

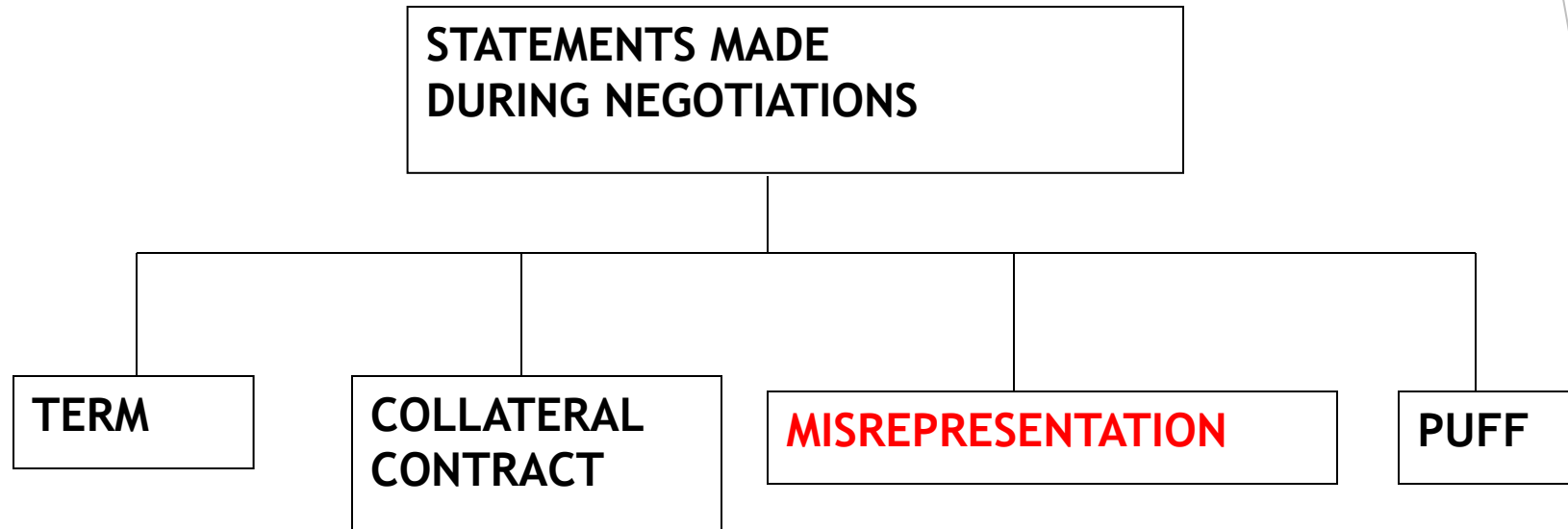
The background features abstract, overlapping green geometric shapes, primarily triangles and polygons, in various shades of green, creating a modern and dynamic visual effect.

Misrepresentation and Misleading Conduct in Commercial Law

Misrepresentation and Misleading or Deceptive Conduct under the *Australian Consumer Law*

- ▶ Section 18 ACL now almost ‘covers the field’ in terms of actionable misrepresentations and misleading conduct. However, there remains a residual role for general law misrepresentation in respect of conduct not ‘in trade or commerce’.
- ▶ Misrepresentation is quite a limited doctrine in terms of its elements and the relief available if misrepresentation is established.
- ▶ Actionable misrepresentation deals with pre-contractual statements on which a contracting party has relied in entering into a contract. Such a statement may *also* become a part of the contract (ie a term). That does not prevent an aggrieved party from relying on the doctrine of misrepresentation rather than breach of contract: much will depend on the relief such a party is seeking. If they wish to be relieved of contractual obligations, they might seek rescission which is the relief available for misrepresentation not for breach of contract.

CLASSIFYING STATEMENTS MADE DURING NEGOTIATIONS



MISREPRESENTATION v PUFF

Puff is a statement in glowing terms made by a trader in praise of his or her own wares.

It is an obvious exaggeration which the person to whom it is addressed should not rely on in making his or her decision to contract.

A misrepresentation is a distinct representation of fact on which the party to whom it is addressed might reasonably rely in deciding whether to contract.

THE ELEMENTS OF AN ACTIONABLE MISREPRESENTATION

- a. a *false statement*;
- b. of *fact*;
- c. *addressed* to the party misled;
- d. intended to and actually *inducing* the contract.

