], 369-370 [20].

⁵⁹ The analysis will be different where the lack of disclosure of material information occurred in the face of *Corporations Act* provisions requiring disclosure, eg. *Corporations Act* Chapter 7, Part 7.9 re Financial Product Disclosures; ss 674-678 re Continuous Disclosures; see generally Jonathan Beach QC (as Beach J then was) *Class Actions: Some causation questions* (2011) 85 ALJ 579.

expectation of receiving the critical non-disclosed information from the defendant? The answer, perhaps an unsatisfactory one, is that it all depends on the circumstances. However as Hargrave J in *ASIC v PFS Development Group Pty Ltd* stated,⁶⁰ particular attention is to be given to the relationship between the parties and the materiality of the information which is not disclosed.

39. In *Demagogue*,⁶¹ purchasers of an off-the plan unit were successful in avoiding their contract of purchase with the vendor. The vendor did not disclose in the contract, or otherwise, that it was in the process of seeking to obtain a necessary Road Licence to authorise it to construct a driveway over public land to provide access for home owners in the development. The trial judge found that the need for a Road Licence for vehicular access to the development was an unusual circumstance, and was unexpected for the purchasers. Had they been aware of the circumstances about obtaining the Road Licence and access to the site prior to their entry into the contract, the judge found that the purchasers would not have entered into the contract. The Court ordered that the contract was void ab initio. The Full Court agreed. Gummow J held that it was to be inferred on the evidence that the vendor's silence on the Road Licence matter was not the result of inadvertence. Gummow J found unobjectionable the trial judge's use of the expression "deliberately chose to be silent" concerning the vendor's conduct.⁶² It was reasonable in all the circumstances for the purchasers to have expected disclosure of the Road Licence by the vendor, but that did not happen.
40. By contrast in *Miller*, on an appeal to the High Court from a decision of Neave JJA and Robson AJA, Ashley JA dissenting,⁶³ the plaintiff financier was unsuccessful in its claim against an insurance broker for damages because the broker had not advised the financier of particular features of an insurance policy which had made it ineffective as a security. The financier agreed to lend monies to a company to fund the payment by the company of a premium for an insurance policy against certain credit risks. The broker arranged the loan from the financier on behalf of the borrower. The insurance policy in respect of which the loan was sought, was not a cancellable policy. Cancellable policies can provide a form of security to the lender for an insurance premium loan as the lender can require the borrower to assign its rights, including of cancellation, under the policy. If the borrower defaults on the loan, the lender can cancel the policy and recover the unused premium. The borrower defaulted under its loan agreement with the financier. The financier could not obtain repayment from the insurer of any part of the premium paid with the loan monies because the policy was not cancellable. The financier

⁶⁰ [2006] VSC 192 at para [362].

⁶¹ (1992) 39 FCR 31.

⁶² *Ibid* at 42.

⁶³ (2010) 241 CLR 357; [2009] VSCA 117.

complained that the broker had misled it by not disclosing the important fact that the policy was neither assignable, nor cancellable, and therefore was of little use as security for the loan made to the borrower to fund payment of the premium for the insurance.

41. The trial judge dismissed the claim and the High Court agreed. The broker knew at all material times that the policy was non-cancellable. A certificate of insurance provided to the financier by the broker did not indicate that, but the subsequently-provided insurance policy did because it did not contain a cancellation clause. The loan was approved and drawn upon after that. One limb of the financier's case was that it had a reasonable expectation that the broker would not provide it with the certificate of insurance without disclosing that the underlying policy was not cancellable. The High Court rejected that based on a close examination of all the circumstances. Important aspects were that the financier was an experienced premium lender, the certificate of insurance did not disclose the nature of the risks insured, which put the financier on notice that the underlying policy may be unusual, the lender made no further inquiries and the financier did not read the later-provided policy which revealed that the policy was not cancellable.⁶⁴

42. I suggest that what emerges is that a plaintiff is only likely to succeed in a silence/non-disclosure misleading or deceptive conduct case where the relevant facts very clearly make out that case. In the words of French CJ and Kiefel J in *Miller*:⁶⁵

“... as a general proposition, s 52 does not require a party to commercial negotiations to volunteer information which will be of assistance to the decision-making of the other party. A fortiori it does not impose on a party an obligation to volunteer information in order to avoid the consequences of the careless disregard, for its own interests, of another party of equal bargaining power and competence. Yet that appears to have been in practical effect, the character of the obligation said to have rested upon Miller in this case.”

43. A decision of the Western Australian Court of Appeal is illustrative. In *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd*,⁶⁶ leased premises were destroyed by fire. A vast collection of antiques, fine furniture and the like were also destroyed. The building did not have a fire protection system that complied with the regulatory framework at the time of the fire. The plaintiff lessee succeeded at trial against the defendant owner because as a result an inspection by the tenant of the premises in which some parts had sprinkler heads and others did not, the Court held that it was a natural and reasonable conclusion for the tenant to draw that there was an operational fire sprinkler system in the premises.⁶⁷ That impression was mistaken, but the trial judge found that

⁶⁴ (2010) 241 CLR 357 at 363-364 [1], [2], 371-372 [24]-[26], per French CJ and Kiefel J; 372 [29], 377 to 378 [54]-[63], 386 [96] per Heydon, Crennan and Bell JJ.

⁶⁵ (2010) 241 CLR 357 at 371 [22] per French CJ and Kiefel J.

⁶⁶ [2011] WASCA 76; [2011] 248 FLR 193.

⁶⁷ *Clambake v Tipperary Projects Pty Ltd [No 3]* [2009] WASC 52 per EM Heenan J.

it was not directly or indirectly induced by anything that the owner had said.⁶⁸ The latter finding was not disturbed on appeal. An appeal to the Court of Appeal succeeded. Concerning the non-disclosure case put, Murphy JA, agreeing with McLure P, reasoned as follows:⁶⁹

“A large portion of the ceiling in the premises shown to Mr Anderson, covering a very substantial area, did not have sprinklers. The presentation of the premises with the appearance that, for most of the proposed leased area, there was no sprinkler system in situ, could not objectively convey the impression that all of the proposed leased premises, or the whole of the building, was protected by an operative sprinkler system.

There was nothing that Clambake did which, viewed as a whole, had a tendency to lead into error. Mr Anderson had not signified any interest in, or raised any queries concerning, either the sprinklers on the bulkhead in particular, or the nature and operation of the fire protection system throughout the building in general. It was known that Mr Anderson was an experienced businessman and it could not have been expected that he would assume the presence of an operative sprinkler system throughout the building when the large portion of the building in which he was interested appeared not to be protected by sprinklers. There were no circumstances giving rise to a reasonable expectation that Clambake would not make the leased premises available to Mr Anderson for inspection without disclosing at that time, or subsequently, that the building's fire protection system was not a sprinkler system, but one which involved the use of a firewall and fire hoses, and portable fire extinguishers. As in other areas of the law, Clambake's conduct is not to be judged in light of hindsight and the significance which, 10 years later, came to be attached to an operative sprinkler system as opposed to another fire protection system.” (Citations omitted)

An aside

44. Concerning the law of obligations generally, it is worthy of note that the High Court cases to which reference has been made are not inconsistent with the Court's recent re-iteration of the objective approach to the construction of contracts, in *Electricity Generation Corporation v Woodside Energy Ltd*, the plurality stated:⁷⁰

“The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties ... intended to produce a commercial result". A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience." (citations omitted)

⁶⁸ See [2011] WASCA 76 at paras [22], [23] per McLure P.

