

2020

Evolution and Revolution: The Remedial Smorgasbord for Misleading Conduct in Australia

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Online ISSN: 2643-7759

Recommended Citation

Elise Bant & Jeannie M. Paterson, *Evolution and Revolution: The Remedial Smorgasbord for Misleading Conduct in Australia*, 14 FIU L. Rev. 25 (2020).

Available at: <https://ecollections.law.fiu.edu/lawreview/vol14/iss1/6>

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EVOLUTION AND REVOLUTION: THE REMEDIAL SMORGASBORD FOR MISLEADING CONDUCT IN AUSTRALIA

Elise Bant* and Jeannie Marie Paterson**

ABSTRACT

In Australia, the revolutionary *Trade Practices Act 1974* (Cth) introduced, in section 52, a simple and powerful prohibition on conduct in trade or commerce that is “misleading or deceptive or likely to mislead or deceive.” The prohibition applies to business-to-business transactions as well as to those involving consumers and contains no requirement of fault on the part of the contravenor. Its purposes are explicitly instrumental: to protect consumers and promote fair business practices. The Act also introduced a veritable ‘smorgasbord’ of remedies for victims of misleading conduct that were equally revolutionary, granting to courts a wide-ranging remedial discretion to award relief that includes, for example, the power to vary contracts retroactively. The prohibition and its remedial scheme have proven enormously influential, having been re-enacted, replicated and repeated dozens of times in different contexts under various Australian state and federal legislation. As a result, they reach into almost every corner of commercial life and dominate the litigation landscape. This paper will argue that this dominance has led the remedial scheme (including in its modern incarnation under the Australian Consumer Law) to have a very significant and ongoing “gravitational influence” on the evolution of analogous common law and equitable remedies and, indeed, the wholesale understanding of the relationship between right and remedy in Australian law and practice. The analysis has implications for the broader theory and practice of the law of remedies that go well beyond the borders of Australian law.

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I. INTRODUCTION: THE NOVEL AUSTRALIAN PRIVATE LAW LANDSCAPE

The law of remedies in Australian private law has been profoundly affected by a suite of expansive and novel statutory schemes that were introduced for explicitly instrumental ends.¹ The *Trade Practices Act 1974* (Cth) (*TPA*) and its successor, the *Competition and Consumer Act 2010* (Cth) (*CCA*), have the purposes of enhancing “the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.”² A key weapon in the scheme as originally conceived was *TPA* section 52, now section 18 of the *Australian Consumer Law (ACL)*, which is in schedule 2 of the *CCA*. This provision revolutionised Australian private law by prohibiting conduct in trade or commerce that was “misleading or deceptive or likely to mislead or deceive.” Unlike many of its general law counterparts concerned with remedying misleading conduct,³ the statutory

¹ In addition to those canvassed in this paper, see, e.g., *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA, 12DB, 12DC, 12DF. These provisions are modelled on the *Australian Consumer Law*, contained in the *Competition and Consumer Act 2010* (Cth) sch 2. Prohibitions on misleading conduct are also found in a wide range of other statutes including the *Corporations Act 2001* (Cth) (Austl.) and more specific federal and state counterparts such as under the various food and retail tenancies acts.

² *Trade Practices Act 1974* (Cth) s 2 (Austl.); *Competition and Consumer Act 2010* (Cth) s 2 (Austl.).

³ The surrounding general law context is complex and extensive, embracing contractual doctrines concerning warranties and duties of disclosure, torts such as deceit, negligent misstatement, injurious falsehood, passing off and defamation, rescission for fraudulent misrepresentation and the equitable doctrines of estoppel, misrepresentation and rescission and, in some contexts, breach of fiduciary duty. For some of the interesting insights from consideration of this overlap, see Elise Bant & Jeannie M. Paterson, *Should Specifically Deterrent or Punitive Remedies Be Made Available to Victims of Misleading Conduct Under the Australian Consumer Law?*, 25 TORTS L.J. 99 (2019) [hereinafter *Should Specifically Deterrent or Punitive Remedies Be Made Available*]; Elise Bant & Jeannie M. Paterson, *Estoppel, Misleading Conduct and Equitable Fraud*, 13 J. EQUITY 183 (2019) [hereinafter *Estoppel, Misleading Conduct and Equitable Fraud*]; Elise Bant & Jeannie M. Paterson, *Exploring the Boundaries of Compensation for Misleading Conduct: The Role of Restitution Under the ACL*, 41(2) SYDNEY L. REV. 155 (2019) [hereinafter *Exploring the Boundaries of Compensation for Misleading Conduct*]; Elise Bant & Jeannie M. Paterson, *Misleading Conduct Before the Federal Court: Achievements and Challenges*, in THE FEDERAL COURT’S CONTRIBUTION TO AUSTRALIAN LAW: PAST, PRESENT AND FUTURE 165, 166–77 (Pauline Ridge & James Stellios eds., 2018) [hereinafter *Misleading Conduct Before the Federal Court*]; Elise Bant & Jeannie Paterson, *Limitations on Defendant Liability for Misleading or Deceptive Conduct Under Statute: Some Insights from Negligent Misstatement*, in LAW OF MISSTATEMENTS: 50 YEARS ON FROM HEDLEY BYRNE V HELLER 159 (Kit Barker et al. eds., 2015) [hereinafter *Limitations on Defendant Liability for Misleading or Deceptive Conduct under Statute*]; Jeannie M. Paterson & Elise Bant, *In the Age of Statutes, Why Do We Still Turn to the Common Law Torts?: Lessons from the Statutory Prohibitions on Misleading Conduct in Australia*, 23(2) TORTS L.J. 139 (2016) [hereinafter *In the Age of Statutes, Why Do We Still Turn to the Common Law Torts?*].

prohibition is strict: it may be contravened by conduct that is unintentionally misleading.⁴ Consistently with its protective aims, the *ACL* empowers regulators to monitor and bring actions in cases of alleged contravention of the statutory norm *simpliciter*, that is without proof of loss or damage having been suffered by any person as a result of its breach.⁵ If the claim is sustained, the *ACL* provides for the award of penalties for specific forms of misleading conduct⁶ and other enforcement powers designed to deter both the breaching party and others in like positions from engaging in misleading or deceptive conduct.

