Misleading or deceptive conduct claims in post-sale litigation

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A. Introduction

1. Disputes arising from the sale of businesses and shares are common. They generally involve allegations that the vendor has misrepresented the performance of the asset and that the purchaser has consequently overpaid.

2. Whilst each transaction is unique, the disputes raise recurring themes, including:

   a. whether claims are to be pursued only in contract under the relevant transaction document or also under statute for misleading or deceptive conduct (**MDC**);

   b. the effect of due diligence on questions of causation;

   c. the effect of contractual clauses that seek to limit liability;

   d. the quantification and proof of loss.

3. This paper discusses the general principles on frequently encountered issues and seeks to provide practical guidance to practitioners acting for clients involved in post-sale disputes. In doing so we address the following common themes arising in MDC claims:

   a. Representations regarding financial performance;

   b. Identification of the respondents;

   c. Reliance and causation;

   d. Effect of contractual terms, including terms seeking to limit liability;

   e. Loss.

B. Representations regarding financial performance

4. Commonly, post-sale litigation is pursued on the dual basis of breach of contract and MDC. For present purposes, MDC issues are grouped into two categories:

   a. first, conduct in the course of the negotiations resulting in the sale transaction; and

b. secondly, the reframing of unfulfilled contractual obligations as MDC.

5. The first of these (conduct in the course of the negotiations) can include both express conduct (matters said or written), implied representations, as well as a party's silence.[1]

B.1. MDC in the course of the negotiations

6. There has been considerable MDC litigation resulting from contract negotiations.

7. One of the most frequent sources of dispute concerns representations, *before* the sale, about the profitability of the business, which are at odds with the purchaser's experience once they take over the running of the business.[2]

8. In addition to disputes about the accuracy of financials, disputes can also arise where there is a representation in relation to the *manner of operation* of the business that, once discovered (and set right) by the purchaser, will adversely affect the financial performance of the business going forward.[3]

9. A further situation is described in ***Yammine*** *v Lantrak Holdings Pty Ltd (No 2)*[4] as follows:

> "*A common experience of negotiations is that an individual on one side believes that he or she has agreed to a deal with the other side that is not reflected in any documentation of the transaction. How that mistaken perception occurs may give rise to a legal, equitable or statutory remedy for the apparently mistaken side*."

1 As Bell CJ observed in ***Care A2 Plus*** *Pty Ltd v Pichardo* [2024] NSWCA 35 at [102], "*Section 18 of the ACL, and its predecessor, s 52 of the Trade Practices Act 1974 (Cth), are concerned with conduct, although cases, including the present, are frequently pleaded by reference to representations*."

2 E.g. *Mikkelsen v Li* [2023] VSCA 255; 72 VR 325; *H & Q Cafe Pty Ltd v Melbourne Cafe Pty Ltd* [2023] VSCA 200; 72 VR 53; *Keys Consulting Pty Ltd v CAT Enterprises Pty Ltd* [2019] VSCA 136; *Henry Jones Food Pty Ltd v Shepparton Partners Collective KP Pty Ltd* [2025] VSC 187; *Davis v Perry O'Brien Engineering Pty Ltd* [2025] QCA 18; *Pave Wealth Services Pty Ltd v Jones* [2021] WASCA 7; *All Options Pty Ltd v Flightdeck Geelong Pty Ltd* [2019] FCA 588; *Shah v Hagemrad* [2018] FCA 91; *Meyidi Pty Ltd v Touloumdjian* [2013] SASC 146.

3 *Spotpress Pty Ltd v Spotpress Newspapers Pty Ltd* [2025] NSWSC 1094 (sellers represented that customers had been notified of price increases and they had been applied to all customers). See also *H & Q Café Pty Ltd v Melbourne Café Pty Ltd* [2022] VCC 1017 at [27] – [29] where although it did not form part of the MDC, staff were paid half in cash to avoid tax, and upon the new owner ceasing that 'cash payment' system there was increase in staff turnover.

4 [2023] FCA 162; 167 ACSR 232.

10. *Yammine* was a (unsuccessful[5]) case of this type, where the purchaser allegedly represented in the course of negotiations that, despite the $13 million purchase price specified in the written sale agreement, the purchaser would pay a further $22 million at a later time. A successful example of this type is *IDI Enterprises Pty Ltd v Classified Transport Pty Ltd*[6], where the parties agreed to pay a total of $280,000 for a hotel business, but the signed written contract only provided a price of $201,000. The difference was due to the purchaser's representations that a further $79,000 (i.e. the difference) by way of a vendor loan would be repaid in instalments, and that if the vendor had that loan agreement drawn up by a solicitor the purchaser would sign it.

11. In this respect MDC claims resulting from contract negotiations can be a powerful claim in the arsenal of a claimant, and a thorn in the side of a respondent who would prefer to limit a claimant's remedies to the contract.

The inherent uncertainty in claims based on recollection of oral statements/promises

12. As observed in ***Watson*** *v Foxman*[7]*:*

> "*…in many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition*"

13. Of itself this observation highlights the immediate and inherent uncertainty that can attend MDC claims in relation to oral representations regarding financial performance.

14. However, the fallibility of human memory adds to the uncertainty of such claims. As explained in *Watson*:

> "*… human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the*

5 At first instance the representation was found to have been made (and the claimant succeed in obtaining damages). On appeal the Full Court overturned the factual finding regarding the making of the representation.

6 [2011] SASCFC 123; 111 SASR 155

7 *Watson v Foxman* (1995) 49 NSWLR 315, 318.

passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

15. Further, in ***Longman*** *v The Queen*, McHugh J noted that :

> "*The fallibility of human recollection and the effect of imagination, emotion, prejudice and suggestion on the capacity to "remember" is well documented. The longer the period between an "event" and its recall, the greater the margin for error*."

16. Although it will be necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances[8]:

> "*whether the evidence of spoken words is sufficiently precise to enable the court to be reasonably satisfied that the words spoken were in fact misleading* <u>*is plainly a question of degree*</u>*, not a demand for unattainable perfection. In some cases, that may depend upon the use of a specific word or phrase, but in many cases the court can be reasonably satisfied of the misleading nature of an oral statement from evidence of the substance of what was said*"[9]
>
> (emphasis added)

[8] Watson at 318

[9] *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381 at [125], cited with approval in *Coonwarra Pty Ltd v CornoNero Pty Ltd* [2023] VSC 781 and *Zacd Group Limited v Bao* [2025] FCA 1500

17. Practitioners must ensure that these uncertainties and risks are considered and addressed in advising clients at the outset of such matters. In particular, when advising on a claim that is to be made based on oral testimony it is important to:

a. keep in mind that the court will seek assistance from the contemporaneous documents: "*[i]n commercial disputes the contemporaneous documents, objectively established facts and the apparent logic of events are likely to be the most reliable sources of evidence*"[10];

b. given the importance of contemporaneous documents – have a proper understanding of the chronology of events[11];

c. "*avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth*"[12].

Obtain an early proof

18. Accordingly, before finalising the pleading of a MDC claim which relies on any oral testimony to make good the representation, it is highly advisable to take a proof from each witness who will need to give the critical evidence at trial.

