

## STATUTE AND COMMON LAW: INTERACTION AND INFLUENCE IN LIGHT OF THE PRINCIPLE OF COHERENCE

ELISE BANT\*

### I INTRODUCTION

Following the recent High Court decision in *Miller v Miller*,<sup>1</sup> there has been renewed emphasis on the principle of coherence as an overarching requirement of Australian private law.<sup>2</sup> Although the concept of coherence in this context is yet to be fully articulated,<sup>3</sup> it clearly embraces the requirement that specific private law rules and doctrines should not be applied in such a way as to undermine or stultify an overriding legal prohibition or principle of liability.<sup>4</sup> Rather, rules and doctrines must be applied in such a way that supports or

---

\* Professor of Law, Melbourne Law School. This paper arises out of an Australian Research Council project jointly led with Associate Professor Jeannie Paterson titled ‘Remedies under the *Australian Consumer Law*: Evolution and Revolution’. The author would like to thank Associate Professor Jeannie Paterson, Emeritus Professor Michael Bryan, Holly Fairhurst, the anonymous referees and the participants at the Obligations VII Conference held in Hong Kong in July 2014 for their very helpful feedback on earlier drafts of this article. All remaining errors and infelicities remain the author’s.

1 (2011) 242 CLR 446.

2 See also *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 518 [34], 520 [38], 523 [45] (French CJ, Crennan and Kiefel JJ) (*‘Equuscorp’*).

3 It seems likely that analogical reasoning, pivotal to maintaining a system of legal rules based (in part) on the doctrine of precedent, is a necessary subset of the concept of coherence. The different forms of analogical reasoning found within the general law (and the leading scholarship in the field) are recently and usefully explored by Grant Lamond, ‘Analogical Reasoning in the Common Law’ (2014) 34 *Oxford Journal of Legal Studies* 567. Lamond argues that there are three different forms of analogical reasoning: classificatory analogies, close analogies and distant analogies. Lamond’s analysis suggests support for the view that both ‘bottom-up’ and ‘top-down’ reasoning are natural and indeed essential to achieving a rational legal system: for discussions in the context of the High Court’s recent warnings of the dangers of ‘top-down’ reasoning, see Keith Mason, ‘Do Top-Down and Bottom-Up Reasoning Ever Meet?’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 19; Carmine Conte, ‘From Only the “Bottom-Up”? Legitimate Forms of Judicial Reasoning in Private Law’ (2014) forthcoming *Oxford Journal of Legal Studies*.

4 *Equuscorp* (2012) 246 CLR 498, 522–3 [45] (French CJ, Crennan and Kiefel JJ), 543–4 [109]–[111] (Gummow and Bell JJ), cf 546–50 [120]–[130] (Heydon J dissenting); *Nelson v Nelson* (1995) 184 CLR 538, 612–14 (McHugh J), following *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, 429 (Mason J) and *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267, 282 (Devlin J). See also *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215, 229–31 (McHugh and Gummow JJ).

promotes coherence in the law, in particular by producing outcomes consistent with any overriding prohibition or principle.<sup>5</sup> Determining what those overriding prohibitions or principles might be is no small task. Moreover, working out what coherence requires must be determined by reference to the individual context. However, what is clear from the existing case law is that the presence of a statutory scheme<sup>6</sup> addressing the impugned behaviour signals the need to consider the statutory purpose as part of the inquiry.<sup>7</sup>

Taking leave from this starting point, this article seeks to lay the groundwork for further discussion and analysis within the broader Australian legal community of the interaction between common law (here including equitable doctrines) and statute in the Australian private law context.<sup>8</sup> Its thesis is that the principle of coherence requires us to take much more seriously than we have done to date the interplay between statute and common law as part of our everyday mode of legal reasoning when addressing private law disputes. Indeed, it arguably requires that statutes and general law must, so far as is possible, be interpreted and applied in such a way as to form part of a coherent private law *as a whole*.<sup>9</sup> On this approach, the search for a rational and integrated system of private law presupposes a mutual process of influence and interaction between general law and statute. The role of common law concepts in informing statutory interpretation and application is well known, although it remains a continuing source of tension within Australian private law.<sup>10</sup> Significantly less well recognised, however, is that statutory principles potentially constitute a potent source of analogical reasoning when determining the application and development of common law principles. It is this latter aspect of the potential interplay between statute and common law that is the focus of this article.