⁶⁹ Ibid at paras [238], [239].

⁷⁰ (2014) 306 ALR 25 at 33 [35] per French CJ, Hayne, Crennan and Kiefel JJ.

45. The statutory prohibition of misleading or deceptive has not supplanted the common law of contract, but is consistent with it. In *Toll (FGCT) Pty Ltd v Alphapharm Ltd*,⁷¹ the High Court stated:

“The general rule, which applies in the present case, is that where there is no suggested vitiating element, and no claim for equitable or statutory relief, a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document.”

46. In *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd*,⁷² Nettle JA pertinently stated:

“... although s 52 may not strike at the traditional secretiveness and obliquity of the bargaining process, one purpose of the section, as Burchett J indeed observed in *Poseidon*, is to ensure that the bargaining process is not seen as a licence to deceive. Hence, as his Honour said, if the bargainer has no intention of contracting on the terms discussed, his conduct in seeming to bargain may accurately be stigmatised as misleading. I add, that just as certainly, if a bargainer having no more capacity than a hope and a prayer of providing goods or services conducts negotiations in a fashion calculated to create the impression that he has the capacity to do so, and extracts payment on the faith of that assumption, his conduct is liable to be stigmatised as misleading and deceptive.”
(citations omitted)

Causation, reliance and loss and damage

47. Where the plaintiff seeks an award of damages, or other related relief,⁷³ in respect of the defendant’s misleading or deceptive conduct, the plaintiff must show that that conduct caused the loss and damage suffered by it.⁷⁴ The court decides whether there is a sufficient connection between the contravening conduct and the loss and damage for relief to be ordered.⁷⁵ The statutory prohibitions of misleading or deceptive conduct do not give rise to a cause of action per se in the plaintiff. Rather the plaintiff sues for relief, in terms of the applicable statute, consequential upon a contravention having occurred.⁷⁶

⁷¹ (2004) 219 CLR 165 at 185 [57] per curiam.

⁷² [2004] VSCA 232 at para [33].

⁷³ *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 513 [43]-[45], per McHugh, Hayne and Callinan JJ. Proof of compensable loss and damage is the gateway to other related relief.

⁷⁴ *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525 per Mason CJ, Dawson, Gaudron and McHugh JJ; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 512-513 [41]-[43] per McHugh, Hayne and Callinan JJ; *Henville v Walker* (2001) 206 CLR 459 at 498 [95], 501 [130] per McHugh J; 508 [158] per Hayne J; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 604-605 [37] per Gleeson CJ, Hayne and Heydon JJ.

⁷⁵ *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525 per Mason CJ, Dawson, Gaudron and McHugh JJ.

⁷⁶ *Ibid* at 551 per Toohey J.

48. In *Henville v Walker*, McHugh J stated:⁷⁷

“If the defendant’s breach has “materially contributed” to the loss or damage suffered, it will be regarded as a cause of the 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. 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.” (citations omitted)

49. In *Travel Compensation Fund v Tambree*, Gummow and Hayne JJ stated:⁷⁸

“Misrepresentation will rarely be the sole cause of loss. If, in reliance on information, a person acts, or fails to act, in a certain manner, the loss or damage may flow directly from the act or omission, and only indirectly from the making of the representation. Where the reliance involves undertaking a risk, and information is provided for the purpose of inducing such reliance, then if misleading or deceptive conduct takes the form of participating in providing false information, and the very risk against which protection is sought materialises, it is consistent with the purpose of the statute to treat the loss as resulting from the misleading conduct.” (citations omitted)

Reliance

50. Where the plaintiff alleges, and hence must prove, reliance, the result will depend upon the court’s decision whether the plaintiff in fact did so.⁷⁹ Macaulay J in *Vouzas v Bleake House Pty Ltd*⁸⁰ held that the defendant vendor had not engaged in any misleading conduct concerning its alleged representations and non-disclosures to the purchaser, but went on to decide whether, if that was wrong, the defendant’s conduct had caused the plaintiff any loss or damage. The Court in that context stated:⁸¹

“Whereas, when considering whether either defendant’s conduct was misleading or deceptive it was relevant to consider what effect that conduct was apt to have on a reasonable person, at this stage of the analysis the task is to find how the representations were understood by Vouzas (the plaintiff) and what effect they had, if any, in inducing him to enter the contract.” (citations omitted)

⁷⁷ (2001) 206 CLR 459 at 493 [106]; see also Gleeson CJ at 469 [14].

⁷⁸ (2005) 224 CLR 627 at 640 [32].

⁷⁹ *De Bortoli Wines Pty Ltd v HIH Insurance Ltd (in liq)* [2012] FCAFC 28 at paras [62]-[67] per Jacobson, Siopis and Nicholas JJ.

⁸⁰ [2013] VSC 534.

⁸¹ *Ibid* at para [194], citing *Krakowski v Eurolynx Properties* (1993) 183 CLR 563 at 576-577 per Brennan, Deane, Gaudron and McHugh JJ.

51. Martin CJ in *NEA Pty Ltd v Magenta Mining Pty Ltd*,⁸² after referring to the statement of McHugh J in *Butcher v Lachlan Elder Realty Pty Ltd*, that “Conduct that objectively leads one into error is misleading”,⁸³ continued as follows:

“On the other hand, once the conduct has been characterised as misleading and deceptive and the question arises as to whether the claimant has established that the conduct caused loss, the question will be determined subjectively - so the relevant question will be, as a matter of fact, did this particular claimant rely upon the conduct by acting in such a way as to cause loss? ... Questions of reasonableness will arise in that context, not because some notion of contributory negligence is available as a partial or complete defence, but only if and to the extent that the unreasonableness of the claimant's conduct precludes the conclusion that the misleading and deceptive conduct caused the loss in the sense required to establish an entitlement to compensation under s 82, or to an alternative remedy under s 87 of the Act. ...

When the issue of causation arises for determination, in the context of the question of whether the claimant has established an entitlement to a remedy for loss suffered by reason of reliance upon misleading and deceptive conduct, the claimant will fail to establish that entitlement even if reliance would have been objectively reasonable if, as a matter of fact subjectively assessed, the claimant did not in fact rely upon the relevant conduct.” (Citations omitted)

52. The starting point concerning causation is the plaintiff's erroneous belief which the defendant led the plaintiff to have. The court then goes on to decide whether that belief induced the plaintiff to act, or fail to act, in a manner such as to have caused it to suffer loss and damage. The impugned conduct must have played some part in inducing the plaintiff to enter into the relevant transaction. That that might have been the case is not enough.⁸⁴ The impugned conduct must have materially contributed to the plaintiff's loss-making actions or inactions.⁸⁵ The plaintiff must have altered its position under the inducement of the contravening conduct.⁸⁶ The court applies common sense in deciding whether causation is established.⁸⁷
53. Legal causation is necessary, and reliance is not a substitute for that.⁸⁸ In many cases reliance by the plaintiff on the defendant's conduct results in the plaintiff acting, or failing to act, in a manner which results in it suffering loss and damage, and that establishes the necessary causal

⁸² *NEA Pty Ltd v Magenta Mining Pty Ltd* [2007] WASCA 70 at paras [128]-[129] per Martin CJ, Wheeler and Buss JA agreeing.

