



# Update on Misleading and Deceptive Conduct

ACLA Presentation  
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# Overview

- Pre-contract financial information:
  - Representations v conduct
  - Entire agreement clauses
- Establishing reliance
- When will silence be misleading?
- Individual liability:
  - Accessorial Liability under section 75B
  - Individual Liability under the state Fair Trading Laws
    - Employees
    - Directors

# Section 52

- Section 52 of the Trade Practices Act 1974 (Cth) (TPA) provides:

*A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*

- Section 42 of the Fair Trading Act NSW provides the same liability for a “person”

# Campbell v Backoffice Investments Pty Ltd [2009] HCA 25



- Share sale
- Vendor provides Purchaser:
  - A. Document adjusting management accounts:
    - Adds back non-recurring expenses
    - Increases EBIT
  - B. Estimate of expected performance for December 04
- Purchaser says they were incorrect at time of sale in January 05

# Campbell v Backoffice



- 'Conduct' under TPA/FTA is not confined to 'representations'.
- The Court must examine the relevant course of conduct as a whole.  
*"The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct."*
- Where the contravention relates to a document, the effect of the document must be examined in the context of the evidence as a whole.

## Campbell v Backoffice

### Add Backs

- The estimates of past performance were inaccurate
- This does not mean there is misleading and deceptive conduct
- They were clearly estimates
- P sought confirmation of their accuracy – V declined to do so
- No evidence V knew they were false
- Reasonability of estimates was not raised at trial
- Finding: no misleading and deceptive conduct

# Campbell v Backoffice

## December 04 Forecast

- Clearly inaccurate at time of contract
- Contract contained entire agreement clause
- *'...neither the inclusion of an entire agreement clause...nor...of a provision expressly denying reliance upon pre-contractual representations will necessarily prevent...misleading information before a contract was made constituting a contravention of the (statutory) prohibition against misleading and deceptive conduct...'*  
[at 130]
- *'...whether conduct is misleading or deceptive is a question of fact to be decided by reference to all of the relevant circumstances, of which the terms of the contract are but one.'* [at 130]

# Campbell v Backoffice



## December 04 Forecast

- Inaccurate

But:

- Was clearly an estimate – not shown to be unreasonable
- Had not been put to V that he knew they were inaccurate
- No evidence from P as to what he would have done had he known the forecast was inaccurate

# MWH Australia Pty Ltd v Wynton Stone Australia (in liq) [2010] VSCA 245



- MWH: subcontractors undertaking geotechnical work for construction of sewerage treatment plant;
- Sub-let tank design work to Wynton Stone;
- Wynton Stone then merged with Taylor Thompson Whiting - asked MWH to execute Deed of Novation
- After tanks constructed, began to crack.

# Deed of Novation



- **Clause 4. Client's Undertaking:**  
*"The client undertakes to pay and accept its liability to pay to WS to pay all moneys due and owing under the contract up to the date of this deed and to TTW as and from such dates. WS acknowledges that the services to be performed under the contract by WS prior to the date of this deed have been performed in accordance with its terms"*
- **Contained a Release in favour of WS**

# MWH Australia v Wynton Stone



Buchanan JA and Nettle JA:

- Work had not been done in accordance with the contract. Therefore acknowledgement that it had '*was likely to mislead or deceive*';
- Absent direct evidence could the Court infer that MWH relied on the statement?
- *Gould v Vaggelas* - if a material representation is calculated to induce the representee to enter into a contract and that person does so, a fair inference arises that the representation acted as an inducement;
- Nothing in *Campbell* which prevented inferences of this kind to be drawn;
- The warranty must have '*played at least some part*' in inducing MWH to enter into the Deed. The conduct in inserting the warranty was misleading.

# Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited [2010] HCA 31



- Miller brokered a loan funded by BMW to fund an insurance policy premium;
- If the policy can be cancelled and assigned the lender can recoup the unused premium;
- Miller provided BMW with certificate of insurance which BMW assumed meant the policy was cancellable.
- Miller also provided the actual insurance policy, but did not draw to BMW's attention that it was not cancellable.

## Miller v BMW



- Borrower defaulted on the loan.
- BMW claimed Miller had represented that the policy was cancellable by:
  - Providing the certificate of insurance, which misrepresented that the policy was cancellable;
  - Failing to disclose that the policy was not cancellable, when it knew this was important to BMW.

## Miller v BMW

- Heydon, Crennan and Bell JJ:
  - the certificate did not represent that the policy was cancellable;
  - in the circumstances, the silence was not misleading and deceptive.
  - Took into account:
    - Commercial sophistication of the parties;
    - Failure of BMW to make further inquiries in relation to the certificate;
    - Failure of BMW to read the policy document, which made apparent that the policy was non-cancellable;
    - The loan application had actually been approved by BMW before the certificate was provided.

