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WHITE PAPER

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Misleading or Deceptive Conduct Claims on Projects in Australia

A claim for misleading or deceptive conduct under s 18 of the Australian Consumer Law is one of the most commonly used causes of action in commercial litigation in Australia, including in disputes on major projects in mining, construction and infrastructure. Such claims can relate to conversations or meetings, courses of conduct between owners, operators, contractors and others, and the effect of any number of types and combinations of documents used on a project.

A well-pleaded and argued case of misleading or deceptive conduct can be difficult and costly to defend, and the relief available to a successful party can be substantial. It can also present substantial challenges, and parties in mining, construction and infrastructure disputes often run into difficulties trying to adduce sufficient evidence to prove (or disprove): (i) the existence and meaning of an alleged misleading representation or conduct; or (ii) that the claimant suffered loss as a result of the conduct.

This *White Paper* looks at the prevalence of misleading or deceptive conduct claims in project-related disputes and some of the challenges which commonly arise, and offers some key takeaways for parties navigating such claims.

INTRODUCTION

Misleading or deceptive conduct ("MDC") claims are some of the most frequently litigated actions in Australian courts. While at first glance the statutory prohibition created by s 18 of the *Australian Consumer Law* ("ACL")[1] appears reasonably straightforward, this provision has arguably received more judicial attention than any other statutory cause of action, at least in the context of commercial litigation. In the first four months of 2024 alone, there were more than 50 published decisions in which a claim for misleading conduct was considered (and no doubt many more such claims were filed).

An overrepresented, but often undiscussed, area in which MDC claims regularly feature is in projects-related disputes, whether that be in construction, infrastructure, energy or mining. While companies may question why legislation ostensibly directed at protecting consumer rights is so frequently used in the context of large projects disputes (which can involve claims valued in the tens or hundreds of millions of dollars and involve sophisticated, well-advised parties), the statutory cause of action has emerged as a powerful tool for side-stepping the parties' contractual risk allocation, and can provide relief where traditional common law or equitable causes of action would likely be unsuccessful.

This is not to say that MDC claims are a panacea for parties trying to recover compensation for a transaction or project gone wrong. In all but the most straightforward of cases, succeeding in a claim for misleading or deceptive conduct can be a protracted and complicated process. Proving a claim that a party has suffered loss or damage because of some misleading conduct or representation is a factually intensive exercise.

This *White Paper* considers how and why MDC claims have come to hold such a prominent role in the construction industry, as well as some of the key challenges often faced by parties in commencing and defending claims.

A REFRESHER ON THE ELEMENTS OF AN MDC CLAIM

Section 18(1) of the ACL provides that:

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

A variety of remedies are available in response to a contravention of this statutory "norm of conduct", including declarations, injunctions, adverse publicity orders and even orders amending or varying the terms of a contract. The most common form of relief claimed in construction disputes is an award of damages. Section 236 of the ACL provides that a person may recover the amount of any loss or damage suffered because of the misleading conduct of another.

Before exploring in detail the application of MDC in the construction industry, it is useful to summarise the key elements of this statutory cause of action. A claim under s 18 will arise if:

- a person;
- in trade or commerce;
- has engaged in conduct;
- which is misleading or deceptive or likely to mislead or deceive.

In order to recover damages, it is also necessary to establish under s 236 that:

- because of the misleading or deceptive conduct of another person;
- the person has suffered loss or damage.

Two central aspects of any MDC claim are the impugned conduct and the counterfactual as to what would have taken place if that conduct had not been misleading or deceptive.

Most MDC claims involve some form of representation, which is said by the claimant to have been misleading. A representation can be express or implied (i.e., the underlying message conveyed by a statement) and can be made in any form (spoken, in writing or by gesture). This includes both statements of fact and opinion and can relate to present or future matters. Section 18 extends beyond positive representations and includes any "conduct", broadly defined as "a reference to

doing or refusing to do any act".[2] On this basis, misleading conduct can occur even where there is no positive representation but instead the non-disclosure of something material.