SILENCE CAN CONSTITUTE MISREPRESENTATION IF:

- a. failure to disclose the information would *distort* the true meaning of something that has been said;
- b. something said is subsequently *found to be untrue* but is not corrected;
- c. something said *becomes untrue* but is not corrected;
- d. one of the parties is under a *fiduciary duty* to disclose all material facts; or
- e. the contract is one “*uberrimae fidei*”.

STATEMENTS OF OPINION

Statements of *opinion* can be treated as statements of *fact* if:

- a. the representor *never held the opinion* in the first place;
- b. *no reasonable person* could have held that opinion;
- c. the representor *implied that she knew facts* justifying the opinion; or
- d. the opinion is given by someone who *should have known* the facts.

STATEMENTS OF FUTURE INTENTION

Misrepresentations of *future intention* will be regarded as misrepresentations of existing fact if the representor:

- a. did not *intend*; or
- b. did not have the *ability*
to put the stated intention into effect.

MISREPRESENTATIONS OF LAW

Misrepresentations of law may be treated as misrepresentations of fact if:

- a. the misrepresentation is *wilful*;
- b. the misrepresentation is of a *mixture* of law and fact;
- c. the misrepresentation is as to the nature of effect of *private rights*; or
- d. the representor is aware that her *superior knowledge* of the law will be relied on.

NON-INDUCING REPRESENTATIONS

- a. where the representee is *not aware* of the representation;
- b. where the representee *knows* that the representation is false;
- c. where the representee *does not act* on the representation; and
- d. where the representation is not *material* to the contract.

CATEGORIES OF MISREPRESENTATION

- ▶ Fraudulent misrepresentation;
- ▶ Negligent misrepresentation;
- ▶ Innocent misrepresentation.

REMEDIES FOR MISREPRESENTATION

- ▶ The innocent party may rescind the contract.
- ▶ For fraudulent misrepresentation and negligent misrepresentation damages may be available in the torts of deceit and negligence (contractual damages are not available).

RECISSION - THE LIMITS

- a. the fact of rescission must be *communicated* to the representor;
- b. restitution must be possible;
- c. the contract must not have been affirmed;
- d. *lapse of time*;
- e. *Third party involvement*; and
- f. *executed contracts*.

Misrepresentation, Sales legislation and the ACL

► *Sale of Goods Act 1923* (NSW)

Section 4 Savings

- ... (2) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, **and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress, or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods**, provided that there shall not be deemed to be or to have been any market overt in New South Wales.
- (2A) Without affecting the generality of subsection (2), the rules of equity relating to the effect of misrepresentation apply to contracts for the sale of goods, but such a contract may be rescinded under those rules for a misrepresentation even though either or both of the following apply:
 - (a) the misrepresentation has become a term of the contract,
 - (b) the contract has been performed.

Misrepresentation, Sales legislation and the ACL

- ▶ **ACL s 2**
- ▶ **"express warranty"** , in relation to goods, means an undertaking, assertion or representation:
 - ▶ (a) that relates to:
 - (i) the quality, state, condition, performance or characteristics of the goods; or
 - (ii) the provision of services that are or may at any time be required for the goods; or
 - (iii) the supply of parts that are or may at any time be required for the goods; or
 - (iv) the future availability of identical goods, or of goods constituting or forming part of a set of which the goods, in relation to which the undertaking, assertion or representation is given or made, form part; and
 - ▶ (b) that is given or made in connection with the supply of the goods, or in connection with the promotion by any means of the supply or use of the goods; and
 - ▶ (c) the natural tendency of which is to induce persons to acquire the goods.

Misrepresentation, Sales legislation and the ACL

► ACL s.59

59 Guarantee as to express warranties

(1) If:

- (a) a person supplies, in trade or commerce, goods to a consumer; and
- (b) the supply does not occur by way of sale by auction;

there is a guarantee that the manufacturer of the goods will comply with any express warranty given or made by the manufacturer in relation to the goods.

(2) If:

- (a) a person supplies, in trade or commerce, goods to a consumer; and
- (b) the supply does not occur by way of sale by auction;

there is a guarantee that the supplier will comply with any express warranty given or made by the supplier in relation to the goods.

MISLEADING OR DECEPTIVE CONDUCT UNDER THE *AUSTRALIAN CONSUMER LAW*

- ▶ 18 Misleading or deceptive conduct
- ▶ (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- ▶ (2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).
- ▶ Note: For rules relating to representations as to the country of origin of goods, see Part 5-3.