19. The discipline of preparing such a proof and requiring the proposed witness to commit to it in writing has a number of benefits:

a. Given that commercial litigation commonly progresses slowly, obtaining a proof early is preferable having regard to the fallibility of human memory over time.

b. It forces the proposed witness to focus on and be precise about the evidence they may need to give. In most instances, it has the effect of aiding recollection and flushing out further facts (including other potential witnesses or documents), which may well be significant in a MDC claim where "*context is all*"[13].

10 ***Et-China.com*** *International Holdings Ltd v Cheung* (2021) 388 ALR 128 [2021] NSWCA 24 at [25] – [29].

11 *Et-China.com* at [25].

12 *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC (Comm) 3560 at [22], cited in *Et-China.com* at [27].

13 *Telstra Corporation Limited v Singtel Optus Pty Ltd* [2020] FCA 1372, [17] (Jagot J).

c. It aids the pleader to accurately capture any representation in the *first* filed version of any claim and thereby reduces the risk of having to make application to amend important pleaded representations after the commencement of proceedings. Amendments of that type are self-evidently problematic because they undermine credibility and provide fertile ground for cross-examination. By engaging in the discipline of obtaining proofs of key representations prepared at the outset, practitioners will avoid criticism of the type expressed in *Wyzenbeek v Australasian Marine Imports Pty Ltd*, where in the course of an application to amend pleaded representations after openings at trial, Derrington J observed:

> *"It is difficult to understand how it was that, in the preparation of the applicants' witness statements, the legal representatives did not notice that the evidence which they were preparing relating to the making of representations did not correspond to the particulars in the [claim]. One might have thought that the main points of reference for the preparation of a witness statement are the allegations which are articulated in the pleadings*."[14]

d. It seeks to ensure that the representation, as pleaded, and not something merely broadly similar, is ultimately proved.

e. Committing central evidence to writing early enables practitioners to make a better assessment of the prospects of the proposed litigation and narrows the scope of disputes between practitioners and clients about centrally important instructions.

f. Finally, should there be a falling out between the claimant and a key witness, having a proof will assist the claimant in adducing the critical evidence at trial, including, if necessary, by making application to declare the witness hostile if the witness gives evidence inconsistent with the prior proof and then tendering the proof. Such falling out occurs not infrequently when an employee is involved in the facts that have given rise to the dispute but, as a

[14] [2017] FCA 1460, [17]. It might be said that one should start with the evidence as the foundation for preparing the pleading.

result of the dispute, the relationship between the employer and employee breaks down.

20. In relation to point [19.d] above, in short, close enough is generally *not* good enough in MDC claims.

   a. In *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd*[15], French CJ and Kiefel J observed that the pursuit of a MDC claim "*requires a clear identification of the conduct said to be misleading or deceptive*".

   b. Hammerschlag J put it as follows in Swiss *Re International SE v David Simpson*:

      > "*Where plaintiffs, in a proceeding such as this, wish to make significant charges of misleading or deceptive conduct with potentially very significant consequences, it is incumbent on them to articulate their case with precision*." [16]

   c. In *Coonwarra v CornoNero*[17]:

      i. The claimant pleaded an oral representation was made by individuals to 'C' to the effect that it was necessary for C to borrow funds in order to carry out the development of certain land pursuant to the relevant agreement between C and T.

      ii. At the closing of the trial, C sought to characterise the representation as though it carried <u>an implication as to the purpose</u> for which the funds would be deployed, and that the representation was false because the funds (that were ultimately borrowed) were not used for that purpose.

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15 (2010) 241 CLR 357, [5].

16 [2018] NSWSC 233, [35]. For a detailed discussion of the principles of pleadings, in the context of (inter alia) MDC claims, see also *Nl Investment Group Pty Ltd v Parc Vue Project Botanic Pty Ltd (Trustee)* [2020] FCA 711, where Anderson J observed (at [37]) "The critical problem with the format of pleading in paras 13–27 is that it fails to identify with requisite precision the content of the representation relied upon to form the relevant material fact…".

17 *Coonwarra Pty Ltd v CornoNero Pty Ltd* [2023] VSC 781 at [939] – [962]. A similar issue arose in relation to other pleaded representations, see [963] – [1006].

iii. The claimant's claim failed on the basis that it was confined to its pleaded representation (and not permitted to reformulate it to include the implication). Confined to the pleaded representation (the necessity of borrowings), the alleged representation was not false (or misleading or deceptive)[18].

B.2. Reframing contractual obligations as MDC

21. In pleading a MDC claim, practitioners should consider whether breaches of contractual obligations ought to be reframed MDC.

Why a practitioner might want to reframe a contractual claim as a MDC claim

22. In most instances, cases benefit from the "KISS" principle.[19] Why then, when contractual remedies are available, should consideration be given to complicating the claim so as to pursue MDC? In short, a MDC claim can confer several strategic advantages, including:

    a. extending the scope of liability beyond the contracting parties, including for the purpose of exerting pressure or overcoming solvency concerns;

    b. reducing the effect of any provisions intended to disclaim or limit liability; and

    c. avoiding the effects of foreign forum clauses.

Principles

23. Contractual warranties are commonly reframed as misleading representations (whether as to present fact or future matters).

24. By reference to the decision of French CJ in *Campbell v Backoffice Investments Pty Ltd*[20], Garde J recently observed in ***Transonic Travel***:

> *It is well established as a matter of principle that there is no reason why a false statement in a contractual document cannot amount to misleading or deceptive conduct. The circumstance that a representation is the subject of a*

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18 at [985] and [993].

19 Keep it simple, stupid. See *R v Taufahema* (2007) 228 CLR 232, footnote [185].

20 (2009) 238 CLR 304 at [35].

contractual warranty does not as a matter of law exclude the making of it from the purview of the statutory prohibition.[21]

25. In transaction documents for the sale of businesses and shares, vendors commonly give warranties as to the accuracy of financial accounts.

26. In *Transonic Travel*, contractual warranties of that type were given and Garde J found that, in breach of the contractual warranty: "*the Management Accounts did not show a materially accurate view of the financial position and state of affairs of*" the target entity.[22]

27. However, Garde J also found that, through the contractual warranty, the vendor had made "*a representation that the Management Accounts showed a materially accurate view of the financial position and state of affairs*" of the target entity, which was misleading or deceptive.[23]

28. There are, however, limits to reframing contractual breaches as MDC. Not every contractual promise is capable being reframed.

29. In ***McGrath*** *v Australian Naturalcare Products Pty Ltd*[24], Allsop J (as he then was) observed:

> *... it is appropriate to say that the divining of representations from the making of contractual promises and the entry into contracts is a task to be approached with caution and with an eye to all the facts*.[25]

30. In short, whilst warranties in a sale agreement are readily understood as being representational and, if breached, are generally capable of supporting a MDC claim, practitioners ought be careful not to *"[imply] representations mechanistically from [contractual] promises*"[26].

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21 *Transonic Travel Pty Ltd & Anor v Tilakee Nominees Pty Ltd & Ors* [2024] VSC 86 at [542].

22 At [537(d)].

23 At [562]-[563].

24 [2008] FCAFC 2; (2008) 165 FCR 230. See also *Coles Supermarkets Australia Pty Ltd v FKP Ltd* [2008] FCA 1915 at [68]-[69] (Gordon J) and *Secure Parking Pty Ltd v Woollahra Municipal Council* [2016] NSWCA 154 at [98] (Meagher JA).

25 At [138].

26 *McGrath* at [138].

