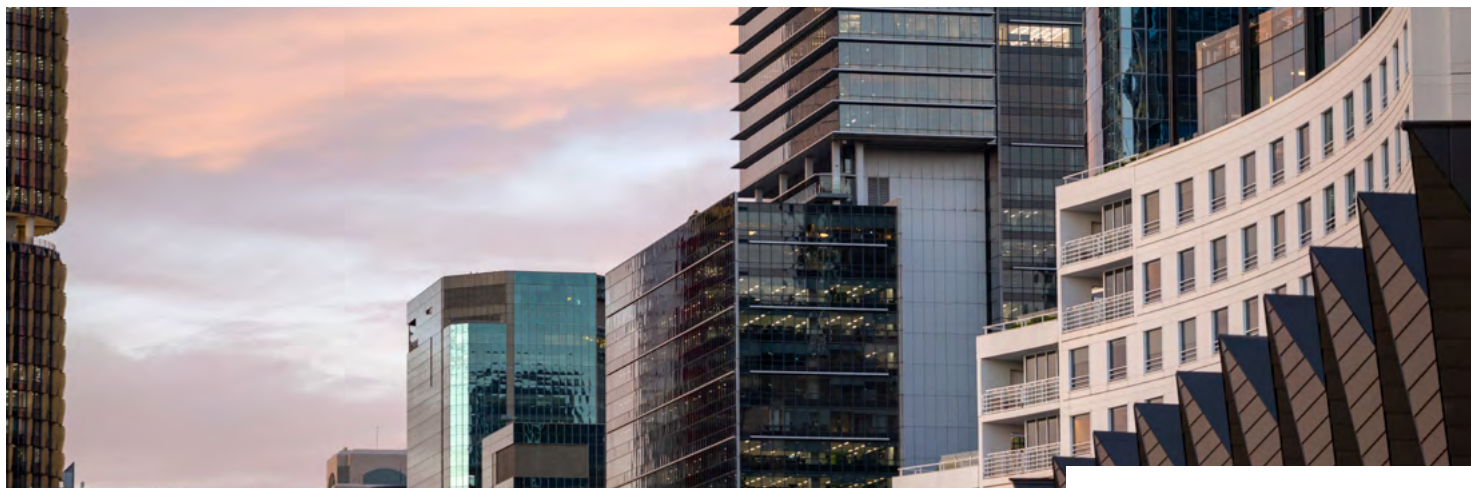




True Value in Australian Post-Acquisition Disputes

In Australia, the assessment of damages in post-acquisition disputes involving allegations of misleading or deceptive conduct frequently hinges on the identification of a true value — the asset's actual worth at the time of acquisition had the misleading conduct not taken place.

True value is not a recognised term in accounting standards, corporate finance or the International Valuation Standards, but courts in Australia use it frequently in the litigation context. The term most often appears in claims for damages brought under misleading or deceptive conduct under the Australian Competition and Consumer Act.¹

In our experience, courts may consider subsequent events when assessing what the asset was truly worth at the time of acquisition — but only where those events are used to reveal a loss in value that was intrinsic to the asset at the time of the transaction. This construct diverges from traditional notions of market value where hindsight is not permitted.

In assessing true value, the questions persist: When is hindsight permissible and how reliably can one separate intrinsic from extraneous causation in multifaceted commercial disputes?

Defining True Value in a Legal Context

Whilst true value is not a recognised term in accounting standards, corporate finance or the International Valuation Standards, courts in Australia use it frequently in the litigation context — often in claims for damages brought under misleading or deceptive conduct where the measure of damages aims to restore the plaintiff to the position they would have been in had the misleading conduct not occurred. In an acquisition-related dispute, this typically relates to a misleading disclosure in the due diligence materials, or an omission of a material fact or document from the due diligence materials, that has come to light after the completion date of the transaction, and is alleged to have misled the purchaser as to the value.

This means that true value for the purpose of assisting the court with its assessment of loss and damage is not restricted to the “standard” valuation principles. Traditional valuations do not have regard to information arising subsequent to the valuation date, in contrast, for cases of misleading or deceptive conduct, information coming to light after an acquisition can be used to assist the court in assessing true value as at the acquisition date.

¹ Competition and Consumer Act 2010 (Cth) sch 2. <https://www.legislation.gov.au/C2004A00109/latest/versions>.