Private plaintiffs may also seek relief in respect of loss or damage suffered as a result of contravention of the statutory prohibition, but the *ACL* does not make caused loss a condition of defendant liability.⁷ Where loss is suffered, the statute provides extensive private rights of redress for victims of misconduct, supported by a veritable remedial “smorgasbord.”⁸ Thus, pursuant to the remedial scheme, courts may award damages for “loss or damage” caused by misleading conduct pursuant to *TPA* section 82 (*ACL* section 236), but also have capacity to make wide-ranging discretionary and compensatory orders under *TPA* section 87 (*ACL* sections 237 and 243).

By omitting intention as an element of the statutory prohibition and opening up a potent range of remedies for victims of misleading conduct, the regime builds upon, and consciously goes beyond, its surrounding general law context. For example, as we will see below, the statute empowers courts not only to order common law-like remedies such as compensatory damages, rescission, restitutionary, and proprietary relief, but also to *vary* contracts where required in the view of the court to prevent or reduce loss or damage caused by misleading conduct⁹—something definitely not found in the traditional, common law arsenal of responses to misleading conduct. On the other hand, while the statutory prohibition is strict, courts have recognized that questions of culpability and relative fault properly and significantly

⁴ As Gibbs CJ said in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 1a IPR 684, 688 (Austl.): “The liability imposed by s. 52 . . . is thus quite unrelated to fault . . .” See also *Yorke v Lucas* (1985) 158 CLR 661, 666 (Mason ACJ, Wilson, Deane, and Dawson JJ) (Austl.) (“Even though a corporation acts honestly and reasonably, it may nonetheless engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”).

⁵ See *Hornsby Building Info Centre Pty Ltd v Sydney Building Info Centre Ltd* (1978) 1b IPR 818, 824; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 (Austl.). If a plaintiff does seek compensation, must a court assess what loss or damage has arisen “because” of the defendant’s conduct. *Competition and Consumer Act 2010* (Cth) sch 2 ss 236(1)(a), 237(1)(a), 238(1) (Austl.).

⁶ See, e.g., *Competition and Consumer Act 2010* (Cth) sch 2 ss 29–34 (Austl.).

⁷ *Competition and Consumer Law* (Cth) sch 2 s 237 (Austl.); see also *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640, 655 [49], 656–57 [54] (French CJ, Crennan, Bell & Keane JJ) (Austl.); *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 318 [24] (French CJ) (Austl.).

⁸ *Akron Sec Ltd v Illiffe* (1997) 41 NSWLR 353, 364 (Mason P) (Austl.).

⁹ *Trade Practices Act 1974* (Cth) s 92(2) (Austl.); *Competition and Consumer Act* (Cth) sch 2 s 243 (Austl.).

inform the award of relief in claims for private redress. In this sphere, guidance from neighboring doctrines such as deceit and negligent misstatement have proven of assistance in drawing boundaries on defendants' scope of liability for misleading conduct.¹⁰

II. THE RELATIONSHIP BETWEEN GENERAL LAW AND STATUTORY REMEDIES

One might be forgiven for assuming that the powerful prohibition and its accompanying remedial regime (the "scheme") would render redundant the cognate common law and equitable claims directed at remedying misleading conduct.¹¹ This outcome may be considered all the more inevitable, once it is appreciated that the scheme is not limited to consumer transactions but extends to business-to-business transactions. Moreover, the scheme is repeated and replicated, in more or less similar formats, across literally dozens of general and specific pieces of legislation. Thus, it now covers virtually every aspect of commercial intercourse.¹² But this anticipated redundancy of related common law doctrines and principles has not occurred.¹³ Rather, Australian law has gradually shifted to see increased reference and interaction between the related common law and statutory law. This interaction paves the way towards an increasingly holistic and integrated landscape in the law governing misleading conduct.

The need to locate the statutory scheme within its broader legal landscape has been encouraged and, indeed, necessitated by the principle-based legislative design underpinning the regime. The core provisions are expressed in open-ended language that echo (but do not necessarily mirror) legal and equitable concepts and are left largely undefined in the statute. Thus, the central prohibition on misleading conduct is supported by a remedial scheme that provides for a wide range of orders designed to "compensate," "prevent or reduce" "loss or damage" suffered "because of" "conduct that is misleading or deceptive."¹⁴ None of these terms are defined in the legislation. This has led courts to draw upon common law and equitable

¹⁰ *Limitations on Defendant Liability for Misleading or Deceptive Conduct Under Statute*, *supra* note 3.

¹¹ See, e.g., Mylton Burns, *Has s 52 of the TPA Rendered Negligent Misstatement Irrelevant to Australian Professional Indemnity Insurance for "Advice Professionals"*, 2001 12(2) *INS. L. J.* 121; Peter Gillies, *Actions for Breach of s 52 and for Negligent Misstatement at Common Law—Some Observations on Their Relative Competitiveness*, 2003 11(1) *COMPETITION & CONSUMER L.J.* 43.

¹² See, e.g., *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA, 12DB, 12DC, 12DF. These provisions are modelled on the ACL, contained in schedule 2 of the *CCA*. Prohibitions on misleading conduct are also found in a wide range of other statutes including the *Corporations Act* and more specific federal and state counterparts such as under the various food and retail tenancies acts.

¹³ *In the Age of Statutes, Why Do We Still Turn to the Common Law Torts*, *supra* note 3.