⁸³ (2004) 218 CLR 592 at 626 [111] per McHugh J.

⁸⁴ *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq)* (2010) 31 VR 575 at 583 [27], [28] per Warren CJ; 601-602 [102], 603 [105] per Buchanan and Nettle JJA, each judge citing with approval Kiefel J, with whom Wilcox J agreed, in *Hanave Pty Ltd v LFOT Pty Ltd* [1999] FCA 357 at paras [45], [47].

⁸⁵ *Henville v Walker* (2001) 206 CLR 459 at 480 [60], [61] per Gaudron J; 483 [70], 493 [106] per McHugh J.

⁸⁶ *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 526, 530 per Mason CJ, Dawson, Gaudron and McHugh JJ.

⁸⁷ *Wardley v The State of Western Australia* (1992) 175 CLR 514 at 525 per Mason CJ; *March v Stramere (E&MH) Pty Ltd* (1991) 171 CLR 506; *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq)* (2010) 31 VR 575, 603 [105], [106], per Buchanan and Nettle JJA.

⁸⁸ *Campbell v Backoffice Investments Pty Ltd* (2009) 2009 CLR 304 at 351 [143] per Gummow, Hayne, Heydon and Kiefel JJ.

link. The clearest example is where the court accepts the plaintiff's evidence that the defendant's misleading or deceptive conduct led the plaintiff to enter into a transaction which resulted in it suffering loss and damage. However in other situations there may be no relevant reliance by the plaintiff, yet causation is established. In particular, it may be artificial in the circumstances before the court to speak of reliance determining what action or inaction would have occurred if the true position had been known.⁸⁹ In a silence or non-disclosure case it may be difficult to say that the plaintiff relied upon information which was not disclosed, yet the defendant's misleading or deceptive conduct by remaining silent may have caused the plaintiff loss or damage. The defendant may have made a misrepresentation to a third party, not the plaintiff, and that party's reliance on the false representation may have indirectly caused the plaintiff loss and damage.⁹⁰

Causation questions

54. There is perhaps a tension between it being sufficient that the defendant's conduct was a cause of the plaintiff's loss and damage not the cause, and the court's attribution of legal responsibility upon the defendant for that nevertheless. Why is this enough? Why, and how, does or can the court pick out the defendant's misleading or deceptive conduct as the basis for the defendant bearing legal responsibility for the plaintiff's loss and damage when other additional and different factors also contributed to, or resulted in, the plaintiff engaging in the loss-making action or inaction which it did? A comparison must be made between the position that the plaintiff is in, and the position it would have been in but for the contravening conduct.⁹¹ If the defendant had not engaged in the contravening conduct and/or done something else, would the plaintiff have acted differently and as a result avoided the loss and damage which it suffered? Or would the plaintiff have engaged in the same loss-making action or inaction even if it had not been led into error by the defendant's contravening conduct? It would be an odd result for the defendant to be held to be legally responsible for the plaintiff's loss and damage, if the plaintiff would have engaged in the same action or inaction if the defendant had not engaged in the contravening conduct. Did the plaintiff taking into account the erroneous belief induced by the defendant make a difference to it taking the course of action or inaction which it did, such that the plaintiff would not have so acted or refrained from acting if it had not had the belief?⁹² Would the plaintiff, despite other contributing factors, have adopted a different course had the relevant belief not been induced by the defendant?⁹³ The court by deciding these questions of

⁸⁹ Ibid.

⁹⁰ See *Bolitho v Banksia Securities Ltd* [2014] VSC 8 at paras [26]-[31] per Ferguson J (now Ferguson JA); *Derring Lane Pty Ltd v Fitzgibbon* (2007) 16 VR 563 at 584 [115] fn 44 per Ashley JA.

⁹¹ *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 512-513 [42] per McHugh, Hayne and Callinan JJ.

⁹² Adapting statements by Gageler J in *Sidhu v Van Dyke* (2014) 308 ALR 232 at 250 [91].

⁹³ Ibid at 250 [93]

fact isolates the legally causative effect, or otherwise, of the defendant's conduct in relation to the plaintiff's loss or damage. These questions are aids for the court in the fact-finding process of determining whether the necessary causal link has been established. The court may be satisfied as to causation by reference just to what happened, and need not consider what would have happened if the defendant's conduct had been different. In some cases the court will find the necessary causal link between the defendant's contravening conduct and the plaintiff's loss and damage made out, because the plaintiff materially altered its position to its detriment induced by the defendant's conduct. In other cases, testing the causation issue by reference to a counterfactual will determine that issue. The way in which the trial judge decides the causation issue will be substantially affected by how the plaintiff puts its damages case, and what defences the defendant runs. Normative considerations also apply as the "but-for" test is a necessary discriminant, but not a sufficient one.

55. Accordingly, a claim by a plaintiff for an award of damages in respect of loss and damage caused by the defendant's misleading or deceptive conduct, can conceptually be broken out into the following questions:
- (a) Did the defendant engage in the impugned conduct?
 - (b) Did that conduct convey or communicate to the plaintiff a message or information which, objectively considered, had a tendency to lead the plaintiff into error?
 - (c) Was the plaintiff induced by the impugned conduct of the defendant to act, or fail to act, in a materially different way from the way in which the plaintiff would otherwise have acted if the defendant had not engaged in that conduct?
 - (d) Did that action, or inaction, by the plaintiff result in it suffering loss and damage?
 - (e) If so, in what sum should the court assess an award of damages to financially compensate the plaintiff for the defendant's contravening conduct having led the plaintiff to act in such a way as to have caused it to suffer loss and damage?

One can conceive of the elements (a) to (d) as constituting a chain of causation. All of the posed questions must be answered by the court in the plaintiff's favour for it to obtain an award of damages, (e). Four further points should be made here.

56. First, in analysing the causal effect upon the plaintiff of the defendant's misleading or deceptive conduct, it can be convenient to refer to the plaintiff's loss-making action or inaction. However whether the plaintiff acted, or failed to act, induced by the defendant's conduct, is a separate question from whether that resulted in the plaintiff suffering loss and damage. The defendant's

conduct which led the plaintiff into error by acting, or not acting, as it did, may not have resulted in the plaintiff suffering any loss or damage. Or the plaintiff may have suffered loss and damage arising from its action or inaction, but the defendant's conduct may not have materially contributed to that. The plaintiff's conduct may be best explained by other factors not involving the defendant's impugned conduct. Or the necessary causal link between the defendant's conduct and the plaintiff's loss and damage may be established, but that may not be compensable by an award of damages by the court because the plaintiff's evidence seeking to quantify the loss and damage suffered in dollars, is insufficient. Or the court may decide that no award of damages should be made for normative reasons.

