

# FOLEY'S | LIST

## MISLEADING AND DECEPTIVE CONDUCT

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# Misleading and Deceptive Conduct

## How, Where, Where and Why?

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### Introduction

1. The statutory action of misleading and deceptive conduct is one of the most (if not, the most) relied upon statutory provisions in the civil and commercial contexts<sup>1</sup>. While there are a number of reasons for this, the vagueness of the language is one of them. While the opacity of the language can prove alluring, it contains hidden pitfalls.

### The Basics

2. As is well known, section 18 of the Australian Consumer Law (ACL) provides:

*A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.*
3. As such, to show that a party has infringed against s 18, it is necessary to demonstrate the following:
  - a. A person has engaged in conduct;
  - b. The conduct is in trade or commerce;
  - c. The conduct must be misleading or deceptive or likely to mislead to deceive.
4. Each of the elements must be considered but it is the last element that gives rise to the greater difficulties of application in practice.
5. Section 29 of the ACL prohibits a person, in trade or commerce, in connection with the supply or possible supply of goods or services, from making various false or misleading statements:
  - a. about the standard, quality, value, grade, composition or style of the goods or services;
  - b. that goods are new;
  - c. that someone has agreed to purchase the goods or services or providing a false testimonial in relation to them;

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<sup>1</sup> French J (as he then was), in *A Lawyer's Guide to Misleading and Deceptive Conduct* (1989) 63 ALJ 250.

- d. that the goods or services have a sponsorship, approval, performance characteristics, uses of benefits that they do not have;
  - e. concerning the availability of facilities for repair;
  - f. concerning the place or origin of the goods;
  - g. concerning the need for any goods or services;
  - h. concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy;
  - i. concerning the requirement to pay for a contractual right that is already covered by law.
6. A breach of these provisions can result in damages (s 236), an injunction (ACL s 232) and where proceedings are brought by a regulator, a publication order (ss 246-247), or other remedial orders such as disqualifying persons from managing corporations (ss 237-241, 248). Breaches of s 29 and 151 (but not s 18) can also lead to pecuniary penalties of up to \$1.1 million per offence for a corporation (s 224), fines and infringement notices. The cause of action can also operate as a defence – for example, to a claim for breach of contract.
7. The principles in relation to misleading and deceptive conduct are largely settled but that their application can cause difficulty. It has also been said that “*it is a mistake to elevate statements in other cases concerning other facts into principles of law to be applied.*”<sup>2</sup> That is not to say that earlier cases are unimportant. However, each case is uniquely determined according to the particular facts of that case and, as such, it is an area where analysis by analogy is fraught with difficulty.

### **A Person Engaging in Conduct**

8. The precursor to s 18 of the ACL, section 52 of the *Trade Practices Act 1974* (TPA), prohibited “corporations” engaging in misleading or deceptive conduct. Prohibitions against individuals engaging in misleading conduct was left to the state based Fair Trading legislation. Further, individuals could be found liable under s75B of the TPA if they aided and abetted a corporation to engage in misleading and deceptive conduct. Given the reference to “a

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<sup>2</sup> *Google Inc v ACCC* (2013) 249 CLR 435 at [100] (Hayne J); *ACCC v Telstra* (2004) 208 ALR 459 (Gyles J) at [50]. As His Honour noted in that case, different judges take different views about whether a robust or protective view ought be taken towards consumers.

person” in ss 18 and 29, the need to demonstrate an offence by a company is no longer an issue<sup>3</sup>.

9. Although the impugned conduct is often cast as making a particular representation, it is important to keep in mind that the prohibition is not on making false representations but on engaging in particular conduct. “Engaging in conduct” is given an extended definition<sup>4</sup> that includes doing or refusing to do an act, giving effect to a provision of a contract or arrangement or arriving at or giving effect to an understanding. Often the impugned conduct is said to involve the making of certain representations but conduct can be misleading or deceptive without the need to identify a particular representation that is conveyed<sup>5</sup>.
10. The issue of “engaging in conduct” is particularly important in two contexts – where it is alleged that a party has engaged in misleading and deceptive conduct by silence and where a person passes on information “for what it is worth” without endorsing it.

#### *Silence*

11. As noted, it is not necessary to identify a particular representation that a person has made prior to a finding that the person has engaged in misleading conduct. Where a person remains silent on a particular matter that silence will be considered in the context of the person’s overall conduct to determine if the conduct generally is misleading or deceptive. As Black CJ said in *Demagogue Pty Ltd v Ramensky*<sup>6</sup> (*Demagogue*):

*"Silence is to be assessed as a circumstances 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 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 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.*

12. The facts of *Demagogue* were that the plaintiff purchased an off-the-plan unit from the defendant. The defendant did not disclose that it was in the process of seeking to obtain a licence to allow it to build a road over public land that would permit vehicular access to the property. The trial judge held, and the

<sup>3</sup> It remains an offence for aid or abet a breach of s 29 of the ACL - ACL s 224(1)(c)

<sup>4</sup> Competition and Consumer Act 2010 s 4(2)

<sup>5</sup> *Google Inc v ACCC* (2013) 249 CLR 435 at [92] per Hayne J.

<sup>6</sup> (1992) 39 FCR 31 at 32

Full Court agreed, that it was a deliberate decision not to disclose this fact. The Full Court held that this amounted to misleading and deceptive conduct because the need for such authorisation was unusual, it was not expected by the purchasers and would have resulted in the purchasers not going ahead with the purchase. As such, it was held that the contract was void *ab initio*.