¹⁴ See *ACL* ss 236–69.

doctrines and remedies to the extent that they are consistent with, and promote, the language and protective purpose of the statute.¹⁵ Thus, as we will see below, courts have drawn on a range of torts and equitable doctrines for guidance on the meaning and measure of “loss or damage” under section 236. Beyond compensatory awards, courts have also consistently held that the equitable principles of rescission provide safe, if not exclusive, guidance for statutory orders that set aside transactions induced by misleading conduct.¹⁶

Conversely, the common practice of pleading both the statutory prohibition and its neighboring general law causes of action have seen the statute exert its own influence on the evolution of analogous common law and equitable principles and remedies in Australia. A good example of the creative potential of this form of “gravitational” influence is *Vadasz v Pioneer Concrete (SA) Pty Ltd*,¹⁷ where the High Court of Australia, in a unanimous judgment, drew upon a number of authorities on cognate statutory fields to support its view that equity permitted partial rescission of a contract. This form of remedial flexibility is clearly permitted under the *ACL*.¹⁸ Another example is in the fractured field of common law and equitable reliance-based estoppels. Australian courts have yet to commit to developing a more rational and unified model of these doctrines, which reconsiders the current, highly formal doctrinal distinctions imposed on this field in light of more substantive questions of principle and policy.¹⁹ Nonetheless, some first steps have been taken.²⁰ There is a reasonable argument in favor of the view that the surrounding and pervasive statutory context not only encourages but demands judicial engagement with this task, if the law is to develop in a coherent and integrated fashion.²¹

In *Re Demagogue*, Gummow J identified the nature of the challenge:

¹⁵ See, e.g., *Elna Australia Pty Ltd v. Int'l Computers (Australia) Pty Ltd [No 2]* (1987) 16 FCR 410, 417–18 (Gummow J); *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 529 [103] (Gummow J); *Henville v Walker* (2001) 206 CLR 459, 470 [18] (Gleeson CJ). For an examination of the nuanced interpretive process, see *Limitations on Defendant Liability for Misleading or Deceptive Conduct under Statute*, *supra* note 3.

¹⁶ See, e.g., *Tenji v Henneberry & Assocs Pty Ltd* (2000) 98 FCR 324, 329–30 [12] (French J) (Austl.); *Marks* (1998) 196 CLR at 535 [116] (Gummow J); *Munchies Mgmt Pty Ltd v Belperio* (1988) 58 FCR 274, 288 (Fisher, Gummow and Lee JJ) (Austl.).

¹⁷ *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 (Austl.).

¹⁸ Indeed, the statutory scheme permits the court to make orders “varying” a contract: *Trade Practices Act 1974* (Cth) s 87(2)(b) (Austl.); *ACL* s 243(b).

¹⁹ For further consideration, see Elise Bant & Michael Bryan, *Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel*, 2015 35(3) OXFORD J. LEGAL STUD. 427.

²⁰ See, e.g., *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 (Austl.); *EK Nominees Pty Ltd v Woolworths Ltd* [2006] NSWSC 1172 (Austl.); see also *Vasue v Lubo Medich Holdings* [2008] NSWSC 899 [53]–[56] (White J) (Austl.); *ACN 074 971 109 (as tr for the Argot Unit Tr) v Nat'l Mut Life Ass'n of Australasia Ltd* [2006] VSC 507 [762] (Redlich J) (Austl.).

²¹ See *Estoppel, Misleading Conduct and Equitable Fraud*, *supra* note 3.

As Professor Finn has pointed out, s 52 of the [Trade Practices] Act epitomises both the encroachment by statute upon areas previously left to the general law and the challenge which now exists to bring into relative harmony with the body of case-law construing s 52, general law doctrines whose deficiencies (for example, as to the legal consequences of pre-contractual statements) this case law has exposed: Finn, “Statutes And The Common Law” (1992) 22 UWA L Rev 7 at 11, 25 . . .²²

The need for ongoing consideration of the potential for rational development and integration of common law and statutory principle has of late been underlined by the High Court’s repeated statements concerning the overriding principle of coherence.²³ While that concept has yet to be fully articulated, there is little doubt that it encompasses the need to consider the interactions and “fit” between statutory and common law principles.²⁴ And given the ubiquity of the statutory prohibitions on misleading conduct, the structure and substance of those schemes form a puissant background to any discussion of the nature and operation of common law remedies.

III. KEY FEATURES OF THE STATUTORY REMEDIES FOR MISLEADING CONDUCT

There are some striking features of the statutory scheme which arguably have profound implications for the wider law of remedies in Australia.

²² *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 6 (Austl.).

²³ *Equiscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 518, 520, 523 (Austl.); *Miller v Miller* (2011) 242 CLR 446, 454 (Austl.).

²⁴ The literature is now extensive, but some influential examples include (in chronological order): Paul Finn, *Statutes and the Common Law*, 22 W. AUSTL. L. REV. 7 (1992); Jack Beatson, *Has the Common Law a Future?*, 56 CAMBRIDGE L.J. 291, 300 (1997); WILLIAM GUMMOW, *CHANGE AND CONTINUITY: STATUTE, EQUITY, AND FEDERALISM* (Oxford Univ. Press 1999); Jack Beatson, *The Role of Statute in the Development of Common Law Doctrine*, 117 L.Q. REV. 247 (2001); Paul Finn, *Statutes and the Common Law: The Continuing Story*, in *INTERPRETING STATUTES 52* (Suzanne Corcoran & Stephen Bottomley eds., 2005); Joachim Dietrich, *What Is “Lawyering”? The Challenge of Taxonomy*, 65 CAMBRIDGE L.J. 549 (2006); Stephen Gageler, *Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process*, 37 MONASH U. L. REV. 1 (2011); Andrew Burrows, *The Relationship Between Common Law and Statute in the Law of Obligations*, 128 L.Q. REV. 232 (2012); Mark Leeming, *Theories and Principles Underlying the Development of the Common Law—The Statutory Elephant in the Room*, 36 UNSW L.J. 1002 (2013); DAVID WRIGHT, *COMMON LAW IN THE AGE OF STATUTES: THE EQUITY OF THE STATUTE* (LexisNexis Butterworths, 2015); Elise Bant, *Statute and Common Law: Interaction and Influence in Light of Principle of Coherence*, 38 UNSW L.J. 367 (2015); Anthony Mason, *A Judicial Perspective on the Development of Common Law Doctrine in the Light of Statute Law*, in *THE COMMON LAW OF OBLIGATIONS: DIVERGENCE AND UNITY 119* (Andrew Robertson & Michael Tilburty eds., 2016); Ross Grantham & Darryn Jensen, *Coherence in the Age of Statutes*, 42 MONASH U. L. REV. 360 (2016). The critical nature of the enquiry in the “age of statutes” was examined, and the term coined in GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES 163–67* (Harvard Univ. Press, 1982).

However, we consider that they may well also offer valuable insights for other jurisdictions, including for debates over fundamental issues such as the relationship between right and remedy, as well as the role and content of judicial discretion. This section will first outline these key features before turning, in the final section, to consider their broader implications.

