

# THE ‘DOCTRINE OF ERRONEOUS ASSUMPTION’ — CLEARING UP THE CONFUSION

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## ABSTRACT

A number of cases dealing with the prohibition on misleading or deceptive conduct have referred to the so-called ‘doctrine of erroneous assumption’. In early cases, the focus was on determining if the consumer had preconceived ideas, already in their mind, that caused them to be misled, rather than being misled by the conduct of the defendant. Later cases draw a distinction between ‘ordinary’ or ‘reasonable’ assumptions and those that are ‘extreme or fanciful’. Confusion has arisen because the phrase ‘erroneous assumption’ has also been used to refer to an assumption a person, without preconceived ideas, might make in response to conduct.

We consider the origin and development of this ‘doctrine’ and the confusion associated with it. We also suggest a solution to the confusion — namely, the discarding of any reference to a ‘doctrine of erroneous assumption’.

## I INTRODUCTION

The general prohibition on misleading or deceptive conduct is well known.<sup>1</sup> The question of whether conduct is misleading or deceptive, or likely to mislead or deceive, is answered by characterisation of the conduct. Characterisation ‘is a task that generally requires consideration of whether the impugned conduct viewed as a whole has a tendency to lead a person into error’.<sup>2</sup> Any error must be caused by the impugned conduct and not by some other cause: ‘there must be some causal relationship between the conduct ... and the ... prospect that people will be led into error by it’.<sup>3</sup> When considering that causal relationship, reference has sometimes been made to a so-called ‘doctrine of erroneous assumption’.<sup>4</sup> Our thesis is that reference to such a doctrine does not aid coherence of analysis when characterising impugned conduct. There is confusion about what is meant by the doctrine. This confusion has arisen because the phrase ‘erroneous assumption’ has been used to mean two different things. Furthermore, we will show that the doctrine has been largely rejected in favour of a different approach to the causal relationship between conduct and the prospect of error. For these reasons, we conclude with a suggestion that the discourse on misleading or deceptive conduct discontinues reference to a so-called ‘doctrine of erroneous assumption’.

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1 *Competition and Consumer Act 2010* (Cth) sch 2 (‘Australian Consumer Law’) s 18; *Fair Trading Act 1986* (NZ) s 9.

2 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 319 [25]; *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, 651 [39].

3 R S French, ‘A Lawyer’s Guide to Misleading or Deceptive Conduct’ (1989) 63 *Australian Law Journal* 250, 258.

4 See, eg, *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 (‘*Campomar*’); *Tasman Insulation New Zealand Ltd v Knauf Installation Ltd* [2016] 3 NZLR 145 (NZCA) (‘*Tasman Insulation Appeal*’); *10th Cantanae Pty Ltd v Shoshana Pty Ltd* (1987) 79 ALR 299, 324–325 (‘*10th Cantanae*’); *Hogan v Pacific Dunlop Ltd* (1988) 83 ALR 403, 426; *Niagara Sawmilling Co Ltd v Carter Holt Harvey Ltd* [2012] NZHC 441; I Finch, ‘The Fair Trading Act 1986’, in *Intellectual Property Law in New Zealand* (online ed, Thomson Reuters) [10.4.13].

## II ORIGIN OF THE ‘DOCTRINE’

The ‘doctrine’ stems from *McWilliam’s Wines Pty Ltd v McDonald’s System of Australia Pty Ltd* (‘*McWilliam’s*’).<sup>5</sup>

In that case, McDonald’s, well-known sellers of hamburgers including one extensively advertised under the name ‘Big Mac’, objected to McWilliam’s using the words ‘Big Mac’ in advertisements for its wine, alleging an infringement of the general prohibition on misleading or deceptive conduct. There was evidence that consumers had ‘erroneous assumptions and preconceived ideas’<sup>6</sup> about the name ‘Big Mac’. The assumptions and ideas were that McDonald’s ‘owned’ the name and that nobody else would be able to use it without the consent of McDonald’s. Neither of these things was true, so the assumptions and ideas were erroneous. On reading the advertisement, a person with those preconceptions was likely to make another false assumption ‘that ... McDonald’s must be in the wine venture in some way’.<sup>7</sup> Such a person was thus led into error on reading the advertisement. But the ‘critical question’ was considered to be ‘whether conduct otherwise neither misleading nor deceptive acquires deceptive quality because persons under the influence of erroneous ideas draw erroneous inferences concerning it’.<sup>8</sup> The answer given to this question was ‘no’. In the words of Smithers J:

those persons who, by approaching the advertisement with erroneous ideas in their mind and interpreting its contents by reference thereto and are thereby misled do not arrive at their erroneous conclusion as a consequence of the terms of the advertisement, but because of the application, to those terms, of reasoning based on erroneous assumptions of their own. A member of the public can hardly complain of being misled by the conduct of another if because of errors made by himself he erroneously interpreted the nature of that conduct. And one would not contemplate that conduct, only misleading to those who misinterpret it because they apply erroneous assumptions in the exercise of interpretation, would be proscribed by the legislature. Such conduct would not be, one would think, truly misleading or deceptive.<sup>9</sup>