57. Second, the plaintiff may have suffered loss or damage immediately upon entering into the transaction, for example in the case of over-payment.⁹⁴ Or the plaintiff may have suffered loss and damage as a result of the defendant's conduct only years after having entered into the relevant transaction.⁹⁵ Obviously, when the plaintiff first suffered loss or damage is critical concerning limitation of actions issues.⁹⁶
58. The third causation point which is relevant here is that where the court decides what would have happened for the plaintiff but for the defendant's wrongful conduct, an issue can arise as to precisely what the defendant, and hence the plaintiff, would have done if the defendant had not engaged in the misleading or deceptive conduct. It may be an unreal view of the dealings between the parties for the court to just take the impugned conduct out of those dealings, but not for the court to go on and to assume that the defendant would have done something else. If so, what something else?
59. This important point is well illustrated by the decision of the New South Wales Court of Appeal in *Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No. 3)*.⁹⁷ The plaintiff was the successful tenderer for a building contract, and entered into the contract on the basis of the tender documentation of the defendant owner. The contract was for a fixed price. The tender documents represented that there were no plans of an outlet pipe. That was not so. Had the plaintiff known of the plans, it would have compared them with other information, which would have revealed that the Concept Design Drawings were wrong. Having been induced by the belief that there were no plans of the outlet pipe, the plaintiff tendered for and entered into a lump sum contract with a fixed date of completion which did not adequately allow for the extent

⁹⁴ Eg *Potts v Miller* (1940) 64 CLR 282 at 297-299.

⁹⁵ *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 527-528, 530-533 per Mason CJ, Dawson, Gaudron and McHugh JJ; at 537 per Brennan J.

⁹⁶ The *TPA* s 82(2); the *Fair Trading Act* 1987 (WA) s 79(2); the *ACL* ss 236(2), 237(3).

⁹⁷ (2006) 67 NSWLR 341, per Beazley JA, Ipp and Tobias JJA agreeing, at 347-348 [23]-[28].

of work actually required. The plaintiff sustained loss in having to do extra work under the fixed price contract. Had it entered into an appropriately priced contract, it would have avoided that loss. Alternatively, it would not have entered into the contract and likewise would have avoided that loss. The defendant contended that the relevant question was: What would the plaintiff have done if the statement that there were no plans of the outlet pipe not been made? The question was not whether the plaintiff would have acted differently if it had been told that there were plans of the outlet pipe.

60. The Court rejected the defendant's contention,⁹⁸ holding that the question was whether the plaintiff suffered loss by the defendant's contravening conduct, not what the plaintiff would have done "but for" the false representation. The correct approach required the Court to decide what the plaintiff would have done if the existence of the plan had been disclosed. If the Court had proceeded just on the basis that the defendant had said nothing about the plans, but not revealed the true position, a number of speculative possibilities would have arisen, including whether there would have been non-disclosure. Such an approach was rejected and the plaintiff succeeded in making good its causation claim. The plaintiff was entitled to an award of damages in respect of the additional work that it performed.

61. The point that emerges here is that the "but for" test assists the court in deciding whether or not causation is established. However, that does not alone determine causation. As Gleeson CJ observed in *Travel Compensation Fund v Tambree*:⁹⁹

"In recent cases, this Court has pointed out that, in deciding whether loss or damage is 'by' misleading or deceptive conduct, and assessing the amount of the loss that is to be so characterised, it is in the purpose of the statute, as related to the circumstances of a particular case, that the answer to the question of causation is to be found."

62. Fourth, it is important to have regard to the onus of proof upon the plaintiff concerning causation. In a "no transaction" case, the court will generally either accept or reject the plaintiff's case that had the contravening conduct not occurred it would not have entered into the loss-making transaction with the defendant, or with others. Does the plaintiff in an "alternative transaction" case have to prove causation of loss on the balance of probabilities? Such a case necessarily involves the plaintiff seeking to demonstrate a hypothetical scenario, being the alternative transaction that the plaintiff could or would have entered into with the defendant or with others, had the defendant not engaged in the impugned conduct. Is it enough for the

⁹⁸ Ibid at 353-354 [54]-[60]

⁹⁹ (2005) 224 CLR 627 at 639 [30], citing *Henville v Walker* (2001) 206 CLR 459 at 470 [18], 489-490 [96], 509-510 [164]-[165]; *I&L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 119 [26], 125-126 [50], 135-136 [84]; and see generally *Allianz Australia Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568. Beazley JA in *Abigroup* applied this statement at (2006) 67 NSWLR 341 at 352 [48], 353-354 [56], [57].

plaintiff to show that there was a chance, to a greater or lesser degree, that it would have entered into an alternative transaction, or must the plaintiff demonstrate on the balance of probabilities that it would have entered into an alternative transaction? Must the plaintiff particularise exactly what alternative transaction it would have engaged in, or is it enough that some such alternative transaction could well have happened, if the defendant had not engaged in the impugned conduct?

63. In *Sellars v Adelaide Petroleum NL*¹⁰⁰ the High Court held that a distinction is required to be drawn between, on the one hand, proof of causation and proof of loss and, on the other, proof of the value of the loss in respect of which an award of damages is sought. The former must be proven on the balance of probabilities. The plurality in *Sellars* stated:¹⁰¹

“When the issue of causation turns on what the plaintiff would have done, there is no particular reason for departing from proof on the balance of probabilities notwithstanding that the question is hypothetical.”

64. However, once the plaintiff has proven on the balance of probabilities that it has suffered some loss, on an assessment of damages “... the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability”.¹⁰²

65. Brennan J in *Sellars*,¹⁰³ in a famous passage, explained as follows:

“Unless it can be predicated of an hypothesis in favour of causation of a loss that it is more probable than competing hypotheses denying causation, it cannot be said that the plaintiff has satisfied the court that the conduct of the defendant caused the loss. Where a loss is alleged to be a lost opportunity to acquire a benefit, a plaintiff who bears the onus of proving that a loss was caused by the conduct of the defendant discharges that onus by establishing a chain of causation that continues up to the point when there is a substantial prospect of acquiring the benefit sought by the plaintiff. Up to that point, the plaintiff must establish both the historical facts and any necessary hypothesis on the balance of probabilities. A constant standard of proof applies to the finding that a loss has been suffered and to the finding that that loss was caused by the defendant's conduct, whether those findings depend on evidence of historical facts or on evidence giving rise to competing hypotheses. In any event, the standard is proof on the balance of probabilities.

Although the issue of a loss caused by the defendant's conduct must be established on the balance of probabilities, hypotheses and possibilities the fulfilment of which cannot be proved must be evaluated to determine the amount or value of the loss suffered. Proof on

¹⁰⁰ (1994) 179 CLR 332.

¹⁰¹ (1994) 179 CLR 332 at 353, per Mason CJ, Dawson, Toohey and Gaudron JJ.

¹⁰² *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 643, applied in *Sellars* by the plurality (1994) 179 CLR 332 at 350, 351; see also Brennan J at 367.

¹⁰³ (1994) 179 CLR 332 at 367-368.

the balance of probabilities has no part to play in the evaluation of such hypotheses or possibilities: evaluation is a matter of informed estimation.” (Citations omitted)

66. *Sellars* was applied by the Full Court in *La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd*.¹⁰⁴ In *La Trobe* the plaintiff made a loan to a customer based upon a valuation of the mortgaged property by the defendant, which substantially over-valued the property. The plaintiff would not have made the loan on a proper valuation. The plaintiff led evidence at trial concerning alternative transactions that would have been available to it had it not proceeded with the subject loan, but not concerning any particular investment forgone as a result of entering into the loan. The defendant contended that the plaintiff’s claim for damages based on the net opportunity cost forgone failed because there was no evidence that the plaintiff had lost any particular loan opportunity. Finkelstein J held that on the plaintiff’s evidence there was not only a chance of the plaintiff lending the money to another borrower on the same terms and at the same rate as the subject loan, but that it was likely that another loan would have been made.¹⁰⁵ There were more potential borrowers than money available and the plaintiff could not satisfy the demand of potential borrowers. That there was a loss suffered by the plaintiff caused by the defendant’s contravening conduct was proven. It was not necessary for the plaintiff to point to a particular loan opportunity that it would have pursued otherwise. Finkelstein J would have reduced the damages awarded by 5 per cent, allowing for the possibility that an alternative loan may not have been entered into, but the majority, Jacobson and Besanko JJ, reduced the damages by 15 per cent for that reason.