B.3. *Non-disclosure of relevant information (silence as MDC)*

31. A claim for MDC need not rely on express representations made by the respondent: conduct can be misleading or deceptive if the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed.[27]

32. The principles relating to silence were conveniently summarised in *Addenbrooke Pty Ltd v Duncan (No 2)*:[28]

> *"On our understanding, the principles concerning misleading or deceptive conduct by non-disclosure or silence which emerge from the authorities and which are pertinent in the present appeal may be summarised as follows:*
>
> *(a) conduct involving silence or non-disclosure may, in some circumstances, constitute misleading or deceptive conduct;*
>
> *(b) in considering whether conduct is misleading or deceptive, silence or non-disclosure is to be assessed as a circumstance like any other;*
>
> *(c) mere silence without more is unlikely to constitute misleading or deceptive conduct. However, remaining silent will constitute misleading or deceptive conduct if the circumstances are such as to give rise to a reasonable expectation that, if some relevant fact does exist, it will be disclosed;*
>
> *(d) the existence or otherwise of such a reasonable expectation is to be determined objectively;*
>
> *(e) it is not possible to categorise all of the circumstances in which a reasonable expectation of disclosure may arise. Such circumstances may exist when either the law or equity imposes a duty of disclosure, when a statement conveying a half-truth only is made (see* Re Winterton Constructions Pty Ltd v Hambros Australia Ltd *[1992] FCA 582; (1992) 39 FCR 97 at [75]), when the representor has undertaken a duty to advise, when a representation with continuing effect, although correct at the time it was made, has subsequently*

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27 *Demagogue Pty Ltd v Ramensky* [1992] FCA 851; 39 FCR 31.

28 [2017] FCAFC 76; 348 ALR 1 at [482] (Gilmour and White JJ).

become incorrect, and when the representor has made an implied representation;

(f) *in considering whether a party engaged in commercial dealing may have a reasonable expectation that a fact, if it exists, will be disclosed, it is to be remembered that it will often be the case that one party to a commercial dealing has more knowledge about a relevant matter than the other and yet will not, in accordance with ordinary commercial expectations, be guilty of misleading or deceptive conduct in failing to make that knowledge known to the other."*

33. But there is a limit to what must be disclosed by a vendor to a purchaser. In *Miller*[29], French CJ and Kiefel J stated*: "… 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.*"

34. In *Porges v Adcock Private Equity Pty Ltd*[30], Mr Porges sold shares in SecureOne to Adcock Private Equity and failed to disclose imminent litigation and the perilous position of SecureOne. The Court of Appeal upheld the finding of the trial judge that Mr Porges had engaged in MDC by silence. The trial judge said "*[i]n all the circumstances, if … Mr Porges had been aware of information that was inconsistent with the glowing picture he painted of SecureOne's prospects, the most basic considerations of commercial honesty would have dictated that he disclose those circumstances to APE*."[31]

C. <u>Identification of the Respondent(s)</u>

35. The starting point is the contracting party (e.g. vendor). Where the party is a company, there is usually no difficulty in attributing representations made by directors, employees, or agents to the company because the Commonwealth Act

29 *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31; (2010) 241 CLR 357 at [22].

30 [2019] NSWCA 79.

31 At [111].

provides a deeming provision,[32] which is "*intended to make proof of corporate responsibility for conduct easier than it is at common law by providing additional means of proving that matter*".[33]

36. Whilst the contracting party is ordinarily the obvious respondent, one benefit of pursuing a MDC claim is that it can be pursued against persons not privy to the sale transaction document (e.g. directors, employees or agents).

37. Claims against directors, employees or agents commonly arise in post-sale litigation where directors or senior representatives of the vendor are involved in the negotiations and make misleading representations about the target assets.

38. Claims against these other respondents may be of strategic advantage, particularly where there are concerns about the solvency of the contracting parties.

39. A party may also wish to bring claims against their own advisors (legal or financial) given the proportionate liability regimes that apply to MDC.

C.1. Claims against directors, employees or agents

40. A claim against a director, employee or agent of the contracting party can brought on one of two bases:

    a. as 'principal';

    b. as an accessory.

Claims as 'principal'

41. A director, employee or agent who makes a misleading representation in the course of acting for the vendor entity may also be found liable as principal.

42. As explained by Nichols J in *GJB Building Pty Ltd v AI&PB Property Pty Ltd*:[34]

> "*It is recognised that a person may function in dual capacities, as an individual, and in their capacity as an agent, director or employee of a*

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32 Section 139B(2) of the *Competition and Consumer Act 2010*.

33 *NMFM Property Pty Ltd v Citibank Ltd (No 10)* [2000] FCA 1558; 107 FCR 270 at [1241]; *Kim v Wang* [2023] FCAFC 115; 298 FCR 337 at [272]; *Australian Competition and Consumer Commission v Emma Sleep GmbH* [2025] FCA 618 at [38].

34 [2023] VSC 782 at [149].

company. It must be determined whether a person, in making a representation, is merely acting as a 'corporate organ' or acting in their individual capacity.

In deciding whether a person made a representation, it is important to consider whether the person has assumed responsibility for, or adopted, or endorsed, the information so that it would be reasonable for a recipient to rely on the confirmation.

In any given can (sic) there can be more than one person who engaged in the relevant impugned conduct. The degree of involvement of each person must be separately assessed. Where one person purports to represent another, it will be important to ask whether, considered as a whole, the agent did no more than communicate what the seller is representing, without adopting or endorsing it".

43. There is no need to find "separate conduct", being conduct engaged in other than in the capacity as a director, employee or agent. A person who engages in conduct for a company can also attract primary and personal liability for that conduct.[35]

44. So, for example, where a person within a company is tasked with sending a document to a prospective purchaser, which is later found to be misleading, that person is unlikely to be principally liable (without more) despite being the communicator of the misleading document. In contrast, a person who participated in the preparation and drafting of the document, adopted and approved the contents as well as authorising and directing the transmission of the document, is likely to be principally liable (subject always to the specific facts of the case).[36]

Claims as accessory

45. Section 236 of the ACL[37] provides that a claimant may recover loss or damage suffered by them, because of conduct that contravened s18, against "any person involved in the contravention."

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[35] *Badger v John Kagelaris Pty Ltd* [2019] NSWSC 1792 at [110].

[36] See for example *Australian Securities and Investments Commission v Narain* [2008] FCAFC 120; 169 FCR 211 at [98] – [99].

[37] And the cognate provisions in the ASIC Act and Corporations Act

46. A person is "involved" in a contravention if the person:[38]

a. has aided, abetted, counselled or procured the contravention;

b. has induced, whether by threats or promises or otherwise, the contravention;

c. has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or

d. has conspired with others to effect the contravention.

47. There is, however, a critical distinction between proof of claims against principals and accessories.

48. To succeed against a principal contravener for MDC, the claimant need <u>not</u> establish intent. Liability has been at times described as strict.