Fisher J, who agreed with Smithers J,<sup>10</sup> also used the term ‘erroneous assumption’<sup>11</sup> in conjunction with the terms ‘preconceived notion’<sup>12</sup> and ‘unwarranted albeit reasonable assumption’.<sup>13</sup> It is clear from a careful reading of his entire judgment that, when he used each of these terms, he was also referring to an assumption that a person had made prior to exposure to the impugned conduct. Thus, the concern of both judges was on determining if consumers had preconceived ideas that caused them to be misled when they applied those ideas to impugned conduct. By this articulation, the cause of any error was said to be the consumer’s preconception rather than the conduct impugned.

5 (1980) 49 FLR 455; see also *Campomar* (2000) 202 CLR 45, 85–86 [104].

6 *McWilliam’s* (1980) 49 FLR 455, 464 (Smithers J).

7 *Ibid* 465.

8 *Ibid*.

9 *Ibid* 466. See also *Johnson Tiles Pty Ltd v Esso Australia Ltd* (2001) ATPR 41-794, 42,547 (FCA): ‘There must be a logical causal connection between the conduct and some hypothesised error. But not every case involving a logical connection between conduct and alleged error will result in the conduct being regarded as misleading or deceptive ... By way of example, it might be said that, strictly speaking, a causal connection exists between conduct and error where the error is based upon erroneous assumption derived from but not logically justified by the conduct. The conduct will not ordinarily be treated on that account, as misleading or deceptive in such a case.’

10 *McWilliam’s* (1980) 49 FLR 455, 475.

11 *Ibid* 479.

12 *Ibid* 478 and 479.

13 *Ibid* 479.

### III DEVELOPMENTS FOLLOWING *McWILLIAM'S*

Although it was possible to interpret *McWilliam's* as propounding a general proposition that the application of a preconception to impugned conduct would always mean that the necessary causal link between conduct and likely error would be absent,<sup>14</sup> this was quickly rejected by the Full Federal Court in *Taco Bell*.<sup>15</sup> Deane and Fitzgerald JJ, referring to *McWilliam's*, said:<sup>16</sup>

In the course of their respective judgments, Smithers J and Fisher J placed particular emphasis on the fact that a person would only be misled or deceived into thinking that the use of the expression 'BIG MAC' by *McWilliam's* indicated some arrangement between *McWilliam's* and McDonald's if he made the erroneous assumption that the expression could not have been used by *McWilliam's* in the absence of such an arrangement. There has been a tendency — in our view mistaken — to see their Honours' comments in that regard as involving some general proposition of law to the effect that intervention of an erroneous assumption between conduct and any misconception destroys a necessary chain of causation with the consequence that the conduct itself cannot properly be described as misleading or deceptive or as being likely to mislead or deceive.

Use of the phrase 'erroneous assumption' in this passage must be taken to mean an erroneous assumption made before exposure to impugned conduct because Deane and Fitzgerald JJ referred to that term as employed by Smithers and Fisher JJ. On this analysis, the passage is saying that the application of a preconception to impugned conduct will not always mean that the necessary causal link between conduct and likely error is absent. In other words, the characterisation inquiry is not necessarily ended by pointing to a preconception. The impugned conduct may still be capable of leading a person into error independently of that person's preconception. This is consistent with Smithers J's critical question, being 'whether conduct *otherwise neither misleading nor deceptive* acquires deceptive quality because persons under the influence of erroneous ideas draw erroneous inferences concerning it'.<sup>17</sup> This question acknowledges the possibility that conduct might be misleading or deceptive for reasons other than the application of a preconception to the conduct.

Deane and Fitzgerald JJ went on to make the following comments:<sup>18</sup>

In truth, of course, no conduct can mislead or deceive unless the representee labours under some erroneous assumption. Such an assumption can range from the obvious, such as a simple assumption that an express representation is worthy of credence, ... to the fanciful, such as an assumption that the mere fact that a person sells goods means that he is the manufacturer of them. The nature of the erroneous assumption which must be made before conduct can mislead or deceive will be a relevant, and sometimes decisive, factor in determining the factual question whether conduct should properly be categorized as misleading or deceptive or as likely to mislead or deceive.

