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THE EFFECT OF PRE-CONTRACTUAL REPRESENTATIONS

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The Effect of Pre-Contractual Representations

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BY

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Introduction.

1. This paper is advertised as being divided into:
 - (1) Examining pre-contractual representations and their legal effect;
 - (2) When pre-contractual representations affect the risk management of contracts.
 - (3) Strategies for managing contractual risk.

Topics (1) and (2) are intertwined and will be dealt with together. This paper is divided thus:

- Examining pre-contractual representations and their legal effect; and when pre-contractual representations affect the risk management of contracts – General.
- The law of statutory misleading or deceptive conduct – Introduction.
- Misleading or deceptive conduct – Basic principles.
- Misleading or deceptive conduct – Statements as to present or past matters.
- Misleading or deceptive conduct – Statements as to future matters.
- Misleading or deceptive conduct – Representations by silence.
- Misleading or deceptive conduct – Where the representor is passing on information.
- Misleading or deceptive conduct – representations contained in a contract.
- Misleading or deceptive conduct – whether there is a causal link between the representation and entry into the subsequent contract.
- Strategies for managing contractual risk – general, and the effect of exclusion and similar clauses.
- Estoppel by pre-contractual representation.

Examining pre-contractual representations and their legal effect; and when pre-contractual representations affect the risk management of contracts – General.

2. A representation is broadly speaking a statement, although the statement can sometimes be by silence. At common law a representation is distinguished at one end from a mere puff and at the other from a statement which becomes a

contractual term, a term being distinguished from a representation by the intention, objectively viewed by a reasonable person, of the maker of statement to accept liability for its truth (eg *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd (in liq)* [2010] VSCA 245 at [90], 31 VR 575 at 597 – 8). This paper concerns representations pre-dating a contract and it first assists to split them into types, some of which overlap. They are –

- Innocent misrepresentation, not made negligently, and not caught by statute.
- Negligent misrepresentation.
- Fraudulent misrepresentation.
- Representation amounting to misleading or deceptive conduct in contravention of statute (“statutory misleading or deceptive conduct” or just “misleading or deceptive conduct”).
- Representation as an element in unconscionability.
- Representation giving rise to an estoppel.

Statutory misleading or deceptive conduct is most common and will occupy most of this paper. But first, the inter-relationship between types of representations is most easily understood by a short historical excursus.

3. The common law divided representations into innocent and fraudulent. At common law an innocent misrepresentation of a material matter attracted no liability in damages and the representee’s only remedy was that equity would not permit the representor to enforce a contract against a representee by specific performance, and the representee could rescind the contract ab initio provided the parties could be substantially restored to their pre-contractual positions. With the exception of the sale of goods (J. W. Carter, E. Peden and G. J. Tolhurst, *Contract Law in Australia*, 5th ed, 2007, [18-38], [18-38]) the equitable rule now generally applies.
4. Innocent misrepresentations, however, divide into the non-negligent and the negligent. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 the House of Lords held that damages could be awarded for negligent misrepresentation or misstatement, or the giving of careless information or advice, in breach of a duty of care. The three elements of the cause of action are: (1) a duty owed by the representor to the representee to take due care to ensure that the representation is true and reliable; (2) failure by the representor to take such due

care; and (3) loss or damage caused by the falsity of the representation. Accordingly, if the pre-contractual representation is made negligently, there may be both liability in tort and the setting aside of a contract induced thereby.

5. Fraudulent misrepresentation embraces situations in which the representor: lacked belief in the truth of the representation; or made it recklessly, not caring whether it was true or false (*Derry v Peek* (1889) 14 App Cas 337). An action for damages for fraud (the tort of deceit) lies against the deceiver and rescission of a contract induced by the representation is also available.

6. A negligent or fraudulent misrepresentation may be made where no contract ever exists. And the law of negligent and fraudulent representation retains life where for some reason not overtaken by statute. But, nonetheless –

“the introduction of statutory prohibitions on certain kinds of conduct, by the Trade Practices Act 1974 (Cth) and fair trading legislation, has made the law of misrepresentation much less significant than it was formerly” (J. W. Carter, E. Peden and G. J. Tolhurst, *Contract Law in Australia*, 5th ed, 2007, p. 368).

