

ALERT

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What's the damage? Assessing damages and establishing causation in actions for misleading or deceptive conduct

The protections against misleading or deceptive conduct and representations contained in the Australian Consumer Law (**ACL**) provide an important means of seeking compensation in commercial disputes, including within the construction industry. These protections offer an alternative to actions in contract or tort and, due to a number of differences with those actions, can sometimes provide relief in circumstances where none would otherwise exist.

When pursuing a claim under those provisions of the ACL, it is crucial that a claimant accurately characterises and proves the loss suffered. A failure successfully to do so can leave a claimant without an award of damages, despite having proved that the conduct was misleading or deceptive and was relied upon. The Victorian Court of Appeal decision in *BHP v Steuler*¹, discussed below, illustrates this point.

¹ BHP Billiton Olympic Dam Corporation Pty Ltd (ACN 007 835 761) v Steuler Services GmbH & Co KG [2014] VSCA 338

Misleading or deceptive conduct and representations

Section 18 of the ACL prohibits a person from engaging in conduct that is misleading or deceptive or likely to mislead or deceive. Section 29 prohibits false or misleading representations about goods or services.

A common remedy sought by claimants relying on a breach of these sections is damages under section 236 of the ACL. That section provides that a claimant may recover the amount of any loss or damage suffered by it because of the conduct prohibited by Chapter 2 or 3 of the ACL (which includes sections 18 and 29).

These provisions have given rise to a wealth of cases since their introduction in the ACL's predecessor, the *Trade Practices Act 1974 (TPA)*, and they have had a dramatic impact on commercial disputes in Australia. One reason for this is the broad interpretation of these provisions by the courts.



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Despite this, claimants seeking compensation under these provisions often face difficulties proving that loss was suffered, and establishing that such loss was caused by the contravening conduct.

What's the damage?

The first step in seeking damages under section 236 is identifying and proving that a loss has been suffered as a consequence of the misleading or deceptive conduct. In most cases, the loss arises as a result of the claimant changing their position in reliance on the misleading or deceptive conduct.

The second (and linked) step of assessing the loss that has occurred as a result of that reliance can be a difficult process. The process involves comparing the position that the claimant is in, and the position in which the claimant would have been but for the contravening conduct.

Claimants' alternative positions usually come within one of two categories which represent the action that they would likely have taken, had they not relied on the misleading or deceptive conduct:

1. a 'no transaction' case, in which a claimant simply would not have embarked upon the project or transaction at all; or
2. an 'alternative transaction' case, in which a claimant was likely to have continued with the project or transaction, but would have done so by entering into an alternative agreement with the same party or a different party.

The comparison is easier in a 'no transaction' case as the alternative position against which the claimants loss or damage is suffered is the position they would have been in had they not gone ahead with the transaction or project at all. In an 'alternative transaction' case, the claimant will need to have evidence of what it could and would have done had the contravention not occurred. The court will then need to assess the likelihood that the claimant would have taken the alternative action or actions (if there is more than one alternative) and make a comparison based on that assessment.

It is crucial that the claimant establishes the alternative actions that were available to it. The law requires in such circumstances that *"a party that is misled suffers no prejudice or disadvantage unless it is shown that that party could have acted in some other way (or refrained from acting in some way) which would have been of greater benefit or less detriment to it than the course in fact adopted."*²

This is one of the key elements that BHP failed to establish in their case against Steuler, discussed below.

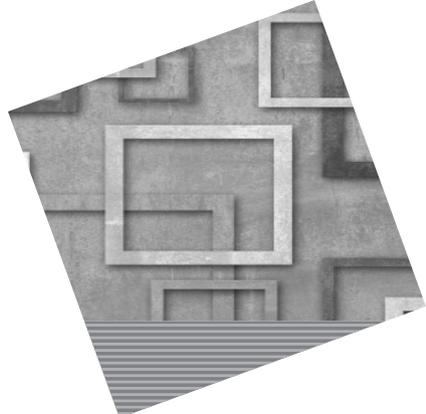
*BHP v Steuler; Protec v Steuler*³

The decision of the Victorian Court of Appeal in *BHP v Steuler* is illustrative of the difficulties claimants may face in accurately characterising and proving their loss.

Western Mining Corporation (Olympic Dam Corporation) (**WMC**) purchased HDPE lining materials for concrete tanks for the

² *Marks v GIO Australia Holdings* (1998) 196 CLR 494 [48]

³ [2014] VSCA 338



Olympic Dam project from an Australian company (Protec), that Protec had purchased from the Defendant (Steuler). Steuler and Protec had both made representations to WMC as to the suitability of the lining. Shortly after installation, the lining material began to fail. WMC was subsequently taken over by BHP. For simplicity, in the balance of the article, reference is made only to BHP, not WMC. BHP initiated proceedings against Protec and Steuler.