13. However, it is important that the facts of the particular case are borne in mind and no attempt is made to derive a general principle from the facts of this case such as – if there are unusual circumstances then the seller is required to tell the purchaser about them.
14. In that context, comparison can be made with the more recent case of *Swindells v Victoria*<sup>7</sup>. In that case, the plaintiff agreed to move from Western Australia to Victoria with his young family to take on the role of Mining Warden. One of the arguments in the case was that the defendant did not disclose to the plaintiff at the time of interview that the role of Mining Warden was the subject of review and a possible outcome of that review was that the role might be abolished. The Court of Appeal held that there was no obligation to disclose such information because the abolition of the role was just one possible outcome amongst many and there were many steps that would need to be taken (including passing legislation) before the role could be abolished. On that basis, it was determined that the failure of the defendants to disclose the potential consequences of the review was not misleading<sup>8</sup>.
15. Alleging that a party has engaged in misleading conduct by silence is particularly difficult (but not impossible) in the context of commercial negotiations. In *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd*<sup>9</sup>, the High Court was faced with a claim by a financier who suffered loss because, the financier said, the insurance broker failed to advise it that an insurance policy taken out by the insured/borrower had particular and unusual features which made it ineffective as a security. In particular, the broker arranged the policy for the borrower but did not tell the financier that the policy was not a cancellable policy which meant that policy could not be assigned to the insurer. This made it ineffective as security.
16. The High Court held that there was no misleading conduct and took into account the experience of the financier, the fact that the certificate of insurance did not disclose the risks which ought to have put the financier on

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<sup>7</sup> [2016] VSCA 9

<sup>8</sup> [2016] VSCA 9 at [60]

<sup>9</sup> (2010) 241 CLR 357

notice that the policy was unusual, the fact the financier made no further queries and that the financier did not read the later-provided policy which revealed the non-cancellable nature of the policy<sup>10</sup>. In that case, the High Court said<sup>11</sup>:

*... 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. ....*

*... When a document contains a statement that is true, non-disclosure of an important qualifying fact will be misleading or deceptive if the recipient would be misled, absent such disclosure, into believing that the statement was complete. In some cases it might not be necessary to invoke non-disclosure at all where a statement which is literally true, but incomplete in some material respect, conveys a false representation that it is complete.*

#### *Passing on Information*

17. A person does not engage in misleading or deceptive conduct simply by passing on information that another has provided if he or she makes it clear that this is what he or she is doing (as long as it is true that they have been provided with that information by another person).
18. As with many aspects of misleading conduct, the issue arises whether the application of this principle to the facts – that is, did the intermediary simply pass on the information or did they do more?
19. As French J said in *Gardam v George Willis & Co Ltd*<sup>12</sup> :
 

*“The innocent carriage of a false representation from one person to another in circumstances where the carrier is and is seen to be a mere conduit, does not involve him in making that representation. Nobody would expect that the postman who bears a misleading message in a postal article has any concern about its content or is in any sense adopting it. The same is true of the messenger boy or courier service. When, however, a representation is conveyed in circumstances in which the carrier would be regarded by the relevant section of the public as adopting it, then he makes that representation.”*
20. This was a significant issue in the case of *Google Inc v ACCC*<sup>13</sup>, dealt with in more detail below.

<sup>10</sup> (2010) 241 CLR 357 at [1] – [2], [24] – [26], [29], [54] – [63] and [96].

<sup>11</sup> At [22] – [23], per French CJ and Keifel J

<sup>12</sup> (1988) 82 ALR 415

<sup>13</sup> *Google Inc v ACCC* (2013) 249 CLR 435

## Trade or Commerce

21. In order to infringe s 18 or s 29 of the ACL, the relevant conduct must be *in* trade or commerce. It is not sufficient that the conduct be *in respect of* trade or commerce. Hence, the High Court found that the statutory prohibitions only applied only to conduct which itself had an aspect or element of activities which, of their nature, bear a trading or commercial character<sup>14</sup>. Hence, the Court found, a discussion about the employment conditions between an employer and employee was not in respect of trade or commerce but was not in trade or commerce.
22. It is not enough that the conduct is undertaken by a trading or commercial entity. It is necessary to consider the conduct which is said to have been misleading and ask whether, according to ordinary usage, that conduct occurred in the course of dealings which, of their nature, bear a trading or commercial character<sup>15</sup>.

## What Conduct is Misleading or Deceptive?

### *An Objective Test*

23. A person engages in misleading conduct if they engage in conduct that might lead a reasonable person in the position of the recipient of the information to be led into error. Conduct is not misleading or deceptive simply because it may cause the recipient(s) to be confused or to wonder about something<sup>16</sup>.
24. The test of whether conduct is misleading or deceptive, or likely to be misleading or deceptive, is objective. The Court must consider the effect of a fair reading or viewing on “reasonable” or “ordinary” members of the target audience<sup>17</sup>. The class may include a wide range of people including the inexperienced and the gullible but the ordinary or reasonable member will be

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<sup>14</sup> *Concrete Constructions (NSW) Pty Ltd PL v Nelson* (1990) 169 CLR 594 at 604.