The analysis undertaken in this discussion article is deliberately preliminary and illustrative of the much broader enquiry that is required to promote a coherent private law of Australia. It therefore does not attempt or claim to yield determinative answers as to how common law and statute interact in the particular areas it reviews, but rather works to provoke and engage further investigation and evaluation. To this end, the article commences by briefly considering the features of Australian statute-based law which may have

---

5 This might require that otherwise relevant causes of action or defences be denied, see, eg, the interplay between failure of basis and illegality in *Equuscorp* (2012) 246 CLR 498.

6 Here including associated regulations and the decisions of adjudicative bodies charged with administering the particular statute.

7 Not an easy task, as evidenced by the differing analysis of this question in *Equuscorp* (2012) 246 CLR 498.

8 This is not to deny the role of coherence within public law, but rather to restrict the discussion to a feasible size and in recognition that, in the private law context, appreciation of the interaction between general law and statute has been relatively slow in coming, discussed below at Part II.

9 For an excellent and detailed argument in the English context, see Andrew Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 *Law Quarterly Review* 232.

10 The tensions are explored in detail in E Bant and J Paterson, 'Limits on Defendant Liability for Misleading or Deceptive Conduct under Statute: Some Insights from Negligent Misstatement' in K Barker, Warren Swain and Ross Grantham (eds), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Hart Publishing, 2015).

hampered examination of its interaction with its common law context. It then examines two categories of cases that illustrate how the failure to take statutory context into account may lead to the incoherent application of or, conversely, the abolition of common law rules, thereby undermining a core statutory scheme. Finally, the article turns to consider cases where the analogical use of statute may well help guide common law development. The analysis suggests that statutes may properly and sometimes necessarily exert a significant ‘gravitational force’<sup>11</sup> on the ongoing development and application of a coherent common law of Australia.

## II THE STATUTE–COMMON LAW DIVIDE

With some notable exceptions,<sup>12</sup> there has been very little work done in Australia on the nature of the relationship and proper interactions between common law doctrines and statutory regimes in a private law context. This position is not unique to Australia. In a recent article, Professor Burrows noted that the ‘relationship in England between [private] common law and statute has traditionally been woefully underexplored by commentators.’<sup>13</sup> Explanations by the few commentators who have addressed the want of scholarship in this area include:<sup>14</sup> the perception (often first gained at law school) that legislation is comparatively ‘unexciting’; the sense that it is an intruder on foundational judge-made law; what might be termed constitutional concerns about the necessary separation of reasoning derived from the two sources of law; appreciation that the piecemeal and limited operation of many statutes make them ill-suited to inform debates concerning broader legal issues; and, finally, the view that legislation is often the poorly drafted outcome of political expediency, rather than reflective of legal principle. Underpinning all factors is a sense, often assumed and unarticulated, that the two sources of civil law liability are ‘oil and water’:<sup>15</sup> separate sources of law that do not mix.

---

11 J Beatson, ‘The Role of Statute in the Development of Common Law Doctrine’ (2001) 117 *Law Quarterly Review* 247, 259.

12 See, eg, Mark Leeming, ‘Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room’ (2013) 36 *University of New South Wales Law Journal* 1002; Paul Finn, ‘Statutes and the Common Law’ (1992) 22 *University of Western Australia Law Review* 7; Paul Finn, ‘Statutes and the Common Law: The Continuing Story’ in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52; W M C Gummow, *Change and Continuity: Statute, Equity, and Federalism* (Oxford University Press, 1999) ch 1.