Misleading or Deceptive Conduct under the ACL

- ▶ The prohibition contained in s.18 ACL establishes ‘a norm of conduct for the market. It poses significant commercial risk at the same time as protection for businesses and consumers.’ [Pearson et al, *Commercial Law: Commentary and Materials*, 4th ed, ThomsonReuters, Sydney, 2019, p.713]
- ▶ A similar prohibition is found in the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), s.12DA and in the *Corporations Act 2001* (Cth), s 1041H. They all share a common origin: s.52, *Trade Practices Act 1974* Cth) (TPA)
- ▶ ‘Courts maintain a cohesive framework of principle by incorporating the jurisprudence of the TPA into the ACL and by reference to decisions decided under the different sets of legislation’: see *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54 per French CJ, Crennan, Bell and Keane JJ at [11]. [Pearson et al, *Commercial Law: Commentary and Materials*, 4th ed, ThomsonReuters, Sydney, 2019, p.714]

MISLEADING OR DECEPTIVE CONDUCT UNDER THE AUSTRALIAN CONSUMER LAW

Whether or not conduct is misleading or deceptive or likely to mislead or deceive is a question of fact.

McHugh J: ‘In determining whether a contravention...has occurred, the task of the court is to examine the relevant course of conduct as a whole. It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. **It is an objective question that the court must determine for itself.**’ *(emphasis added)*

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60; 218 CLR 592 at [109].

MISLEADING OR DECEPTIVE CONDUCT UNDER THE AUSTRALIAN CONSUMER LAW

Whether or not conduct is misleading or deceptive or likely to mislead or deceive is a question of fact. It is a separate question to that of causation even if there may be a factual overlap, ie, even if the behaviour is established, the applicant must also establish, as a separate matter, that the behaviour caused the loss or harm for which relief is sought:

Campbell v Backoffice Investments Pty Ltd [2009] HCA 25
per French CJ at [24]

MISLEADING OR DECEPTIVE CONDUCT UNDER THE *AUSTRALIAN CONSUMER LAW*, the *ASIC Act* and the *Corporations Act*

The following conditions must apply:

- ▶ the section must apply;
- ▶ the conduct must have occurred “in trade or commerce” (see [13.100], TBK); and
- ▶ it must have been “misleading or deceptive” or “likely to mislead or deceive”.
- ▶ look at the audience to whom the conduct was directed (TBK [13.220];
- ▶ was the conduct *capable* of leading members of that audience into error?
- ▶ proving that someone has been led into error is not required;
- ▶ did the conduct cause the error?

MISLEADING OR DECEPTIVE CONDUCT UNDER THE *AUSTRALIAN CONSUMER LAW*

- ▶ The prohibition is absolute ie, there is no defence for engaging in such conduct. Remedies are civil remedies under the ACL.
- ▶ **Jurisdiction:** under s.5(1), ACL, the Law applies to conduct outside Australia, engaged in:
 - ▶ by corporations ‘carrying on business within Australia’;
 - ▶ by Australian citizens;
 - ▶ by persons ‘ordinarily resident within Australia’.
- ▶ See *Valve Corporation v Australian Competition and Consumer Commission* [2017] FCAFC 224

Valve Corporation v Australian Competition and Consumer Commission [2017] FCAFC 224

- ▶ Valve, based in the USA, represented that Australian consumers who downloaded video games purchase from Valve via the Steam website were not entitled to a refund from Valve;
- ▶ Valve further claimed that the statutory consumer guarantees were excluded or modified.
- ▶ For its part, the ACCC alleged that Valve was in breach of ss. 18, 29(1)(m), ACL. To succeed, the ACCC had to establish either that Valve engaged in the relevant conduct in Australia or that it carried on business in Australia and was subject to the extended operation of the ACL under s.5.
- ▶ Valve sought to rely on principles set down in three judgments, including the two High Court decisions of *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (Voth) and *Dow Jones & Ors Inc v Gutnick* [2002] HCA 56; (2002) 210 CLR 575 (Dow Jones). Essentially, Valve was arguing that it was beyond the reach of the ACL and not bound by its legislative consumer guarantees. Valve failed and its application for leave to appeal to the High Court was dismissed.