Protec settled its claim with BHP for \$15 million and then initiated proceedings of its own against Steuler to recover the settlement amount. Those aspects of the proceeding are beyond the scope of this article.

At first instance, the trial of the issues between BHP and Steuler was split into two separate hearings: 'representations and reliance'; and 'causation, loss and quantum'. On representations and reliance, the trial judge found that the representations made by Steuler were misleading or deceptive in breach of section 52 of the TPA (the predecessor to section 18 of the ACL) and had been relied on by Protec and BHP in choosing to use the HDPE lining. On causation, loss and quantum, His Honour rejected BHP's claim on the basis that it had not proved it had suffered any loss as it did not establish what it would have done had it not been misled. This was one of the points upon which BHP appealed to the Victorian Court of Appeal.

On appeal, Tate, Santamaria and Kyrou JJA disagreed with the trial judge's findings on representations and reliance. The Court of Appeal held that BHP had failed to discharge the onus of proof which lay upon it to establish that the supplied HDPE lining would have failed prematurely. This finding was heavily based on the technical evidence before the court and is not directly relevant to the scope of this article. The Court of Appeal went on to assess causation and loss (in case it was wrong on liability).

The Court of Appeal confirmed that BHP's case was properly characterised as an 'alternative transaction' case –had it not been for the contravening conduct, BHP would have continued with the lining of the tanks, but would have done so by entering into an alternative agreement with the same party or an agreement with a different party.

In its assessment of loss suffered by BHP as a consequence of its reliance on the misleading or deceptive conduct of Steuler, the Court of Appeal reviewed the case law and upheld the trial judge's decision, but disagreed with the trial judge's reasoning. Specifically, the Court of Appeal held that the judge should not have concluded that BHP could not prove that it had suffered any loss simply because BHP could not prove which of two alternative transactions it might have entered into, but for the contravening conduct.

The Court of Appeal held that, when presented with a number of alternative transactions, it was for the judge to estimate the likelihood that each hypothetical past situation would have occurred. If the trial judge had done so, the Court of Appeal considered that he would have been in a position to consider what loss (if any) BHP would have suffered had it engaged in that alternative transaction, by comparison with the transaction in which it did engage.

The Court of Appeal then assessed the likelihood of each of the alternatives and held that it was most unlikely that BHP would have used the alternative FRP lining. That left the only realistic alternative transaction being for BHP to enter into a transaction with a different party to use a similar HDPE lining.

BHP did not argue that the HDPE lining supplied by the other party would have been properly functioning or any less defective than the HDPE lining supplied by Steuler. Instead BHP argued

that it would have been better off because it would have had a valuable cause of action against the alternative supplier for breach of warranties, which it had foregone by choosing Steuler.

The Court of Appeal rejected BHP's argument, stating that it was more than speculative to be invited to assess whether BHP would have had a cause of action against the other supplier, let alone the likely success or quantum of that action. On that basis, the Court of Appeal upheld the trial judge's conclusion that BHP was unable to prove its loss. However, the Court of Appeal came to this conclusion, not on the basis of the trial judge's reasoning (that BHP could not precisely prove what it would have done but for Steuler's misleading or deceptive conduct), but because BHP could not prove that it would have been worse off from having relied on Steuler's representations.

This appeal case clearly demonstrates the importance of properly characterising and proving the loss suffered as a consequence of the misleading or deceptive conduct. BHP's failure to prove that it would have been better off had it not relied on the misleading or deceptive representations of Steuler meant that it was unable to establish any loss caused by the contravening conduct. As a consequence, it was left without any award of damages, despite proving at trial that Steuler's representations were misleading or deceptive and that it had relied on those representations when choosing to purchase the lining supplied by Steuler.



Implications

The ACL provisions which prohibit misleading or deceptive conduct provide important protection for parties entering into transactions in reliance on representations made by suppliers of products and services. These provisions have had a significant impact on commercial disputes in Australia by providing a useful alternative to actions brought on the basis of contract, tort or equity and by providing relief in circumstances where it would not otherwise exist.

In any action of this nature, it is crucial that a claimant carefully considers the loss that it claims to have suffered as a consequence of the misleading or deceptive conduct or representation and the evidence that will be required to prove the loss. This will depend on the circumstances of the case, in particular whether the claimant simply would not have proceeded with the project or transaction but for the contravening conduct (no transaction), or whether it would have continued with the project or transaction but by entering into an alternative transaction with the same or a different party (alternative transaction).

In either case, the claimant will need to establish that the loss was caused by the misleading or deceptive conduct or representation and will need to put forth evidence which will allow the court to make a comparison between the position that the claimant would have been in had it not relied on the contravening conduct, and the position that it now finds itself in.

Without such evidence the claimant may be left with a Pyrrhic victory in that it may be successful in proving that the respondent engaged in misleading or deceptive conduct in contravention of the ACL, but will not enjoy an award of damages in compensation, for failure to prove a loss arising as a consequence of that conduct.

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