Fact-finding and drawing inferences

67. A useful illustration of the court’s fact-finding process concerning causation is provided by the decision of Hargrave J in *Taylor v Gosling*.¹⁰⁶ The plaintiffs made an unsecured loan to a property development company, but the loan was not repaid and their loan monies were lost. The plaintiffs sued a business adviser who was the sole director of the company. They particularly complained of statements made by the defendant at a meeting of proposed investors that there was no risk associated with the short-term loans to the company, as it would use the funds to acquire three properties and the loans would be secured against that. Those statements were

¹⁰⁴ (2011) 190 FCR 299 per Finkelstein, Jacobson and Besanko JJ. *La Trobe Capital* was followed in *Valcorp Australia Pty Ltd v Angas Securities Ltd* (2011) 277 ALR 538 at 560-561 [132]-[180] per Jacobson, Siopis and Nicholas JJ, and by Allanson J in *Orchard Holdings Pty Ltd v Paxhill Pty Ltd* [2012] WASC 271 at paras [381]-[383].

¹⁰⁵ *Ibid* at 320-321 [96]; see Jacobson and Besanko JJ to like effect at 323 [113].

¹⁰⁶ [2010] VSC 75. See also *Clifford v Vegas Enterprises Pty Ltd* [2011] FCAFC 135 at paras [206], [224]-[226] per Besanko J, North and Jessup JJ agreeing; *Townsend v Collova* [2005] WASC 4 at paras [141], [149]-[151] and [153] per Le Miere J; *Consolo Ltd v Bennett* [2012] FCAFC 120 at paras [241], [242], [243] and [246] per Keane CJ, McKerracher and Katzmann JJ.

misleading. The plaintiffs gave evidence that there were four other factors which influenced their decision to make the loan. Hargrave J found that the defendant's statements were the principal reason for them making the loan, having weighed the other factors influencing the plaintiff's investment decision. The Court referred to the objective consideration that although novice investors, the plaintiffs were unlikely to have invested 80 per cent of the value of their matrimonial home unless they felt safe in doing so. Hargrave J held that in all the circumstances causation between the misleading statements by the defendant and the loss suffered by the plaintiffs, was established in connection with the loans. The defendant contended that there were five other factors which the plaintiff relied on in making the investment. Hargrave J took those matters into account as being factors which may have influenced the plaintiffs' investment decision but considering the evidence as a whole, found that those other factors did not sever the causal link between the defendant's misleading statements and the decision by the plaintiffs to invest. Those statements remained the principal reason for the plaintiffs making the loss-making loan.¹⁰⁷ Hargrave J did not in terms ask: Would the plaintiffs have gone ahead with the loan if the defendant had not made the misleading statements about the investment being no risk? However, it is implicit in the factual findings made that the defendant's statements were the principal or primary reason for the plaintiffs lending the money, that the loan would not have proceeded otherwise. The defendant appears not to have contended that the plaintiffs would have invested anyway.

68. The decision of Hargrave J in *Taylor v Gosling* may be contrasted with the decision of Habersberger J in *BHP Billiton (Olympic Dam) Corporation Pty Ltd v Steuler Industriewerke GmbH (No 2)*.¹⁰⁸ The plaintiff purchased lining materials for concrete tanks from an Australian company, which were installed by a related company. The defendant German company sold the lining to the Australian company. The defendant and the Australian re-seller made representations to the plaintiff as to the suitability of the lining. Habersberger J found that the representations were misleading or deceptive.¹⁰⁹ The plaintiff settled a claim against the Australian company for \$15 million. There was a separate later trial of the plaintiff's claim against the defendant for \$13.7 million on an assessment of damages, if any. The plaintiff claimed all of the costs incurred by it in respect of purchasing, installing, repairing and removing the lining and all of the costs of preparing or re-instating the tanks to be ready for the installation of a new lining. The plaintiff's earlier claim for the cost of replacing the lining with a particular alternative lining system, was withdrawn. The plaintiff contended that the defendant was liable

¹⁰⁷ Ibid at paras [141]-[151].

¹⁰⁸ [2011] VSC 659. Judgment on an appeal to the Court of Appeal was reserved by Tate, Santamaria and Kyrou JJA on 12 June 2014, sub nom *Protec Pacific Pty Ltd v Steuler Services GmbH & Co KG*; see [2013] VSCA 379.

¹⁰⁹ *BHP Billiton (Olympic Dam) Corporation Pty Ltd v Steuler Industriewerke GmbH* [2009] VSC 322.

for all of those costs because, as a result of being misled about the suitability of the lining, it had gone “down the wrong path”. The costs were said by the plaintiff to be recoverable even if those costs did not result from the unsuitability of the lining, costs had been incurred in respect of work which was not related to the lining and costs were incurred for work performed before the tanks had been commissioned. The defendant argued that the plaintiff had not established what it would have done if the defendant had not engaged in misleading conduct. The case was not a “no transaction” case, but rather an “alternative transaction” case because had the contravening conduct not occurred, the plaintiff would have proceeded with the expansion of the site and the lining of the tanks anyway but with a different supplier. The defendant submitted that on this alternative transaction case, the Court was required to compare the position the plaintiff was in, with the position that it would have been in had the representations not been made. On the evidence the plaintiff had a number of possible options had the contravention not occurred, but the plaintiff’s position was that it could not say what would have happened if the defendant had not misrepresented the suitability of the lining. The defendant contended that as the Court could not decide what alternative route the plaintiff would have taken, it was impossible for the Court to compare the plaintiff’s position with the position it would have been in had the defendant not made the suitability representations.¹¹⁰

69. The Court rejected the plaintiff’s claim in its entirety. Habersberger J stated that:¹¹¹

“WMC (the plaintiff) accepted that the Court must compare the position the claimant was in subsequent to the contravention, with the position it would have been in had the contravention not occurred. In *Henville v Walker*, for example, Hayne J stated that:¹¹²

The conclusion that the appellants suffered loss requires comparison between the position in which the appellants found themselves after the project was finished, and the position they would have been in if, instead of relying on what they were told by the respondents, they had not undertaken the project.

This follows what was said earlier in the joint judgment of McHugh, Hayne and Callinan JJ in *Marks v GIO Australia Holdings Limited*:¹¹³

a comparison must be made between the position in which the party that allegedly has suffered loss or damage is and the position in which that party would have been but for the contravening conduct.

In a no transaction case, the comparison is rather easier for the plaintiff to establish because the alternative course of action is simply that the plaintiff would not have entered into the transaction at all, but for the representation. However, in the alternative transaction case, the plaintiff will need to have evidence of what it could and would have

¹¹⁰ [2011] VSC 659 at paras [11]-[31].

¹¹¹ Ibid at para [34].

¹¹² (2001) 206 CLR 459 at 509 [162].

¹¹³ (1998) 196 CLR 494 at 512 [42]

done had the contravention not occurred, in order to prove that it has suffered loss in consequence of the contravention.”

