

Topic 6

Non-Disclosure/Silence

- In what circumstances is there a duty to disclose information relevant to the transaction that would influence the position of the other party?
 - o Generally, there is no duty to voluntarily disclose information
 - See, eg, *Demagogue Pty Ltd v Ramensky*
 - *Costa Vraca Pty Ltd v Berrigan Weed and Pest Control Pty Ltd*
- Starting point: no obligation to disclose even though might know that the other party would consider the information important to the decision making
 - o 'Mere silence' does not contravene s 18
 - o See, eg, *Software Integrators v Roadrunner Couriers*

Exceptional Circumstances

The provision of incomplete information

The failure to disclose a change of circumstances

Where P has a 'reasonable expectation' of disclosure

Ultimate test: Was the conduct m or d, judged in the light of all the circumstances, including acts, omissions, statements or silence?

- *Demagogue Pty Ltd v Ramensky* per Gumow J
- *Johnson Tiles Pty Ltd v Esso Australia*

Incomplete Information

- A failure to mention a qualification, the absence of which makes an absolute statement m or d.
 - o *Henjo Investments v Collins Marrickville*
 - o *General Newspapers Pty Ltd v Telstra Corporation*
- The further information must genuinely clarify the situation for the reasonable person
 - o *Fraser v NRMA Holdings*

Changed Circumstances

Liability where D fails to disclose changed circumstances

- *Jones v Dumbrell*
- *HCF v Switzerland Australia Health Fund*

Reasonable Expectation of Disclosure

Did P have a reasonable expectation that disclosure will be made?

Ultimate question is whether, in all the circumstances and looking at D's conduct as a whole, including acts, omissions, statements or silence, the conduct is m or d.

- *Demagogue Pty Ltd v Ramensky* (SEMINAL CASE)
 - o See also *Seirlis v Bengtson* [2013] QSC 240
- *Costa Vraca Pty Ltd v Berrigan Weed and Pest Control Pty Ltd*
- *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd*
- *Whitaker v Paxad Pty Ltd*

Vs

- *Rhone-Poulenc Agrochimie v UIM Chemical Services*
- *Johnson Tiles Pty Ltd v Esso Australia*

Commercial Transactions

'Where parties are dealing at arms length in a commercial situation in which they have conflicting interests, the fact that one party is aware of information that would cause the other to take a different negotiating stance does not of itself impose an obligation of disclosure.'

- *Lam v Ausintel Investments Australia Pty Ltd* (1990) 97 FLR 458 at 475
- See also *Miller v BMW Australia*
 - o Common assumptions and practices established between parties or in the particular trade, profession or industry will be relevant 'circumstances'
- Cf cases involving an inexperienced commercial party:
 - o *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd*

Authority that P must show D deliberately withheld the information

- Section 2(2)(c) of the ACL [formerly s 4(2)(c) of the TPA]: engaging in conduct includes refraining to do an act (otherwise than inadvertently).
 - o *Rhone-Poulenc Agrochimie SA v UIM Chemical Services*
 - o *Costa Vraca Pty Ltd v Berrigan Weed and Pest Control Pty Ltd+*
- But is it always necessary to prove a deliberate withholding?
 - o Authority is that deliberate withholding is not necessary where silence is merely one element of the m or d conduct
 - *Johnson Tiles Pty Ltd v Esso Australia Ltd*
 - *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd*

Important Considerations Are:

- (a) Was the non-disclosure deliberate?
- (b) Did the topic arise during contract negotiations?
- (c) Are the parties on an equal footing negotiating a commercial transaction?

Puffery

Superlatives or hyperbolic statements – evident exaggerations/sales talk unlikely to be taken seriously

- *Lowe v Mack Trucks Australia Pty Ltd*
- *Lymquartz Pty Ltd v 2 Elizabeth Bay Road Pty Ltd*

But always a question of fact in each case whether the reasonable person would be misled

- *ACCC v Kaye* [2004] FCA 1363

Literal Truth

Statement that is literally true will contravene s 18 where it conveys a secondary false meaning

- *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd*
- Use of D's actual name can be misleading or deceptive where suggests a false representation with another person or business
 - o *Bridge Stockbrokers Ltd and Moore v Bridges Stockbrokers Ltd*

Relaying Information

General rule: agents liable even though merely passing on information from another

BUT D does not breach s 18 merely by passing on information supplied by another where:

- In the circumstances it is apparent that D is not the source of the information, and
- D expressly or impliedly disclaims any belief in its truth or falsity
 - o *Butcher v Lachlan Elder Realty Pty Ltd* (express disclaimer)
 - Cf *John G Glass Real Estate v Karawi Constructions*
 - o *Saints Gallery v Plummer* (implied disclaimer)
 - In essence, ultimately what it comes down to is if there is no misleading conduct on the particular matter.
- See also, in advertising context, *Google Inc v ACCC* [2013] HCA 1
 - o Search engine providers not liable for sponsored ads that are misleading

Future Statements

Statements about a future matter can be m or d, example:

- A forecast or predictions
 - o Eg 'the value of houses in this area will increase'
 - o 'The share market is going to rise'
- A statement as to future intention or promise of future performance
 - o Eg 'the developer will provide a shop in the suburb'
 - o 'You will be given a permanent job within the company'
- A rep does not lose its character as a rep about a future matter merely because it is expressed as a present belief or opinion based on existing facts
 - o See the discussion in *Sykes v Reserve Bank of Australia*

Global Sportsman Pty Ltd v Mirror Newspapers; James v ANZ Banking Group:

1. Merely because reps about future events or conduct does not come to pass does not amount to a contravention of s 18
2. Section 18 is breached where there is a false rep of fact
3. A statement as to the future ordinarily conveys two factual reps:
 - i. A rep that D honestly holds that state of mind, and
 - ii. A rep that D has a reasonable basis for holding that state of mind
4. D will contravene s 18 where:
 - i. D does not honestly believe in the prediction or forecast, or does not intend to act in the way represented, or
 - ii. D has no reasonable grounds for believing in the prediction or forecast, or for believing it will be possible to act in the way represented
 - See, example, *Sykes v Reserve Bank of Australia*
 - *ACCC v Henry Kaye*
 - *Patrick v Steel Mains Pty Ltd*
 - *Bennet v Elysium Noosa Pty Ltd (in liq)* [2012] FCA 2011

Future matters – s 4 of the ACL [formerly s 51A of the TPA]

- Section 4 contains an evidentiary provision:
 - o S 4(1): where a corporation makes a representation with respect to any future matter, and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading
 - Reflects existing common law principles
 - o S 4(2): A corporation that makes a representation about a future matter will be deemed, *in the absence of evidence adduced to the contrary*, not to have had reasonable grounds for making the representation.
 - Onus is on D to adduce evidence to discharge the statutory presumption that no reasonable grounds
 - o S 4(3) – subs-s(2) does not:
 - (a) Have the effect that, merely because such evidence to the contrary is adduced, the person that made the representation is taken to have had reasonable grounds for making the representation, or