A. Section 236 Damages

As a section that entitles a plaintiff as of right²⁵ to monetary compensation for loss caused by misleading conduct, section 236 traditionally has been the first port of call for plaintiffs seeking pecuniary relief under the *ACL* for contravention of the prohibition of misleading or deceptive conduct:

236 Actions for damages

(1) If:

- (a) a person (the *claimant*) suffers loss or damage because of the conduct of another person; and
- (b) the conduct contravened a provision of Chapter 2 [which includes the prohibition on misleading conduct] or 3; the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

The meaning of “loss or damage” under section 236 is undefined in the *ACL*. However, as we have explained elsewhere, Australian courts have risen to the challenge of its interpretation by drawing on cognate general law concepts to the extent that they are consistent with and promote the particular statutory language and purpose.²⁶ When thinking about potential forms of loss or damage, the laws of contract and tort provide different (albeit not exhaustive)²⁷ paradigms for the law’s response to misleading conduct. Both commonly provide remedies for misleading conduct: in contract where the misrepresentation is incorporated into the agreement, and in tort through a raft of claims including deceit, negligent misstatement, defamation, passing off and injurious falsehood. Equitable doctrines also frequently operate in the

²⁵ Remedies (including compensation) that may be available at the discretion of the court pursuant to sections 237 and 243 of the *ACL*, and the different conceptions of “loss or damage” the subject of those sections, are addressed in the following section.

²⁶ See *Misleading Conduct Before the Federal Court*, *supra* note 3, at 165.

²⁷ As Gummow J has observed, it is an error to think that “tort and contract compris[e] the universe of analogues offered by the general law in s 52 cases.” *Elna Australia Pty Ltd v. Int’l Computers (Australia) Pty Ltd [No 2]* (1987) 16 FCR 410; see also *GIO Australia Holdings Ltd v Marks* (1996) 70 FCR 559, 582–83. On the gain-based remedial analogues beyond rescission and restitution for misleading conduct, see also *Should Specifically Deterrent or Punitive Remedies Be Made Available*, *supra* note 3, at 99.

context of, and provide relief for, misleading conduct, through the doctrines of estoppel, misrepresentation, rescission and breach of fiduciary duty.²⁸ Given the rich panoply of evolved general law doctrines that respond to misleading conduct in all its varieties,²⁹ the task is to determine which of these general law doctrines best aligns with, and promotes, the statutory language and purpose. Some brief examples may illustrate this point.

It is well understood in the law of contract that expectation damages are a form of normative, rather than factual, loss.³⁰ Expectation damages make sense in a context where the legal order demands that contracts must be performed.³¹ Where a misleading contractual warranty (for example, as to profit) has been breached, a plaintiff's dashed expectation of gain caused by the proscribed conduct constitutes "loss" because the plaintiff not only *expected* the profit but was *entitled* to it.

By contrast, section 18 of the *ACL* does not demand that parties should perform their promises or make true their representations. The statute requires that defendants should not engage in misleading or deceptive conduct. This suggests that, without loss of profit to which the plaintiff was *entitled*, the only loss suffered in cases of misleading or deceptive conduct relating to profitability, for example, is the disappointment of shattered hopes.

Consistently with this analysis, Australian courts have concluded that the statutory measure is the extent to which a plaintiff is left "worse off" by reference to the "actual" loss suffered as a result of misleading conduct.³² This sum is usually calculated in terms of "reliance loss," by analogy with the torts of deceit³³ and negligent misstatement.³⁴ However, courts have also noted that, on the language of the statute, plaintiff reliance is not required.

²⁸ See *Elna* (1987) 16 FCR 410.

²⁹ Fiduciary law, for example, frequently raises the issue of misleading silence when a fiduciary fails to disclose and obtain informed consent for a breach of fiduciary duty.

³⁰ L. L. Fuller & William R. Perdue Jr., *The Reliance Interest in Contract Damages: I*, 46 *YALE L.J.* 52, 53 (1936).

³¹ *Clark v Macourt* (2013) 253 CLR 1, 7 (Austl.) (discussing the nature of expectation damages in contract); see also *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 504:

[O]nce it is appreciated that, for the purposes of the law of contract "expectation" loss signifies the loss of a valuable right, namely, the contractual promise, it is irrelevant and quite misleading to ask whether, in the case of misleading and deceptive conduct under s 52 of the Act, ss 82 and 87 allow for "expectation" loss or "consequential" loss. It is irrelevant, because, if the misrepresentation is not contractual, there can be no loss of a contractual promise.

³² See *Gates v City Mut Life Assurance Soc'y Ltd* (1986) 160 CLR 1, 12 (Austl.); *Marks* (1998) 196 CLR 494.

³³ See *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281, 291 (Austl.); *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413, 460–61 (Austl.).

³⁴ See *Gates* (1986) 160 CLR at 11. The law of negligent misstatement has perhaps been underutilized by courts to date. See *Limitations on Defendant Liability for Misleading or Deceptive Conduct Under Statute*, *supra* note 3, at 172.

Rather, the statute demands that the damage has been suffered “because of” the misconduct: a requirement of causation.³⁵ Thus, the prohibition also captures loss or damage caused by third parties relying on a defendant’s misleading conduct, with the consequence that the plaintiff suffers loss. An example is where the defendant makes misleading statements about the plaintiff competitor’s products or business, resulting in diversion of custom from the plaintiff to the defendant’s business. Here, the torts of injurious falsehood, defamation and passing on have also proven valuable resources to guide the operation of the statute.³⁶ Whichever analogical route is taken, it seems clear that the disappointment of shattered hopes arising from a misrepresentation as to profitability may be compensated not through expectation damages but, at best,³⁷ as a type of distress damage.³⁸ The result of this interactive reasoning is a better understanding of the nature of harm and compensation within an integrated legal system comprising common law, equity and statute.

B. Sections 237–39 and 243: Rescission and the Remedial Smorgasbord

Turning to sections 237–39 of the *ACL*, these provisions arm courts with the discretion to make a wide range of creative orders to remedy misleading conduct,³⁹ illustrations of which are set out in section 243. Section 243 of the *ACL*, which replicates the earlier provision under section 87 of the *TPA*, provides a non-exhaustive list of the kinds of orders that may be made:

³⁵ See *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 351 (Austl.); see also *Caason Invs Pty Ltd v Cao* (2015) 236 FCR 322, 352 (Austl.) (discussing section 729 of the *Corporations Act*).