The courts have used various expressions, such as “real value,” “actual value” and “intrinsic value” to refer to this concept. Broadly, they refer to the actual worth of an asset or interest at a point in time, determined on a counterfactual basis — had the alleged misconduct or misleading disclosure not occurred.

Distinguishing True Value from Market Value

True value is a legal construct. Courts use it to quantify losses in actions for deceit, misrepresentation or misleading conduct. It is usually determined as at the date of the transaction but may be informed by subsequent facts that reveal the asset’s condition at that time.

Market value, by contrast, is the estimated amount for which an asset should exchange between a willing buyer and a willing seller on an arm’s-length transaction after proper marketing, where both parties have acted knowledgeably, prudently and without compulsion — crucially it is based only on information available at that date.

Given this difference, the legal assessment of true value is broader and more flexible than standard market valuation, with hindsight evidence playing a key role.

Potts v Miller — Foundational Case

The case often referenced for a definition of true value is *Potts v Miller*², a foundational High Court of Australia decision regarding the assessment of damages for misleading conduct. The plaintiff alleged that he was induced by false representations made by the defendant to underwrite and purchase shares in a company. The shares subsequently became worthless.

The Court established that *“the measure of damage in a case in which a person is induced by fraud to take up shares in a company is the difference between the amount he paid for the shares and the real value of the shares at the time of allotment, and not at any subsequent period, although subsequent events may throw light on the value at the time of allotment.”*

In relation to subsequent events, the Court further established it was necessary to:

“distinguish between the kinds of cause occasioning the deterioration or diminution in value. If the cause is inherent in the thing itself, then its existence should be taken into account in arriving at the real value of the shares or other things at the time of the purchase. If the cause be ‘independent,’ ‘extrinsic,’ ‘supervening’ or ‘accidental,’ then the additional loss is not the consequence of the inducement.”

Use of Hindsight

Potts v Miller and subsequent authorities confirm that, when assessing damages for deceit or misleading conduct, courts may use hindsight to determine the real value of what was received, provided that the subsequent events taken into account are where their impact goes to a diminution in value that is intrinsic to the asset at the time of the transaction and not to a diminution caused by an extraneous or supervening event.

The use of hindsight is not uncommon in assessing traditional loss and damage, courts often consider events that occurred or became known after an event to assess the financial impact of the event to the plaintiff. For example, in a typical breach of contract case, the loss suffered by the plaintiff is typically assessed by comparing the financial position of the plaintiff after the alleged breach with the financial position of the plaintiff prior to the alleged breach. In a post-acquisition dispute, this translates to using events arising or becoming known after the acquisition date to determine the true value of the asset as at the acquisition date. This use of hindsight is a key difference from a traditional “market value” assessment, which is based only on information known or knowable at the valuation date and does not allow the use of hindsight.

For example, if a business’s financial performance shortly after the acquisition reflects pre-existing operational weaknesses or risks (such as the loss of a major customer contract) that were known but not disclosed, that subsequent performance may be relevant to quantifying the financial impact of the non-disclosure.

The rationale is that subsequent events may reveal facts about the asset that were not (but should have been) disclosed at the time of acquisition, or may reveal the financial impact of a misleading disclosure, thereby informing the assessment of its true value at that historical point in time.

As set out in *Potts v Miller*, the use of hindsight is not unrestricted. Courts draw a clear distinction between:

- Events or outcomes that are reflective of the asset’s inherent characteristics at the time of acquisition (generally admissible).
- Supervening or extrinsic events that are unrelated to the condition, nature or reasonable use of the asset (generally inadmissible).

This distinction is critical when assessing whether post-acquisition performance or developments may be relied upon in support of a valuation opinion.

² (1940) 64 CLR 282 https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1940/43.html?context=1;query=potts%20v%20miller;mask_path=

Supervening Events

Not all subsequent events are relevant to the assessment of true value. Only those that relate to the intrinsic qualities or characteristics of the asset at the time of acquisition can be considered. Supervening events are external, unforeseen developments that arise after the transaction and are not attributable to the underlying qualities of the asset (or to the misleading conduct).