<sup>15</sup> *Hearn v O'Rourke* [2003] 129 FCR 64

<sup>16</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199 (Gibbs CJ), 209 (Mason J); *Campomar v Nike International* (2000) 202 CLR 45 at 87; *Singtel Optus v Telstra* [2004] FCA 859 at [76]

<sup>17</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199 (Gibbs CJ), 209 (Mason J); *Tobacco Institute of Australia Ltd v Australasian Federation of Consumer Organizations Inc* (1992) 38 FCR 1, 48; *TPC v Optus Communications Pty Ltd* (1996) 64 FCR 326, 336 (Tamberlin J); *Campomar v Nike International* (2000) 202 CLR 45 at 85

identified as having particular characteristics<sup>18</sup>. The section is not designed to protect people who fail to take reasonable care to protect their own interests<sup>19</sup> and the court will not take into account extreme or fanciful reactions to the conduct<sup>20</sup>

25. It is not necessary to show that it is more likely than not that a reasonable reader/listener would be led into error – it is enough to show that any reasonable reader/listener might be led into error. Hence, if a statement has two or more possible meanings that are reasonably open, and one of them would be misleading and the other would not be misleading, the conduct is likely to be misleading<sup>21</sup>.
26. It has been held that it is necessary to establish that a “significant proportion” of the readers would have been misled before it can be said that a statement is misleading<sup>22</sup>. This is because:
- “To speak of a reasonable member of a class necessarily implies that one is speaking of a significant proportion of that class. It is impossible to postulate a situation in which the reasonable member of the class is not representative of such a proportion”*<sup>23</sup>.
27. To similar effect, it has been said that a degree of robustness is required because the public is accustomed to some puffery of products and benefits in

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<sup>18</sup> *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 at para [18]; *Astraneca Pty Ltd v GlaxoSmithKline Australian Pty Ltd* [2006] FCAFC 22 at [34], [37]

<sup>19</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199, *Campomar v Nike International* (2000) 202 CLR 45 at para [102] – [103]; *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 at para [18]

<sup>20</sup> *Campomar v Nike International* (2000) 202 CLR 45 at para [105]. It is instructive to note that example of an “extreme” or “fanciful” interpretation that the High Court used in that case (at para [105]). The High Court said that it would be extreme or fanciful for a prospective purchaser of pet food or toiler cleaners to believe that only the Nike sporting company could use the Nike name in respect of such products. See also *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 at para [18]

<sup>21</sup> *Tobacco Institute of Australia Ltd v Australasian Federation of Consumer Organizations Inc* (1992) 38 FCR 1 at 5, 27; *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 at para [24]

<sup>22</sup> *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 at para [21]-[23] per Dowsett J, referring to Wilcox J in *10<sup>th</sup> Cantanae Pty Ltd v Shoshana Pty Ltd* (1987) 79 ALR 299 (“*10<sup>th</sup> Cantanae*”) at 302 and, to the same effect at para [70] – [71] per Jacobsen and Bennett JJ referring to Pincus J in *10<sup>th</sup> Cantanae* which he said that it was not sufficient that “some readers” were affected and Gummow J who said that it is necessary to prove that a substantial proportion had been misled. See also *ACCC v Panasonic Australia Pty Ltd* (2010) 269 ALR 622 at [39]

<sup>23</sup> *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 at para [23]; note that in *au Domain Administration Ltd v Domain Names Australia Pty Ltd* (2004) 207 ALR 521 at [25] – [26] (a passage cited with approval by Gordon J in *ACCC v Telstra* (2007) 244 ALR 470 at [17]) that Finkelstein J rejected the idea that it was necessary to show that a significant proportion of the class would have been misled. Finkelstein J’s comments to this effect were rejected by the Full Court in *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 at para [71]. See also *Hansen Beverage Company v Bickfords (Australia) Pty Ltd* [2008] FCAFC 181; (2008) 171 FCR 579 at [44]-[47]; [55]; [66]; *Optical 88 Limited v Optical 88 Pty Ltd (no 2)* [2010] FCA 1380 (Yates J) at [337] – [342]

mass advertising<sup>24</sup>. It has also been said that, where a significant purchasing decision is involved, a reasonable consumer will take more active steps to check matters than might be the case with a smaller, impulse purchase<sup>25</sup>. Further, the prospective purchaser of a substantial item will have some knowledge of the comparative prices in the relevant market or, at least, will have a chance to acquaint themselves with those comparative prices or pricing policies<sup>26</sup>;

28. Evidence that a person has, or has not, been misled is relevant to the question of whether the statement is misleading and may be important and persuasive but is not conclusive<sup>27</sup>. So much is demonstrated by the presence of the words “likely to mislead or deceive” in s 18<sup>28</sup>. As explained below, where a plaintiff seeks damages for misleading conduct, the plaintiff’s subjective understanding of the statement is also important in demonstrating causation and reliance and what other relief might be granted<sup>29</sup>. However, ultimately, the test of whether conduct is misleading is an objective test and the court must determine the question for itself<sup>30</sup>.
29. When considering an advertisement published to an indeterminate group (such as the general public) the Court must<sup>31</sup>:
- a. identify the relevant target audience;
  - b. consider what characteristics a reasonable or ordinary member of the relevant target audience would have;
  - c. consider what meaning or meaning that person would reasonably ascribe to the advertisement;

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<sup>24</sup> *Singtel Optus v Telstra* [2004] FCA 859 at [66]; *Stuart Alexander and Co (Interstate) Pty Ltd v Blenders Pty Ltd* (1981) 37 ALR 161 at 164-165; *Australian Competition and Consumer Commission v Global One Mobile Entertainment Ltd* [2011] FCA 393 at [51]

<sup>25</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199; *Duracell Australia Pty Ltd v Union Carbide Australia Ltd* (1988) 14 IPR 293, 299; *Specsavers Pty Ltd v The Optical Superstore Pty Ltd* [2009] FCA 692 at [9]

<sup>26</sup> *Specsavers Pty Ltd v The Optical Superstore Pty Ltd* [2009] FCA 692 at [9]

<sup>27</sup> *Astraneca Pty Ltd v GlaxoSmithKline Australian Pty Ltd* [2006] FCAFC 22 at [33], [52]

<sup>28</sup> *Google Inc v ACCC* (2013) 249 CKR 435 at [6]