49. In *Care A2 Plus,* Bell CJ recently said "*a person's knowledge or intention to mislead or deceive is immaterial to determining whether that person is liable for misleading and deceptive conduct*".[39]

50. By contrast, Bell CJ observed that:[40]

> *…accessorial liability depends upon **<u>both knowledge and participation</u>** in the relevant misleading or deceptive conduct. Participation requires "some practical involvement" in the misleading conduct, such as helping, encouraging or inducing the conduct.*
>
> *Furthermore, the individual must have knowledge of the essential facts constituting the breach ... For misrepresentations ... this requires the individual to have "knowledge or [be] wilfully blind to, the falsity of the relevant representations For instance, in Sutton v AJ Thompson Pty Ltd (in liq) (1987) 73 ALR 233 at 242, Forster, Woodward and Wilcox JJ determined that it was necessary that Mr Sutton knew that the figures which he provided would create a "false picture" in relation to the acquisition of the impugned business.*

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[38] ACL, s 2; Corporations Act, s 79; ASIC Act, s 5(2).
[39] [2024] NSWCA 35 at [101]. see also *Ireland v WG Riverview Pty Ltd* (2019) 101 NSWLR 658 at [33].
[40] [2024] NSWCA 35 at [119].

(emphasis added)

51. When pleading an allegation of involvement, it is not sufficient to merely plead the definition of 'involvement' from the ACL. Consistent with the general rule that pleadings must give fair notice of the case to be met, accessory claims should plead explicitly the matters known to the respondent and the fact amounting to their participation. It has been observed that *"[i]n the [accessorial claim] against Mr Sutton ...no material facts constituting his being "knowingly concerned" in the contravention were pleaded. The allegation was simply made in terms of the section. This is undesirable, at least where the respondent concerned is not a principal of the respondent company of the prime actor in the conduct alleged. The consequences for the individual can be so serious that he is entitled to have the details of his alleged involvement, amounting as it must to something akin to fraudulent conduct, spelt out*".[41]

52. The mere fact that a person is a director of a company is not, of itself, sufficient to establish their intentional participation.[42] Nor is it sufficient that a person was merely present when a representation was made.[43]

53. As can be seen, there are considerable benefits if a claim can be made against an individual as 'principal' (with an alternative claim as an accessory), including because it will avoid the need to prove the requisite knowledge for accessorial liability.

D. <u>Reliance and causation</u>

54. Damages arising from misleading or deceptive conduct arise by operation of s236. Importantly, s236 requires that the loss and damage was suffered "because" of the contravening conduct.

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41 *Sutton v A J Thompson* (1987) 73 ALR 233 at 242.
42 *Millinium Capital Managers Ltd v Soma Group Ltd* [2020] NSWSC 300 at [18].
43 *Morris v Danoz Directions Pty Ltd* (No 1) [2009] FCA 134 at [23].

55. Causation in MDC claims has been described as a two-stage process:[44]

a. The claimant must identify how that breach has led them to act (or refrain from acting) in reliance on the breach;

b. The claimant must establish a sufficient link between the reliance and the loss and damage said to flow from that reliance.

56. It is not necessary for a plaintiff to establish that "but for" the alleged impugned conduct, it would not have acted upon it. All that is required is proof that the impugned conduct made some "non-trivial contribution" or "materially contributed" to the decision taken by the plaintiff to act in a particular manner.[45]

57. The plaintiff's level of care for its own interests is generally disregarded; there is no need for the plaintiff to establish that the alleged reliance was reasonable in the circumstances.[46]

58. A purchaser will often carry out its own 'due diligence' in sale of business/shares transactions (albeit, the level of due diligence will vary significantly depending on the resources of the party and the size or importance of the transaction).

59. What effect does carrying out due diligence have on the issue of causation, given the above principles?

60. In *Elite Gold*, Tamberlin and Sackville JJ said the following:[47]

> *It is suggested that, as a matter of principle, investigations by a representee which confirm or tend to confirm the representation cannot displace the operative effect of the initial representation so as to establish lack of reliance. In our view, this categorical statement of principle is not correct. Whether an applicant establishes reliance on a representation in a particular case must depend upon the circumstances. These will include the nature and extent of the investigations, if any, undertaken by the representee and the significance of those investigations for the decision ultimately made.*

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44 Lockhart, *The Law of Misleading or Deceptive Conduct* (6th ed) at [10.9]; *Thales Australia Limited v Madritsch KG* [2022] QCA 205 at [273].

45 ***Henville** v Walker* [2001] HCA 52; 206 CLR 459 at [14], [106], [109].

46 *Henville* at [66], [140] and [165].

47 *Elite Gold Pty Ltd v CM Holdings Pty Ltd* [1995] FCA 447; ATPR ¶41–422.

For example, an estate agent may attribute a value to a particular property, falsely representing that his belief is based on a valuation by an independent valuer. The representee decides to make independent inquiries. To this end, the representee obtains valuations from several reputable valuers in which he or she has great confidence. The valuations support the value attributed to the property by the agent.

In these circumstances it cannot be categorically said that a misrepresentation acts as an inducement to the representee simply because the misrepresentation caused the representee to verify the situation for himself or herself. In such circumstances, the conclusion may be open that the representee has acted on his or her own independent investigations to the exclusion of the representation have any operative effect on the ultimate decision. True it is that the enquiries and independent investigations may not have been made but for the misrepresentation. However, that does not necessarily mean that the misrepresentation was an inducing cause, at the time the transaction was entered into, within the well known principles enunciated by Wilson J in Gould v Vaggelas (1985) 157 CLR 215 at 236. At the time the decision was made, the representee may have discounted completely the opinion expressed by the agent and placed no reliance whatsoever on the false claim that the opinion was supported by an independent valuation

61. In the case of the purchase of a business specialising in hospital and aged care medical equipment, the purchaser engaged advisors to undertake extensive due diligence, and the directors of the purchaser themselves were highly qualified and very experienced commercial operators. In those circumstances, as well as including the relatively simplistic budget that was said to found the MDC, the judge ultimately found that causation was not established.[48]

62. In the *GJB* case, the judge held that certain 'earnings representations' were not the operative cause of the purchaser's decision to invest. While those representations "*helped propel him to investigate further*", there were other factors, such as a

48 *Lifehealthcare Distribution Pty Limited v Stewart Allen Nicholas* [2011] NSWSC 661.

detailed due diligence report telling him that the earnings projections for the current year were in effect unachievable and that the business had been overvalued.[49]

63. See also *Lifehealthcare Distribution Pty Limited v Stewart Allen Nicholas* [2011] NSWSC 661 at [294]-[296] (Hammerschlag J) and *Lawless v Mackendrick [No 4]* [2013] WASC 272 at [213(14)] (Kenneth Martin J).

D.1. <u>*Relevance of contributory negligence*</u>

64. Given the general principle identified in paragraph [57] above, it is important to identify the applicable contributory negligence provisions that came into force in 2004.

65. Section 137B of the *Competition and Consumer Act 2010*[50] ***(CCA)*** provides that the loss or damage recoverable under s236 is to be reduced (on the terms set out in that section) if:

   a. the claimant suffered the loss or damage as result:

      i. partly of the claimant's failure to take reasonable care; and

      ii. partly of the conduct of the other person; and

   b. the other person did not intend to cause the loss or damage and did not fraudulently cause the loss or damage.

66. As explained by Ward CJ in Eq in *Stav Investments*:[51]

> "*Contributory negligence is to be determined objectively: a plaintiff will be guilty of contributory negligence where they expose themselves to a risk which might reasonably have been foreseen and avoided, and suffer damage within the class of risk to which they exposed themselves.*"

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49 *GJB Building Pty Ltd v AI&PB Property Pty Ltd* [2023] VSC 782

50 And s 12GF(1B) of the ASIC Act and s 1041I(1B) of the Corporations Act.

51 *Stav Investments Pty Ltd v Taylor* [2022] NSWSC 208 at [543].