Examples include:

- Loss of a contract after the acquisition date and unrelated to the alleged breach
- Natural disasters, such as bushfires and floods
- Pandemics, for example COVID-19
- Regulatory changes
- New market entrants or macroeconomic shocks

The identification of extrinsic events is crucial for assessing true value in the context of misleading or deceptive conduct. In general, courts exclude the impact of such events from the assessment of true value, on the basis that they do not assist in determining what the asset was worth at the time of acquisition. They are not relevant to the calculation of damages under misleading conduct claims where the focus is on counterfactual value.

The parsing of information between ‘intrinsic’ and ‘extrinsic’ may sound simple. However, separating losses attributable to the alleged conduct from those caused by supervening events actually requires a detailed forensic analysis. Some cases are ‘black and white’, while others involve shades of grey. Identifying relevant facts requires a careful analysis of the evidence and professional judgement is needed to consider complex counterfactual assumptions and scenarios.

Key Australian Authorities on True Value and Hindsight

HTW Valuers (Central Qld) Pty Ltd v Astonland Ltd [2004] HCA 54

The *HTW Valuers (Central Qld) Pty Ltd v Astonland Ltd [2004] HCA 54* case is another common authority on the application of true value in post-acquisition disputes involving misleading or deceptive conduct. This case demonstrates how Australian courts distinguish between losses that are intrinsic to an asset and those caused by supervening events in assessing damages.

In this case, Astonland relied on a rental valuation provided by HTW Valuers when purchasing a shopping centre. Shortly after the purchase, a new competing shopping centre opened nearby, leading to a significant decline in the profitability and value of Astonland’s property. Astonland claimed that HTW’s valuation advice was misleading and deceptive because it did not

sufficiently caution about the competitive risks from the imminent new shopping centre — a risk that was reasonably foreseeable at the time the advice was given.

The crux of the litigation was whether the loss in value experienced by Astonland was due to an intrinsic flaw — a failure by HTW to account for foreseeable competition — or whether it was due to a supervening event. The Court determined that HTW should have qualified its advice by warning about the risk of competition given that this risk was reasonably foreseeable at the time, and was therefore considered intrinsic to the value of the property at acquisition.

Consequently, the measure of damage was the difference between the price Astonland paid for the shopping centre and its true value at the time of purchase, reflecting the risk posed by the impending competition. The subsequent opening and adverse impact of the new shopping centre was admissible as hindsight evidence because it confirmed the existence of a risk that should have been anticipated and disclosed at the time of valuation.

Kizbeau Pty Ltd v W G & B Pty Ltd

*Kizbeau*³ is another leading case concerning property rather than shares or businesses- that reinforced the principle that the loss measured must relate to the true value at acquisition, not the value at the time of the trial. In *Kizbeau*, the High Court found that a plaintiff induced to buy property under a misrepresentation is entitled to damages reflecting the difference between the price paid and the value at acquisition, irrespective of subsequent market movement.

The decision highlights that where later events clarify the asset’s initial state, and those events are inherently connected to the original condition or representation, they may inform the true value assessment. However, subsequent unrelated market fluctuations are disregarded as ‘supervening’.

Pacific Current Group Limited v Michael Clifford Fitzpatrick & Ors

This recent Federal Court⁴ case further illustrates the application of true value in the context of breach of director’s duties — a context conceptually similar to misleading or deceptive conduct, given its focus on the counterfactual position of the company.

Pacific Current Group (“PAC”) sued five former directors following a merger with Northern Lights Capital Partners. After the merger, PAC incurred losses and alleged the directors failed to conduct proper due diligence, asset valuations and obtain necessary shareholder approvals. The allegations centred on the business’s contractual interests in WHV Investment Management Inc (“WHV”). Only the CEO was found liable — for not adequately investigating and disclosing material risks concerning

³ *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281

⁴ *Pacific Current Group Limited v Fitzpatrick* [2024] FCA 1480 (18 December 2024). Dawna Wright of FTI Consulting (Australia) Pty Ltd acted as an expert witness instructed by solicitors for PAC in this matter

WHV. All other non-executive directors were cleared, as they were not properly informed by McGill about material issues and were found to have acted with reasonable care.

The case, still ongoing as of mid-2025 for questions of causation and relief, demonstrates several points relevant to true value and the role of hindsight:

- The Federal Court limited hindsight to those post-merger facts that illuminated pre-existing defects
 - not poor management or market conditions arising after completion.
- It evidences how careful courts are to apportion losses to mismanagement or misrepresentation, as distinct from losses arising from properly disclosed or extrinsic risks.
- The court's reliance on the evidence of post-merger performance was limited to events that clarified pre-existing risk, not unforeseeable outcomes.
- The application of hindsight was controlled to ensure only intrinsic defects were compensable.