Valve Corporation v Australian Competition and Consumer Commission [2017] FCAFC 224

- ▶ The Full Federal Court held that, although the two High Court decisions dealt with service out of jurisdiction on the one hand (Voth) and choice of law rules in relation to the tort of defamation on the other (Dow Jones) the decisions contained ‘general themes which may assist [in determining the place of conduct for the purposes of ss 18, 29(1)(m), ACL], at least by analogy.’ per Dowsett, McKerracher and Moshinsky JJ at [127] (TBK, p, 716).
- ▶ At [134] the Court stated: In light of the above statements of principle, we consider that where it is alleged that respondent has, by making representations on the internet, engaged in conduct that is misleading or deceptive or likely to mislead or deceive in contravention of s18 of the [ACL], or made false or misleading representations in contravention of s29 of the [ACL] ***and an issue arises as to the place of the representations***, it is necessary to ask where in substance the representations were made. If the respondent is based overseas and has a relationship with customers in Australia, it is likely that representations addressed to those customers will be taken to have been made in Australia, being the place where the customer accesses and reads the representations on his or her computer.....**A distinction is to be drawn between the conduct proscribed by ss 18 and 29 and the causation of loss or damage.** The approach we have outlined is both consistent with the general principles discussed in the cases and reflective of the consumer protection purposes of the statutory provisions. (*emphasis added*)

Valve Corporation v Australian Competition and Consumer Commission [2017] FCAFC 224

Valve also argued that it was not ‘carrying on business’ in Australia (see [141] of the judgment.) The Court (at [143] - [149]) considered this argument at, drawing on the decision of Merkel J in *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1, who considered the expression (carrying on business) in the context of s 5(1) TPA. The Court also considered the decision of Barrett J in *Campbell v Gebo Investments (Labuan) Ltd* (2005) 190 FLR 209 concerning the question of whether ‘the mere solicitation of business transactions by the internet constituted carry on business in Australia in the context of the winding up provisions of the *Corporations Act 2001* (Cth).’ (at [146]).

The Court held, at [150]: ‘Applying these principles in the present case, we do not consider any error to be shown in the primary judge’s conclusion that Valve was carrying on business in Australia for the purposes of s 5(1)(g) of the *Competition and Consumer Act*.’

The Court rejected a further argument submitted by Valve that sought to confine the meaning of the expression ‘carrying on business’ in s.5(1)(g) (see [152] of the judgment).

‘Conduct’ under the ACL

► Section 2(2) ACL

(2) In this Schedule:

(a) a reference to engaging in conduct is a reference to doing **or refusing** to do any act, including:

- (i) the making of, or the giving effect to a provision of, a contract or arrangement; or
- (ii) the arriving at, or the giving effect to a provision of, an understanding; or
- (iii) the requiring of the giving of, or the giving of, a covenant; and

(b) a reference to conduct, when that expression is used *as a noun otherwise than as mentioned in paragraph (a)*, is a reference to the doing of **or the refusing** to do any act, including:

- (i) the making of, or the giving effect to a provision of, a contract or arrangement; or
- (ii) the arriving at, or the giving effect to a provision of, an understanding; or
- (iii) the requiring of the giving of, or the giving of, a covenant; and

(c) a reference to refusing to do an act **includes** a reference to:

- (i) refraining (otherwise than inadvertently) from doing that act; or
- (ii) making it known that that act will not be done; and

(d) a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making it known that the person will accept applications, offers or proposals for the person to do that act or to do that act on that condition, as the case may be.

‘Conduct’ under the ACL

- ▶ In *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25, (*Campbell*) the High Court, per Gummow, Hayne, Heydon JJ and Kiefel CJ at [102] endorsed *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60 (per Gleeson, Hayne and Heydon JJ at [39], McHugh J at [129]) and stressed that at issue is the relevant conduct *as a whole* and that ‘[r]eferences to misrepresentation or reliance must not be permitted to obscure the need to identify the contravening conduct...and a causal connection...between that conduct and the loss or damage allegedly suffered.’ (*Campbell* at [102]).

‘Conduct’ under the ACL

- ▶ “It is necessary to look at the context of the conduct. This might be another way of identifying the whole conduct. This will involve qualifications by the person engaged in the conduct, such as disclaimers, express warranties about the conduct, entire agreement clauses. The context may also involve what the person to whom the conduct was directed knew.” (*Tbk*, p.724, [13.60]) See further, the discussion there of the following decisions:
- ▶ *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; *TBK*: [13.320], p.779.
- ▶ *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25;
- ▶ *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; *TBK*: [13.250], p.752.
- ▶ *Parkdale Custom Built Furniture Pty Ltd v Puxtu Pty Ltd* [1982] HCA 44; *TBK*: [13.230], p.748.
- ▶ *Campomar Sociedad Limitada v Nike International Ltd* [2000] HCA 12; *TBK*: [13.240], p.749.