Even where there has been misleading or deceptive conduct, establishing a counterfactual (what would have taken place in the absence of that impugned conduct) is usually needed to establish loss or damage. This aspect of MDC claims frequently raises significant evidentiary challenges given its hypothetical nature.

THE ROLE OF MDC CLAIMS IN CONSTRUCTION DISPUTES

Very often, MDC claims in construction disputes accompany a raft of other common law and equitable causes of action. It is fair to say that in some cases, an MDC claim is an afterthought or "catch all"—an alternative to a primary claim for contractual entitlements, included in an effort to bolster a party's position in acrimonious proceedings. This was the case in the 2018 decision of *Europlex Pty Ltd v Unique Living Australia Pty Ltd*.[3] In dismissing a cross-claim for misleading conduct, the Court was particularly critical of the cross-claimants for having "tacked on" the s 18 cause of action without having taken the time to sufficiently develop or prove its case.

It is also common for litigants to employ an MDC claim along with a claim (in tort) for deceit, in order to guard against a finding that the representation or statement was one of opinion (which will be fatal to many MDC claims if there was a reasonable basis for the opinion). However, claimants should take care to avoid a situation where many alternative allegations arising from the one factual matrix are piled "one on top of the other", as this approach has drawn strong criticism from Australian courts.[4]

Despite its perceived role as a "back-up" claim, it is not uncommon for the relative importance of a misleading conduct argument (along with the time and effort involved in making or defending it) to expand rapidly as proceedings progress. If pleaded and argued wisely, a claim under the ACL can be a highly effective weapon for a number of reasons. First, the types of conduct that may be covered by s 18 are extremely broad. Second, free from the strictures of common law or equitable actions, MDC claims can be extremely effective in side-stepping otherwise impenetrable contractual allocations of risk. Third, and especially where the claimant asserts, it would not have entered into the transaction or project had it not been for the MDC, the relief available can far outweigh what might be recoverable for a comparable common law cause of action. Fourth, MDC claims often involve serious allegations about a contracting party's lack of skill, expertise or poor professional conduct, which can have significant reputational ramifications even if those allegations are never ultimately made out. For these reasons, MDC claims can become significant factors in commercial negotiations. Even claims that are assessed as having very low probability of ultimate success can present considerable risks to a party on the receiving end of a claim.

These factors are particularly relevant in the construction industry. Often the parties have entered into a sophisticated contractual bargain that effectively limits or reduces the possibility for claims to be made under the contract (either through extensive warranties and indemnities or strict notice requirements that act as a precondition to entitlement). In this environment, it is easy to see why MDC claims have come to feature so prominently.

HOW MISLEADING OR DECEPTIVE CONDUCT CLAIMS ARISE

The open language of s 18 means an MDC claim can be founded upon conceivably any type or combination of conduct. That said, in practice in the construction industry, the impugned conduct or representation often falls into one of the following categories.

- **Pre-Contractual Representations.** It is normal for parties to discuss in detail the scope and nature of a project in advance of contract execution. Although entire agreement clauses can effectively exclude reliance on pre-contractual statements for some claims, actions under s 18 tend to be a notable exception.

  This is not to say that everything said before a contract is executed will amount to MDC. For example, in *AGC Industries Pty Ltd v Karara Mining Ltd*,[5] the WA Supreme Court emphasised

the importance of compelling evidence in establishing MDC, particularly regarding verbal pre-contractual negotiations. In this case, the contractor alleged that the owner had made several representations in two pre-contractual meetings concerning profit rates and project completion dates. The contractor claimed that, but for these representations, it would not have entered into the contract and would have chosen an alternative arrangement. Considering the whole course of conduct between the parties, the entire agreement clause and express contract terms that directly contradicted the alleged representations, the Court concluded that: (i) the contractor had not proven that all of the alleged representations had been made; and (ii) those representations which had been made were neither false nor misleading.