The Court rejected the plaintiff’s claim as it had not proved that it had suffered any loss, because it did not prove what it would have done had it not been misled.¹¹⁴

70. An important example of where the plaintiff’s damages claim failed in a no-transaction case, *inter alia*, because he did not establish reliance on the defendant’s impugned conduct, is the decision of the Court of Appeal in *Woodcroft-Brown v Timbercorp Securities Ltd (in liq)*.¹¹⁵ The case was relevantly summarised by Ferguson J¹¹⁶ in *Bolitho v Banksia Securities Ltd*,¹¹⁷ as follows:

“... In *Timbercorp*, the plaintiff had invested in managed investment schemes which collapsed. Part of his case was that he had read the product disclosure statements (“*Timbercorp PDS*”); that in contravention of the *Corporations Act* certain matters had been omitted from the *Timbercorp PDS* that should have been included and that certain statements in the *Timbercorp PDS* were false or misleading. The plaintiff claimed that if the correct information had been provided, he would not have invested nor borrowed money to do so. However, the trial judge was not persuaded that the plaintiff read any of the *Timbercorp PDS* in any detail and found that what was contained in or omitted from them was not what induced the plaintiff to invest. That finding was not disturbed on appeal. The Court of Appeal observed that:¹¹⁸

In order to make out both the non-disclosure and the misrepresentation case, it was necessary for the [plaintiff] to establish that there was reliance placed upon the non-disclosures and the misleading conduct so as to cause entry into the investment product and, therefore, subsequently to cause loss.

Later in their reasons, the Court said:¹¹⁹

In order to recover damages pursuant to s 1022B(2)(c) or s 1041I(1) for breach of s 1022A or s 1041H, a plaintiff “must establish that he relied on the misleading or deceptive conduct, or the false or misleading statement or that he would have acted differently if the material omission had been disclosed”, in other words, the vice aimed at by the legislation “is not issuing misleading prospectuses, but misleading investors by issuing misleading prospectuses”.

A counterfactual was in issue because that was the way that the defendants ran part of their defences in response to the plaintiff’s claim that he would have acted differently had the impugned conduct not occurred, by contending that on the plaintiff’s evidence the Court could not be satisfied about anything he would or could have done differently had disclosure been

¹¹⁴ [2011] VSC 659 at para 35.

¹¹⁵ [2013] VSCA 284, Warren CJ, Buchanan JA and Macaulay AJA. A special leave to appeal application to the High Court was refused: [2014] HCA Trans 85.

¹¹⁶ As Ferguson JA then was.

¹¹⁷ [2014] VSC 8 at paras [23]-[25].

¹¹⁸ [2013] VSCA 284 at para [68].

¹¹⁹ *Ibid* at para [227].

made.¹²⁰ Judd J rejected the plaintiff's reliance case at trial, and the Court of Appeal (Warren CJ, Buchanan JA and Macaulay AJA) upheld that finding.¹²¹

71. The court's decision as to whether the plaintiff has established the necessary causal link can be a difficult one. Where the court decides what would have happened so far as the plaintiff's loss-making action or inaction was concerned if the defendant had not engaged in the contravening conduct, the court decides a necessarily hypothetical question. The court assumes that the defendant would not have engaged in that conduct, and/or would have engaged in different conduct, and then tests that assumption against all the surrounding circumstances. What would have happened had that been the situation? Where the plaintiff's witnesses give evidence about this, the evidence is necessarily self-interested. That is not to say that such evidence inherently lacks credibility, but it does mean the court will take particular care in weighing such evidence. In some cases the plaintiff's witnesses have given no direct evidence of reliance, but the plaintiff nevertheless has established reliance and hence causation.¹²²
72. In making factual findings as to causation in misleading or deceptive conduct cases the court applies, where appropriate, the following important statement by Wilson J in *Gould v Vaggelas*, a common law deceit case, about the drawing of inferences:¹²³

“[w]here a plaintiff shows that a defendant has made false statements to him intending thereby to induce him to enter into a contract and those statements are of such a nature as would be likely to provide such inducement and the plaintiff did in fact enter into that contract and thereby suffered damage and nothing more appears, common sense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract.”

73. In *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd*¹²⁴ a majority of the Court of Appeal, Nettle and Buchanan JJA, Warren CJ dissenting, found that a clause in a deed was misleading or deceptive. Nettle and Buchanan JJA went on to consider and decide the question of reliance in this way:¹²⁵

“As to evidence of reliance, it is true that MWH did not adduce any direct evidence of such (reliance) but, consistently with its pleading, it sought in its written submissions before the judge to have his Honour infer reliance based on what was contended to be the materiality of the acknowledgement; what was said to be the objective likelihood that the

¹²⁰ *Woodcroft-Brown v Timbercorp Securities Ltd (in liq)* [2011] VSC 427 at para [613].

¹²¹ *Woodcroft-Brown v Timbercorp Securities Ltd* [2013] VSCA 284 at paras [226]-[239].

¹²² See, eg. *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq)* (2010) 31 VR 575 at 599-603 [96]-[106] per Buchanan and Nettle JJA.

¹²³ (1984) 157 CLR 215 at 238.

¹²⁴ (2010) 31 VR 575. A special leave to appeal application to the High Court was refused: [2011] HCA Trans 146.

¹²⁵ *Ibid* at 599 [96], 603 [106].

acknowledgment would have induced MWH's entry into the Deed; and the fact that MWH did in fact enter into the Deed." ...

"At all events, if one looks at the acknowledgment in clause 4 of the Deed in the light of the relevant surrounding facts and circumstances and the course of conduct leading up to the execution of the deed, it appears to be a material representation calculated to induce MWH to enter into the Deed and make the payment. Absent evidence of the kind which was held to be determinative in *Campbell*,¹²⁶ common sense dictates the conclusion that it played at least some part in inducing MWH to enter into the Deed and make the payment. We do not consider that the acknowledgment can be regarded as uninfluential on the mind of MWH considering whether to accept the novation and make payment for what had already been done. It follows, in our judgment, that a fair inference arises that the representation operated as an inducement."

74. Another useful illustration of the court's fact-finding process is provided by the decision of the Court of Appeal in *Lord Buddha Pty Ltd v Harpur*.¹²⁷ The Court there, Weinberg and Tate JJA and Vickery AJA, upheld the decision of the trial judge, Robson J, as the factual findings made were open to the judge. At trial a purchaser successfully obtained orders to set aside a contract of sale of land against the vendor, based upon the falsity of four representations made by the vendor. Robson J ordered that the \$425,000 deposit had to be re-paid by the vendor to the purchaser.
75. Vickery AJA summarised the relevant findings by the trial judge as follows:¹²⁸

"The trial judge was very critical of the evidence given by Mr Harpur, finding that:

Mr Harpur's evidence was generally unsatisfactory. His recollection of meetings held was poor. He was unclear on the circumstances surrounding the making of the contract. Significant parts of his evidence were a reconstruction. He often said "I would have", indicating that he was only speculating. He also often appeared to be formulating the context and his views before giving evidence of what he said. He consistently failed to answer questions directly and without equivocation. In many instances his evidence was contradicted by other witnesses, whose evidence I prefer. I now turn to several specific aspects of his evidence which raise doubts about the reliability of his evidence.