‘Conduct’ under the ASIC Act

- ▶ *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486(TBK [13.270], p.759) per French CJ, Gummow, Hayne and Kiefel JJ at [33]:
- ▶ “While it is to be doubted that the proposition which ASIC identified is accurately, or at least sufficiently, described as a statement of ‘fact’, it is ultimately unprofitable to attempt to classify the statement according to some taxonomy, no matter whether that taxonomy adopts as its relevant classes fact and opinion, fact and law, or some mixture of these classes. **It is necessary instead to examine more closely and identify more precisely what it is that the impugned statements conveyed to their audience.**” (*Tbk*, p.724, [13.60])

‘Conduct’ under the ASIC Act and *Corporations Act*.

- ▶ Conduct ‘in relation to’ financial services is dealt with under the ASIC Act and the *Corporations Act 2001* (Cth): s.12DA, ASIC Act (see also, s1041H, *Corporations Act 2001*(Cth)).
- ▶ ‘The ACL does not apply to the supply or possible supply of services that are financial services or products and in particular it does not apply to misleading or deceptive conduct engaged ‘in relation to’ financial services: ACL, ss131A(1) and 131A(2).
- ▶ *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65
- ▶ ABN AMRO created a structured financial product in 2006 that was sold in Australia under the name ‘Rembrandt Notes’.
- ▶ [1] Standard & Poors (S&P) was a division of McGraw-Hill Companies Inc (a party to the proceedings). At the request of the issuer of a financial instrument, S&P would assign a rating to the instrument. The rating was intended to describe the likelihood that principal and interest due under the instrument would be paid in accordance with its terms. ABN Amro asked S&P to rate the Rembrandt notes. S&P rated them AAA (the highest rating assigned by S&P). S&P accepted on appeal that the rating was flawed.
- ▶ [2] ABN Amro marketed and sold the Rembrandt notes to Local Government Financial Services Pty Ltd (LGFS). The two Australian dollar issues were known as the Rembrandt 2006-2 and Rembrandt 2006-3 notes (collectively, the Rembrandt notes). As its name suggests, LGFS dealt with local government authorities. LGFS purchased \$10 million of the Rembrandt 2006-2 notes (\$6 million on behalf of StateCover Mutual Limited (StateCover) and \$4 million which it purchased in its own name and subsequently transferred to StateCover). LGFS then purchased \$45 million of the Rembrandt 2006-3 notes. LGFS sold a substantial portion of the Rembrandt 2006-3 notes to 13 municipal councils in New South Wales (the Councils). StateCover and the Councils lost much of the amounts they invested in the Rembrandt notes. StateCover and the Councils sued ABN Amro, S&P and LGFS for damages.

‘Conduct’ under the ASIC Act and *Corporations Act*.

- ▶ *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65
- ▶ ...
- ▶ [3] After a trial occupying 53 days, judgment was entered for the Councils against ABN Amro, S&P and LGFS and orders were made apportioning liability between them. LGFS also established an entitlement to equitable contribution from ABN Amro and S&P including on account of LGFS’ payment to StateCover to discharge StateCover’s claims against LGFS, S&P and ABN Amro (the StateCover settlement). The primary judge dealt also with other claims which are described in more detail below....
- ▶ On appeal, ABN AMRO failed and the findings of the trial judge were affirmed.
- ▶ Per Jacobson, Gilmour and Gordon JJ at [752] “...The statement that was made, and the information that was disseminated, by S&P was not limited to the fact that the product was rated AAA. It included (1) that the rating was S&Ps opinion; (2) for which it had reasonable grounds; (3) that it had exercised reasonable care and skill in forming that opinion and (4) that the instrument (the Rembrandt notes) had an extremely high likelihood of meeting its obligations.”

‘Conduct’ under the ASIC Act and *Corporations Act*.