³⁶ *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526 (Austl.); see *Caason* (2015) 236 FCR 322.

³⁷ Distress damages may not be available for corporate plaintiffs.

³⁸ *New South Wales Lotteries Corp Pty Ltd v Kuzmanovski* (2011) 195 FCR 234, 253 (Austl.).

³⁹ Section 237 allows for claims by injured persons and the regulator on behalf of such persons. Section 238 allows for compensation orders arising out of other proceedings. Section 239 covers orders for non-party consumers.

243 Kinds of orders that may be made

Without limiting section 237(1), 238(1) or 239(1), the orders that a court may make under any of those sections against a person (the *respondent*) include all or any of the following:

- (a) an order declaring the whole or any part of a contract made between the respondent and a person (the *injured person*) who suffered, or is likely to suffer, the loss or damage referred to in that section, or of a collateral arrangement relating to such a contract:
 - (i) to be void; and
 - (ii) if the court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (b) an order:
 - (i) varying such a contract or arrangement in such manner as is specified in the order; and
 - (ii) if the court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;
- (d) an order directing the respondent to refund money or return property to the injured person;
- (e) except if the order is to be made under section 239(1)—an order directing the respondent to pay the injured person the amount of the loss or damage;
- (f) an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that had been supplied by the respondent to the injured person;
- (g) an order directing the respondent, at his or her own expense, to supply specified services to the injured person;
- (h) an order, in relation to an instrument creating or transferring an interest in land, directing the respondent to execute an instrument that:
 - (i) varies, or has the effect of varying, the first mentioned instrument; or

- (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first mentioned instrument.

Section 237(2) of the *ACL* (entitled “Compensation orders etc. on application by an injured person or the regulator”) provides that any order made under section 243 “must be an order that the court considers will: (a) compensate the injured person, or any such injured persons, in whole or in part for the loss or damage; or (b) prevent or reduce the loss or damage suffered, or likely to be suffered . . .”.⁴⁰ The repetition of “loss or damage” in both subsections might be taken to mean that, as for section 236, the primary aim of the orders is compensatory, responding to pecuniary loss arising from misleading conduct. But, as we have explained elsewhere,⁴¹ this may be an unduly narrow understanding of loss or damage in this context. The very juxtaposition (through “or”) under section 237(2) of orders that “(a) compensate . . . or (b) prevent or reduce” loss or damage, taken together with the extension of preventative remedies under (b) to loss or damage “likely” to be suffered, suggests that the section as a whole is not restricted to orders with a solely compensatory effect. This reading is further supported by the range of illustrative orders available under section 243, which expressly encompass refund and return orders, which look distinctly restitutionary in nature. Finally, if those orders are intended to ensure that meaningful redress is afforded to victims of misleading conduct consistent with the instrumental and protective aims of the statute, it is highly unlikely that the remedial purpose of section 237 can be restricted solely to compensatory awards.⁴²

Consistently with this view, courts have repeatedly held that the principles of equitable rescission provide ready sources of guidance for orders made pursuant to section 243 to reverse transactions induced by misleading conduct.⁴³ Courts draw on guidance from equitable rescission in the operation of section 243 even though the statute nowhere expressly adopts the language of rescission.⁴⁴ This use of the doctrine is practically

⁴⁰ *ACL* sections 238–39 are to similar effect.

⁴¹ *Exploring the Boundaries of Compensation for Misleading Conduct*, *supra* note 3 at 333–34.

⁴² *See, e.g., Tenji v Henneberry & Assocs Pty Ltd* (2000) 98 FCR 324, 333 [20] (French J) (Austl.): Rescission in equity transcends compensation. Avoidance under s 87 must serve a compensatory purpose but may serve other purposes in doing justice between the parties. There are cases in which a party who enters a contract as a result of misleading or deceptive conduct may be compensated in a pecuniary sense by an award of monetary damages but is left nonetheless with a continuing burden of unforeseen risk, a transaction soured by the events that surrounded it and a property, once the repository of hope for the future that is now an albatross around its neck.

⁴³ *See Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 535 (Gummow J); *Munchies Mgmt Pty Ltd v Belperio* (1988) 58 FCR 274, 288 (Fisher, Gummow and Lee JJ) (Austl.); *see also Tenji* (2000) 98 FCR at 329–30 [12] (French J).

⁴⁴ The leading case addressing this issue is *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 (Black CJ) (Austl.).

pertinent in understanding the scope of statutory relief because equitable rescission cannot be regarded as compensatory in nature. Equitable rescission indubitably operates to effect restitution and counter-restitution of benefits conferred pursuant to the impugned transaction. That is, the remedial aim is to require the parties to give back (make restitution of)⁴⁵ benefits received from the other, rather than provide compensation as that concept is understood in the law of torts. This is demonstrated by the fact that, at general law, compensation cannot be sought cumulative upon rescission unless the plaintiff pleads and proves the independent tort that supports compensation as a remedy.⁴⁶

Courts have reconciled the restitutionary nature of orders of rescission made under section 243 of the *ACL* (section 87 of the *TPA*) with the statutory scheme through close analysis of the terms and structure of those provisions and the protective purposes of the scheme.⁴⁷ As they have found, the deliberate strategy to separate compensatory orders as of right from the discretionary suite points to a more expansive and strongly functional conception of “loss or damage” as being the subject of section 237 orders, which is required to effect the protective purpose of the statute.⁴⁸ Early decisions suggested that it would be possible to embrace an expansive approach to section 236, “giving ‘recover’ the sense of *regaining through restitution a position lost* by the conduct complained of.”⁴⁹ However, given the established approach to section 236 damages, which are awarded as of right, the better solution (and one accommodated by the language and structure of the remedial scheme) is to adopt this more expansive approach under sections 237 and 243. There, the courts’ remedial discretion clearly embraces orders akin to rescission, regaining through restitution a position lost and thereby “preventing or reducing” the loss or damage suffered because of misleading conduct.⁵⁰

⁴⁵ Restitution in this sense is distinguished from disgorgement damages or the order following an account of profits, which require a defendant to give up defined benefits to the plaintiff, whether or not they were transferred from the plaintiff: See JAMES EDELMAN, MCGREGOR ON DAMAGES ch. 14, ¶ 14 (Sweet & Maxwell eds., 20th ed. 2018).