Use of the phrase 'erroneous assumption' in this passage must be taken to mean an erroneous assumption made *after* exposure to impugned conduct. The examples in the passage support this interpretation. There can be no assumption about an express representation until the representation is received by a person. Likewise, there can be no assumption about a person selling goods until that person sells goods. The natural interpretation of the passage is that it refers to the need for an erroneous assumption in response to impugned conduct. So, here we

14 See, eg, Finch, above n 4 [10.4.13]. See also French, above n 3, 258.

15 *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 ('*Taco Bell*').

16 *Ibid* 200.

17 *McWilliam's* (1980) 49 FLR 455, 465 (emphasis added).

18 *Taco Bell* (1982) 42 ALR 177, 200.

see the first use of the phrase ‘erroneous assumption’ to mean something different from what Smithers and Fisher JJ meant when they used the same term in *McWilliam’s*.

Lockhart describes the *Taco Bell* decision as having questioned the status of the ‘doctrine’ (as enunciated in *McWilliam’s*) ‘virtually immediately after [that] enunciation’.<sup>19</sup> However, Deane and Fitzgerald JJ in *Taco Bell* did not disagree with what Smithers and Fisher JJ had said in *McWilliam’s*. Rather, they sought to make it clear that what had been said did not amount to a general rule that the existence of a preconception would always preclude the characterisation of conduct as misleading or deceptive. Indeed, as Lockhart himself notes,<sup>20</sup> these two judges employed the doctrine in the *Lego*<sup>21</sup> case to characterise conduct as not misleading or deceptive. This was another case involving use of a similar name: irrigation equipment was sold in Australia and elsewhere under the name ‘Lego’, resulting in action being taken by Lego Australia Pty Ltd, the marketer in Australia of the well-known children’s building blocks of the same name. There was evidence that some members of the public mistakenly thought that the Lego irrigation equipment being sold was made by the manufacturer of the Lego toys. The evidence showed that members of the public had a prior familiarity with the use of the name ‘Lego’ in respect of Lego plastic toys and no familiarity with it being applicable to any other products. Some of the evidence went so far as to show ‘that it would be possible to find some members of the public who would assume that any product at all to which the name was applied was manufactured by the manufacturer of the toy’.<sup>22</sup> Deane and Fitzgerald JJ said that it was ‘necessary to inquire why proven misconception has arisen’<sup>23</sup> in order to determine whether those shown to have been led into error were so led by the impugned conduct. That inquiry revealed that persons were led into error because of the preconceptions they had about the name ‘Lego’, which they brought to bear on the impugned conduct. It was the application of preconceptions to the conduct that caused their error, not the conduct per se. Deane and Fitzgerald JJ concluded that the conduct:

viewed objectively, cannot properly be seen as involving or conveying any representation to the effect that the manufacturer of the irrigation equipment was connected with the manufacturer of the plastic building blocks. Any members of the public who were confused or under a misconception in that regard were so confused or under such a misconception as a result of an unwarranted assumption which they themselves made.<sup>24</sup>

The term ‘unwarranted assumption’ employed in this passage equates to the term ‘unwarranted albeit reasonable assumption’<sup>25</sup> used by Fisher J in *McWilliam’s* and the term ‘erroneous assumption’ used by Smithers J in that case. It is clear from a reading of the judgments as a whole that all four judges were each referring to an assumption that a person had made prior to exposure to the impugned conduct. In *Lego*, the assumption was essentially that the toy manufacturer owned the name ‘Lego’, and that any product to which that name was applied must therefore have a connection with the toy manufacturer.

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19 C Lockhart *The Law of Misleading or Deceptive Conduct* (4th ed, LexisNexis, 2015) [3.30].

20 Ibid [3.31]

21 *Lego Australia Pty Ltd v Paul’s (Merchants) Pty Ltd* (1982) 60 FLR 465 (‘Lego’).

22 Ibid 473.

23 Ibid, quoting from *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216, 228.

24 *Lego* (1982) 60 FLR 465, 474.

25 *McWilliam’s* (1980) 49 FLR 455, 479. See above.