13 Burrows, above n 9, 232.

14 P S Atiyah, ‘Common Law and Statute Law’ (1985) 48 *Modern Law Review* 1; Jack Beatson, ‘Has the Common Law a Future?’ (1997) 56 *Cambridge Law Journal* 291; Beatson, ‘The Role of Statute in the Development of Common Law Doctrine’, above n 11; Burrows, above n 9; Sir Anthony Mason, ‘A Judicial Perspective on the Development of Common Law Doctrine in the Light of Statutory Developments’ (Paper presented at the Obligations VII Conference, University of Hong Kong, 17 July 2014).

15 Beatson, ‘Has the Common Law a Future?’, above n 14, 300.

Australia's federated jurisdictions exacerbate the difficulty of integrating statutory and general legal analysis within a unified common law of Australia.<sup>16</sup> As was effectively recognised by the former Australian Attorney-General's (ultimately abortive) call in 2012 for wholesale review of the law of contracts in Australia, the fragmented and diverse statutory schemes that proliferate in our state and federal jurisdictions do not readily lend themselves to cogent legal analysis, let alone application.<sup>17</sup> In those circumstances, development of a comprehensive theory or account of the interaction between statute and common law is very difficult. Indeed, the High Court has warned that reasoning by analogy from statutory schemes that are enacted in different terms in different jurisdictions could lead to an unwarranted and undesirable fragmentation of the 'one common law in Australia'.<sup>18</sup> On this view, the opportunities for integrated reasoning will be greatest where statutory reforms are consistent and adopted across state and federal jurisdictions.<sup>19</sup>

The particular format or methodology of legislation may also have an important impact on the capacity for interaction between common law and statute. As Francis Bennion notably put it:

[An] Act resembles a vessel launched on some one-way voyage from the old world to the new. The vessel is not going to return; nor are its passengers. Having only what they set out with, they cope as best they can. On arrival in the present, they deploy their native endowments under conditions originally unguessed at.<sup>20</sup>

Where the statutory language adopts broad normative standards,<sup>21</sup> illustrates its operation by inclusive rather than exhaustive criteria,<sup>22</sup> or assumes<sup>23</sup> or adopts a common law doctrine as its criterion for operation,<sup>24</sup> there is significant room

---

16 Finn, 'Statutes and the Common Law: The Continuing Story', above n 12. See the detailed discussion on the effect of fragmented statutory approaches to privilege under the various state Evidence Acts in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 60–3 [21]–[28] (Gleeson CJ, Gaudron and Gummow JJ) ('*Esso*').

17 The fact that there is diversity is not of itself a bad thing: at the least, the jurisdictions become fertile testing grounds for finding better solutions to common problems. The point rather is that this diversity makes it very difficult to identify at any one time an overarching commonality on any one, given legal point.

18 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 (The Court), quoted in *Esso* (1999) 201 CLR 49, 61–2 [23] (Gleeson CJ, Gaudron and Gummow JJ).

19 Sir Anthony Mason has argued powerfully that states must also develop their own coherent private law systems by reference to their particular statutory enactments: 'If a statute in a particular jurisdiction has clearly manifested a general policy why should the courts of that jurisdiction not take account of it, even if other State legislatures have not adopted the same policy?': Mason, above n 14. This position highlights the inherent (some might say intractable) tension between a federal system and the concept of 'one common law of Australia' (also the subject of criticism by Sir Anthony Mason) but is unfortunately beyond the scope of this article.

20 Francis Bennion, *Statutory Interpretation: A Code* (Butterworths, 3<sup>rd</sup> ed, 1997) 687, quoted in Gummow, above n 12, 6–7.

21 As in statutory adoption of concepts such as good faith.

22 As in *Competition and Consumer Act 2010* (Cth) sch 2 ss 21–2 ('*ACL*'), which list extensive but non-exhaustive indicators of unconscionable conduct in connection with the supply of goods and services.

23 As in the various Trusts Acts, which build on the case law foundations governing constitution and operation of express trusts.