And –

“The cause of action for contravention of statutory prohibitions against conduct in trade or commerce that is misleading or deceptive or is likely to mislead or deceive has become a staple of civil litigation in Australian courts at all levels. Its frequent invocation, in cases to which it is applicable, reflects its simplicity relative to the torts of negligence, deceit and passing off.” (per French CJ and Kiefel J in *Miller & Associates v BMW Australia* [2010] HCA 31 at [5], (2010) 241 CLR 357 at 364).

7. Statutory misleading or deceptive conduct commenced by s. 52(1) of the Trade Practices Act (TPA) 1974 which provided that a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Section 82(1) provided that a person who suffered loss or damage by conduct in contravention of, inter alia, s. 52 may recover the amount of the loss or damage by action against the other person or against any person involved in the contravention. Section 87 provided for a range of other remedies in relation to contraventions or apprehended contraventions. The history was then chronologically as follows -

(a) In all States these provisions were replicated by fair trading legislation which operated concurrently with the federal legislation and applied to

persons generally, whether incorporated or not, eg Fair Trading Act 1999 (Vic) (FTA) ss. 9, 158, 159;

- (b) In 2001 misleading or deceptive conduct in relation to financial services was removed from s. 52 to s. 12DA of the Australian Securities and Investments Commission Act 2001 (Cth);
- (c) By the Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 the relevant TPA provisions were replaced by provisions in the Australian Consumer Law, set out in Schedule 2 of that Act. The central provision is s. 18(1): “A person must not in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.” As with the TPA, very wide remedies are given (eg ss. 236, 243, 244);
- (d) The Australian Consumer Law and Fair Trading Act 2012 (Vic) s. 233 repealed the FTA. The 2012 Act provided that the Australian Consumer Law text, as in force from time to time, applied in Victoria and as so applying may be referred to as the Australian Consumer Law (Victoria), and as so applying was a part of the 2012 Act (s. 8).

Because all the cases cited in this paper refer to s. 52, this paper will continue to refer to statutory misleading or deceptive conduct by reference to “s. 52”.

- 8. Unconscionability. A typical unconscionability provision is s. 20(1) of the Australian Consumer Law: a person must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law from time to time. Pre-contractual misrepresentation may be an element in unconscionability (eg *Associated Retailers Limited v Toys Unlimited Pty Ltd & Ors* [2011] VSC 297 at [180]). However, because of the considerable overlap between misrepresentation as a part of unconscionability and statutory misleading or deceptive conduct, unconscionability will not be dealt with in this paper.
- 9. In a contract text book representations and estoppel are dealt with in different chapters. Estoppel effects contracts widely, but one discrete area is that a pre-contractual representation can in certain circumstances found an estoppel.
- 10. Accordingly this paper will concentrate on statutory misleading or deceptive conduct at the expense of the law of innocent, fraudulent and negligent misrepresentation, but will also briefly consider pre-contractual representations constituting estoppel. These topics are capable of attracting hundreds of pages of

text, but it is thought more helpful to concentrate on the principles derived from High Court and Victorian Supreme Court cases in the last several years, as by this means this reader will see much of the relevant law in action.

The law of statutory misleading or deceptive conduct – Introduction.

11. By way of reminder, the crucial words are –

“A person must not in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”.

The topic divides as follows –

- Basic principles.
- Statements as to present or past matters.
- Statements as to future matters.
- Representations by silence.
- Where the representor is passing on information.
- Representations contained in a contract.
- Whether there is causal link between the representation and entry into the subsequent contract.
- The effect of exclusion and similar clauses – this will be discussed under Strategies for managing contractual risk.

Misleading or deceptive conduct – Basic principles.

12. Several cases contain concise passages or summaries of many principles which other judges tend to repeat. They include: *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60 at [37], [103], [109], (2004) 218 CLR 592 at 604 – 5, 623, 625; *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25 at [26], (2009) 238 CLR 304 at 319, per French CJ; and *ACCC v Dukemaster Pty Ltd* [2009] FCA 682 at [10] per Gordon J. The main principles are:

- “Conduct” is not confined to representations, but includes representations as to matters of present or future fact or law.
- There must be a causal connection (denoted by the word "by") between the contravening conduct and the loss and damage allegedly suffered.
- Whether s 52 has been contravened is determined by examining the relevant course of conduct as a whole, ie by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances – it is an objective

question for the court. Accordingly 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 conduct is directed to the public or members of a class in a general sense, the determination of whether the conduct as misleading or deceptive is made with respect to a hypothetical individual isolated by some criterion as a representative member of that class.
- Where the conduct occurs in dealings between identified individuals it is unnecessary that he or she be reconstructed into a hypothetical, 'ordinary' person. Determination of whether the conduct contravenes s. 52 may proceed by reference to the circumstances and context of the questioned conduct, by considering the character of the particular conduct of the particular representor in relation to the particular representee(s). Determination of the causation of loss or damage may require account to be taken of subjective factors relating to a particular person's reaction to conduct found to be misleading or deceptive or likely to mislead or deceive.
- By making a statement of past or present fact, the representor's state of mind is irrelevant unless the statement involved the state of that person's mind. Contravention does not depend upon the representor's intention or belief concerning the accuracy of the statement of fact but upon whether the statement conveys a meaning which is false. A false meaning will be conveyed if what is stated concerning the past or present fact is inaccurate but also if, although literally true, the statement conveys a meaning which is false.
- A statement which involves the state of mind of the maker ordinarily conveys the meaning (expressly or impliedly) that the maker of the statement had a particular state of mind when the statement was made and, commonly, that there was a basis for that state of mind. If the maker did not have that state of mind or had it without proper basis this may amount to misleading or deceptive conduct.
- Representations with respect to future matters are affected by the former TPA s. 51A, now Australian Consumer Law (Vic) s. 4, dealt with below under that heading.

Misleading or deceptive conduct – Statements as to present or past matters.

13. These may be mundane, eg as to quality of products (*BHP Billiton (Olympic Dam) Corporation Pty Ltd v Steuler Industriewerke GmbH* [2009] VSC 322), or more subtle, eg a certificate of valuation of a painting is both a statement of value and certification of authenticity (*Blackman v Gant* [2010] VSC 229 at [117], 29 VR 29 at 59). However in a complicated mix of facts extending over a period it may be much more difficult to determine whether a representation is misleading or deceptive, as is demonstrated by *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25, (2009) 238 CLR 304 –

- A company ("Healthy Water") of which Mr Campbell was the sole director and shareholder owned a business. By an agreement dated 24 January 2005 one of the two shares in Healthy Water was sold to Backoffice, controlled by Mr Weeks.
- On 9 December 2004 Campbell provided to Weeks –
 - management accounts of Healthy Water for the five months ended 30 November 2004 that showed its operating results for that period, and;
 - a list of non-recurring expenses, and;
 - a document setting out operating results and sales revenue for the five months ended 30 November 2004, and projections of that revenue for four future periods including December 2004 and the six months ended 31 December 2004. This document recorded the earnings before interest and tax ("EBIT") of Healthy Water "as per Management Accounts" and added the items in the list of non-recurring expenses, to yield an "EBIT (Adjusted)".
- These documents were subsequently alleged ("the first claim") to be misleading or deceptive by not accurately stating past financial performance, in particular concerning the particular amounts of non-recurring expenses and EBIT for the five months to 30 November 2004.
- Weeks unsuccessfully asked for substantiation of the amounts recorded as non-recurring expenses.
- Healthy Water's actual sales revenue for December 2004, which Campbell knew before entering the sale agreement but did not disclose to Weeks, were 8% less than estimated in the operating results document provided on 9 December. This affected the accuracy of other figures in the documents. The second claim was that Campbell engaged in misleading or deceptive conduct

in not correcting estimates of Healthy Water's expected performance for December 2004.

- The allegations of misleading or deceptive conduct failed at trial. A majority of the NSW Court of Appeal upheld an appeal on this point. Campbell appealed to the High Court.
- The High Court found the first claim not established because, although the trial judge had found that the non-recurring expenses provided on 9 December were not all accurate (which also rendered the EBIT (adjusted) inaccurate), taking the relevant course of conduct as a whole the documents only provided estimates of financial performance, not representations of particular amounts.