- **Contractual Representations.** Representations and warranties within the contract can also contravene the ACL. These kinds of claims are arguably easier to assert and prove, as the impugned conduct does not need to be separately proved (although difficulties may arise where a party alleges that the express representation had some implied meaning).

  For example, *MWH Australia Pty Ltd v Wynton Stone Australia Pty Ltd*[6] involved a provision in a deed of novation in which the respondent acknowledged that the design services it performed "prior to the date of the deed have been in accordance with its terms". After defects arose as a result of the respondent's negligent design, the claimant successfully argued that this acknowledgment had been misleading.

- **Site Conditions.** Representations as to the quality of the site (e.g., weather or latent conditions) also commonly give rise to MDC claims.

  A recent example is *Kourosh Jafari (on his own and behalf and as the trustee of the Essence Unit Trust) v 23 Developments Pty Ltd*.[7] The parties, who were in a joint venture to develop an apartment block, made a series of claims and cross-claims against each other. One of the cross-claims was that the plaintiff had engaged in MDC by failing to disclose that the relevant site was heavily contaminated (having previously been a dry cleaners), and by incorrectly stating that there would be "no problem with contamination". The Court found that although the cross-defendant had in fact disclosed the existence of contamination, the cross-claimant reasonably relied on the cross-defendant's representation that remedying the contamination would not be a problem.

- **Quality / Technical Specifications of Equipment.** Similarly, representations as to equipment performance or specifications (including that they are defect-free) can give rise to MDC.

  An example is *F.Y.D Investments Pty Ltd v Promptair Pty Ltd (No 2)*,[8] which involved a claim that an air conditioning installer had contravened the ACL by submitting progress claims that failed to disclose the equipment it had installed was not sourced from the approved manufacturer. Although there were no express conversations or statements about the equipment, the Federal Court found that by submitting progress claims, the defendant had improperly represented that it had duly complied with the contract (which required the contractor to get permission before installing non-approved equipment or submitting progress claims).

- **Costs and Schedule Estimates.** Given the near inevitability of delay and cost overruns in the construction industry, representations about expected costs or scheduling are commonly alleged to have been misleading or deceptive.

  An example is *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd*,[9] in which the Federal Court held that estimated completion dates in a tender document did not constitute representations that would reasonably be perceived as misleading in the circumstances. The Court emphasised that, absent other representations that might take it further, a construction program in a tender is "little more than a statement of intention or a statement that the contractor will use his best endeavours to comply with it". Importantly, this decision draws a distinction between representations capable of founding an MDC claim from mere puffery or salesmanship.

  Similarly, in *Brighton Australia Pty Ltd v Multiplex Constructions Pty Ltd*,[10] the subcontractor alleged that the head contractor misrepresented construction schedules as achievable during pre-contractual negotiations. The Court held that while the schedules were optimistic, they did not amount to an actionable MDC. This claim largely failed because the subcontractor's reliance on the schedules was deemed unreasonable, given the inherent unreliability of construction schedules generally.

A final example is *Fendley v Owen*,[11] in which the plaintiffs successfully made out an MDC claim against the sole owner and director of a boatbuilding company who had during pre-contract negotiations represented that the company was capable of delivering the construction of a catamaran by December 2020. The boatbuilding company subsequently failed to deliver the project on time, and so the company's sole owner and director was found to have engaged in misleading or deceptive conduct, having had no reasonable grounds for making the representation. That said, the claimants in this case were in an unusually strong evidentiary position because: (i) the defendant (the sole owner and director) did not appear at the trial or provide any evidence; and (ii) at the time of making the misleading representations, the defendant's company had been insolvent for three years.

- **Variations, Change Orders and Site Instructions.** Closely related to the above example, another common claim (normally made by contractors) is that misleading representations were made to them that a variation or change order would be issued.