24 As in the prohibition against unconscionable conduct contained in *ACL* s 20.

for cognate common law doctrines both to inform and be informed by the developing statutory jurisprudence. Notwithstanding its innate restrictions noted by Bennion, the statute obtains a kind of ‘dynamic’ operation by reference to its common law context.<sup>25</sup> However, sometimes parliament seeks to prohibit interaction between the two sources of law. A good example is found in the recent Future of Financial Advice reforms,<sup>26</sup> which enumerate exhaustively the relevant considerations that determine whether a financial adviser has acted ‘in the best interests of the client’.<sup>27</sup> By ‘listing’ considerations relevant to determining liability in a way that is exhaustive, rather than inclusive or illustrative, the reforms leave little or no room for analogical or contextual reasoning between otherwise similar common law and statutory rules, such as fiduciary law.<sup>28</sup>

Finally, as Donald has noted,<sup>29</sup> the complexity of determining the relationship between statute and common law in Australia is exacerbated by the pervasive role of regulators.<sup>30</sup> These are empowered to introduce regulations relating to statutory obligations and commonly issue guidelines as to the meaning of core statutory provisions that influence actors subject to those regimes and the kinds of questions and arguments that come before courts. This regulatory, interpretive environment is active and specific, providing much more detailed guidance on the substantive and procedural aspects of statutory provisions than would be generally forthcoming in a solely curial context. It is also potentially a far less transparent process. The underlying reasons for interpreting a particular provision in a certain way may not be revealed and may be informed by contextual considerations (such as practicality of enforcement), cultural motivations and the

---

25 Gummow, above n 12; Mark L Humphery, ‘Should Common Law Doctrines Dynamically Guide the Interpretation of Statutes?’ (2009) 3 *Legisprudence* 171.

26 See, eg, *Corporations Amendment (Future of Financial Advice) Act 2012* (Cth); *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth).

27 *Corporations Act 2001* (Cth) s 961B, as inserted by *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (Cth) sch 1 item 23; and more broadly pt 7.7A div 2, as inserted by *Corporations Amendment (Future of Financial Advice Measures) Act 2012* (Cth) sch 1 item 23.

28 Discussed perceptively by M Scott Donald, ‘Regulating for Fiduciary Qualities of Conduct’ (2013) 7 *Journal of Equity* 142. See also Sir Anthony Mason, ‘Themes and Prospects’ in P D Finn (ed), *Essays in Equity* (LawBook, 1985) 242, 243–4. Another example on the horizon is the New Zealand trusts law reforms, which aim to define and regulate the entirety of the law of trusts, a mission that faces immediate and intractable difficulties explored in depth in Helen Dervan, ‘The New Zealand Law Commission’s Proposals to Modernise the Law of Trusts: Is the Cure Worse than the Disease?’ (Paper presented at the Obligations Group Trusts Law Conference, Melbourne Law School, University of Melbourne, 5–6 December 2013).

29 Donald, above n 28, 164–6.

30 Examples are the Australian Competition and Consumer Commission, Australian Securities and Investments Commission and Australian Prudential Regulation Authority. The impact of independent dispute resolution bodies such as the Financial Ombudsman Service is a further important area about which little work has been done and correspondingly little is known.

regulator's own agenda that would not find a place, or would need to be overtly addressed, (and would be subject to curial review) in judicial reasoning.<sup>31</sup>

The thesis of this article is that notwithstanding the complexities inherent in the relationship between common law and statute, private lawyers need to be far more ready to engage in that broader contextual enquiry than we have been to date, if we are to avoid increasing fracturing and incoherence in our legal landscape. In some key areas, the acknowledged difficulties faced in developing an integrated analysis of common law and statutory operation are potentially less formidable than in others. In particular, in Australia, dominant statutory schemes such as those which arise from the *Corporations Act 2001* (Cth), the *ACL*<sup>32</sup> and the Torrens statutes,<sup>33</sup> for example, have consistent (or largely consistent) expression across all jurisdictions, and often evidence statutory principles of long standing.<sup>34</sup> The High Court has noted that a 'consistent pattern of legislative policy' may provide a proper source of analogical reasoning 'to which the common law in Australia can adapt itself.'<sup>35</sup> In these contexts, the traditional concerns about the temporary, political and ad hoc nature of legislation as a source of principled law are somewhat, if not wholly<sup>36</sup> assuaged. We should be correspondingly much more ready to engage with the statutory principles which

---

31 Administrative review processes aimed at regulators may well assist to promote accountability and consistency over time in their administrative decisions, but will not generally touch on the substantive reasons for interpreting specific statutory provisions in specific ways.