67. Cases considering this contributory negligence provision have adopted, as guidance, the following statements of the High Court in a personal injury cases:[52]

> "*What has to be done is to arrive at a "just and equitable" apportionment as between the plaintiff and the defendant of the "responsibility" for the damage. It seems clear that this must of necessity involve a comparison of culpability. By "culpability", we do not mean moral blameworthiness but the degree of departure from the standard of care of the reasonable man*."[53]

And

> "*The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie of the degree of departure from the standard of care of the reasonable man (Pennington v Norris (1956) 96 CLR 10 at 16) and of the relative importance of the acts of the parties in causing the damage: Stapley v Gypsum Mines Ltd [1953] AC 663 at 682; Smith v McIntyre [1958] Tas SR 36 at 42-49 and Broadhurst v Millman [1976] VR 208 at 219, and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case; for example, the circumstances of some cases may be such that a comparison of the relative importance of the acts of the parties in causing the damage will be of little, if any, importance*."[54]

68. However, as the cases have observed, there may be cases in MDC claims when some adjustment may need to be made to the application of the above 'guidance', because a party may contravene s 18 even in the absence of negligence.[55]

69. It is unlikely that a reduction for contributory negligence will be ordered for a "*failure to verify or inquire as to the accuracy of the impugned conduct where there was nothing in the circumstances to the alleged victim on notice that the conduct*

52 See Merost Pty Ltd v CPT Custodian Pty Ltd [2014] FCA 97 at [138]; **Valcorp** Australia Pty Ltd v Angas Securities Ltd [2012] FCAFC 22 at [104] – [110]; **Wealthsure** Pty Ltd v Selig [2014] FCAFC 64; 221 FCR 1 at [88]

53 *Pennington v Norris* (1956) 96 CLR 10; [1956] HCA 26.

54 *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALR 529

55 *Valcorp* at [110]; *Wealthsure* at [91].

might be misleading, or where ascertainment of the true position from sources other than information supplied by the defendant would not have been easy".[56]

70. In the recent decision of *Mikkelsen v Li*[57], the Court of Appeal overturned a primary judge's assessment of contributory negligence. The Court of Appeal noted that the question of contributory negligence under s137B involves a four-stage inquiry:[58]

a. The first is whether the claimant failed to take reasonable care.

b. The second, which arises if the claimant did not take reasonable care, is whether their loss or damage was 'as [the] result partly' of that failure to take reasonable care.

c. Thirdly, the question is what reduction in damages, if any, is just and equitable having regard to the parties' respective shares in the responsibility for the loss and damage.

d. Fourthly, addressing the question whether the respondent intended to cause the loss or damage, or did so fraudulently.

71. In overturning the primary judges' finding the Court of Appeal said the following:[59]

> *"…we are not convinced that the judge properly assessed whether the [claimant's] loss or damage was 'as [the] result partly' of the failure to take reasonable care. This language requires there to be a causal link between the failure to take reasonable care and the loss or damage suffered. This does not involve a 'but for' test of causation, but does raise the question whether the failure to take reasonable care was a factor in the subsequent loss or damage suffered. The judge did not explicitly address this question*
>
> *In our view, in circumstances where the [respondents] repeatedly made false representations, using documents that were highly misleading and gave the false appearance that the figures they put forward were authoritative … it is not clear that a failure on the part of the [claimants] to conduct due diligence or obtain further advice contributed to their loss at*

56 Lockhart, *The Law of Misleading or Deceptive Conduct (6th ed)* at [10.18] and the cases cited.
57 ***Mikkelsen** v Li* [2023] VSCA 255; 72 VR 325
58 *Mikkelsen* at [138].
59 *Mikkelsen* at [141] – [143]

all. The focus of the [claimants] argument was on the level of apportionment (the third stage of the inquiry), even assuming the causal connection was established. But in truth these issues are intertwined. The question of apportionment looks at culpability for the loss and the relative importance of the acts of the parties in causing the loss. Without causation, no question of culpability for the loss arises.

In any event, in our view, the judge did not assess the relative culpabilities of the parties. Instead, she identified what a prudent purchaser acting reasonably would have done and stated the result she considered just and equitable as a result. A comparative analysis required her to have regard to the actions of both parties and identify their relative importance in causing the loss"

D.2. <u>The 'anomaly' in the MDC regimes</u>

72. It important to highlight the peculiar anomaly in the MDC regimes in relation to contributory negligence.

73. As identified above in paragraph [65], the contributory negligence provision is found in the CCA itself, and not in the ACL (which is a schedule to the CCA). This is relevant because in addition to the Commonwealth ACL, each of the State's Fair Trading Acts 'pick up' the text of the ACL and apply it as a law of the State.[60] However, those acts do not 'pick up' the relevant sections of the CCA, and do not have their own contributory negligent provisions.[61]

74. The effect of this is that a respondent to a Commonwealth ACL claim may rely on the contributory negligence defence, while a respondent to a State ACL claim may not.

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60 This is done to expand the reach of the ACL given the constitutional limitations constraining the Commonwealth to make laws.

61 For a detailed analysis of the anomaly see Seddon N and Fridman S, '*Misleading conduct and contributory fault: Inconsistency under the uniform Australian Consumer Law*', Australian Journal of Competition and Consumer Law, Volume 20, No 2, 2012

75. The only exception to this anomaly appears to be in South Australia[62], where section 7 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* can apply in certain cases[63].

E. Effect of contractual terms

76. There are no provisions in the Australian Consumer Law that expressly prohibit 'contracting out' of either s 18 or s 236.[64] Contracts (or other relevant documents) frequently seek to limit, exclude or modify a party's rights, and are frequently raised in MDC litigation. Understanding their efficacy on the case is critical, both in advising a client but in understanding the evidence to be obtained to either give efficacy to the clauses or overcome them.

E.1. Effect of disclaimers, no representation clauses

77. In frequent situations, a person who is said to have engaged in MDC seeks to rely on a contemporaneous disclaimer given by the person.

78. Similarly, a person facing a MDC claim may seek to argue that the claimant agreed (either through terms of the contractual document or some other related document) that it was not, and had not, relied on the person's conduct. This is raised on the contention that even if the conduct was MDC, any loss was not caused by that MDC (since the claimant agreed that it had not relied on the MDC).

79. How these defences are to be assessed was explained by French CJ as follows:

> *"The contemporaneous disclaimer by the person engaging in the impugned conduct is likely to go to the characterisation of the conduct.*
>
> *A subsequent declaration of non-reliance by a person said to have been affected by the conduct is more likely to be relevant to the question of causation"*[65]

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62 Lockhart, *The Law of Misleading or Deceptive Conduct (6th ed)* at [10.17] citing *Valcorp* at [70].

63 While section 4 applies the Act to liabilities "in damages that arises under statute", the contravening conduct must also meet the definition of "negligent wrongdoing" in section 3: see the text in s7.

64 *Viterra Malt Pty Ltd v Cargill Australia Ltd* [2023] VSCA 157; 74 VR 1 at [421].