⁴⁶ See *Sibley v Grosvenor* (1916) 21 CLR 469, 475 (Griffith CJ); Elise Bant, *Rescission, Restitution and Compensation*, in EQUITABLE COMPENSATION AND DISGORGEMENT OF PROFIT 277, 281 n.24 (Simone Degeling & Jason NE Varuhas eds., 2017) (discussing *Redgrave v Hurd* (1881) 20 Ch D 1, 12 (Jessel MR, Lush LJ agreeing at 26)).

⁴⁷ The chain of development is addressed in *Misleading Conduct Before the Federal Court*, *supra* note 3 at 167–68.

⁴⁸ See *Demagogue* (1992) 39 FCR at 33 (Black CJ), 43–44 (Gummow J), 47–48 (Cooper J).

⁴⁹ *Munchies Mgmt Pty Ltd v Belperio* (1988) 58 FCR 274, 287–88 (Fisher, Gummow and Lee JJ) (Austl.) (emphasis added), cited with approval in *Demagogue* (1992) 39 FCR at [61] (Gummow J); *Metz Holdings Pty Ltd v Simmac Pty Ltd [No 2]* (2011) 216 IR 116, 257 [865] (Barker J); see also *Karmot Auto Spares Pty Ltd v Dominelli Ford (Hurstville) Pty Ltd* (1992) 35 FCR 560, 573 [56] (Heerey J).

⁵⁰ *Munchies* (1988) 58 FCR at 287–88 (Fisher, Gummow and Lee JJ).

This broad, policy-driven conception of “loss or damage” under section 237 of the *ACL* (*TPA* section 87) permits courts to consider, as relevant factors in crafting orders for relief, whether the plaintiff would suffer harm in the absence of, or indeed as a result of, the award.⁵¹ The particular focus of the inquiry, as for equitable rescission, seems to be whether it is possible to return the parties to their former positions, in so preventing or reducing loss or damage. To that end, for example, courts routinely apply change of position-style considerations to protect rescinding plaintiffs from being placed without justification (such as plaintiff fault or risk-taking once they become aware that the defendant’s conduct was misleading) in a worse position than they occupied prior to the impugned transaction.⁵² Again, there remains potential for further interplay between common law and statutory developments. For example, while courts have yet to decide whether the common law defense extends to non-reliance-based changes of position (so-called “independent” changes of position),⁵³ recognition by courts in the statutory context that these considerations need to be factored in to avoid causing harm consequent on rescission provides an important template of reasoning for future common law decisions.

IV. BROADER IMPLICATIONS FOR THE LAW OF REMEDIES

A number of important and broader implications flow from this analysis. For reasons of space, these may be only briefly stated, but they point to an important source of evidence informing ideas that hitherto have not, perhaps, attracted the attention of remedies scholars to the extent warranted.

It will have been observed that the statutory prohibition on misleading conduct is separated both structurally and normatively from the remedial consequences of its contravention. Thus, as we have seen, defendant fault is irrelevant to the primary issue of contravention for the purposes of section 18 of the *ACL*, found in Chapter 2. By contrast, the fault of both parties strongly informs the remedial inquiry following a finding of contravention, both in relation to regulator actions and to private claims for redress, made under Chapter 5 “Enforcement and Remedies.”⁵⁴ We have also seen that the statute

⁵¹ See, e.g., *id.* at 287–89; *Akron Sec Ltd v Iliffe* (1997) 41 NSWLR 353, 364 (Mason P) (Austl.).

⁵² The same change of position considerations are also at work in equitable rescission: see, e.g., *Coastal Estates Pty Ltd v Melevende* [1965] VR 433, 440–41 (Sholl J) (Austl.); Bant, *supra* note 46, at 277, 288–90, 298.

⁵³ *Australian Fin Serv & Leasing Pty Ltd v Hills Indus Ltd* (2014) 253 CLR 560 (Austl.); see also ELISE BANT, *THE CHANGE OF POSITION DEFENCE* 143–60 (Hart 2009).

⁵⁴ *Limitations on Defendant Liability for Misleading or Deceptive Conduct Under Statute*, *supra* note 3; Jeannie M. Paterson & Elise Bant, *Intuitive Synthesis and Fidelity to Purpose?: Judicial Interpretation of the Discretionary Power to Award Civil Penalties Under the Australian Consumer Law*, in *STATUTORY INTERPRETATION IN PRIVATE LAW* 154, 175 (Prue Vines & Scott Donald eds., Federation Press 2019).

expressly recognizes and gives effect to the role of judicial discretion in awarding remedies in response to contraventions of the primary prohibitions. Finally, the statutory schemes dominate the private law landscape in a manner that demands their close consideration alongside, and in conjunction with, their common law counterparts. These features feed in to and may properly inform broader debates about the nature and role of private law remedies not merely within Australia, but within other jurisdictions sharing a common law tradition.

The first area of debate relates to the forms of harm that are the subject of orders for compensation. Eric Descheemaeker has persuasively posited that the law of torts contains two different and mutually incompatible conceptions of harm: a “bipolar” model of harm wrongfully caused, which focusses on the extent to which a person is left financially or emotionally worse off because of the defendant’s wrongdoing, and a “unipolar” model in which the very infringement of the plaintiff’s right is itself considered the harm to be compensated. Adopting that distinction for present purposes, recent years have seen a significant surge of interest in, and support for, rights-based or unipolar conceptions of harm.⁵⁵ These appear to supply a particularly cogent basis for awarding compensation in cases where it is difficult or impossible to identify actual (financial or emotional) harm caused by the defendant’s wrongdoing and, yet, it is clear that some remedy or relief ought to be granted.⁵⁶ Hence a consequence of rights-based models of harm is to re-establish the principled dominance of compensation as the primary remedy for torts, sidelining and delegitimizing alternatives such as restitutionary and exemplary damages. A striking and recent example is the UK Supreme Court case of *One Step (Support) Ltd. v. Morris-Garner*⁵⁷ in which Lord Reed (with whom Lady Hale, Lord Wilson and Lord Carnwath agreed) characterized “user damages” (or, as Lord Reed preferred, “negotiating damages”) as:

providing compensation for loss, albeit not loss of a conventional kind. Where property is damaged, the loss suffered can be measured in terms of the cost of repair or the diminution in value, and damages can be assessed accordingly. Where on the other hand an unlawful use is made of property, and the *right to control such use is a valuable asset*, the owner suffers a loss of a different kind, which calls for a different method of assessing damages. In

⁵⁵ Eric Descheemaeker, *Unravelling Harms in Tort Law*, 132 L.Q. REV. 595 (2016).