More particularly:

- the documents included one item expressly stated to be an estimate and others which bore every indication of being only estimates. Gummow, Hayne, Heydon and Kiefel JJ stated (at [132], 349) that although in some cases the provision of an estimate of financial performance may be misleading or deceptive, the conduct of Campbell taken as a whole was to proffer estimates which he was to be understood as asserting that he believed to be true, but the trial judge concluded that he did not know that they were inaccurate or incomplete or misleading and it had not been alleged that he had no sufficient basis for them.
- the documents were provided in the course of investigations or negotiations over a period of weeks, and Campbell refused or declined to substantiate the figures causing Weeks to insist on contractual warranties (at [131], 348 – 9).
- Although the second claim was established it was not proved to have been clearly relied on – see paragraph 26 below.

14. Two cases which underline the importance of discerning the impact of the representation on the representee(s) are *Miller & Associates v BMW Australia* [2010] HCA 31, (2010) 241 CLR 357 and *Taylor & Anor v Gosling & Ors* [2010] VSC 75. In *Miller* it was alleged that a certificate by an insurer, provided by a broker to an experienced lender of insurance premiums, in some way represented that the underlying policy was cancellable. The court held that, against the background of what objectively the certificate conveyed to its intended audience

(ie an experienced insurance premium lender), the certificate did not make this representation (at [87] 383, [24] 371).

15. In *Taylor* the plaintiffs attended a meeting of proposed investors in a project at which Gosling, who addressed the meeting and knew nothing of the plaintiffs as individuals, stated that short-term loans to a company carried “no risk” because there was adequate security (at [10]). Hargrave J stated the impugned conduct should be approached as conduct directed to members of a class in a general sense, having regard to the mix of persons in the audience from experienced sophisticated investors to, as the first defendant knew, novices such as the plaintiffs. Accordingly, in considering his conduct towards the plaintiffs, the characterisation of whether the statement contravened s. 52 was to be made with respect to its effect on a hypothetical novice investor (at [132])

Misleading or deceptive conduct – Statements as to future matters.

16. Section 51A (now Australian Consumer Law (Vic) s. 4) materially provided: that where a corporation made a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading, and; that the corporation shall unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.
17. An illustrative case is *Body Bronze International Pty Ltd & Ors v Fehcorp Pty Ltd* [2011] VSCA 196 –
 - Body Bronze carried on the business of a franchisor of body tanning salons. It agreed to grant a franchise to Fehcorp in connection with a new salon at particular premises.
 - A document entitled Heads of Agreement was executed between the future director of Fehcorp and Body Bronze. It included a term (“the finance arrangement”) which reflected a previous undertaking to the effect that if the fit-out costs, which were to be met by the franchisee, exceeded \$250,000, Body Bronze would lend it additional funds for the fit-out. It also contained all the essential terms of the franchise arrangement, bound the parties to establish the business based on it, and obliged them to use best endeavours to

prepare a franchise agreement which included its terms. The finance arrangement was also the subject of representation by Body Bronze in other roughly contemporaneous documents.

- Some weeks later the Franchise Agreement was executed, omitting the finance arrangement.
- The fit-out occurred, the sum of \$250,000 was exceeded, and Body Bronze refused to honour the finance agreement.
- Fehcorp sued in the County Court including for breach of s. 52 by making representation that Body Bronze would make the loan. It succeeded, the only relief material to the subsequent appeal being that Body Bronze had engaged in misleading or deceptive conduct, and its CEO Meneilly and its sole director and shareholder Mitchell (as persons involved therein) were liable in damages for that conduct.
- The appeal succeeded, the main judgment being that of Macaulay AJA. His Honour held -
 - The trial judge had correctly held that Body Bronze breached the finance agreement.
 - Although the trial judge concluded, without recourse to s. 51A, that Body Bronze breached s. 52, the judge had also found that, at the time at which the representation which led to the finance arrangement was made, Meneilly and Mitchell intended to honour the representation and believed that Body Bronze possessed the means by which the representation could be honoured.
 - The representation was as to future conduct. Such a representation may contain an implied statement of existing fact, namely, that the promisor has a present intention to make good the promise, or that he has the means to do so. If such a representation is made when no intention or means to make it good exists, the representation may be misleading or deceptive.
 - However, the trial judge had found that there was an intention, and belief that the means existed, to honour the representation. The judge's conclusion was accordingly erroneous: the mere fact that representations as to future conduct or events do not eventuate does not make them misleading or deceptive even though the plaintiff has relied upon them.
 - Even if Body Bronze had been guilty of misleading or deceptive conduct Meneilly and Mitchell were not involved in any contravention.