In the light of these findings, his Honour approached Mr Harpur's evidence in the following way:

Mr Harpur bears the onus of satisfying me on the balance of probabilities that Lord Buddha made the representations that he alleges. For the reasons I have given, I do not accept Mr Harpur's evidence on the alleged representations except where his evidence is supported by other evidence that I accept.

The appellant submitted that Mr Harpur's evidence only went to the relevant representations in part and barely 'proved up' his claim. In my opinion, it was open to the trial judge to approach the question as to whether the representations were made in the way he did. Mr Harpur's evidence on the matter was supported by other evidence

¹²⁶ *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 353 [147] per Gummow, Hayne, Heydon and Kiefel J.

¹²⁷ [2013] VSCA 101.

¹²⁸ *Ibid* at paras [72]-[75], [37]-[38].

which was accepted by the trial judge. Further, to the extent that Mr Harpur gave evidence of the matter, in large part that evidence as to the making of the representations was at least consistent with the finding that the four representations were in fact made.” (citations omitted)

...

“The trial judge further found that by reason of the misleading or deceptive conduct, Mr Harpur paid the deposit and had lost the use of that money. In particular, his Honour found that Mr Harpur relied on the representations in entering into the contract for the purchase of the Portland land. The following passages summarize his findings on the issue:

I find the misleading representations made by Lord Buddha, as referred to above, were made to induce Mr Harpur to enter into the contract for the sale of the Portland land. I find that Mr Harpur relied on these representations and I infer that he did enter the contract based on these inducements. I find that Mr Harpur did not have actual knowledge of the true facts in relation to the above representations and therefore the inference has not been rebutted. I find that the representations were not the sole inducement. I find, however, that they played some part in contributing to Mr Harpur’s decision to buy the property.” (citations omitted)

76. The decision of the Court of Appeal, dismissing the appeal from the decision of Robson J on the facts, is a strong one. The Court of Appeal held that the trial judge was entitled to apply a *Gould v Vaggelas* inference, notwithstanding that the purchaser’s evidence was generally unsatisfactory. *Lord Buddha* perhaps shows that the court can, and should, place significant weight upon objective matters concerning causation.
77. Based on further statements by Wilson J in *Gould v Vaggelas*, Vickery AJA in *Lord Buddha* said:¹²⁹
- “... an inference of inducement is no more than an inference of fact, which may be rebutted on the facts of the case. In order to rebut the inference, the representor assumes an evidentiary onus to point to facts inconsistent with the inference arising. Those facts, when weighed alongside the inference which is otherwise open to be drawn, may be sufficient to rebut it. For example, a rebuttal may be established by showing that the representee, before he entered into the contract, either was possessed of actual knowledge of the true facts and knew them to be true or alternatively made it plain that whether he knew the true facts or not he did not rely on the representation. A possible inference may also be rebutted by the direct evidence called, for example, where the direct evidence is inconsistent with the inference of reliance which may otherwise have been open to be drawn.” (citations omitted)
78. Concerning references here to the “rebuttal” of inferences otherwise open, the High Court in *Sidhu v Van Dyke*, an equitable estoppel case, confirmed that nothing in the judgments in *Gould v Vaggelas* suggested that the onus of proof in relation to detrimental reliance shifts to the

¹²⁹ Ibid at para [159](2).

defendant in any circumstances, and that the plaintiff at all times bears the legal onus that it had been induced to rely upon the defendant's conduct.¹³⁰

Disclaimers

79. The court will be slow to give effect to a disclaimer clause where the defendant has otherwise engaged in misleading or deceptive conduct. The effect on the plaintiff of such a clause is just a matter to be taken into account by the court in all the circumstances. In *Butcher v Lachlan Elder Realty Pty Ltd*, McHugh J stated¹³¹:

“If a disclaimer clause has the effect of erasing whatever is misleading in the conduct, the clause will be effective, not by any independent force of its own, but by actually modifying the conduct. However, a formal disclaimer would have this effect only in rare cases.”

80. In *Campbell v Backoffice Investments Pty Ltd*,¹³² French CJ stated:

“Where the impugned conduct comprises allegedly misleading pre-contractual representations, a contractual disclaimer of reliance will ordinarily be considered in relation to the question of causation. For if a person expressly declares in a contractual document that he or she did not rely upon pre-contractual representations, that declaration may, according to the circumstances, be evidence of non-reliance and of the want of a causal link between the impugned conduct and the loss or damage flowing from entry into the contract. In many cases, such a provision will not be taken to evidence a break in the causal link between misleading or deceptive conduct and loss. The person making the declaration may nevertheless be found to have been actuated by the misrepresentations into entering the contract. The question is not one of law, but of fact.” (citations omitted)

81. In *NEA Pty Ltd v Magenta Mining Pty Ltd*¹³³ Martin CJ, Wheeler and Buss JJA agreeing, stated:

“For present purposes, it is sufficient to summarise, at a very general level, the principles which emerge from the many cases on this topic in the following terms:

- (1) It is not possible for a party to exclude the statutory liability that arises from a contravention of s 52 of the *Trade Practices Act 1974* (Cth) (“the Act”) by force of contractual provision alone.
- (2) A disclaimer or exclusion clause can only affect the statutory liability for misleading and deceptive conduct if:
 - (a) it has the effect that the relevant conduct cannot be properly characterised as misleading and deceptive; or

¹³⁰ (2014) 308 ALR 232 at 243 [55], 244 [61] per French CJ, Kiefel, Bell and Keane JJ.

¹³¹ (2004) 218 CLR 592 at 639[152].

¹³² (2009) 238 CLR 304 at 321 [31].

¹³³ [2007] WASCA 70 at para [112].

- (b) it has the effect that the claimant cannot successfully establish that it reasonably relied upon the misleading and deceptive conduct.”

Normative considerations

82. Although causation is a matter of fact, there is an overlay of normative considerations which apply as to whether there is a sufficient causal connection between the plaintiff’s loss and damage and the defendant’s contravening conduct, such as to justify holding the defendant legally liable for the plaintiff’s loss and damage. Ultimately the normative effect of the statutory prohibition of misleading or deceptive conduct must be implemented by the court when it decides whether the plaintiff makes out its causation case. The court does so by examination of the purpose of the statute, the purpose of the cause of action and the nature and scope of the defendant’s obligations in the particular circumstances.¹³⁴ In *Henville v Walker* McHugh J stated:¹³⁵

“The purposes of the Act include promoting fair trading and protecting consumers from contraventions of the Act. Those purposes are more readily achieved by ensuring that consumers recover the actual losses they have suffered as the result of contraventions of the Act. Where a person contravenes the Act and induces a person to enter upon a course of conduct that results in loss or damage, an award of damages that compensates for the actual losses incurred in embarking on that course of conduct best serves the purposes of the Act and should ordinarily be awarded.”

83. In *Hay Property Consultants Pty Ltd v Victorian Securities Corporation Ltd*,¹³⁶ the defendant valuers over-valued properties. The plaintiff lender relied on the valuation, and would not have lent any moneys if the valuers had valued the properties at market value. The borrowers defaulted on the loan from the plaintiff lender, and the lender obtained an order for possession of the properties, but before it obtained possession the properties were deliberately damaged by the criminal acts of an unknown third party. The diminution of value of the properties caused by the damage was \$215,000, but the lender’s loss on a re-sale was only \$170,601.74. The trial judge in the County Court held that the valuers were liable for the loss suffered by the lender because their misleading and deceptive conduct was one of the two causes of loss, the other being the criminal damage to the properties. An appeal to the Court of Appeal by the valuers was allowed and the lender obtained no damages for the loss in value of the properties resulting from the criminal acts of third parties. Neave JA, with whom Ashley and Hansen JJA agreed, reasoned as follows:¹³⁷

¹³⁴ *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 637-640 [24]-[31] per Gleeson CJ; at 642-644 [44]-[50] per Gummow and Hayne JJ.