  For example, in *Colin R Price & Associates Pty Ltd v Four Oaks Pty Ltd*,[12] the Full Federal Court upheld a first instance decision that found the principal had not made an alleged representation that it would pay all additional material and labour costs plus a 15% uplift. The only conduct raised in support of this implied representation was an oral assurance by the principal that it would "sort it out at the end". The Court held this was inadequate to establish that the implied representation actually occurred or had the meaning alleged.

- **Interim Settlement Agreements.** Representations that arise out of interim settlements during projects—such as, for example, a contractor promising to improve performance in return for additional payment—can give rise to MDC claims.

  For example, in *Donau Pty Ltd v ASC AWD Shipbuilder Pty Ltd*,[13] the NSW Supreme Court considered an MDC claim arising from the contractor's acceptance of a variation of the original contract, which altered the payment terms based on representations made by the subcontractor. After examining the pre-contractual representations against the evidence, the Court determined that the representations were factually accurate, so the subcontractor had not engaged in MDC.

HOW MISLEADING OR DECEPTIVE CONDUCT CLAIMS ARE ARGUED

Claims for misleading or deceptive conduct are commonly described as "easy to plead, hard to prove". The broad scope of the statutory cause of action encompasses all manner of conduct. It is relatively straightforward to frame a course of events as involving misleading or deceptive conduct. Claims under the ACL also have an obvious appeal given the nature of pleadings-based litigation (where the collection and submission of evidence follows the assertion of a cause of action).

However, it is important to note that a claimant must prove the pleaded conduct and not a case that expands from the evidence. It is therefore imperative that the impugned conduct is articulated in the pleadings with precision. When it comes to proving a claim for misleading conduct, challenges can quickly arise because of the high evidentiary onus associated with ss 18 and 236. Below are some insights into the evidentiary issues that can (and often do) arise in the context of two components of MDC: (i) establishing the impugned conduct as misleading; and (ii) proving causation and reliance.

PROVING THE MISLEADING OR DECEPTIVE CONDUCT

In a cause of action that heavily depends on the precise identification of who said what (as well as where, when and to whom), satisfying the evidentiary burden is often made more difficult by the fact that claims, particularly claims arising from major infrastructure projects, can arise months or years after the relevant conduct took place. An example of these challenges is in *Lucas Earthmovers Pty Limited v Anglogold Ashanti Australia Limited* ("*Lucas*").[14] *Lucas* concerned the construction of an access road to a remote mine site. The parties had contemplated that some of the construction materials would be sourced from areas alongside the proposed route. Unfortunately, much of the roadside material did not meet specifications, and the claimant instead had to source and haul greater amounts than expected.

In a claim for MDC, the claimant argued it had relied on verbal representations made on site by the respondent about the quality of the roadside materials. The claim failed because the Court was not satisfied the alleged representations conveyed the alleged misleading meaning. The Court emphasised that it must be necessarily sceptical of witnesses' accounts of verbal conversations, especially where a significant period of time has elapsed (in this case, the alleged statements were made seven years ago, and their potential significance "became apparent only in retrospect").

While the Court only requires proof that the substance or effect of what was said was more probable than not to have conveyed the alleged representations, this must be objectively considered in light of all the surrounding evidence. Any relevant documentary evidence such as emails, minutes of meetings or site reports will often be preferred over the fallibility of human memory. In *Lucas*, no records were kept of the alleged representations apart from a subsequent minutes of meeting that indirectly contradicted the claimant's case. The Court gave this evidence considerable credence given that it provided a contemporaneous recount of the impugned course of events.

PROVING CAUSATION: RELIANCE AND THE COUNTERFACTUAL

A claimant generally must establish that it materially relied on the misleading conduct to its detriment.

An important factor to consider here is the source of the alleged reliance. Parties often advance MDC claims on the basis that a representation was made, and the claimant's subsequent conduct demonstrates that there must have been reliance. However, it is not sufficient to simply assert that there must have been reliance, or that a claimant entity as a whole relied on the alleged representation. For an MDC claim to succeed, the claimant must be able to demonstrate reliance on the specific representation by agents with the appropriate decision-making authority and the ability to bind the claimant.