18. Other illustrative cases largely exemplify lack of reasonable grounds for making the representation. They are –

- *Associated Retailers Limited v Toys Unlimited Pty Ltd & Ors* [2011] VSC 297. Kyrou J found [at 132 and 161] that before execution of a mortgage between the sixth defendant and the plaintiff, securing a debt of the first defendant to the plaintiff, the plaintiff represented to the sixth defendant that the mortgage would only secure a limited amount and would only secure the first defendant's liabilities to the plaintiff incurred within 12 months of the mortgage. The plaintiff reneged on this representation, thereby contravening s. 52: insofar as the representation was as to a future matter it did not establish that it had reasonable grounds for making it [164 - 165]. At [165] his Honour stated –

“ARL has not adduced any evidence that it had reasonable grounds for making the Representation. Shortly after his conversation with Mr Grosse on 28 June 2006, Mr Williams arranged for ARL's lawyers to prepare the Mortgage. He did not instruct ARL's lawyers to include any provision in the Mortgage by which the liability secured by the Mortgage would be limited to a period of 12 months. I therefore infer that Mr Williams did not, at any time, intend that the terms of the Representation be incorporated in the Mortgage. It follows that Mr Williams and, through him, ARL did not have any reasonable grounds for representing that the liability to be secured by the Mortgage would be limited to a period of 12 months.”

- *Taylor & Anor v Gosling & Ors* [2010] VSC 75 at [135], [136]. Hargrave J held that if Gosling stated that short-term loans would carry a low risk this was capable of characterisation as a statement of a present fact, or of his opinion, or of a future matter. But, having regard to Gosling's other statements that it was his role to protect investors, the statement was one of opinion with respect to a future matter. This carried an implied representation that he actually held such an opinion and that it was based on reasonable grounds after applying his expertise, skill or experience. This representation was not based on reasonable grounds.
- In *Trans-It Freighters Pty Ltd & Ors v Billy Baxters (Franchising) Pty Ltd* [2012] VSCA 71 the respondent made a representation, before entering into a franchise agreement with the appellant, as to anticipated turnover and that it would enable the business to meet its rental commitments and make a profit. This was held not to be made on reasonable grounds.

Misleading or deceptive conduct – Representations by silence.

19. The leading recent High Court case is *Miller & Associates v BMW Australia* [2010] HCA 31, (2010) 241 CLR 357. By way of background to *Miller* –

- "Conduct" was defined in the TPA s. 4(2)(a) and (b) as including "refusing to do any act", which in turn referred to "refraining (otherwise than inadvertently) from doing that act" (now Australian Consumer Law s. 2(2));
- The most quoted case on silence is *Demagogue Pty Ltd v Ramensky* [1992] FCA 557; (1992) 39 FCR 31, which upheld a decision of a trial judge that a vendor of land had engaged in misleading or deceptive conduct by creating an erroneous impression in the purchasers that there was nothing unusual concerning access to the land and, in particular, had been silent that access depended on grant of a licence by a statutory authority. Black CJ stated at 32 that silence was to be assessed as a circumstance like any other, the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. Gummow J stated at 41, however -

"unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist".

This use of the concept of “reasonable expectation” although not found in the statute is a tool frequently subsequently applied.

20. In *Miller* –

- Miller was a broker retained by a company to obtain a premium loan in respect of an insurance policy between that company, an insurer (HIH) and a bank. It approached BMW Australia Finance for an insurance premium funding loan. It was relevant to a lender whether the policy was cancellable: cancellable policies could provide some security for a premium loan because the lender could take an assignment of the policy and so, if the borrower defaulted, could cancel the policy and recover the unused premium.
- BMW’s agent provided quotations for the loan stated to be subject to inter alia “full policy information”.
- Due to an administrative error BMW agreed to make the loan.