<sup>29</sup> *Astraneca Pty Ltd v GlaxoSmithKline Australian Pty Ltd* [2006] FCAFC 22 at [33]

<sup>30</sup> *TPC v Optus Communications Pty Ltd* (1996) 64 FCR 326, 336 (Tamberlin J) quoting from *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202-203; *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1 at para [43] – [44]; *Singtel Optus v Telstra* [2004] FCA 859 at [75]

<sup>31</sup> *TPC v Optus Communications Pty Ltd* (1996) 64 FCR 326, 336 (Tamberlin J) quoting from *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202-203; see also *.au Domain Administration Ltd v Domain Names Australia Pty Ltd* (2004) 207 ALR 521 cited with approval by Gordon J in *ACCC v Telstra* (2007) 244 ALR 470 at [17]; see also *Telstra Corp Ltd v Cable and Wireless Optus Ltd* [2001] FCA 1478 at [21]-[25] (Goldberg J) and *ACCC v Global One Entertainment Ltd* [2011] FCA 393 at [49]- [50] (Bennett J)

- d. determine whether those meanings are the same as the pleaded meanings; and
  - e. determine if those meanings are false.
30. However, a different approach is called for when person claims damages for a representation made to that person rather than to the public at large. As the High Court said in *Butcher v Lachlan Elder Realty Pty Ltd* (citations removed)<sup>32</sup>:

*[36]... Questions of allegedly misleading conduct, including questions as to what the conduct was, can be analysed from two points of view. One is employed in relation to "members of a class to which the conduct in question [is] directed in a general sense". The other, urged by the purchasers here, is employed where the objects of the conduct are "identified individuals to whom a particular misrepresentation has been made or from whom a relevant fact, circumstance or proposal was withheld"; they are considered quite apart from any class into which they fall. ...*

*[37] The former approach is common when remedies other than those conferred by s 82 (or s 87) of the Act are under consideration. But the former approach is inappropriate, and the latter is inevitable, in cases like the present, where monetary relief is sought by a plaintiff who alleges that a particular misrepresentation was made to identified persons, of whom the plaintiff was one. The plaintiff must establish a causal link between the impugned conduct and the loss that is claimed. That depends on analysing the conduct of the defendant in relation to that plaintiff alone. So here, it is necessary to consider the character of the particular conduct of the particular agent in relation to the particular purchasers, bearing in mind what matters of fact each knew about the other as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known."*

#### *The Medium*

31. The medium in which the representation is conveyed is an important consideration. For example, consumers may not study advertisements closely but will absorb the general thrust<sup>33</sup>. Advertisements in different media will be read differently. A newspaper would tend to "*catch the eye and raise interest rather than lead to a decision to purchase*" whereas a brochure may be read more carefully by those with a closer interest in acquiring an item<sup>34</sup>. Consumers do not pay the same level of attention to television advertisements as does a judge looking at in court or in chambers for the

<sup>32</sup> (2004) 218 CLR 592 at [36] - [37]:

<sup>33</sup> *Tobacco Institute of Australia Ltd v Australasian Federation of Consumer Organizations Inc* (1992) 38 FCR 1at 4; *Singtel Optus v Telstra* [2004] FCA 859 at [38]; *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [41], [51]

<sup>34</sup> *ACCC v Telstra* (2004) 208 ALR 459 (Gyles J) at [52]

purpose of determining a case<sup>35</sup>. While some generalisations are sometimes made about particular media, they are difficult to justify because the nature of any advertisement is a significant variable in the “*calculus of deception*”<sup>36</sup>.

### *The Context*

32. The Defendant’s conduct must be viewed in context and as a whole and it is wrong to select some act or word in isolation if the conduct was not misleading if viewed in context<sup>37</sup>. The entire context includes “*surrounding circumstances, documents, conversations and sequences of events, to which the advertisement is broadcast up to the point of sale*”<sup>38</sup>.
33. On the other hand, if an statement is misleading, the fact that the recipient learns the true position prior to entering into an agreement, does not usually mean that there has been no infringement of the Act<sup>39</sup>. However, an impression held for only a moment that is corrected almost immediately may be of no commercial significance and so will not be misleading<sup>40</sup>. Further, the fact that a misleading impression in a representation is corrected prior to any contract being entered into is relevant to the relief that may be granted<sup>41</sup>.
34. Further, a later, corrected message may not correct an earlier, misleading message if the corrections are not adequately brought to the consumers’ attention<sup>42</sup>.

### *Qualifications and Exclusions*

35. The question of whether the misleading nature of a dominant message in a statement or advertisement is ameliorated by an accurate disclaimer will depend upon the circumstances<sup>43</sup>. If a reasonable viewer would not have read the qualification or would, in any event, be left with an erroneous

<sup>35</sup> *Gilette Australia Pty Ltd v Energiser Australia Pty Ltd* (2002) 193 ALR 629 at [47] (Lindgren J); *ACCC v Telstra* (2007) 244 ALR 470 (Gordon J) at [40]

<sup>36</sup> *ACCC v Singtel Optus Pty Ltd* [2010] FCA 1177 (Perram J) at [5]

<sup>37</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 199, *TPC v Optus Communications Pty Ltd* (1996) 64 FCR 326, 338 (Tamberlin J); *ACCC v Panasonic Australia Pty Ltd* (2010) 269 ALR 622 at [41]

<sup>38</sup> *TPC v Optus Communications Pty Ltd* (1996) 64 FCR 326, 338 (Tamberlin J)

<sup>39</sup> *ACCC v Telstra* (2004) 208 ALR 459 (Gyles J) at [58]; *Singtel Optus v Telstra* [2004] FCA 859 at [42] cf the approach taken by Ryan J in his interlocutory judgment in this proceeding – *ACCC v TPG Internet Pty Ltd* [2010] FCA 1478 at [19] – [20]

<sup>40</sup> *Knight v Beyond Properties Pty Ltd* (2007) 242 ALR 586 74 IPR 232 ; [2007] FCAFC 170 at [51]; *Hansen Beverage Company v Bickfords (Australia) Pty Ltd* (2008) 171 FCR 579; [2008] FCAFC 181 at [41]

<sup>41</sup> *Singtel Optus v Telstra* [2004] FCA 859 at [42]

<sup>42</sup> *Duracell Australia Pty Ltd v Union Carbide Australia Ltd* (1988) 14 IPR 293, 299.