65 ***Campbell** v Backoffice Investments Pty Ltd* [2009] HCA 25; 238 CLR 304 at [29]

80. More recently in the *Viterra* decision, the Court of Appeal surveyed the relevant authorities and provided the following opinion:

> "*No representation clauses and no reliance clauses and other forms of disclaimers can have an evidentiary effect that negates an integer of liability in relation to misleading or deceptive conduct. They may alter the character of a representation which was made. They may render conduct not misleading or deceptive. They may lead to a conclusion that a claimant did not rely upon the conduct or did not suffer loss because of the conduct. Such provisions, however, cannot otherwise have the effect of absolving a party from liability for misleading or deceptive conduct, even where their express terms purport to do so*"[66]

81. As with all MDC cases, whether *conduct* is misleading or deceptive is a question of fact to be decided by reference to all of the relevant circumstances, including the terms of the contract and other documents.[67] The word conduct is emphasised in the previous sentence as a reminder that the prohibition in s18 (and cognate provisions) is against conduct. Although MDC claims are often framed in terms of 'representations' made, isolating a single representation and divorcing it from the surrounding circumstances and conduct is not how MDC claims are assessed.[68]

82. As explained by Macfarlan JA in *Ireland v WG Riverview Pty Ltd*[69] in the case involving the sale of a bull at auction: "*the disclaimer clause was important, not because it excluded liability ... but because it was an integral part of the [respondent's] conduct*." A similar observation was made by Garde J in *Transonic Travel*[70] in a share sale agreement dispute.

83. Whether the relevant conduct was, in the circumstances, misleading or deceptive is determined by reference to what a reasonable person in the position of claimant would have made of the conduct.[71]

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66 *Viterra* at [379(3)].
67 See *Campbell* at [130] per Gummow, Hayne, Heydon and Kiefel JJ.
68 See *Campbell* at [102] per Gummow, Hayne, Heydon and Kiefel JJ.
69 ***Ireland*** *v WG Riverview Pty Ltd* [2019] NSWCA 307; 101 NSWLR 658 at [74].
70 At [543]
71 *Poulet Frais Pty Ltd v The Silver Fox Company Pty Ltd* [2005] FCAFC 131; 220 ALR 211 at [76]; *Ireland* at [65].

84. Accordingly, before advice can be given as to the effect of a particular clause, practitioners must ensure that they have obtained and reviewed all the available information so as to be able to place the impugned conduct in context.

E.2. Clauses limiting damages (e.g. capping damages) or limiting the time to bring claims

85. Parties frequently seek include contractual provisions that cap, or limit, their damages under or in connection with the contract. This can extend to capping or limiting damages for MDC claims.

86. As Robb J observed in *Infocus Tax and Business Advisory Pty Ltd v Andrews (No 3): "[t]erms in agreements that govern the sale of businesses ... which limit the liability of the seller for damages for wrongs arising out of the transaction in some arbitrary way, such as by making the price the amount of the limit, are perhaps unusual but by no means unknown or commercially unacceptable*."[72]

87. Similarly, parties often include clauses that limit the time in which a claim may be made by the other party (the ordinary position being that a claim must be made within 6 years of the cause of action arising).

88. There are several first instance decisions to the effect that a clause capping or limiting a party's damages for MDC is permissible.[73]

89. There are also conflicting first instance decisions concerning whether temporal limits on MDC claims are permissible.[74] In ***Brighton Australia*** *Pty Ltd v Multiplex Constructions Pty Ltd,*[75] Riordan J rejected the contention that parties could, by their contract, place limits on the time within which to bring claims under the ACL and said:

> *"I appreciate that the above conclusion differs from the decisions of McDougall J in Kell, and Sackar J in Lane Cove and Firstmac. However, my conclusion is consistent with the observation of Ball J in Omega Air Inc v CAE Australia Pty Ltd that it is reasonably arguable that the parties cannot*

72 *Infocus Tax and Business Advisory Pty Ltd v Andrews (No 3)* [2021] NSWSC 481 at [59].

73 *Owners SP 62930 v Kell & Rigby Pty Ltd* [2009] NSWSC 1342; *Lane Cove Council v Michael Davies & Associates* [2012] NSWSC 727 at [73]; *Firstmac Fiduciary Services Pty Ltd v HSBC Bank of Australia Ltd* [2012] NSWSC 1122 at [38].

74 ***Viterra*** *Malt Pty Ltd v Cargill Australia Ltd* [2023] VSCA 157; 74 VR 1 at [641].

75 [2018] VSC 246; 56 VR 557 at [131].

contract out of the six-year limitation period; and the obiter of Hansen J in Kay Group Holdings Pty Ltd v K & K Plastics Pty Ltd."

90. In the relatively recent *Viterra* decision, the appellant accepted that it was not possible for a person to 'contract out' of the prohibition contained in s18,[76] but argued that it was possible to 'contract out' of, or waive, the right to claim damages under s236[77]. The Court of Appeal extensively surveyed the relevant case law and held that a party cannot 'contract out' of s 236.[78] Further, the Court of Appeal held that the policy considerations that underpinned that finding applied whether or not the contract in question was entered into before or after the occurrence of the MDC.[79]

91. However, *Viterra* was concerned with a contractual provision that sought to prevent liability from ever arising, as opposed to capping or limiting the quantum.

92. Given the outcome in *Viterra* (i.e. it is not possible to contract out completely) and the earlier first instance decisions, there remains uncertainty in respect of the earlier first instance decisions that permitted reliance on clauses capping or limiting damages, or limiting the time in which a claim could be brought. However, if it is contrary to public policy to limit damages to zero, it is difficult to reconcile how a clause that retained liability but limited damages to $1 could be permissible. Riordan in *Brighton Australia* used the extreme example that – if it was possible to create a temporal limitation requiring a claim to be brought within one hour of the cause of action arising – it would likely preclude any claim under the ACL.[80]

93. As stated by Ball J in *Omega* in relation to both types of clauses: "*If the parties can agree to limitations on those rights, it is not easy to see how the line can be drawn between those limitations that are acceptable and those that are not*."[81]

94. While it remains to be seen how these issues are resolved following the decision of the Court of Appeal in *Viterra*, it would appear that the ability to limit the damages payable, or shorten the time to make a claim, is unlikely to be permissible in MDC claims, which can be a great strategic benefit when formulating the causes of action

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[76] Viterra at [426]
[77] *Viterra* at [429].
[78] *Viterra* at [447].
[79] *Viterra* at [448].
[80] *Brighton Australia* at [129].
[81] *Omega Air Inc v CAE Australia Pty Ltd* [2015] NSWSC 802 at [31].

to be pleaded. We consider that it is likely that the view expressed by Riordan J in *Brighton Australia* (in the context of temporal limitations but which is, in our view, equally applicable to damages limitations) will prevail.

E.3. Entire agreement clauses

95. Unsurprisingly, "entire agreement" clauses can also not be relied upon to seek to exclude liability for MDC. In *Campbell v Back Office Investments* it was observed that "…neither the inclusion of an entire agreement clause in an agreement nor the inclusion of a provision expressly denying reliance upon pre-contractual representations will necessarily prevent the provision of misleading information before a contract was made constituting a contravention of the prohibition against misleading or deceptive conduct by which loss or damage was sustained."[82]

E.4. Exclusive foreign forum clauses

96. If the transaction documents contain provisions that provide for disputes to be determined in a foreign forum, a plaintiff runs the real risk that a claim in contract brought in an Australian court will be stayed. In those circumstances, "*the courts begin with a firm disposition in favour of maintaining that bargain unless strong reasons be adduced against a stay, it being the policy of the law that the parties who have made a contract should be kept to it*".[83]

97. However, by reframing the claim under statute for MDC, a plaintiff may avoid the consequences of a foreign forum clause because, as a matter of principle, parties ought not be permitted to contract out of obligations under Australian consumer protection legislation. As Elliott J said, "*[a] stay may be refused where the exclusive foreign jurisdiction clause offends the public policy of the forum evinced by statute or judicial decision*."[84] In each case, it will be a matter of discretion whether a stay will be granted.