Applying True Value

Assessing true value and the use of permissible hindsight can range in complexity depending on the circumstances at play. There are many more variables to consider when valuing a business, compared with the property valuations that were the subject of the early foundational cases. From the straight forward to the near impossible, below are some key examples of true value and permissible hindsight in action.

Straightforward Application of Hindsight:

A vendor falsely claims a business has a cornerstone contract with a named customer. After acquisition, it is immediately discovered through correspondence and contract registers that no such arrangement existed.

In this instance the true value could be assessed by valuing the business, but excluding the impact of the revenue from that specific customer. This is a more straightforward application of the use of hindsight because:

- The absence of the contract is objectively and immediately verifiable.
- Valuation experts can directly subtract the value of the affected (non-existent) customer revenue in order to arrive at the business's "true value."
- Hindsight is solely used to clarify a present fact — there is no subjectivity or need to interpret post-acquisition performance.

Complex Application of Hindsight

In another example, the vendor misrepresentation related to the 'quality', rather than the existence of key contracts. After completion of the transaction, the business was integrated into the purchaser's operations and new management made a number of 'operational' decisions. The business was also impacted by a market downturn and other external factors. The reason for the diminution in value of the business since completion was obscured. Was the poor performance related to the inherent quality of the contracts as at completion that should have been disclosed (for which the vendor is liable), or due to decisions by the new management team or market changes (for which the vendor is not liable)?

Once the business is integrated and its performance is altered by the purchaser's decisions, it becomes more difficult to isolate the intrinsic value at the time of sale from the impact of the external factors.

Nearly Impossible Application of Hindsight

In other contexts, excluding supervening events is more challenging. Consider the following, a business is acquired with the expectation that its performance and asset base will be substantially the same as represented at completion. However, shortly after settlement, the sector experiences significant regulatory change, fundamentally altering compliance obligations and the operational landscape. Compounding this, the purchaser embarks on a rapid reorganisation — shifting strategic focus, merging teams and overhauling core systems.

When significant regulatory changes and major operational restructuring occur shortly after acquisition, isolating the true value at completion becomes very challenging. The business environment and internal structure may shift so dramatically that post-acquisition performance bears little resemblance to the state of the asset at sale. This intertwining of intrinsic flaws present at acquisition with extrinsic, supervening factors complicates valuation expert's efforts to separate causes of loss. Confounding developments require careful consideration and forensic analysis to support a credible assessment of true value at the transaction date.

Final Thoughts

True value assessments arise frequently in misrepresentation claims in Australia.

The assessment of true value in post-acquisition disputes presents distinct legal and valuation challenges. Unlike standard market valuations, true value requires consideration of legal principles regarding causation and the use of hindsight. Where supervening events have occurred, the assessment of true value will often depend on assumptions and/or instructions and therefore the reliability of the valuation opinion will be subject to scrutiny.

Lawyers play a critical role in guiding expert witnesses when assessing true value in legal disputes, especially in cases involving misleading or deceptive conduct, by providing clear instructions and context that help the expert distinguish between relevant hindsight and supervening events.

When assisting an expert to assess true value and distinguish between hindsight and supervening events, lawyers should seek to provide the expert with comprehensive information or instructions about the asset, the context of the transaction, and all significant events and circumstances, where they are not evident in the documents. This enables the expert to reliably identify which subsequent events are supervening and which are truly intrinsic to the asset or transaction under review.

The calibration of damages in complex commercial cases like *HTW Valuers v Astonland*, *Kizbeau* and *Pacific Current Group v Fitzpatrick* illustrates both the flexibility and the limits of the true value doctrine. Simple cases — involving discoverable facts or clear evidence such as missing assets or contracts — underscore situations where hindsight can be applied with minimal controversy. In more nuanced matters, lawyers must grapple with separating losses caused by undisclosed, intrinsic defects from those triggered by events falling outside the counterfactual framework.

The degree of difficulty in applying these principles depends on the clarity, simplicity and availability of post-acquisition evidence to illuminate what the value genuinely was at the time of the transaction.

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