Where the parties are sophisticated entities that receive independent legal or technical advice, it can be especially difficult to prove the requisite degree of reliance. *Flash Lighting Company Ltd v Australia Kunqian International Energy Co Pty Ltd* is a recent example.[15] In this case, the respondent made a cross-claim under s 18 arguing that it had relied on an erroneous geological report provided by the plaintiff when deciding to purchase shares in a Queensland mining company. The Court dismissed this argument on the basis that the cross-claimant had engaged its own geologist who identified many of the flaws in the impugned report. Robson J concluded that the surrounding circumstances and evidence tended to suggest the cross-claimant had decided to invest for reasons unrelated to the geological report. There was therefore no causative link between the misleading conduct and alleged loss suffered.[16]

A related area of difficulty frequently faced by parties prosecuting claims for MDC relates to proving the counterfactual (i.e., what the claimant would have done had it known the representation(s) was misleading). This counterfactual may be a "no transaction case" where the claimant alleges that it would not have entered into the contract for the project had it known the representation(s) were misleading, or an "alternative transaction case" where the claimant alleges that it would have entered into a different, more advantageous contract. Both options have consequences with respect to the evidence the claimant must adduce and the relief available. Especially in "alternative transaction" cases, it is often not enough to merely plead that, absent the misleading conduct, the claimant would have proceeded on different terms. The claimant must precisely identify what this alternative transaction would have looked like and adduce evidence of what it could and would have done. This may require evidence regarding the availability of alternative contractual terms or alternative counterparties who would have been capable of delivering the project/transaction. The relevant counterfactual might also involve questions as to how any project execution steps would have proceeded differently and had different outcomes for the parties. Given the number of factors and variables that can be involved in project execution, identifying and establishing the relevant counterfactual for such claims can quickly become very complex.

An example of the difficulties associated with proving the counterfactual is found in *AGC Industries Pty Ltd v Karara Mining Ltd* (a case discussed above in the context of pre-contractual representations). The Court considered AGC's

submissions on causation, which asserted that the company had lost the opportunity to enter into an alternative contract with the respondent.

Allanson J held that AGC failed to meet the evidentiary burden on this issue. Although AGC was only required to prove its counterfactual on the balance of probabilities (that it was more likely to have occurred than not), the Court noted that none of the alternative contracts raised by AGC were shown to have been advanced in the negotiations or to have received any degree of contemplation from Karara. Critically, AGC also did not show that it could have achieved a greater profit on any of the alternative contracts it advanced. There were other trade-offs in the deal that was struck that might not have been possible in the alternatives.

Therefore, while proof of causation inevitably involves construction of a hypothetical counterfactual, this will be made easier where the contemporaneous evidence suggests that proposed alternatives were actually considered by the parties (e.g., where a principal claims it would have engaged a different contractor, it may be able to lead evidence of alternative tender bids it received) or if the surrounding circumstances objectively suggest that the proposed alternative would have likely been adopted (e.g., if the alternative transaction was on market terms or common in the industry).

THE EXPANSION OF MISLEADING OR DECEPTIVE CONDUCT TO SECURITY OF PAYMENT CLAIMS

An area broadening the potential relevance of MDC claims in the construction industry even further is the use of MDC as a defence against security of payment claims.

In 2006, the NSW Court of Appeal determined that parties could use MDC as a defence to a payment claim under NSW's *Security of Payment Act*[17] ("SOPA"), despite the SOPA seeking to exclude cross-claims and defences in the interest of prompt decision-making.

In *Bitannia Pty Ltd v Parkline Constructions Pty Ltd*,[18] Parkline (the builder) had routinely submitted payment claims to S & S Quirk (the architect) who issued payment schedules as an agent of the proprietor (Bitannia). In February 2005, Parkline instead submitted its payment claim to the general manager of a company associated with Bitannia. That payment claim indicated that it had been copied to S & S Quirk when, in fact, it had not. Consequently, neither S & S Quirk or Bitannia issued a payment schedule.