32 The *ACL* was formerly contained in the *Trade Practices Act 1974* (Cth). The states and territories enacted laws to apply the *ACL* as a law of their jurisdictions in 2010: *Fair Trading (Australian Consumer Law) Act 1992* (ACT), as amended by *Fair Trading (Australian Consumer Law) Amendment Act 2010* (ACT); *Fair Trading Act 1987* (NSW), as amended by *Fair Trading Amendment (Australian Consumer Law) Act 2010* (NSW); *Consumer Affairs and Fair Trading Act 1990* (NT), as amended by *Consumer Affairs and Fair Trading Amendment (National Uniform Legislation) Act 2010* (NT); *Fair Trading Act 1989* (Qld), as amended by *Fair Trading (Australian Consumer Law) Amendment Act 2010* (Qld); *Fair Trading Act 1987* (SA), as amended by *Statutes Amendment and Repeal (Australian Consumer Law) Act 2010* (SA); *Australian Consumer Law (Tasmania) Act 2010* (Tas); *Fair Trading Act 1999* (Vic), as amended by *Fair Trading Amendment (Australian Consumer Law) Act 2010* (Vic); *Fair Trading Act 2010* (WA).

33 *Land Titles Act 1925* (ACT); *Real Property Act 1900* (NSW); *Land Title Act 2000* (NT); *Land Title Act 1994* (Qld); *Real Property Act 1886* (SA); *Land Titles Act 1980* (Tas); *Transfer of Land Act 1958* (Vic); *Transfer of Land Act 1893* (WA).

34 Consistency has been fortified by the High Court's requirement that courts adopt 'uniformity of decision in the interpretation of uniform national legislation': *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 (The Court). Although stated in the context of the *Corporations Law*, the same unifying approach to interpretation arguably should apply to other common legislative schemes such as the *ACL* and, potentially, the Torrens statutes – although the latter do differ in some important respects, discussed below at Part III(A)(1).

35 *Esso* (1999) 201 CLR 49, 62 [23] (Gleeson CJ, Gaudron and Gummow JJ). See also *Seidler v Schallhofer* [1982] 2 NSWLR 80; *Carmody v Delehunt* [1984] 1 NSWLR 667, discussed by Mason, above n 14.

36 The criticisms of the widespread statutory reforms introduced in the various Wrongs Acts and Civil Liability Acts suggest that it is not enough that there should be widespread and similar enactments among Australian states: it may need to be possible to identify common statutory principles that have been accepted and applied in Australia over time. For an example of the powerful concerns expressed about the insurance industry-led statutory reforms in Australia, see Barbara McDonald, 'Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia' (2005) 27 *Sydney Law Review* 443.

such regimes disclose and which interact with a broad sweep of common law doctrine.

The following considers briefly just some of the undoubtedly many specific areas where increased attention to the statutory context would yield insights into the proper application and development of common law liability rules within the private law context.<sup>37</sup> The purpose here is illustrative rather than determinative of the issues in play: the aim is to inspire greater investigation and discussion of the interplay under review – to bring the debate into the spotlight where its details can be more clearly examined by all.

### III THE IMPORTANCE OF THE STATUTORY CONTEXT

Courts in Australia have long been alive to, if cautious about, the role of common law in informing statutory interpretation and application.<sup>38</sup> Less well recognised by courts or commentators but no less potent is the potential influence of statute on the continuing development of the common law, not only in areas of particular overlap but in a broader compass. The High Court's restrictive attitude adopted in cases such as *Toll FGCT Pty Ltd v Alphapharm Pty Ltd*<sup>39</sup> suggests that there is a very limited role for analogical development of the common law by reference to statute. In that case, the presence of an Australian-wide consumer protection regime was considered a reason *against* further development of cognate common law principles (such as the doctrine of non est factum) also concerned with protecting vulnerable parties from hardship arising from contracting.<sup>40</sup> However, it is arguable that this stance unduly obstructs the coherent development of the common law and seems distinctly at odds with the same Court's more recent emphasis on the overriding principle of coherence. This article offers some examples of where statutory analysis may shed light on important issues faced by cognate common law doctrines.