98. Relevantly, in ***Lew** Footwear Holdings Pty Ltd v **Madden** International Ltd,*[85] the contract contained an exclusive foreign forum clause which provided that Lew

82 (2009) 238 CLR 304, 348 (Gummow, Hayne, Heydon and Kiefel JJ).

83 *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 445.5, citing *Huddart Parker Ltd v The Ship "Mill Hill"* (1950) 81 CLR 502, 508.8-509.3 (Dixon J).

84 *Lew Footwear Holdings Pty Ltd v Madden International Ltd* [2014] VSC 320 art [232].

85 [2014] VSC 320 (Elliott J).

irrevocably agreed "*that any and all actions or proceedings arising out of or relating to this Agreement or the transactions contemplated herein shall be exclusively heard only in*" the court in the Counties of New York. Contrary to the exclusive forum clause, Lew commenced a claim against Madden in the Supreme Court of Victoria alleging MDC. Madden sought to stay the litigation on the basis of the exclusive forum clause, contending that all claims were to be pursued in New York.

99. In refusing the stay, Elliott J observed:

> *"Speaking generally, it has been accepted that if a plaintiff makes a claim based on misleading or deceptive conduct in trade or commerce pursuant to the Trade Practices Act or the Australian Consumer Law, then that may give rise to public policy considerations which may override an otherwise binding exclusive foreign jurisdiction clause. If it were otherwise, foreign corporations could place themselves outside the protection provided by this fundamental and important legislation which governs commercial interaction throughout Australia.*[86]*...*
>
> *Ordinarily then, if an overseas corporation were to engage in conduct that was misleading or deceptive or likely to mislead or deceive in trade or commerce, and a plaintiff could establish that such conduct was committed within Victoria or caused damage suffered wholly or partly in Victoria, then it would be expected that an exclusive foreign jurisdiction clause would not be a proper basis for staying the proceeding.*[87]

100. The decision in *Lew* was upheld on appeal.[88]

F. <u>Loss</u>

101. Although loss is often the last issue to be given consideration, it is arguably the most important, since it is the reason for the litigation. Despite this, the issue of loss, including proving it, is often given less attention than required.

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86 Ibid, [233].

87 Ibid, [235].

88 *Madden International Limited v Lew Footwear Holdings Pty Ltd* (2015) 50 VR 22 (Mandie, Beach JJA and Dixon AJA).

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

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

103. In *Keys Consulting Pty Ltd v CAT Enterprises Pty Ltd*,[89] the Court of Appeal emphasised that it is the plaintiff who bears the evidential onus of proving both the *fact* of loss and the *amount* of loss under s 236 of the ACL. The Court of Appeal stated as follows:[90]

> *"[67] The statutory misconduct prohibited by s 18 of the ACL only gives rise to a cause of action for damages if, because of the conduct, a person suffers loss and damage.[91] The statutory actions for relief under ss 236 or 243 of the ACL require proof that the plaintiff suffered (or, in the case of s 234, is likely to suffer) loss and damage. Being an element of the cause of action, the legal burden of proof of that damage lies upon the plaintiff.*
>
> *[68] In claims for damages, the plaintiff must prove both the fact of loss and the amount of that loss before he or she can recover substantial damages.[92] If a plaintiff fails to prove either of those elements, he or she may recover nominal damages only where the claim is in contract, or the action fails altogether, where it lies in tort.[93]*
>
> *[69] <u>However, it is well established that a mere difficulty in quantifying damages does not necessarily defeat the plaintiff's entitlement to a remedy against the wrongdoer. In appropriate circumstances, where some sort of actual loss has been established, the court must estimate the damages as best it can</u>.[94]*
>
> …
>
> *[70] However, there is a distinction to be drawn between a situation that does not permit damages to be assessed with certainty, and one in which the plaintiff has simply failed to produce evidence that was*

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89 [2019] VSCA 136 (Maxwell ACJ, Niall JA and Macaulay AJA).

90 [2019] VSCA 136 at [67]-[75].

91 *ACL* ss 18, 236.

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

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

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

> *otherwise reasonably available. The plaintiff is entitled to have the court do the best it can in the former case, but not in the latter. Where a party is able to produce evidence about loss and damage, they must do so with as much certainty and particularity as is reasonable in the circumstances. This principle is long established.*"[95]

(underline emphasis added)

104. For a recent Court of Appeal decision concerning the approach to take where there are difficulties assessing damages in the sale of a business see *H&Q Café Pty Ltd v Melbourne Café Pty Ltd*[96], where the primary judge's decision to refuse damages due to a perceived lack of evidence was overturned and damages of $2.15million were awarded.

105. If reliance is established, it is then necessary to considered what loss or damage was caused because of the misleading or deceptive conduct. As a general proposition, a party which is the victim of misleading or deceptive conduct is entitled to be placed in the position in which it would have been had the misleading or deceptive conduct not occurred. Hence, the assessment is akin to assessments for the tort of deceit.

106. In *Gates v City Mutual Life Assurance Society Ltd*,[97] Gibbs J stated:

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

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

96 [2023] VSCA 200 at [131] – [172].

97 (1986) 160 CLR 1.

107. Mason, Wilson and Dawson JJ said:

> "*But this has been treated as a prima facie measure only, the true measure being reflected in the proposition stated by Dixon J. in Toteff v. Antonas (at p 650) in these terms:*
>
> > *"In an action of deceit a plaintiff is entitled to recover as damages a sum representing the prejudice or disadvantage he has suffered in consequence of his altering his position under the inducement of the fraudulent misrepresentations made by the defendant."*
>
> *As his Honour then pointed out, it is a question of determining how much worse off the plaintiff is as a result of entering into the transaction which the representation induced him to enter than he would have been had the transaction not taken place. This entitles the plaintiff to all the consequential loss directly flowing from his reliance on the representation (Potts v. Miller, at pp 297-298; Doyle v. Olby (Ironmongers) Ltd. (1969) 2 QB 158), at least if the loss is foreseeable (see Gould v. Vaggelas, at p 563; p 37 of ALR).*
>
> …
>
> *Because the object of damages in tort is to place the plaintiff in the position in which he would have been but for the commission of the tort, it is necessary to determine what the plaintiff would have done had he not relied on the representation. If that reliance has deprived him of the opportunity of entering into a different contract for the purchase of goods on which he would have made a profit then he may recover that profit on the footing that it is part of the loss which he has suffered in consequence of altering his position under the inducement of the representation.*"

108. In *The Commonwealth of Australia v Amann Aviation Pty Ltd*,[98] Dean J stated:

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

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98 (1992) 174 CLR 64.