## IV A LESS CONFUSING NAME FOR THE DOCTRINE

The doctrine was described by Gummow J as a doctrine of ‘erroneous preconception’ in *10th Cantanae Pty Ltd v Shoshana Pty Ltd* (‘*10th Cantanae*’).<sup>26</sup> We think this is a better name than the ‘doctrine of erroneous assumption’ because it directs attention to a preconceived idea or assumption — that is, an idea arrived at or assumption made by a person before encountering the impugned conduct. As we have endeavoured to articulate above, this is what the doctrine is concerned with. This name also avoids confusion arising from using the term ‘erroneous assumption’ to mean two different things, which, as we have pointed out, is what Deane and Fitzgerald JJ did in *Taco Bell*.<sup>27</sup> Gummow J’s name conveniently allows the term ‘erroneous assumption’ to be confined to the second sense in which it was used by Deane and Fitzgerald JJ in *Taco Bell* — that is, an erroneous assumption made *after* exposure to the impugned conduct.

The doctrine was not applied in *10th Cantanae* by either Gummow J or the trial judge because any preconception was correct rather than erroneous. Nor did Gummow J endorse the doctrine. Agreeing with the judge at first instance, he said:

whatever be the true scope of any doctrine of ‘erroneous preconception’, his Honour held, in my view correctly, that it had no application to this case. If there was a preconception, it was a correct one.<sup>28</sup>

## V IN THE HIGH COURT OF AUSTRALIA

Early in its existence, the doctrine was endorsed by Brennan J in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*.<sup>29</sup> Expressly agreeing with *McWilliam’s*, but using the term ‘erroneous preconceived belief’ rather than erroneous assumption, he opined that ‘an erroneous preconceived belief’ might cause a consumer to make a false assumption in response to conduct. If that is so, the false assumption or error ‘is self-induced’<sup>30</sup> rather than caused by the impugned conduct. The express agreement with *McWilliam’s*, but use of the term ‘erroneous preconceived belief’, supports our view expressed above<sup>31</sup> that the doctrine as articulated in *McWilliam’s* is concerned with thoughts harboured prior to exposure to impugned conduct, which cause a wrong impression to be taken from the conduct.

Eighteen years passed before the doctrine was again considered by the High Court of Australia in *Campomar Sociedad, Limitada v Nike International Ltd* (‘*Campomar*’).<sup>32</sup> *Campomar*, seeking to invoke the erroneous assumptions ‘doctrine’, claimed that Nike’s case was based on ‘exploiting a false belief — a belief built up by [Nike’s own] advertising and promotional expenditure that ... the only goods that are or will be marketed under the mark “Nike” are those of the respondents’,<sup>33</sup> and that there was therefore no ‘nexus between [Campomar’s] conduct and [consumers’] misconceptions or deceptions’.<sup>34</sup>

26 (1987) 79 ALR 299 (Full FCA), 325.

27 *Taco Bell* (1982) 42 ALR 177, 200. See above.

28 *10th Cantanae* (1987) 79 ALR 299 (Full FCA) 325.

29 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 225 (‘*Parkdale*’).

30 *Ibid.* See R Durie, ‘Commercial Law Note’ (1985) 59 *Australian Law Journal* 115, 117.

31 See above, ‘II Origin of the Doctrine’.

32 *Campomar* (2000) 202 CLR 45. See E Webb and D Farrelly, ‘Before the High Court: *Campomar Sociedad Limitada and Anor v Nike International Ltd and Anor*’ (1999) 21 *Sydney Law Review* 278, written on the eve of High Court of Australia determination in *Campomar*; B McCabe, ‘Consumer Protection’ (2000) 8 *Trade Practices Law Journal* 180, 185–186, written shortly thereafter.

33 *Campomar* (2000) 202 CLR 45, 55 [5].

34 *Ibid* 83 [98].

The court, in response, did not adopt the erroneous assumptions ‘doctrine’ articulated in *McWilliam’s*,<sup>35</sup> declaring that ‘the courts in Australia have not applied any “erroneous assumption” doctrine’.<sup>36</sup> The court gave attention to that part of the joint judgment of Deane and Fitzgerald JJ in *Taco Bell* that emphasised ‘no conduct can mislead or deceive unless the representee labours under some erroneous assumption’.<sup>37</sup> As we have noted above,<sup>38</sup> the ‘erroneous assumption’ referred to there is an erroneous assumption made *after* exposure to impugned conduct. The interest of the High Court was in that type of assumption. It did not seek to determine if they were the result of preconceptions, preferring to consider if the assumptions made were likely to be made by a reasonable consumer.<sup>39</sup> It distinguished between ‘extreme or fanciful’ assumptions on the one hand, and ‘ordinary or reasonable’ assumptions on the other, noting that ‘the court may well decline to regard ... those assumptions by persons whose reactions are extreme or fanciful’.<sup>40</sup> Evidence given by a witness in the case (a pharmacist) was noted by the court as an example of ‘not only erroneous but extreme and fanciful’ assumptions:<sup>41</sup>

he assumed that ‘Australian brand name laws would have restricted anybody else from putting the Nike name on a product other than that endorsed by the [Nike sportswear company]’. Further, [his] assumption ... extended to the marketing of pet food and toilet cleaner ... They would not be attributed to the ‘ordinary’ or ‘reasonable’ members of the classes of prospective purchasers of pet food and toilet cleaners.