There are also many examples of areas where a failure to advert to the relevant statutory context has led to incoherent developments in the private law. This section first considers some examples where this inadvertence has enabled the application or, conversely, the abolition of common law rules that have the

---

37 It is accepted that there are aspects of these statutory regimes that blur the public-private law divide, particularly in the role of regulators and the presence of civil penalty orders under the *Corporations Act* and the *ACL*. In the interests of space, this article focuses on issues arising squarely in the private law sphere.

38 The *ACL*, in particular the provisions relating to misleading or deceptive conduct and its remedial counterparts have become a familiar battlefield in this context: cf, eg, *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 510 [38] (McHugh, Hayne and Callinan JJ); *Henville v Walker* (2001) 206 CLR 459, 470 [18] (Gleeson CJ); *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 407 [44] (The Court); *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, 351–2 [143] (Gummow, Hayne, Heydon and Kiefel JJ).

39 (2004) 219 CLR 165, 182–3 [48] (The Court).

40 Although the statutory regime is very broad, in some instances (eg, ss 271, 278) it remains applicable only to consumers as defined by *ACL* s 3, leaving those who do not come within its scope to their general law remedies.

clear effect of undermining a core statutory scheme. The section then turns to consider cases where the analogical use of statute may well help guide common law development.

## A The Torrens System

### 1 *The Consequences of Registration*

It is well established that the Australian Torrens system is one of title by registration, not registration of title.<sup>41</sup> That is, interests in land are conferred through the act of registration, not through the acts of prior agreement between transacting parties, or execution or even lodgement of the conveyancing documents. Registered title is subject (in general) only to those interests noted on the register. The protection conferred by registration is significant. Transactions that would be a nullity at common law are ‘cured’ on registration. Thus a registered transferee of a forged transfer obtains good and indefeasible title unless personally implicated in the forgery. The same result follows where the conveyancing instrument is made void by statute,<sup>42</sup> void for non est factum,<sup>43</sup> void for mental incapacity,<sup>44</sup> void for being ultra vires<sup>45</sup> or void for any other reason.<sup>46</sup> The main exception to the protection offered by the mantle of registration is where registration has been obtained through some personal fraud on the part of the newly registered proprietor.

It is uncontentious that these distinctive features of the Australian Torrens scheme, as enacted within each particular state’s legislation, have the purpose of promoting a registration system in which land transactions are secure, quick, efficient and reliable.<sup>47</sup> The statutory scheme is engineered to protect the position of those who take registered title in good faith (purchasers, mortgagees, lessees

---

41 *Breskvar v Wall* (1971) 126 CLR 376, 385–6 (Barwick CJ), 399 (Windeyer J).

42 *Ibid* 386 (Barwick CJ); see also *Palais Parking Station Pty Ltd v Shea* (1980) 24 SASR 425, 427, 430 (King CJ); *Tyre Marketers (Australia) Ltd v Martin Alstergren Pty Ltd* [1989] V Conv R ¶54-335, 64 183 (Marks J).

43 *PT Ltd v Maradona Pty Ltd* (1992) 25 NSWLR 643, 681B (Giles J); *Parker v Mortgage Advance Securities Pty Ltd* [2003] QCA 275, [6]–[7] (Davies JA), [16] (Williams JA agreeing), [17] (Jerrard JA agreeing); cf *Lissa v Cianci* [1994] ANZ Conv R 65, 66 (Grove J).

44 *Horvath v Commonwealth Bank of Australia* [1999] 1 VR 643, 650 [16] (Tadgell JA), 659–60 [37]–[39] (Ormiston JA), 669–70 [63]–[65] (Phillips JA).

45 *Boyd v Mayor of Wellington* [1924] NZLR 1174, 1223–5 (Adams J).