- BMW subsequently asked for details of the insurance and Miller provided a copy of an HIH certificate stating that it related to the insurance.
- BMW subsequently decided not to proceed with the loan and refunded a payment made to it.
- However, the parties subsequently decided to renegotiate the loan and BMW sought further information. One document then provided by Miller was a copy of a policy which differed from the HIH certificate; but it was common ground that this was the policy underlying the certificate. The policy was not cancellable.
- BMW sent another quotation, inter alia requiring “full policy information”.
- BMW subsequently made the loan but it was not repaid.
- BMW alleged misleading or deceptive conduct by Miller in two respects, the first being based on the contents of the certificate (see paragraph 14 above) and the second being based on silence, namely that Miller supplied the HIH certificate without disclosing that the underlying policy was non-cancellable.
- The claim based on silence failed. Heydon, Crennan and Bell JJ stated (at [91] – [97], 384 – 386) that there was no foundation for the conclusion that the known importance of cancellability gave rise to a reasonable expectation, in the circumstances of this transaction, that Miller would not supply the certificate without disclosing that the policy was not cancellable. They particularly took into account:
 - the parties were commercially sophisticated and experienced;
 - the loan was \$3.975 m.;
 - the HIH certificate put BMW on notice that the underlying policy may be unusual but it made no further inquiry;
 - when BMW requested details of the insurance, Miller knew that BMW had been in direct contact with the insured and had been informed that the loan application had been approved (but not of the administrative error and that the application had not been investigated);
 - after being told that BMW was not proceeding with the loan, Miller was not put on notice that BMW was under a misapprehension that the policy was cancellable;
 - the requirement, after a copy of the policy was supplied, of "full policy information", was not relevant.

- The judgment of French CJ and Kiefel J was to similar effect but added (at [22], 371) –

“However, 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.”

21. A case the other way is *Sahin v National Australia Bank Ltd* [2011] VSCA 64. The Sahins obtained a bank loan of \$110,000 and, on advice from a lending manager Mr Moss, of the benefits of insurance Mrs Sahin purchased a policy of consumer credit insurance. When the loan was fully drawn they sought and were offered further finance of \$23,000, on terms that the first loan would be repaid and replaced by a second loan for the existing loan balance plus \$23,000. They did not purchase loan insurance for the second loan, although the cost of such insurance was relatively small, believing that the original insurance continued in force. Events then arose leading them to claim on the supposed policy and subsequently to sue for misleading or deceptive conduct. They failed in the County Court but succeeded on appeal, the main judgment being that of Hargrave AJA. His Honour found and held -

- At the time of the original insurance the Sahins received only a brochure (they not receive the policy) which stated in substance that, if all loan repayments were made before expiry of the loan term, the unexpired portion of the insurance premium would be refunded and insurance cover would then cease. This was ambiguous because the statement assumed that there would a premium refund (followed by cessation of cover). But there was no refund here and thus nothing to alert the Sahins that their loan cover had ceased.
- At the time of taking the first loan, but not when taking the second loan, the bank required the Sahins to sign a document recording whether or not they elected to accept loan insurance.
- After discussions for possible future finance had commenced between the new bank lending manager, Mrs Davis, and the Sahins, the Sahins received an insurance renewal notice/letter the contents of which induced them to believe to believe that the loan insurance would be automatically renewed.
- The insurer’s cancellation letter was sent to the wrong address and not received.

- In circumstances where the bank and the insurer created confusion by a combination of correspondence referring to automatic renewal of the loan insurance and the new loan structure, the bank engaged in misleading or deceptive conduct by failing to give a full, accurate and unambiguous explanation that the first loan would be repaid in full and re-advanced by the second loan, with the effect that the loan insurance would automatically terminate. In summary at [76] -

“... the relevant conduct of the bank and the insurer included: (1) the way in which Mr Moss dealt with the insurance cover in respect of the first loan, where a full explanation was given as to all relevant matters and a signed acknowledgment was obtained in accordance with the bank’s forms and procedures; (2) the correspondence sent by the bank and the insurer, and received by Mr and Mrs Sahin; (3) the failure of Mrs Davis to give Mr and Mrs Sahin a clear explanation of the effect on the loan insurance of the new loan structure insisted upon by the bank; (4) the failure of the insurer to send the cancellation letter to the correct address; and (5) the failure of Mrs Davis to apply the bank’s prudent procedure of obtaining a signed acknowledgment by Mr and Mrs Sahin concerning loan insurance. Viewed as a whole, that conduct was misleading and deceptive.”

Sahin is also an illustration of the width of possible relief from breach of s. 52, including in this case in substance: an order varying the insurance policy to extend to the insurance in respect of the second loan; declarations that the insurer was obliged to pay the bank the loan instalments under the second loan; orders relieving the Sahins from the obligation to pay certain amounts due under the second loan contract and restoring their position to what it should have been.