## Miller v BMW

- French CJ and Kiefel J:
  - *"For conduct to be misleading or deceptive it is not necessary that it convey express or implied representations. It suffices that it leads or is likely to lead into error."* [at 15]
  - Silence to be assessed as a circumstance like any other;
  - One test is whether there is a reasonable expectation on part of BMW that if a relevant fact existed (e.g. policy non-cancellable), it would be disclosed;
  - Circumstances relevant to whether conduct is misleading and deceptive include:
    - Silence itself;
    - Knowledge of person to whom conduct is directed;
    - Existence of common assumptions between the parties or standard industry/commercial practice.

## Miller v BMW

- French CJ and Kiefel J:
  - “...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. ...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.” [at 22]

# Accessorial Liability



Section 75B of the TPA:

- (1) *A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB, V or VC, or of section 75AU or 75AYA, shall be read as a reference to a person who:*
- (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.*

# Accessorial Liability

- Section 75B does not apply to pecuniary penalty provisions, criminal provisions or the injunction provision.
- *Yorke v Lucas* (1985) ATPR 40-622:
  - the meaning of the terms in each of the sub-sections a-d of section 75B was substantially the same;
  - liability depends upon the knowing involvement of the accessory and proof that the accessory was aware that the representation was false, i.e. it is necessary to prove intent to mislead.

# State Consumer Laws



- Section 42 of the Fair Trading Act (NSW) provides:
  - (1) A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*

## Houghton v Arms [2006] HCA 59



- Arms set up website to sell products of small wineries
- Employees of WSA misrepresented that “ANZ e-Gate” would:
  - enable customers to pay by credit cards; and
  - wineries could be added to the website “by simply filling in a form” and paying a small set up fee.

## Houghton v Arms



- The employees submitted:
  - They were individuals not acting "*for themselves*" in trade or commerce but were acting in the trade or commerce of the company; and
  - Because they were acting as employees, they did not fall within the definition of "*a person*" in section 9(i) of the FTA.

## Houghton v Arms



- As to “trade or commerce”
  - The section does not refer to trade or commerce of any particular corporation.
  - It was not necessary for the employees to be engaged in “*their*” trade or commerce.
  - A person can be engaged in trade or commerce if e.g. statements made by that person are designed to encourage others to invest in a particular trading entity.
  - WSA provided advice and service in trade or commerce.
  - Houghton and Student were also engaged in trade or commerce.

## Houghton v Arms

- As to “a person” in section 9:
  - In tort the status of an individual as an employee does not divest that person of personal liability for wrongful acts committed whilst an employee.
  - There is no good reason for treating section 9 differently or for construing the section as if it read “*a person, as principal, must not .....*”.
  - The fact that a corporation has a separate legal identity means that in law the act of an individual can be both a corporate act and the separate act of the actor as an individual.

# CH Real Estate Pty Ltd v Jainran Pty Ltd

[2010] NSWCA 37



- Misleading and deceptive conduct:
  - A standard form of requisition and responses was included in a contract for sale of land by a company which said:
    - the land was not affected by a road widening proposal; and
    - there was no current or anticipated legal proceedings against the vendor.

## CH Real Estate v Jainran

### Facts:

- Sgro was the sole director of the vendor.
- He was not an accessory under section 75(b) because there was no proof of intent to mislead.
- His conduct was alleged to be:
  - Giving instructions to the solicitor for the vendor;
  - Preparing the contract of sale;
  - Executing the contract on behalf of the vendor; and
  - Presenting the contract to the purchaser.

## CH Real Estate v Jainran

- It was submitted that to hold Sgro liable for conduct undertaken as the human agent of the company overturned the line of cases which commenced with *Saloman v A Saloman & Co Ltd* [1897] and had the effect of withdrawing the protections available to an individual who ran a business through a corporate vehicle.
- Following *Houghton v Arms* the Court said the question was whether the conduct of the corporation in presenting the contract with its misleading representations to the purchaser was also the conduct of Sgro.

## CH Real Estate v Jainran



The Court of Appeal found:

- In terms of legal analysis it was correct to say that the solicitors acted as agent for the vendor not Sgro himself who was not their client.
- In terms of the characterisation of the conduct, as a matter of fact, the conduct was nevertheless conduct which could be attributed to the direction of Sgro.

*“It follows ... that Mr Sgro was directly liable for the misleading conduct because “he engaged in it” and “his liability is the product of his own conduct”...*

## Conclusions

- Just because a pre-contractual statement is inaccurate does not mean the conduct in all the circumstances was misleading (*Campbell*).
- A Court can infer reliance if a representation is made which is designed to induce the representee to enter into a contract and he does (*MWH*).
- In commercial negotiations there is no obligation to volunteer information which will assist the other party. However silence can be a circumstance to be taken into account in determining whether conduct is misleading or deceptive (*Miller*).
- Employees can be liable if they engage in misleading or deceptive conduct (*Houghton*).
- Directors can also be liable if they do so (*CH Real Estate*).



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