- ▶ *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65
- ▶ Their Honours held that the impugned conduct was ‘in relation to “financial services”’, affirming the primary judge’s findings (see [757] of the Full Court’s judgment.)
- ▶ (at [758]): “...The statutory question therefore was, and remains, whether, in expressing an opinion as to the creditworthiness of the Rembrandt notes by communicating the rating, S&P ‘provide[d] a service...that [was] otherwise supplied in relation to a financial product. In our view, the answer is yes. S&P provided a service (the rating) and that service was *in relation to* a financial product (the Rembrandt notes). The service was not for any other purpose or in relation to any other thing.
- ▶ As to the second limb of s12BAB, whether the ratings (of S&P) could be reasonably regarded as being *intended* to influence a person or persons in making a decision in relation to a particular financial product, namely the Rembrandt notes, see [762] of the judgment.

‘Conduct’ under the ASIC Act and the ACL.

- ▶ The ACL and the ASIC Act are not mutually exclusive: although conduct concerning only financial services is dealt with under the ASIC Act and not the ACL, if a dispute concerns conduct relating to financial services as well as other types of services that are dealt with under the ACL and/or goods, then the aggrieved party would argue under both pieces of legislation: the ASIC Act in relation to the impugned conduct and financial services and the ACL in relation to such conduct and other services and/or goods (as the case may be).

‘Conduct’ under the ACL: Is it ‘in trade or commerce’?

- ▶ Whether or not conduct is ‘in trade or commerce’ is a threshold inquiry. This must be satisfied before proceeding to consider whether or not the conduct is misleading or deceptive or likely to mislead or deceive. (Strictly speaking, one really only needs to meet the lower threshold of ‘likely to mislead or deceive’ given the wording of the section.)
- ▶ The leading case on the meaning of ‘in trade or commerce’ is *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 (see TBK: [13.110]) Despite the difficulties evident from the subsequent application of this decision, the ‘narrow conception of “in trade or commerce” derived from [this decision] still stands.’ (TBK: [13.105], p. 728): *Murphy v State of Victoria* [2014] VSCA 238, per Nettle AP, Santamaria and Beach JJA at [77].
- ▶ See also, *Houghton v Arms* [2006] HCA 59 (TBK: [13.120], p. 730).

Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594 (see TBK:) [13.110]

- ▶ Per Mason CJ, Deane, Dawson and Gaudron JJ at [7]: “...Alternatively, the reference to conduct “in trade or commerce” in s52 can be construed as referring only to conduct which is itself an aspect or element of activities or transactions, construed as referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. **So construed**, to borrow and adapt words used by Dixon J in a different context in *Bank of NSW v Commonwealth* (1948) 76 CLR 1, at p 381, the words “in trade or commerce” refer to “the central conception” of trade or commerce and not to the “immense field of activities” in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business.” *(emphasis added)*

‘Conduct’ under the ACL: Is it ‘in trade or commerce’?

- ▶ ***Government Dealings and Public Interest***

- ▶ *Murphy v State of Victoria and Linking Melbourne Authority* [2014] VSCA 238

- ▶ *Gold and Copper Resources Pty Ltd v Newcrest Operations Ltd* [2013] NSWSC 281

- ▶ ***Employment***

- ▶ *Westpac Banking Corporation v Wittenberg* [2016] FCAFC 33

- ▶ ***Social Media***

- ▶ *Fletcher v Nextra* [2015] FCAFC 52

- ▶ ***Sale of Property***

- ▶ *Williams v Pisano* [2015] NSWCA 177

- ▶ *Hera Project Pty Ltd v Bisognin (No3)* [2017] VSC 268

‘Conduct’ under the ACL: The General Approach

- ▶ Whether or not conduct contravenes s18 ACL is informed by a series of principles that have been set out in lists in some judgments. See, e.g., *National Exchange Pty Ltd v Australian Securities and Investments Commission* [2004] FCAFC 90; *ACCC v Meriton* [2017] FCA 1305 per Moshinsky J at [184]; *Director of Consumer Affairs Victoria v Domain* [2017] FCA 1603 per Murphy J at [64]. The lists are not exhaustive but they ‘emphasise examination of the conduct as a whole, its circumstances and qualifications; the market in which the conduct has occurred; the audience for the conduct and whether it is addressed to a specific person or persons, a class of persons, or the world at large; the role of intention to mislead; whether any person must actually be misled; and the role of categorising statements as fact, law, opinion or about the future.’ (*TBK*, [13.190], p. 740)

Australian Competition and Consumer Commission v Valve Corporation (No. 3) [2016] FCA 196