22. Other illustrative cases are -

- *Ipex ITG Pty Ltd (Receivers & Managers appointed) & Ors v Melbourne Water Corporation* [2012] VSCA 169. A tender was awarded to IT outsourcing company to provide IT services for Melbourne Water, and non disclosure of help desk figures arising from earlier IT environments was held not misleading or deceptive.
- *Thong Guang Plastic and Paper Industries SDN BHD v Vicpac Industries Australia Pty Ltd* [2010] VSC 11. The plaintiff was a Malaysian company manufacturing plastic. The defendant was an Australian company which purchased plastic and supplied plastic bags to customers in Australia. The

defendant alleged that the plaintiff represented to it, inter alia by silence, that it would not sell products that it was manufacturing for the defendant directly or indirectly to the defendant's customers. This was established but no loss ensued: [123] – [125].

- *S. E. Vineyard Finance Pty Ltd (Receivers and Managers Appointed) v Casey* [2011] VSC 403 held at [45] that it was open to a Magistrate to hold that a prospectus was misleading or deceptive in not disclosing that the management fees were paid by round robin transaction.

Misleading or deceptive conduct – Where the representor is passing on information.

23. What of a representor who is merely passing on information?

- In *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60, (2004) 218 CLR 592 an estate agent incorporated an inaccurate survey diagram supplied by the vendor into an advertising brochure provided to potential purchasers. By majority (Gleeson CJ, Hayne and Heydon JJ) the High Court held that the agent had not engaged in misleading or deceptive conduct because it had only communicated the vendor's representation without adopting or endorsing it.
- The test of non adoption or endorsement has also recently been applied in favour of Google's internet search engine, which displayed search results of advertisers with sponsored links, which results were misleading. The mere act of publishing or displayed the results was held not to amount to misleading or deceptive conduct: *Google Inc v ACCC* [2013] HCA 1.

Misleading or deceptive conduct – representations contained in a contract.

24. Although this paper concerns pre-contractual representations, the reader is briefly reminded that a representation contained in a contract can contravene s. 52 and so have somewhat similar effects to misleading or deceptive conduct before a contract. In *Campbell v Backoffice Investments* French CJ stated at [35] (322) –

“Whether the proffering of a contractual document containing a false statement amounts to a misrepresentation or to misleading or deceptive conduct, is a matter of fact to be determined by reference to all the circumstances.”

Thus in *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd* [2010] VSCA 245, 31 VR 575, a provision in a deed that the respondent “acknowledges that the services to be performed under the contract by [Wynton Stone] prior to the date of this deed have been performed in accordance with its terms” was held by

Buchanan and Nettle JJA (Warren CJ dissenting, at [25]) to contravene s. 52 (at [92], 598).

Misleading or deceptive conduct – whether there is a causal link between the representation and entry into the subsequent contract.

25. Ideally a plaintiff will lead evidence of reliance on the representation. But inferences of reliance can be drawn, as is most clearly explained by Buchanan and Nettle JJA in *MWH Australia Pty Ltd v Wynton Stone Australia P/L (in liq)* [2010] VSCA 245 at [93] – [106], 31 VR 575 at 598 - 603 (Warren CJ dissenting on this point). MWH did not adduce direct evidence of reliance but successfully sought to have the court infer reliance on the acknowledgment in the deed referred to above. Their Honours quoted [at 99] Wilson J in *Gould v Vaggelas* (1985) 157 CLR 215 at 238 – 9 that:

“[w]here a plaintiff shows that a defendant has made false statements to him intending thereby to induce him to enter into a contract and those statements are of such a nature as would be likely to provide such inducement and the plaintiff did in fact enter into that contract and thereby suffered damage and nothing more appears, common sense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract. However, it is open to the defendant to obstruct the drawing of that natural inference of fact by showing that there were other relevant circumstances. ...”

26. On the other hand, *Campbell v Backoffice Investments Pty Ltd* (the facts of which are stated in paragraph 13 above) illustrates that all the evidence must be considered. The second piece of conduct by Campbell complained of was not correcting estimates of Healthy Water's expected performance for December 2004. The High Court held that, as there was no evidence from Weekes that he would not have proceeded with the purchase if he had known *only* that the sales revenue for December 2004 had been 8% below estimated, reliance could not be inferred.