There have been few subsequent considerations in the High Court of Australia of the role of erroneous assumptions in misleading or deceptive conduct cases.<sup>42</sup> Those that do deal with the issue have approached it in a manner that is consistent with the *Campomar* decision; they have looked for an erroneous assumption made after exposure to the impugned conduct, which might be made by a reasonable or ordinary member of the relevant class of persons said to be affected by the conduct.

In *Forrest v Australian Securities and Investments Commission*,<sup>43</sup> the High Court did not refer to any ‘doctrine’ of erroneous assumption. It considered the determinative issue to be: what did the impugned statements convey to their intended audience?<sup>44</sup> Citing *Campomar*, it was the

35 See above, ‘II Origin of the Doctrine’.

36 *Campomar* (2000) 202 CLR 45, 89 [110], citing *10th Cantanae* (1987) 79 ALR 299, 324–325; *Hogan v Pacific Dunlop Ltd* (1988) 83 ALR 403, 426. This statement was made in that part of the court’s judgment concerning passing off but the court proceeded on the assumption that questions respecting sufficiency of causation were the same for both passing off and misleading or deceptive conduct: see [110].

37 See text following n 18 above.

38 See above, ‘III Developments following *McWilliam’s*’.

39 *Campomar* (2000) 202 CLR 45, 85 [103], citing *Parkdale* (1982) 149 CLR 191, 199.

40 *Campomar* (2000) 202 CLR 45, 86–87 [105].

41 *Ibid.*

42 There is a brief noting of the *Campomar* case’s references to the ‘doctrine’ in *I and L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 125 [49], but that case dealt with remedies, rather than the characterisation of conduct. There is perhaps an allusion to the ‘doctrine’ in *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 370–371 [21]–[22], where the court noted the need for ‘attention to the effect or likely effect of [conduct] unmediated by antecedent erroneous assumptions’. The *High Court in Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, 646 [19] also briefly alludes to the concept when it notes that the trial judge’s conclusion states ‘the ordinary or reasonable consumer would not have any starting assumption’ about the defendant’s product.

43 (2012) 247 CLR 486 (*Forrest*).

44 *Ibid* 504 [31].

message conveyed to an ordinary or reasonable member of that audience that mattered.<sup>45</sup> An extreme or fanciful understanding was not to be attributed to the ordinary or reasonable member of that audience.<sup>46</sup> Thus, the determination of whether conduct is misleading or deceptive, or likely to mislead or deceive, involves an inquiry into how an ordinary or reasonable member of the intended audience would receive a message.<sup>47</sup> *Forrest* and *Campomar* are at one.

## VI OTHER AUSTRALIAN CASES

The approach taken in *Campomar* has also been followed in a number of Federal Court cases. In *Knight v Beyond Properties Pty Ltd*, Buchanan J in the Federal Court responded to evidence that certain witnesses had made an erroneous assumption about a connection between Mr Knight (the author of a series of children's books with 'Mythbusters' in the title) with the *Mythbusters* TV show. He held that their beliefs, although misplaced, did not necessarily mean that their evidence should 'be rejected simply because their impressions or reactions were coloured or affected by a wrongful assumption'.<sup>48</sup> However:<sup>49</sup>

The particular knowledge and association of the witnesses relied on by Mr Knight prevents them ... being regarded as representative of the class as a whole ... [T]he reactions of these witnesses, who each had a pre-existing association of some kind or other with Mr Knight, are not a reliable or representative guide to the reactions to be imputed to ordinary or typical members of the class in question.