<sup>43</sup> *George Weston Foods Ltd v Goodman Fielder Ltd* (2000) 49 IPR 553 (Moore J); *Singtel Optus v Telstra* [2004] FCA 859 at [40]; *ACCC v Telstra* (2007) 244 ALR 470 (Gordon J) at [116]

assumption notwithstanding the qualification then the advertisement is misleading<sup>44</sup>. However, the otherwise misleading nature of a headline message may be corrected if the qualification is an “*express clear statement, over a sufficient time span, in a reasonably sized print*”<sup>45</sup>. The form of a disclaimer and its manner of execution can be as important as its substance<sup>46</sup>. To put the matter another way, the qualifying material must be sufficiently prominent to prevent the primary message being misleading or likely to mislead<sup>47</sup>.

36. Where the small print tells the reader the conditions under which he or she can get what is advertised in the body of the advertisement<sup>48</sup>, that is a very different thing to a heading in an advertisement that portrays the “highly exceptional as the norm” with the true position hidden away in footnotes that are unlikely to be read<sup>49</sup>;
37. Even if a reasonable viewer may not read all of the qualifications in one viewing, in some circumstances, it may be sufficient to put them on notice that conditions apply<sup>50</sup>.

#### *Representations as to Future Matters*

38. The decision of *Forrest v ASIC*<sup>51</sup>, considered in detail below, demonstrates that a representation of a person’s opinion will only be misleading if the person does not hold the opinion or, in certain circumstances, if there are no reasonable grounds for holding the opinion. Prior to introduction of section 4 into the TPA (and then the *Competitions and Consumer Act*) promises, predictions or opinions as to future matters were held not to be misleading even if they were shown, by later events, to not be correct<sup>52</sup>. This position has now changed somewhat so that the focus is now on the reasonableness of the statement as at the time of the statement.

<sup>44</sup> *TPC v Optus Communications Pty Ltd* (1996) 64 FCR 326, 338 (Tamberlin J)

<sup>45</sup> *TPC v Optus Communications Pty Ltd* (1996) 64 FCR 326, 340 (Tamberlin J)

<sup>46</sup> *ACCC v Telstra* (2007) 244 ALR 470 (Gordon J) at [116]

<sup>47</sup> *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1 at para [37]; *National Exchange Pty Ltd v ASIC* (2004) 49 ACSR 369 at para [51]; *Singtel Optus v Telstra* [2004] FCA 859 at [47], [81]

<sup>48</sup> *Singtel Optus v Telstra* [2004] FCA 859 at [55]

<sup>49</sup> *ACCC v Boost Tel Pty Ltd* [2010] FCA 701 at [80]; *Singtel Optus Pty Ltd v Vodafone Pty Ltd* [2010] FCA 1448 (Nicholas J) at [19]

<sup>50</sup> *ACCC v Panasonic Australia Pty Ltd* (2010) 269 ALR 622 at [9]

<sup>51</sup> (2012) 247 CLR 486

<sup>52</sup> *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 87. See also *Hatt v Magro* (2007) 34 WAR 256 at 268-269 [33]; per Steytler P, Wheeler and Pullin JJA agreeing;; *Fubilan Catering Services Ltd v Compass Group (Australia) Pty Ltd* [2008] FCAFC 53 at para [91] per Heerey, Sackville and McKerracher JJ; *Consolo Ltd v Bennett* [2012] FCAFC 120 at para [36] per Keane CJ, McKerracher and Katzmann JJ.

39. Representations as to future matters tend, of their nature, to be statements of opinion. Recognising this, and the frequency with which representations as to future matters are made, the ACL now makes specific provision for representations as to future matters. It provides<sup>53</sup> that:
- a. If a person makes a representation as to a future matter; and
  - b. The person does not have reasonable grounds for making the representation;
- then the representation is taken to be misleading.
40. It is assumed that the person making the representation did not have reasonable grounds unless evidence to the contrary is adduced<sup>54</sup>. However, once some evidence is adduced, there is no onus on the defendant and the plaintiff has to prove their case in the ordinary way<sup>55</sup>.
41. Hence, with representations as to future matters, matters learned via hindsight are effectively put to one side and the focus is on whether, at the time, there was a reasonable basis for the representation (although if the statement ultimately proves correct, there will be no loss).
42. The ACL provides that the fact that a person may have reasonable grounds for making the representation does not necessarily mean that the representation is not misleading<sup>56</sup>. This sits somewhat uneasily with s 4(1) which deems statements as to future matters to be misleading if there are not reasonable grounds. The deeming provision in s 4(1) has no work to do if there are reasonable grounds. The point seems to be that, if it is possible to demonstrate that the representation was misleading, other than by pointing to a lack of reasonable grounds, then that basis remains open. How that could apply in practice is not immediately clear.
43. If it is denied that the representation was made, the defendant is placed in something of an invidious position. It is technically possible to argue the representation was not made but then argue, in the alternative, that if the representation was made, it was made on reasonable grounds. However, leading evidence of all the matters that would have made it reasonable to make the representation at the relevant, is likely to increase the likelihood that the court will find that the representation was made<sup>57</sup>.