Strategies for managing contractual risk – general and the effect of exclusion and similar clauses.

27. The easiest method of managing contractual risk is not to make the misrepresentation. However the meat of this topic concerns exclusion, acknowledgment and merger clauses, and disclaimers. While these may be

effective at common law they are greatly reduced in impact when dealing with s. 52 claims. In *Campbell v Backoffice Investments* the share sale agreement contained an entire agreement clause and a provision denying that the purchaser relied on any warranty made by or on behalf of the vendor, except those set out in the agreement.

- Gummow, Hayne, Heydon and Kiefel JJ noted [at 127] that such clauses were not effective answers to s. 52 claims but [at 130] that 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.
- French CJ dealt with the topic more fully at [29] – [31] noting that:
 - in the case of a disclaimer of reliance contemporaneous with the conduct, this was likely to go to whether the conduct was misleading or deceptive;
 - and the case of a subsequent disclaimer of reliance was more likely to be relevant to the question of causation of loss.

His Honour stated at [31] –

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

Thus in *Taylor & Anor v Gosling & Ors* [2010] VSC 75 the Taylors attended an investment seminar at which the first defendant stated that there was a lack of material risk in a proposed investment [at 7]. When they arrived at the seminar they signed a “Disclaimer Confidentiality and Release Form” with numerous exclusionary terms. Hargrave J found [at 142] that the Taylors placed no reliance on the disclaimers and so the existence of the disclaimers did not prevent them relying on what was said at the seminar.

Estoppel by pre-contractual representation.

28. An illustrative case is *Associated Retailers Limited v Toys Unlimited Pty Ltd & Ors* [2011] VSC 297. Before entry into a mortgage the plaintiff (ARL) represented that a mortgage by the sixth defendant (Moore) would only secure the first defendant's liabilities to the plaintiff incurred within 12 months of the mortgage. In paragraph [167] Kyrou J stated –

“In order to establish a promissory estoppel, it is necessary for Paul Moore to prove that:

- (a) he expected that a particular legal relationship would exist between him and ARL, and that ARL would not be free to withdraw from the expected legal relationship [ie that after a year the plaintiff would be legally obliged to discharge the mortgage];
- (b) ARL induced him to adopt the expectation;
- (c) he acted in reliance on the expectation;
- (d) ARL knew or intended that he would rely on the expectation;
- (e) his action would occasion detriment if the expectation were not fulfilled; and
- (f) ARL failed to act to avoid that detriment by fulfilling the expectation or otherwise.”

His Honour found [at 171 – 176] these elements satisfied, concluding that it would be unconscionable for the plaintiff to resile from the representation and to enforce the mortgage as if the representation had not been made, and that accordingly the plaintiff was estopped from enforcing the mortgage.

29. A similar case is *IOOF Building Society Pty Ltd v Foxeden Pty Ltd* [2009] VSCA 138, 23 VR 536. The appellant represented to the relevant appellants that if they signed an agency agreement, which contained a term that the agency could be terminated on 60 days notice, it would subsequently negotiate a period of termination, having acknowledged that the period of 60 days was too short from both parties' point of view. The Court of Appeal upheld the decision of the trial judge that the appellant was estopped from relying upon or enforcing the 60 day notice termination provision. It held that the relief appropriate to satisfy the equity established by the estoppel was to allow a period of 12 months.

30. However it must be reasonable for a party to rely on the representation – although one may wish that everything said by a bank manager is binding this is not necessarily so! In *Commonwealth Bank of Australia Ltd & Ors v Marsden* [2012] VSC 607 the defendant argued that the plaintiff was estopped from enforcing documents by reason of pre-contractual representations of, broadly speaking, ongoing financial support for a minimum of 10 years. Judd J concluded -

“139 I reject the defendants’ estoppel case. While it seems likely that the bank conveyed to Mr Marsden, ... that it was interested in establishing a long term relationship with the Marsden group, and that it could be flexible in its future dealings, there was no reasonable basis upon which Mr Marsden could have interpreted what was said, or could have assumed that the relationship would not be determined by the terms and conditions of the facility that might be provided by the bank. Once the facility had been provided, the agreements executed and the securities given, Mr Marsden was under no misunderstanding about the facility limits, the terms and conditions upon which the advances were made and the default rights of the bank under the facility documents and the securities.”

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Monday 4 March 2013

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