*Peter Bodum A/S v DKSH Australia Pty Ltd*<sup>50</sup> was a case dealing with the sale of coffee plungers whose shape and features were alleged to be likely to mislead consumers into believing that they were either manufactured by or promoted with the sponsorship or approval of Bodum. The court held:<sup>51</sup>

In order to test whether a misconception has arisen or might arise amongst members of the relevant cohort by reason of the impugned conduct, the inquiry is to be made notionally of the hypothetical individual excluding 'assumptions by persons whose reactions are extreme or fanciful' ... The question is 'whether the misconceptions, or deceptions, alleged to arise, or to be likely to arise, are properly to be attributable to the ordinary and reasonable members of the class of prospective purchasers' ... The evidence should be viewed objectively to determine whether the reputation subsisting in Bodum's coffee plunger is such that members of the public (that is, ordinary and reasonable members of the relevant class excluding those making extreme or fanciful assumptions) would assume that a rival product exhibiting those features ... is a product of Bodum or a product sold with the licence, sponsorship or approval of Bodum.

In *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd*, it was noted:<sup>52</sup>

In some cases, the circumstance that a representation is misleading only because of an erroneous assumption made by the representee will preclude a finding of the requisite causal link. In

45 Ibid 508 [43].

46 Ibid 510 [50].

47 Ibid 512 [59].

48 *Knight v Beyond Properties Pty Ltd* (2007) 71 IPR 466 [169]; upheld on appeal by the Full Federal Court: (2007) 74 IPR 232.

49 Ibid [173]–[174].

50 *Peter Bodum A/S v DKSH Australia Pty Ltd* (2011) 280 ALR 639.

51 Ibid [204]. The quotes are from *Campomar* (2000) 202 CLR 45, 86–87 [105].

52 *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd* [2014] FCA 1369 [228].

particular, in cases in which the misleading or deceptive character of conduct or of a representation depends on the representee having made an ‘extreme or fanciful’ assumption, the requisite causal nexus will not usually be found as such assumptions will not be attributed to the ordinary or reasonable class of representees.

In *Telstra Corporation Ltd v Phone Directories Company Pty Ltd*, Murphy J in the Federal Court held that the erroneous assumption doctrine was relevant to a claim that the defendant’s conduct, in publishing telephone print directories, a website and mobile phone app, was likely to mislead directory users and advertisers that those products were published by or were otherwise associated with Telstra.<sup>53</sup>

This is relevant in the present case because I infer that it is likely that many consumers think that all telephone directories originate from or are associated in some way with Telstra. I infer that they do so because for many decades Telstra’s predecessors were government agencies and the sole producers of official telephone directories.

The trend of current Australian authority is thus contrary to the approach in *McWilliam’s*. The ‘critical question’ has not been considered to be, as it was in *McWilliam’s*, ‘whether conduct otherwise neither misleading nor deceptive acquires deceptive quality because persons under the influence of erroneous ideas draw erroneous inferences concerning it’.<sup>54</sup> Rather, the courts have focused on the message conveyed by the impugned conduct to an ordinary or reasonable member of the target audience.<sup>55</sup>

## VII ERRONEOUS ASSUMPTIONS IN NEW ZEALAND

Erroneous assumptions as a factor in misleading or deceptive conduct litigation first appeared in *Mills v United Building Society* (*‘Mills’*), the second case ever to consider s 9 of the *Fair Trading Act 1986* (NZ).<sup>56</sup> Mr Mills purchased a leasehold property, believing that its value was sufficient to provide security for a substantial mortgage that he planned to take to fund an upgrade of the property. He discovered later that the lease was worth much less than he had paid. He claimed that the defendant had breached s 9 by ‘[s]tating or implying’ that the lease was worth around \$230,000, when it was in fact worth around \$66,000.<sup>57</sup> He had been warned that the property was leasehold, that the lease contained some onerous terms and that he ought to seek legal advice. He was also given a copy of the lease, which ‘he simply skimmed through ... and assumed it was similar to [more common] leases, with which he was very familiar ... He quite failed to pick up or appreciate the onerous rental conditions’.<sup>58</sup> Sinclair J in the High Court noted *McWilliam’s*<sup>59</sup> and held:<sup>60</sup>

if a party assumes a certain set of facts which leads him to a particular conclusion, then in the absence of anything said or done by any other party which results in that conclusion being reached, it is not possible for the parties to say they have been misled or deceived by the conduct of that other party. It highlights the basic principle that it is the conduct of the party in question which must be looked at to see whether it has deceived or misled the party

53 *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (2014) 316 ALR 590 [405], citing both *McWilliam’s* and *Campomar*.

54 *McWilliam’s* (1980) 49 FLR 455, 465 (Smithers J).

55 *Campomar* (2000) 202 CLR 45, 86–87 [105]; *Forrest* (2012) 247 CLR 486, 508 [43].

56 See *Mills v United Building Society* [1988] 2 NZLR 392 (NZHC and NZCA) 404.

57 *Ibid* 395.

58 *Ibid* 412.

59 *Ibid* 406.