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<sup>53</sup> ACL s 4

<sup>54</sup> ACL s 4(2)

<sup>55</sup> ACL s 4(3)(b), *McGrath v Australian Naturalcare Products Pty Ltd* (2008) 165 FCR 230 at [44], [191] - [192]; *North East Equity v Proud Nominees Pty Ltd* [2010] FCAFC 60; (2010) 269 ALR 262

<sup>56</sup> ACL s 4(4)

<sup>57</sup> See *Cummings v Lewis* [1993] FCA 149

## Reliance and Remedies

44. However, where a proceeding is brought by a particular plaintiff seeking damages or an injunction or other related relief, the plaintiff must demonstrate that the impugned conduct caused them to suffer loss or damage<sup>58</sup>. The role of the Court is to determine if there is a sufficient nexus between the misleading conduct and the loss suffered<sup>59</sup>. Again, this is done by reference to all of the facts of the case. Satisfying a “but for” test is usually necessary, but not necessarily sufficient, pre-condition to the grant of relief. The question is whether the misleading conduct materially contributed to loss and damage and the fact that other factors may have contributed to the loss – and perhaps may have contributed more than the misleading conduct – does not mean that relief will be denied<sup>60</sup>.
45. It is necessary for the plaintiff to demonstrate that they have relied on the misleading conduct. Hence, while the question of whether the conduct is misleading is an objective test, to obtain damages, a plaintiff must also demonstrate that they relied upon the misleading conduct. As a matter of practice, therefore, the plaintiff will often need to demonstrate that, subjectively, he or she understood the conduct to bear the meaning as objectively determined. Hence, if the person knew the statement was false or did not believe it then relief will not be granted<sup>61</sup>. However, if the proceedings are being brought by the regulator, relief may still be available even though the representee knew the statements to be wrong and did not believe them<sup>62</sup>.
46. Importantly, the damages that will be awarded will usually (but not inevitably) be reliance loss (ie tortious) damages rather than expectation (ie contractual) damages<sup>63</sup>. Hence, if a claim is based on contract and, alternatively, in contract then care needs to be taken to ensure that the right

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<sup>58</sup> *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.

<sup>59</sup> *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 525 per Mason CJ, Dawson, Gaudron and McHugh JJ

<sup>60</sup> *Henville v Walker* (2001) 206 CLR 459 [106]. See also *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at [32].

<sup>61</sup> *Gould v Vaggelas* (1985) 157 CLR 215 at 238 per Wilson J; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 320 [28] per French CJ; *Taylor v Gosling* [2010] VSC 75 at para [141] per Hargrave J).

<sup>62</sup> *Director of Consumer Affairs v The Good Guys* [2016] FCA 22 at [211]

<sup>63</sup> See *Murphy v Overton Investments Pty Ltd* (2004) 204 ALR 26

form of loss is claimed. Further, loss under s 18 and 29 can be apportioned or reduced if the whole or part of the loss was caused by the plaintiff's own actions or the actions of another party to the proceeding<sup>64</sup>.

### **Forrest, Google and TPG**

47. Andrew Forrest, Google Inc and TPG Internet, who may not otherwise have a lot in common, make up the triumvirate of leading misleading and deceptive conduct cases that have recently been determined by the High Court. The cases provide some very useful indications as to how courts approach the task of determining whether a statement is misleading or deceptive.
48. The first matter to note in relation to the three cases is that, on each occasion, the High Court overturned the decision of the Full Federal Court and reinstated the trial judge's decision. This demonstrates the fact that the question of whether conduct is misleading or deceptive can be highly subjective with different judges coming to different conclusions based on the same facts.
49. The second matter to note about the three cases is that they were all brought by regulators (ASIC in the case of Forrest and the ACCC in the case of Google Inc and TPG). This means that the issues of reliance and damages did not have significant roles to play as the cases were about penalties.

#### *Forrest v ASIC*<sup>65</sup>

50. Between August 2004 and February 2005 Andrew Forrest and Fortescue Metals Group Inc ("**Fortescue**") issued a number of public statements, and statements to the ASX to the effect that Fortescue had entered into "binding contracts" with a number of Chinese state owned enterprises for the construction and financing of Fortescue's railway, port and mine infrastructure in the Pilbara. ASIC called for a copy of the contracts and, upon receiving them, formed the view that the contracts contained significant omissions and that they would not be found to be binding if litigated in an Australian court. It was ultimately accepted that it was likely that the contracts would not have been binding in an Australian court but that the parties had, when making the agreements, intended that they would be binding.

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<sup>64</sup> *Competition and Consumer Act 2010* s 137B