⁵⁶ For example, in the context of user damages: David J. Brennan, *The Beautiful Restitutionary Heresy of a Larrikin*, 33 SYDNEY L. REV. 209, 219–25 (2011); Mitchell McInnes, *Gain, Loss and the User Principle*, 14 RESTITUTION L. REV. 76, 85 (2006); cf. Kit Barker, *Damages ‘Without Loss’: Can Hohfeld Help?*, 34 OXFORD J.L. STUD. 631(2014).

⁵⁷ *One Step (Support) Ltd. v. Morris-Garner* [2018] UKSC 20, [2019] AC 649.

such circumstances, the person who makes wrongful use of the property *prevents the owner from exercising his right to obtain the economic value of the use in question, and should therefore compensate him for the consequent loss*. Put shortly, he takes something for nothing, for which the owner was entitled to require payment.⁵⁸

And subsequently:

The claimant has in substance been deprived of a valuable asset and his loss can therefore be measured by determining the economic value of the asset in question. The defendant has taken something for nothing, for which the claimant was entitled to payment.⁵⁹

This reasoning enabled the Court to reject restitutionary damages as necessary or appropriate on the facts of the case, although the Court did not shut the door entirely on the possibility of those damages in some, presumably exceptional, cases (and, indeed, the Court's repeated emphasis on "taking something for nothing" points strongly to the fact of enrichment in these cases). The Singapore Court of Appeal has similarly adopted a compensatory analysis of user damages in the recent case of *Turf Club Auto Emporium Pte Ltd. v. Yeo Boong Hua*.⁶⁰ In that case, the Court characterized the harm to be compensated as the loss of rights, rather than actual loss, albeit the amount of loss is calculated by reference to a restitutionary measure.

In this context, it is striking that the primary Australian statutory prohibition on misleading conduct and its associated remedial scheme is entirely consistent with Descheemaeker's conception of bipolar harm. Indeed, a bipolar analysis may fairly be considered to be mandated by both the language and structure of the statutes. It would be very difficult to see any reason for the repeated legislative designs that structurally separate wrong from remedy if they were one and the same, nor to adopt the mandated requirements of causation and separate identification of "loss or damage" that characterize both section 236 and sections 237/243 orders and their counterparts. As we have seen above, this dualist position has been confirmed by the courts' identification of loss under section 236 *ACL* as entailing "actual" rather than normative loss. The same must follow for sections 237/243 orders, albeit the focus in some cases will be on preventing or reducing actual harm by returning the parties to their former positions.⁶¹

⁵⁸ *Id.* at [30] (emphasis added); see also *Bunnings Grp Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420.

⁵⁹ *Morris-Garner* [2018] UKSC 20, [2019] AC 649 [92]; see also *id.* at [94]–[95] (points (1) and (10)).

⁶⁰ *Turf Club Auto Emporium Pte Ltd. v. Yeo Boong Hua* [2018] SGCA 44, [210]–[215] (Sing.).

⁶¹ *Exploring the Boundaries of Compensation for Misleading Conduct*, *supra* note 3.

Indeed, it is arguable that the statutory scheme under the *ACL* (and equivalents) does not even conform to Hohfeld's famous distinction between rights and obligations, which has such a powerful influence over rights-based theories of remedies. The statutory prohibition confers no corresponding right on private litigants unless and until there is (actual) harm suffered because of its contravention. It is a statutory norm that, when contravened, triggers a range of regulatory responses and which, only when causative of actual loss or damage, attracts private rights of redress. Notwithstanding this seemingly radical diversion from orthodoxy, the scheme seems intuitively familiar and highly workable in practice in a jurisdiction steeped in the common law tradition. All of this suggests that doubt can and should be held in respect of any claim of the incontestable and singular truth of rights-based analysis.

Alongside and informing this debate, is a second strand of disagreement about the nature of the relationship between right and remedy and, in particular, the proper role of courts in awarding relief. As is well-known, at one end of the spectrum is a "monist" vision of right and remedy, in which the two are inextricably connected.⁶² To adapt Peter Birks' memorable phrase, on this account a remedy is a right "contemplated from the other end."⁶³ Clearly there is a strong (although not essential)⁶⁴ connection between this understanding of remedies and rights-based theories of harm and compensation. On a monist account, there is very little room for judicial discretion in the award of relief: the nature of the right dictates the form and measure of relief. An example is the view that a plaintiff's contractual right can be defined in terms of the defendant's obligation to perform or pay compensation for the loss of the right to performance. The plaintiff's entitlement "as of right" is to performance or compensation. At the other end of the spectrum of theories concerning rights and remedies is a "dualist" account, which separates functionally and analytically the roles of right and remedy. In this school of thought, once a right has been breached, a range of considerations arise that can and should guide the legitimate use of judicial

⁶² Grant Hammond, *Rethinking Remedies: The Changing Nature of the Conception of the Relationship Between Legal and Equitable Remedies*, in *REMEDIES: ISSUES AND PERSPECTIVES* (Jeffrey Berryman ed., 1991).

⁶³ Peter Birks, *The Law of Restitution at the End of an Epoch*, 28 U.W. AUSTL. L. REV. 13, 55 (1999) [hereinafter *The Law of Restitution at the End of an Epoch*]; see also Peter Birks, *Definition and Division: A Meditation on Institutes 3.13*, in *THE CLASSIFICATION OF OBLIGATIONS* 3, 24 (Peter Birks ed., 1997) ("The secondary obligation to pay such compensatory damages is . . . the same thing as the right, looked at from the other end.").