60 *Ibid* 407–408 and 410; upheld by the Court of Appeal: [1988] 2 NZLR 392 at 411–413.



complaining ... [Mr Mills's belief] was an assumption which was erroneous and not brought about at all by the conduct of the defendant ... it was an assumption made by him — and one that was not warranted.

The approach taken in the *Mills* case thus mirrors that taken in *McWilliam's*. Mr Mills had preconceived ideas about ordinary leases. He applied those ideas to an extraordinary lease, which caused him to misunderstand that lease. He may have been misled or deceived, but not by the impugned conduct. *Mills* is the high-water mark of the 'doctrine' of erroneous assumption in New Zealand.

In *Trust Bank Auckland Ltd v ASB Bank Ltd* ('*Trust Bank*'),<sup>61</sup> the court was encouraged by the defendant to find that 'consumer confusion based on erroneous assumptions ... does not establish a breach of the section', but 'doubt[ed] whether an unqualified general proposition to that effect was intended to be laid down and, if it were, would respectfully regard it as a gloss on the statute open to misuse'.<sup>62</sup> On the subject of erroneous assumption, the court stated that it generally agreed with Deane and Fitzgerald JJ in *Taco Bell*.<sup>63</sup> There is a difficulty with this statement of general agreement because, as noted above,<sup>64</sup> Deane and Fitzgerald JJ in *Taco Bell* used the term 'erroneous assumption' to mean two different things and the court in *Trust Bank* gave no indication whether it was agreeing with both or just one of those meanings.

The most recent New Zealand reference to erroneous assumptions occurred in the Court of Appeal's decision in *Tasman Insulation New Zealand Ltd v Knauf Installation Ltd* ('*Tasman Insulation Appeal*').<sup>65</sup> In the High Court, Brown J concluded:<sup>66</sup>

a hypothetical reasonable person is likely to form the erroneous assumption that the Earthwool® product is manufactured from animal wool, probably sheep's wool ... It is my conclusion that the erroneous assumption would be a reasonable and not fanciful assumption.

The Court of Appeal agreed. Randerson J, for the court, said:<sup>67</sup>

Addressing the 'so-called doctrine of erroneous assumption' and the possibility prospective purchasers might adopt false assumptions that are extreme or fanciful the Judge<sup>68</sup> adopted the approach of the High Court of Australia in *Campomar Sociedad, Limitada v Nike International Ltd*.<sup>69</sup> The initial question which must be determined is whether the misconceptions or deceptions alleged to arise are properly attributed to the ordinary or reasonable members of the classes of prospective purchasers.

This passage is problematic. The approach in *Campomar* was not that of the 'so-called doctrine of erroneous assumption'. In truth, both Brown J and the Court of Appeal followed *Campomar*, not the 'so-called doctrine of erroneous assumption'.

61 *Trust Bank Auckland Ltd v ASB Bank Ltd* [1989] 3 NZLR 385 (NZCA) ('*Trust Bank*'). See also *Bonz Group Pty Ltd v Cooke* (1996) 7 TCLR 206; *Commerce Commission v Telecom Corp. of New Zealand Ltd* (1990) 4 TCLR 1.

62 *Trust Bank* [1989] 3 NZLR 385, 389, citing *Parkdale* (1982) 149 CLR 191.

63 *Taco Bell* (1982) 42 ALR 177, 200.

64 See above, 'III Developments following *McWilliam's*'.

65 *Tasman Insulation Appeal* [2016] 3 NZLR 145.

66 *Tasman Insulation New Zealand Ltd v Knauf Installation Ltd* [2014] 108 IPR 162 ('*Tasman Insulation*'), [313] and [317].

67 *Tasman Insulation Appeal* [2016] 3 NZLR 145 [225].

68 Brown J in the High Court: *Tasman Insulation* [2014] 108 IPR 162.

69 *Campomar* (2000) 202 CLR 45, 86–87 [105].

## VIII CONFUSION

Reference to a ‘doctrine’ of erroneous assumption is beset with semantic difficulties. As originally articulated in *McWilliam’s*, ‘erroneous assumption’ referred to an idea or understanding that a person had prior exposure to impugned conduct, which makes them likely to err when encountering that conduct. In *McWilliam’s*, the focus was on determining if the consumer had preconceived ideas that caused them to be misled when they applied those ideas to impugned conduct.