¹³⁵ (2001) 206 CLR 459 at 503 [135]; see also at 489-493 [96]-[104] per McHugh J.

¹³⁶ (2010) 29 VR 483.

¹³⁷ *Ibid* at 525-526 [87]-[91].

“First, although the lender would not have made the loan but for the valuers’ misrepresentations, the satisfaction of the ‘but for test’ is not sufficient to establish that the loss was caused ‘by’ the negligent conduct of the valuers.” ...

“True it is that the lender would not have suffered any loss if it had not made the loan. But the misrepresentations simply initiated a train of events, commencing with the making of the loan, and did not create a legally causal relationship between the loss caused by the damage to the properties and the making of the loan. The criminal damage could have occurred regardless of the valuers’ negligent misstatement.

Secondly, as I have previously said, the legal context in which the right to recover damages arises must be taken into account in resolving causation issues. The purpose and policy of the TPA does not require a negligent valuer to be held liable for loss caused by the criminal acts of third parties, except in circumstances where the original breach increased the risk that those acts would occur. The damage suffered was not within the scope of the protection conferred by the TPA.

Thirdly, none of the authorities to which the Court was referred supports the lender’s claim for the whole of its loss. Although a broad approach has been taken to causation under s 82 of the TPA, the case law does not require valuers to be treated as insurers of the loan with liability for all losses which occur after a negligent misstatement of the value of the property is made.” ...

“Fourthly, this is an example of an abnormal event intervening between the breach and the damage which breaks the chain of causation between the misleading representation and the loss suffered as the result of the subsequent criminal acts.” (citations omitted)

Passing off-type misleading or deceptive conduct

84. A defendant trader commits the common law tort of passing off where the plaintiff has a reputation in a name, get up or other trade indicia, the defendant by reason of its name, get up or trade indicia falsely represents that its business or products or services are those of the plaintiff, or are associated with those of the plaintiff, leading members of the public to be deceived, and the defendant’s conduct causes damage to the plaintiff’s goodwill in its business, products or services.¹³⁸ Passing off protects the plaintiff’s goodwill in or in connexion with its business. The same facts can give rise to liability in the defendant for having engaged in misleading or deceptive conduct. There the interest of the court is in protecting members of the public from being misled or deceived. The plaintiff will typically sue the defendant based on both causes of action. Judges usually decide the misleading or deceptive conduct claim, without the need to go on to decide the passing off claim as the facts will typically establish both, or neither. The flexibility of the range of remedies potentially available in a misleading or deceptive conduct claim tends to make such a claim more attractive for a plaintiff than for it just to pursue a passing off claim.

¹³⁸ *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491 (HL) at 499 per Lord Oliver.

85. The same misleading or deceptive conduct principles apply in respect of such claims by the incumbent plaintiff trader against the newcomer defendant. The misleading or deceptive conduct principles in this context are stated by the High Court in *Campomar*.¹³⁹ The factual scenario which occurs in passing off-type misleading or deceptive conduct cases gives rise to particular issues worthy of separate comment.
86. First, the circumstances in which the defendant's impugned conduct is assessed involves examination of the market in which the plaintiff trades. The plaintiff must prove that it has a distinctive reputation in the marketplace in the minds of ordinary reasonable consumers, by reference to the plaintiff's trade name, logo, get up, colour scheme or a combination of some or all of these. The plaintiff must lead evidence of how it trades, the extent of its trade and the duration of its trading activities. It is against those background circumstances that the defendant's conduct is assessed. No-one will relevantly be misled or deceived by the way that the defendant trades if the plaintiff's business is not known by ordinary reasonable members of the public, notwithstanding similarities.
87. Second, the defendant will often dispute the plaintiff's claim to a distinctive reputation in the elements of the way that the plaintiff trades which are in common with, or similar to, those of the defendant. The defendant may contend that there is nothing about the way that the plaintiff trades that identifies the plaintiff alone, and to the exclusion of others, in the minds of members of the public. The defendant is particularly likely to challenge the plaintiff's reputation evidence where the plaintiff uses a wholly or partially descriptive trade name, or where the colours, or colour combinations, used by the plaintiff are used by others in the trade. It may be noted that, by contrast, in an infringement proceeding pursuant to s 120(1) of the *Trade Marks Act 1995* (Cth), the registered proprietor of the mark does not need to prove that it has a reputation in the market place derived from its use of the mark.
88. Third, the defendant's intention in choosing to trade in the way that it does will typically loom large as an issue at trial. The defendant will usually be a new trade competitor of the plaintiff, hence the plaintiff taking proceedings. However, the defendant may not be a direct competitor of the plaintiff. In *Campomar* the Court enjoined the defendant from marketing NIKE SPORT FRAGRANCE at the suit of the plaintiff Nike sporting goods company. The defendant is likely to well know of the plaintiff's business. The defendant will contend that its trade name, get up, trade indicia and colour combinations are not "too close" to those of the plaintiff, such as to cause members of the public to be misled or deceived. Indeed, the defendant will contend that it is establishing its own reputation from the way it trades. The plaintiff will contend that the

¹³⁹ (2000) 202 CLR 45 at 81 [92] to 88 [107] per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ.

defendant chose its manner of trading with “its eyes wide open”, and intended to trade on the plaintiff’s established reputation by means of non-identical trade indicia, but which are “too close” for the court to permit the defendant to continue with. The plaintiff will allege that the defendant’s intent in trading on the plaintiff’s reputation is being carried into effect. The plaintiff will complain that the defendant’s conduct in misleading or deceiving members of the public as to a trading association between the defendant’s business and the plaintiff’s business is causing it loss and damage, particularly from a diversion of trade from the plaintiff to the defendant. Hence the court should enjoin the defendant from continuing to engage in the impugned conduct.

89. Fourth, evidence of actual confusion from members of the public arising from the defendant’s conduct, given the plaintiff’s reputation, is not necessary for the plaintiff to succeed, but such evidence may be important where it is led. However, it is for the court to decide the question of whether the defendant’s conduct is “too close” by reference to the court’s objective assessment of what the hypothetical ordinary reasonable member of the public familiar with the plaintiff’s business would make of the way that the defendant trades. Matters of impression are involved here in the court deciding this question of fact. That this is so simply arises from the nature of the factual issues in passing off-type misleading or deceptive conduct cases.

Conclusion

90. In deciding whether a person has engaged in misleading or deceptive conduct in trade or commerce, and whether there is sufficient connection between that conduct and the plaintiff’s loss and damage such that relief should be ordered, the court manifestly does not do so by application of any rigid formula. The wide range of economic activity in respect of which those questions have arisen has seen the courts, based on the statutory provisions, develop principles to fit the factual circumstances of the case. The applicability of those principles is substantially affected by the issues raised by the facts, and the way that the plaintiff and the defendant put their respective cases at trial. While reasoning from factual analogies can be unhelpful, the ways in which the courts have applied the principles to the facts do provide guidance for us in new cases. Decisions of the Supreme Court of Victoria are an important part of that.