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

110. In *Henville v Walker*[99], Gleeson CJ said the following in respect of relief under the TPA (at [18]):

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

111. In assessing the appropriate amount, the Court must have regard to a hypothetical, namely the situation which the plaintiff would have been in had the misleading or deceptive conduct not occurred. In a context of a loss of chance case, in *Sellars v Adelaide Petroleum NL*[100]*,* Mason CJ, Dawson, Toohey and Gaudron JJ said:

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

99 (2001) 206 CLR 459.
100 (1994) 179 CLR 332.

112. In *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 28)*,[101] Elliott J recently and conveniently set out the principles relevant to the assessment and measure of damages under s 236 of the ACL in the context of a sale of a business.[102] The relevant parts of the judgment are set out below:

> *[3912] The starting point is consideration of the words of section 236 itself. The question is simply has the plaintiff established it has suffered loss or damage because of the contravening conduct? In assessing the loss, the court's approach must be flexible and best adapted to give the plaintiff an amount that will most fairly compensate for the wrong suffered.*
>
> *[3913] The court is not constrained to principles of common law relevant to assessing damages in contract or tort. However, in many cases the measure of damages in tort has been considered appropriate. In tort, damages are awarded with the object of placing the plaintiff in the position they would have been had the tort not been committed. In particular, where appropriate and helpful, the court can look to actions for deceit as analogous to claims for compensation pursuant to s 236, but only as a guide.*
>
> *[3914] In the current proceeding, the measure of damages for tort of deceit provides helpful guidance for the court to ascertain the measure of damages under section 236 that will most fairly compensate Cargill Australia for its loss. Such an approach would essentially put Cargill Australia in the position it would have been in if not for the relevant conduct; namely not paying the purchase price of $420 million and not acquiring Joe White (but accounting for the benefit received by actually taking ownership of Joe White represented by ascertaining its real value).*
>
> ***X.73.12 The common approach***
>
> *[3915] In HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd, the High Court recognised that, when the acquisition of an asset is induced by misleading or deceptive conduct, the common approach to the measure of damages is the difference between the real value of the asset at the date of acquisition and the price paid for it. In effect, a plaintiff is entitled to recover the loss or expenditure incurred because of the conduct in question, but must account for any corresponding advantage gained. This approach has been described as "the rule in Potts v Miller". The High Court explained that true or real value is distinct from market value:*
>
>> *[T]he test [of the rule] depends not on the difference between price and "market value", but price and "real value" or "fair value" or "fair or real value" or "intrinsic" value or "true value" or "actual value" or what the asset was "truly worth" or "really worth" or "what*

[101] [2022] VSC 13.

[102] [2022] VSC 13 at [3912]-[39##].

would have been a fair price to be paid … in the circumstances … at the time of the purchase".

(Citations omitted.)

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

X.73.1.2.1 Determining true or real value

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

[3918] Market value will differ from true value if the market value is delusive or fictitious". Such a market value may be the result of market manipulation or some other improper practice on the part of the vendor, or where the market operates under some material mistake.

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

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

[3921] In Kizbeau Pty Ltd v W G & B Pty Ltd, the nature of this distinction was traversed. The High Court stated that subsequent events arising

from the nature or the use of the thing itself should be taken into account. For example, the takings of a business subsequent to purchase were generally relevant not only to prove a representation made before the acquisition, but also to prove the true value of the business as at the date of purchase. This is true even when some difference exists between the conditions under which the business was conducted before and after purchase, subject to allowance being made for differences in conditions. However, supervening events, such as a decline in takings caused by ineptitude or unexpected competition post-acquisition, should not be taken into account.

…

X.73.1.3 Instances when Potts v Miller is not appropriate

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

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

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

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

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

(3) Where the misrepresentation continues to operate and subsequent losses are directly attributable to the impugned conduct itself and not extraneous factors.

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

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

X.73.1.4 The "left in hands" approach

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

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

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

[underlined emphasis added].

113. It is critical that early thought be given to the identification of the loss. A striking example of the issue of loss not being appropriately addressed is seen in the appeal of the *Yammine* decision (*Lantrak*[103]), where an appeal on a procedural fairness point (regarding the way in which the loss case was advanced) succeeded, highlighting how critical it is to properly articulate a loss case from the outset of a dispute.

   a. As set out above in paragraph [10], the purchaser allegedly represented in the course of negotiations that, despite the $13 million purchase price for the shares in the written sale agreement, the purchaser would pay a further $22 million at a later time.

   b. The vendors' pleaded case was only that they had "*suffered loss and damage in the amount of $22 million and are entitled by virtue of s 236 of the ACL to recover that loss and damage*".[104] No evidence in chief was adduced from any of the witnesses called by the vendors as to an identified loss of

[103] ***Lantrak** Holdings Pty Ltd v Yammine* [2023] FCAFC 156.
[104] *Lantrak* at [8] and [282].

opportunity. The closing submissions did no more than restate that they "*relied upon the conduct and suffered loss*".[105]

c. Only in reply to the purchasers' submissions did the vendors assert that "*the loss is the difference between the value of the business ($35 million) and the amount received ... ($13 million)*", citing decisions that stand for the proposition that the measure of damages is the difference between the real value of the thing acquired as at the date of acquisition and the price paid for it. [106]

d. At no stage did the vendors advance a case that the loss was the loss of opportunity to negotiate a higher price for their shares.[107] The vendors' case was put solely on the difference between the value of the shares and what was paid.[108]

e. At first instance the primary judge did not approach the loss case in the way the vendors had put it, and instead held that in reliance on the representation found to be conveyed, the vendors *lost the opportunity* to negotiate a higher price for their shares, and were entitled to compensation in the amount of $7.25 million, representing the value of the loss of that chance.[109]

f. On appeal the purchasers argued that they were denied procedural fairness because the primary judge had determined loss on an entirely different basis than what was pleaded and run at trial. The Full Court unanimously upheld that ground of appeal, including because "*There were many potential lines of evidence, both in chief and in cross-examination, which would likely have been pursued if a case of a loss of a chance had been articulated.*"[110]

g. Further, and critically, on appeal the vendors did not suggest that their loss claim could have been sustained on the way in which it was run (i.e. the difference between the value of the shares and what was paid).[111]

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105 *Lantrak* at [9].
106 *Lantrak* at [11] – [12].
107 *Lantrak* at [15] and [18]
108 *Lantrak* at [16].
109 Summary provided on appeal in *Lantrak* by Lee J at [4].
110 *Lantrak* at [289] – see also [18] per Lee J.
111 *Lantrak* at [20].

Accordingly, there could not even be a remitter back to the trial judge to determine the loss issue on the case advanced.

114. In *Lantrak* the failure to properly identify the loss, from the outset, had catastrophic consequences for the vendors' case. It is a salient reminder that practitioners must be across loss from the outset of a claim, and properly understand how the loss claim can and needs to be proven (or defeated).

G. Conclusion

115. Ultimately, while misleading or deceptive conduct may appear at first to be a straightforward proscription — a simple requirement not to mislead — closer examination reveals a far more intricate doctrinal landscape. The assessment hinges not merely on the literal content of a representation but on its overall effect, its context, the characteristics of its audience, and the practical realities of commercial communication. What begins as a seemingly simple inquiry therefore becomes a nuanced evaluation of impression, reliance, and context. This complexity underscores that the law's apparent simplicity is only superficial. In order to effectively litigate such claims, practitioners require a comprehensive understanding of the relevant principles.