As a result of non-payment, Parkline commenced proceedings to recover the unpaid debts. Bitannia resisted the application on the basis that Parkline's service of the February 2005 payment claim was misleading or deceptive.

Despite the relevant section of the SOPA stating that the respondent (Bitannia) would not be able to bring any cross-claim or raise any defence in relation to matters arising under the construction contract, the Court concluded that the SOPA does not exclude a defence of MDC. Justice Basten determined that MDC is not a matter "arising under the construction contract" and therefore, the SOPA could not exclude it. Justice Hodgson, agreeing with Basten JA, stated that, if a person were permitted to obtain a judgment where an essential element has been obtained by MDC, it would directly contradict the legislative purpose of the Trade Practices Act.

Courts in SA and QLD have similarly confirmed the application of MDC as a defence to summary judgment in security of payment claims where the service of those claims has been tainted by MDC.[19]

More recently, the NSW Supreme Court has confirmed that parties can also use a defence of MDC where the payment claim itself might be based on misleading or deceptive representations.

In *Marques Group Pty Ltd v Parkview Constructions Pty Ltd*,[20] Parkview (the contractor) had engaged Marques (the subcontractor) to provide formwork on projects in Woolooware and Parramatta. Marques served two payment claims amounting to $2.3 million, accompanied by statutory declarations suggesting Marques had paid all employees and subcontractors for the work done in that period, and that Marques was paying its debts as and when they fell due. Parkview issued payment schedules certifying payment of $1.8 million collectively, but failed to pay that amount when due.

Marques subsequently commenced proceedings under the SOPA seeking a summary judgment that Parkview had failed to pay the amounts certified in its payment schedule. However, Parkview contended that Marques had engaged in misleading or deceptive conduct by the representations within its statutory declarations, and said that if it had been aware of that misleading conduct, it would have instead certified $0 payable.

Although Rees J noted that Parkview's MDC defence was "unattractive" on the basis that it ran contrary to the "pay now, argue later" premise at the heart of the SOPA, her Honour found that the MDC defence did not meet the threshold of being so clearly untenable that it could not possibly succeed and accordingly dismissed Marques' application for summary judgment.

There are some limits to an MDC defence to security of payment claims. Parties are still required to demonstrate that the elements of MDC are made out. In particular, one element which has received attention is whether the impugned conduct is "in trade or commerce".[21]

In *Bhatt v YTO Construction Pty Ltd*,[22] YTO, as principal contractor, entered into a subcontract with Innovative for it to carry out certain civil works. Mr Bhatt was the sole director of Innovative. Innovative issued a payment claim to YTO under the SOPA which YTO disputed in its payment schedule. Innovative lodged an adjudication application in which the adjudicator determined that YTO was to pay Innovative a total of $1,535,377.51. YTO subsequently commenced proceedings seeking to set aside the adjudication. It claimed that certain statements made by Innovative and Mr Bhatt in the adjudication were misleading or deceptive.

Justice Mitchelmore determined that the statements made to the adjudicator were not "in trade or commerce". Her Honour said that while carrying out construction work and the receipt of progress payments could be in trade or commerce, the relationship between the adjudicator and the parties is not a relationship which involves trade or commerce. As a result, YTO's claim failed.

While this area is certainly still developing, these decisions suggest that MDC claims have the potential to erode key elements of the SOPA regime across the country, by allowing respondents that have failed to serve a payment schedule, or failed to pay an amount certified in a payment schedule, to defeat a summary judgment claim by reference to misleading or deceptive conduct on the part of the claimant.

CONCLUSION AND KEY TAKEAWAYS

The discussion and cases above demonstrate a number of issues and several traps that can cause parties in MDC claims to stumble. Chief among these is the high evidentiary onus associated with claims under s 18. While the above examples tend to reveal the difficulties faced by claimants in adducing sufficient evidence to prove their case, precisely the same can be said for respondents. Where a respondent relies on verbal testimony to refute allegations that a representation took place or had the meaning alleged, and a claimant can point to contradictory records or objectively ascertainable facts, the Court is more likely to prefer the latter.