<sup>65</sup> (2012) 247 CLR 486

51. ASIC brought a proceeding against Forrest and Fortescue under s 1041H of the *Corporations Act 2001*. For current purposes, the principles are relevantly the same as under s 18 of the ACL. ASIC argued that the public statements conveyed the following representations to the audience (1) as a fact, Fortescue had binding contracts in place and (2) Fortescue had reasonable basis for making believing that it had binding contracts in place. ASIC said that neither was true and that, in respect of the two representations, Forrest and Fortescue knew, or ought to have known, that the contracts were not binding.
52. The High Court was highly critical of the manner in which ASIC cast the representations and then ran its case. The two representations were quite different and the allegation that Forrest and Fortescue actually knew that there were no binding contracts in place amounted to an allegation of fraud but this very serious allegation was often run together with the other representations. Further, if the first representation was proved then the second representation was entirely unnecessary and it was, the High Court said, unacceptable to run a fraud case as a “back-up”<sup>66</sup>.
53. This warning from the High Court is important. All too often, allegations of misleading conduct are made in circumstances where, if the statement was made and was untrue, the fact that it was untrue must have been known to the defendant. In that circumstance, the allegation is one of fraud but often plaintiffs appear not to appreciate that they are making such serious allegations. Of course, if allegations of fraud are made without the evidence to support them, this can amount to misconduct by the legal practitioners.
54. Even more significantly, for current purposes, the plurality in *Forrest* determined<sup>67</sup> that the references to “binding contracts” in the public statements would not have been understood by the reasonable reader to mean that, if the matter was litigated in an Australian court, the agreements would not be open to challenge (which, the High Court found, was the effect of what ASIC was arguing). Rather, the High Court found, the reasonable person would have understood the statements to mean that the parties intended the agreements to be binding and this was true<sup>68</sup>.
55. Heydon J agreed with the outcome reached by the plurality but came to that conclusion via a slightly different route. He determined that the statement of a legally enforceable agreement was a statement of opinion and the opinion

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<sup>66</sup> (2012) 247 CLR 486 at [23] - [24]

<sup>67</sup> (2012) 247 CLR 486 at [37], [41]

<sup>68</sup> (2012) 247 CLR 486 at [43]

was based on reasonable grounds<sup>69</sup>. On the other hand, the plurality found that the fact/opinion dichotomy was not terribly useful and was more likely to lead to confusion than to be of assistance. The issue, in the opinion of the plurality, was whether the conduct of the defendant was likely to lead a reasonable person into error and asking whether the statements were ones of fact or opinion did not necessarily assist in answering that question<sup>70</sup>.

56. The approach taken by the High Court was interesting. In essence, all members of the Court asked what meaning would the reasonable reader take from the public statements. The two possible meanings were set up as being mutually exclusive – that is, the reasonable reader could have understood the publication to have one or the other meaning. As set out above, and as noted in relation to the TPG decision below, this has not otherwise been the test. In other cases, if any meaning open to any reasonable reader was misleading then the conduct would be found to be misleading. It might be that the High Court was, in effect, finding that no reasonable person could have found that reference to “binding contract” meant that the contract would be enforceable in an Australian court. However, if they did make such a finding, it was not expressed in those terms and it would have been a surprising finding on the facts.

*Google Inc v ACCC*<sup>71</sup>

57. The well known search engine, Google, established an “Ad Words” program so that advertisers could pay to have links to webpages displayed in response to particular inputs from users. So, for example, if a user put in a search for “Harvey Travel” (the name of a competitor of STA Travel), the following sponsored link would show up:

*“Harvey Travel*

*Unbeatable deals on flights, hotels and pkg’s Search, Book and Pack Now!*

*www.statravel.com.au”*

58. There were similar outcomes for other searches (eg a link to carsales.com.au in response to a search for “Honda”, a link to dogtrainingaustralia.com.au in response to a search for “Alpha Dog Training” and a link to tradingpost.com.au in response to a search for “4x4 magazine”). It was accepted that the advertisements were misleading. The question, however,

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<sup>69</sup> (2012) 247 CLR 486 at [97], [107]. Note that, Heydon J was of the view that the need to determine if the opinion was based on reasonable grounds was a matter of some conjecture but, since it was, there was no need to consider that issue in depth.

<sup>70</sup> (2012) 247 CLR 486 at [33]

<sup>71</sup> (2013) 249 CLR 435

was whether Google had engaged in misleading or deceptive conduct. The ACCC eschewed any reliance on the aiding and abetting provisions.

59. The High Court first looked to earlier cases where the issue arose of whether a person who passed on information was liable for the misleading nature of the content of that information.
60. In *Yorke v Lucas*<sup>72</sup> an agent acting for the vendor of a business was said to have engaged in misleading conduct when he passed on inaccurate turnover figures to the prospective purchasers. Importantly, it was determined that at the time of providing the figures, the agent told the purchasers that he had not confirmed the figures or done any work to determine the accuracy. The Court found, in that circumstance, that the representation was no more than he had been provided the figures by the vendors and, as he had not adopted the figures, he was not liable for the fact that they were inaccurate.
61. In *Butcher v Lachlan Elder Realty Pty Ltd*<sup>73</sup> a real estate agent gave a prospective purchaser a brochure with certain (inaccurate) dimensions. The brochure contained a disclaimer to the effect that agent believed the information on the brochure to be reliable but could not guarantee its accuracy and interested person “should make own inquiries”. The High Court held that the agent did no more than pass on the information “without adopting or endorsing it”<sup>74</sup>.
62. Taking those matters into account, the plurality in *Google* found that users would know that the authors were the advertisers themselves and that Google did not authorise or adopt the advertisers statements and, therefore, it did not engage in misleading or deceptive conduct<sup>75</sup>.
63. Hayne J, came to same conclusion albeit via a different route. He said that the analysis of whether a person passing on information had engaged in misleading conduct did not involve consideration of whether the defendant had “adopted” the statement. Hayne J said that rather, the issue was whether, on an analysis of all the facts, the defendant had engaged in conduct that was likely to lead others into error. He said that the earlier cases did not involve turning the test into one of “adoption”. Rather, the courts in those cases were saying that the conduct was simply passing on information, and making it clear that simply doing that, without adopting or endorsing it, did not

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<sup>72</sup> (1985) 158 CLR 661

<sup>73</sup> (2004) 218 CLR 592 at [36] – [37]:

<sup>74</sup> (2004) 218 CLR 592 at [40]

<sup>75</sup> (2013) 249 CLR 435 at [70]

involve any misleading conduct<sup>76</sup>. The critical factor for Hayne J was that users would not understand Google to be making the relevant representations<sup>77</sup>.