But the term ‘erroneous assumption’ has also been used to refer to an assumption a person, without preconceived ideas, might be likely to make in response to conduct. It is universally accepted that ‘no conduct can mislead or deceive unless the representee labours under some erroneous assumption’.<sup>70</sup> But here the phrase refers to an assumption made in response to conduct, without bringing to bear preconceptions on that conduct. This is the way the phrase has been used in most cases subsequent to *McWilliam’s*. Thus, in *Campomar*, when the High Court of Australia referred to ‘the nature of the erroneous assumption which must be made’<sup>71</sup> before conduct may be characterised as misleading or deceptive or likely to mislead or deceive, it was in the context of assessing likely reactions of persons to impugned conduct. It was not in the context of persons reacting to conduct under the influence of a preconception.<sup>72</sup>

Because the phrase has been used to mean two different things, it is perhaps not surprising that there is confusion about the so-called ‘doctrine’ of erroneous assumption. The courts have conflated the two meanings, confounding clear thinking on the characterisation of conduct as misleading or deceptive or likely to mislead or deceive.

*Tasman Insulation*<sup>73</sup> illustrates the confusion. In the High Court, Brown J referred to ‘the so-called doctrine of erroneous assumption’,<sup>74</sup> citing *Campomar* for this description. He then immediately cited the words of Deane and Fitzgerald JJ in *Taco Bell*, where they use the phrase ‘erroneous assumption’ in accordance with the second meaning we have articulated above.<sup>75</sup> All further references by his Honour to an ‘erroneous assumption’ are in connection with an erroneous assumption caused by impugned conduct, not to an erroneous assumption caused by ideas or understandings that precede exposure to such conduct. The confusion continued in the Court of Appeal. Randerson J, for the court, spoke of ‘[a]ddressing the ‘so-called doctrine of erroneous assumption’ and the possibility prospective purchasers might adopt false assumptions that are extreme or fanciful ...’.<sup>76</sup> This conflates the two meanings of ‘erroneous assumption’. In both courts, the case was decided by assessing the likely consumer reaction to the conduct impugned, not by assessing the likely consumer reaction, having regard to preconceptions.

## IX A SOLUTION

The confusion can be overcome by discarding reference to a ‘doctrine of erroneous assumption’. In truth, any such ‘doctrine’ did not advance beyond *Lego*. From *Taco Bell* onwards, the phrase ‘erroneous assumption’ has been used to refer to a likely consequence of impugned conduct,

70 *Taco Bell* (1982) 42 ALR 177, 200; See also *Lego* (1982) 60 FLR 465; *Forrest* (2012) 247 CLR 486; *Trust Bank* [1989] 3 NZLR 385; *Bonz Group Pty Ltd v Cooke* (1996) 7 TCLR 206; *Commerce Commission v Telecom Corp. of New Zealand Ltd* (1990) 4 TCLR 1.

71 *Campomar* (2000) 202 CLR 45, 86 [104].

72 See generally *Campomar* (2000) 202 CLR 45, 86–87 [104]–[105].

73 *Tasman Insulation* [2014] 108 IPR 162 (NZHC); *Tasman Insulation Appeal* [2016] 3 NZLR 145 (NZCA).

74 *Tasman Insulation* [2014] 108 IPR 162 [280].

75 *Taco Bell* (1982) 42 ALR 177, 200. See text following n 18 above.

76 *Tasman Insulation Appeal* [2016] 3 NZLR 145 [225].

unencumbered by preconceptions held by persons likely to be affected by that conduct. To describe the phrase as a ‘doctrine’ muddies the water and risks breathing life back into the moribund approach of *Smithers and Fisher JJ* in *McWilliam’s*. Since *Taco Bell*, the courts, despite the occasional reference to a ‘doctrine of erroneous assumption’, have not tried to divorce error from impugned conduct, as *Smithers and Fisher JJ* did in *McWilliam’s*. Instead, they have accepted that error that is a consequence of conduct (albeit not all such error) will suffice to characterise that conduct as misleading or deceptive or likely to mislead or deceive. Error that is extreme or fanciful will not suffice. To continue to speak of a ‘doctrine of erroneous assumption’ is to compound the confusion identified above. In 1989, French J, as he then was, writing extra-judicially, stated that *McWilliam’s* ‘should not be allowed to burden the language of the statute with a quasi-doctrine of “erroneous assumptions”’.<sup>77</sup> The courts have met his wish. It is time to eschew reference to a ‘doctrine of erroneous assumption’.

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77 French, above n 3, 258. See also Webb and Farrelly, above n 32, 293, where the desire was expressed that the High Court in *Campomar* would ‘define the ambit of “erroneous assumption” ... and perhaps provide guidance regarding the standard to be applied to those persons who are privy to the impugned conduct’.