Of course, saying that parties should favour the use of documentary evidence is easy with the benefit of hindsight—very often the impugned conduct or representation involves a seemingly insignificant conversation or comment. Only later, sometimes months or years after the fact, does the full import of the conduct become apparent, which is why parties often find themselves making or defending large claims based on witness recollection alone.

During the performance of a project, parties are also understandably usually focused on project execution and efforts to act more collaboratively to get things done, rather than adopting an adversarial and litigation-focused mindset that might direct them to the kind of steps that will prepare them for a dispute down the track. In the midst of tight deadlines, complex technical and commercial challenges, and an understandable focus on getting the job done, there can be a real danger that important assumptions are left undiscussed or that solutions to problems achieved "on the fly" are not recorded in writing.

Below are some key suggestions and takeaways that may help minimise the risks of MDC claims arising (or, if they do, ensuring that sufficient evidence is available to persuasively argue the case).

- **Identifying Representation "Hot Spots".** Parties should be aware of the kinds of representations that often give rise to misleading or deceptive conduct claims, as described above. The risks of litigation can be mitigated if these representations are committed to writing, included within the contract wherever possible and formally signed off by representatives of both parties having authority to bind each party, to ensure there is no misunderstanding or misapprehension.

- **Assumptions About the Contract / Management of the Negotiation Process.** A key risk mitigation tool is ensuring that all key pre-contractual representations are resolved in the tender process and / or incorporated into the suite of contractual documents.

  A bespoke and carefully drafted clause that acknowledges the types of information and representations that have or have not been relied on by the parties can be effective in avoiding MDC claims. For example, in the *Lucas* decision, the evidence showed that the claimant's general practice when preparing a tender was to record in writing all material assurances, representations or statements on which the tender was based. The claimant's failure to do so in respect of the on-site conversations regarding the roadside materials was a material reason why the Court concluded the representations did not occur as alleged.

- **Contemporaneous Notes.** While conduct and representations that give rise to ACL claims can and often do occur post-execution of the contract, the key to ensuring that parties do not differ is by keeping accurate records of key conversations, meetings and site instructions. If a claim for MDC does arise, contemporaneous evidence such as emails, file notes and site reports will play a critical role in proving or disproving a claim. In an environment where the parties are diligent in documenting and recording their correspondence, meetings and instructions, the fact that an alleged representation is not recorded in writing can further support an argument that it either did not occur or should not have reasonably been relied on.

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ENDNOTES

1 Previously s 52 of the *Trade Practices Act 1974* (Cth).
2 ACL, s 2(2)(a).
3 [2018] NSWSC 1291.
4 See *Forrest v ASIC* (2012) 247 CLR 486 at [26]-[27]; *Kimberley Developments Pty Ltd v Bale* [2023] NSWCA 25 at [39].
5 [2019] WASC 140.
6 [2010] VSCA 245.
7 [2018] VSC 404.
8 [2019] FCA 419.
9 [2003] FCA 174.
10 [2018] VSC 246.
11 [2022] QDC 249.
12 (2017) 349 ALR 100.
13 [2018] NSWSC 1273.
14 [2019] FCA 1049.
15 [2018] VSC 711.
16 This decision has since has been reversed on other grounds, but the MDC findings were upheld in the appeal judgment. See [2020] VSCA 239 at [265].
17 *Building and Construction Industry Security of Payment Act 1999* (NSW).
18 (2006) 67 NSWLR 9.
19 *Aalborg CSP A/S v Ottoway Engineering Pty Ltd* (2017) 129 SASR 283; *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2011] 2 Qd R 114.
20 [2023] NSWSC 625.
21 See also *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* (2005) 226 ALR 362.
22 [2023] NSWCA 318.