*ACCC v TPG Internet Pty Ltd* <sup>78</sup>

64. TPG provides internet and telephone services to consumers. It engaged in a broad ranging advertising campaign involving television, radio and print for an internet and telephone bundle. The advertisements set out the internet price in large type of \$29.99 per month but the monthly price for the telephone line rental (an additional \$30) was less obvious. Nonetheless, the trial judge found that the reasonable reader would see it. An example of the advertisement is set out at the end of this paper.
65. The issue was whether the TPG advertisements said (inaccurately) to the reasonable person that internet service could be obtained as a stand alone service for \$29.99 or whether it would have been apparent that, in fact, the internet service could only be purchased as part of a bundle at a price of \$59.99 per month.
66. The trial judge found that the advertisements were misleading. He said that the dominant message was one of an internet service of \$29.99 per month and the power of this message was so overwhelming that the qualification would not remove that message from the mind of the reasonable reader, viewer or listener. This was so even though the trial judge found that the reasonable person would have been aware that internet services were usually sold as part of package with telephone services and would have read, and understood, the much smaller print in relation to set up fees.
67. The Full Court said that the advertisements were not misleading. The Full Court had said that while it was true to say that some people would only absorb the “general thrust”, this did not mandate against the rule that the whole of the advertisement had to be considered. Further, the Full Court said, considering only the dominant message ignored the attributes of the hypothetical reader or listener who, it had been found, knew that internet plans were often sold bundled with telephone line rental.

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<sup>76</sup> (2013) 249 CLR 435 at [114]

<sup>77</sup> (2013) 249 CLR 435 at [82]

<sup>78</sup> (2013) 250 CLR 640

68. By a 4-1 majority, the High Court agreed with the trial judge that the advertisements were misleading. They said that once the Full Court accepted that some recipients absorb the general thrust only, the consequence of this was that the advertisements were misleading. It was not sufficient, the High Court determined, to expect consumers “to pick their way through advertising stratagems” which seek to highlight the attractive qualities of an offer and relegate the rest to “relative obscurity”<sup>79</sup>.
69. Gageler J (who, as a barrister had considerable experience in telecommunications matters) dissented. He noted <sup>80</sup> that the break-up between internet prices and telephone line rental pricing was “unremarkable” and that the price of \$29.95 for telephone line rental was largely uniform amongst telecommunications providers and had been that way for many years. The pricing, and offerings, in relation to internet services had, on the other hand, been hotly contested. TPG ASDL2+ internet offer was one of the first in the market to have unlimited downloads and uploads. It was upon these elements that the advertising was focused and it was not misleading for having done so<sup>81</sup>.
70. In the TPG case, the High Court made a number of other important statements in relation to misleading and deceptive conduct.
71. The High Court reiterated that the defendant’s intentions do not determine whether the statements were misleading. It was accepted that TPG did not intend to mislead customers. However, the High Court found, TPG did intend to highlight the attractive part of its package, and relegate the less attractive so that customers did not focus upon them, and it could be assumed that they achieved this aim<sup>82</sup>.
72. When it had been said in previous cases that the prohibition against misleading and deceptive conduct was not designed to protect people who did not take care of their own interests, this meant no more than there must be a sufficient causal link between the relevant conduct and the error that the recipient made<sup>83</sup>. That is, if a person made an error through failing to protect their own interests, the error was caused by that factor and not by the

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<sup>79</sup> (2013) 250 CLR 640 at [51] - [54]

<sup>80</sup> (2013) 250 CLR 640 at [82]

<sup>81</sup> The TPG matter was also the subject of an application for an injunction when it was first issued. The judge hearing that application refused it on the basis that the ACCC’s case was a weak one. Hence, of the 10 judges to hear the case at different levels, 5 found the advertisements to be misleading and 5 found that they were not.

<sup>82</sup> (2013) 250 CLR 640 at [57]

<sup>83</sup> (2013) 250 CLR 640 at [39]

advertisement. If however, the conduct by the defendant led the plaintiff or consumers into error, then s 18 would be infringed.

### **Conclusion**

73. There are certain rules that must be followed when considering whether a case for misleading and deceptive conduct is made out. It is important to identify the particular conduct that is to be impugned and it is then important to identify the error that a person made as a consequence of that conduct. The conduct must be in trade or commerce. Any loss that is alleged must arise as a result of the person's reliance on the impugned conduct. However, taking particular rules from specific cases - particularly on what amounts to misleading or deceptive conduct - is otherwise difficult.
74. Of course, some conduct is plainly misleading and some conduct is plainly not. However, between these two extremes are circumstances where reasonable minds may differ on whether conduct is misleading or deceptive. All of the facts are important but the question of whether the conduct is ultimately determined to be misleading is, in many instances, a decision that is highly impressionistic and subjective. While that may allow courts to adjust the outcome to the individual "justices of the case", it does not make it easy to advise clients on their prospects of success in any particular case.

26 July 2016

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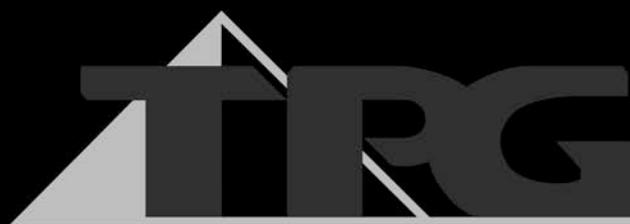
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