- ▶ Per Edelman J at [212] on whether or not conduct can be characterised as misleading or deceptive: ‘First, the process....generally requires consideration of whether “the impugned conduct *viewed as a whole* has a tendency to lead a person into error” (emphasis added): *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25...(French CJ). **This is assessed objectively. Although evidence that a particular person has been misled or deceived might be taken into account, that evidence is not necessary nor is it always sufficient. The objective characterisation also means that conduct which is only misleading for a temporary period might still amount to misleading or deceptive conduct when viewed as a whole. Further, it is unnecessary to establish that any actual or potential consumer has taken or is likely to take any positive step in consequence of the misleading or deception.’ (emphasis added).**
- ▶ As the text in bold above reminds us, the two fundamental elements of analysis here, as we have seen for example in the case of the court’s approach to contract construction, is to take an *objective* perspective and to consider the conduct in its context. That is what is meant by the expression ‘when viewed as a whole.’

Australian Competition and Consumer Commission v Valve Corporation (No. 3) [2016] FCA 196

- ▶ At [213], Edelman J quotes at length from the judgment of Gummow, Hayne, Heydon and Kiefel JJ and from that of McHugh J in *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304 at [213] of his judgment. He discusses at length, both ‘the need to consider the conduct in light of all relevant circumstances’ and the implications flowing from that (see [214] - [228]). This is a useful discussion, bearing in mind that this is the first instance judgment. The Full Federal Court affirmed Edelman J’s decision on appeal.
- ▶ In *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liquidation)(No.2)* [2017] FCA 709, Beach J set out a similar list of ‘non-contentious principles’ applicable to the application of s.18 ACL (and s. 29).

SILENCE AND THE *AUSTRALIAN CONSUMER LAW*

Silence can be “misleading or deceptive conduct” under s 18 if information is withheld where there is a “duty” to disclose it:

That “duty” is not a formal duty in a common law or equitable sense.

It arises whenever there is a “reasonable expectation” that there will be disclosure.

That reasonable expectation” might arise where:

- a. silence would *distort* the true meaning of something that has been said;
- b. something actually said is subsequently *found to be untrue*;
- c. something actually said subsequently *becomes untrue*.

SILENCE AND THE *AUSTRALIAN CONSUMER LAW*

- ▶ *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* [2010] HCA 31
- ▶ Consolidated Timber Holdings Ltd (CTHL) engaged Miller to broker a loan between CTHL and a lender. In December 2020, CTHL entered into a loan contract with BMW Australia Finance Limited (BMW) for an amount of \$3.97 million AU.
- ▶ CTHL repaid only \$1.2 million AU and then defaulted on the loan.
- ▶ BMW failed to recover from CTHL and brought an action against Miller, claiming it had engaged in misleading or deceptive conduct in the course of broking the premium funding loan. The alleged impugned conduct was either an assurance that an insurance policy covered property and was assignable and cancellable, or was a failure to disclose that the policy was non-assignable and non-cancellable.
- ▶ Miller was successful before the High Court which found that Miller had not engaged in misleading conduct.

SILENCE AND THE *AUSTRALIAN CONSUMER LAW*

- ▶ *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1
- ▶ The issue was whether Google had engaged in misleading or deceptive conduct by publishing or displaying certain sponsored links that were misleading or deceptive. Google, for its part, argued that it was merely a ‘conduit’ and not a principal. The Full Court found that Google was in fact a principal and Google thereupon relied on a defence contained in TPA s85(3), now ACL ss 209, 251.
- ▶ The plurality (French CJ, Crennan and Kiefel JJ) set out a number of well-established propositions concerning s.52, TPA ([6] - [9]). Hayne J considered decided cases and in particular, cautioned against extrapolating from the decided cases a rule of general application which can never ‘stand in the place of the statutory text.’ [100]
- ▶ The discussion in the judgment of Hayne J at [100] - [116] is particularly instructive in how to approach decided cases in the context of statutory interpretation, particularly in respect of a statutory provision - such as s.52 TPA (now s.18 ACL) that has been the subject of such extensive judicial consideration.

REMEDIES FOR MISLEADING OR DECEPTIVE CONDUCT UNDER THE ACL

- ▶ Injunctions under s 232;
- ▶ Damages under s 236;
- ▶ One or more of the ancillary remedies under s 243 (through s 237(1)(b)):
 - ▶ Declaring the contract void;
 - ▶ Varying it;
 - ▶ Refusing enforcement;
 - ▶ Directing refunds or a return of property;
 - ▶ Requiring payment for loss or damage;
 - ▶ Directing repair or replacement or provision of services.