⁶⁴ Birks, himself, famously argued for the end of the "false monopoly" of compensation and recognition of the proper role for punitive and gain-based relief. *The Law of Restitution at the End of an Epoch*, *supra* note 63, at 52–54. For Birks, the challenge lay in identifying with sufficient clarity the conditions for their award, thereby restricting, if not eliminating entirely, the role of judicial discretion. See, e.g., Peter Birks, *Three Kinds of Objection to Discretionary Remedialism*, 29 U.W. AUSTL. L. REV. 1, 1 (2000).

discretion in the award and measure of remedy. A moderate form of this school of thought does not demand that the law of remedies degenerate entirely into instances of individuated justice, but does acknowledge and defend the exercise of judgement by courts in actively crafting relief.⁶⁵ That is the species of dualism that seem to have taken root in Australian remedial jurisprudence.

The *TPA* and the *ACL* have, in this regard, had a subtle but potentially profound influence. As Paul Finn has rightly noted, the pervasive statutory context encourages discretion and flexibility in the award of remedies under the general law: “. . . liability and remedy have been uncoupled. This . . . reflects the “basket” approach to remedy taken in modern statutes at least in Australia, as for example, in . . . [the *ACL*].”⁶⁶ Finn identifies the remedial constructive trust and the dramatical revival of equitable compensation as examples of Australia’s distinctive law of remedies which, one could argue, strongly reflect this “dualist” and discretionary approach. As we have seen, to this list one could readily add partial rescission and proportionate responses to equitable estoppel.⁶⁷

The short point from the foregoing analysis is that the structural and normative separation between right and remedy under the *ACL* and related statutory schemes has made Australia relatively sterile ground for the sorts of monist and rights-based theories that assert a direct and inviolable connection between right and (usually compensatory) remedy. The same may be said for attempts to sterilise judicial discretion in the award of relief.

Finally, reference must be had, albeit briefly, to the ongoing debates between corrective justice and distributive justice theorists, which are concerned to map and guide judicial reasoning in private law disputes. For present purposes, these schools of thought are relevant as identifying the sorts of reasons that courts should or should not consider in the award of relief. While there are, again, numerous visions of each (and there are plenty of scholars and judges who think that both forms of justice can and should simultaneously occupy the legal stage), corrective justice is commonly understood as demanding that any remedial discretion on the part of a judge

⁶⁵ Wright has memorably described the relationship as “sticky”: the remedy necessarily responding to and reflecting the nature of the claim to which it relates. David Wright, *Wrong and Remedy: A Sticky Relationship*, SING. J. LEGAL STUD. 1, 1 (2001); see also Kit Barker, *Rescuing Remedialism in Unjust Enrichment Law: Why Remedies Are Right*, 57 CAMBRIDGE L.J. 301, 323 (1998) (noting the deeply “reflexive” relationship between remedy and right); Paul Finn, *Equitable Doctrine and Discretion in Remedies*, in EQUITABLE DOCTRINE AND DISCRETION IN REMEDIES: ESSAYS IN HONOUR OF GARETH JONES 251, 267 (1998).

⁶⁶ Paul Finn, *Unity, Then Divergence: The Privy Council, the Common Law of England and the Common Laws of Canada, Australia and New Zealand*, in THE COMMON LAW OF OBLIGATIONS: DIVERGENCE AND UNITY 37, 56–57 (Andrew Robertson & Michael Tilbury eds., 2016); see also Paul Finn, *Common Law Divergences*, 37 MELB. U. L. REV. 509, 531–32 (2013).

⁶⁷ See, e.g., *Giumelli v Giumelli* (1999) 196 CLR 101, 113 (Austl.).

is and should be circumscribed to considerations relevant to the interests of the immediate parties to the dispute. That is, the reasoning that supports liability must match the inherent correlative structure of liability itself, which focuses solely on the relationship between plaintiff and defendant.⁶⁸ It follows that considerations external to that correlative relationship (for example, third party interests or questions of public benefit) are foreign to the inquiry and can only serve to undermine corrective justice. On a distributive account, by contrast, broader considerations of public interests and benefits may also play a legitimate role in informing relief. These are also sometimes called “instrumental” conceptions of private law, as they see a legitimate role, consequence and even purpose for the law in promoting certain beneficial societal ends.

In Australia, any strict corrective justice account must grapple with the reality of a legal system dominated by legislation with instrumental purposes that expresses fundamental community norms and values to which statutory and, arguably, general law principles must conform in the pursuit of greater public goods. These fundamental norms include the prohibition on misleading or deceptive conduct, as well as other fundamental values such as the norm against unconscionable conduct. These arguably set the baseline against which general law standards such as “reasonableness” must be assessed.⁶⁹ The statutory schemes also irrevocably position the required commercial standards of conduct and their related remedial frameworks in the context of wider public interests or ends. This inevitably affects and reflects community expectations in a way that must inform the operation of related general law principles.⁷⁰

V. CONCLUSION

While the analysis offered in this paper might seem limited to a specific and, perhaps, idiosyncratic jurisdiction, there are, arguably, wider lessons to be had from the exercise. In particular, the analysis challenges rights-based theorists to take statute seriously. It also invites them to acknowledge a more plural account of the common law world. Australia is unlikely to abandon, be divorced from, or betray its common law heritage because of the development of its overarching statutory regimes. After all, the statutory regimes were born within and reflect an understanding of common law rights and remedies and a conception of the valid role of private law. The charge

⁶⁸ ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 114–15 (1995).

⁶⁹ As discussed in the context of estoppel and misleading conduct. *Estoppel, Misleading Conduct and Equitable Fraud*, *supra* note 3.

⁷⁰ *Dir of Consumer Affairs Vict v Scully* (2013) 303 ALR 168, 186 (Santamaria JA, Neave and Osborn JJA, concurring) (Austl.) (citing *Australian Competition & Consumer Comm'n v Lux Distribs Pty Ltd* [2013] ATPR 42–447, 43–463, ¶ 23); *see also* Bant, *supra* note 24, at 388.

that a legitimate common law system can only be understood and applied in rights-based terms must at least pause, if not falter, in the face of a sophisticated jurisdiction seeking to develop a principled, dualist and discretionary approach to right and remedy, in which remedies operate actively and appropriately to promote the many purposes of the law.