46 See, eg, *Morton v Black* (1986) 4 BPR 9164, 9166 (Young J); *Paradise Constructors & Co Pty Ltd v Poyser* (2007) 20 VR 294, 301–2 [30] (Neave JA), 310 [67] (Redlich JA); *Owners of Corinne Court 290 Stirling Street Perth Strata Plan 12821 v Shean Pty Ltd* (2000) 23 WAR 1, 18 [72] (Hasluck J); *Rock v Todeschino* [1983] 1 Qd R 356, 366 (McPherson J).

47 Douglas J Whalan, *The Torrens System in Australia* (Law Book, 1982) 14–17. Although there are some divergences between some equivalent provisions of the state legislation, it is uncontentious that, overall, they share the same legislative purposes and largely adopt similar approaches to achieving those ends.



and even donees)<sup>48</sup> from claims by the former registered proprietor or third parties, whether arising out of prior defects in the transferor's title or defects in the transaction preceding registration. Those who lose title as a result of registration of a new proprietor are protected (in theory) by the availability of compensation from state assurance funds.<sup>49</sup>

Given the primacy of this legislative regime in the Australian legal and commercial landscape, and the position of statute generally as a paramount source of law,<sup>50</sup> an outstanding feature of Australian precedent is the frequent failure of solicitors and courts to advert to the relevance of registration in private law disputes. A recent example is *National Australia Bank Ltd v Savage*.<sup>51</sup> In that case, the Bank took registered mortgages and a guarantee over land, which were subsequently the subject of claims for rescission pursuant to the equity in *Yerkey v Jones*.<sup>52</sup> Broadly speaking, this category of case concerns domestic sureties (often, but not always, wives) who give security to a financier for a primary debtor's (often a husband's) loan as a result of some mistake, undue influence or other vitiating factor. In such cases, the security may be set aside where the financier did not take sufficient steps to reduce the appreciated risk of mistake or other vitiating factor to a level where it was proper to accept the security.

In *Savage*, the wife succeeded in establishing her equity under the principle in *Yerkey v Jones*, with the result that all mortgages and the guarantee were set aside and judgment for possession of the property in question was entered in her favour.<sup>53</sup> The legal significance of the fact of registration of the mortgages was not argued before the Court and therefore was not considered. This was a pity from the Bank's perspective. Following the High Court decision in *Farah*, it is strongly arguable that such claims are defeated by registration. In the absence of fraud on the part of a financier, the only way to impugn its registered title as

---

48 *Land Title Act 2000* (NT) s 183; *Land Title Act 1994* (Qld) s 180. In the other states, the matter is one of statutory interpretation. Statutes in NSW and WA have been held to confer indefeasibility of title: *Bogdanovic v Koteff* (1988) 12 NSWLR 472, 480D (Priestley JA), 473D (Hope and Samuels JJA agreeing), approved in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 172 [198] (The Court) ('*Farah*'), but now see *Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2015] HCA 2 [59]–[62] (French CJ, Hayne, Bell and Gageler JJ), [105]–[119] (Keane J); *Conlan v Registrar of Titles* (2001) 24 WAR 299, 330–7 [177]–[200] (Owen J). SA and Victoria would restrict indefeasibility to purchasers: *Biggs v McEllister* (1880) 14 SALR 86, 116 (Boucaut J); *King v Smail* [1958] VR 273, 276 (Adam J); *Rasmussen v Rasmussen* [1995] 1 VR 613, 632 (Coldrey J).

49 In practice, protection is significantly curtailed by the very limited circumstances that qualify a former registered proprietor for compensation, chiefly (for present purposes) loss of title as a consequence of fraud (omitted in Victoria) and error and misdescription in the Register.

50 There is an interesting issue as to the justifications for and ongoing relevance of equity's traditional willingness to undermine clear statutory directives, eg, so as to avoid a statute operating as an instrument of fraud, as occurred most famously with the *Statute of Frauds 1677*, 29 Car 2, c 3. To adopt the same approach in the modern context of the Torrens systems to override registration in favour of equitable proprietary interests arguably would not only undermine the clear purposes of the system of registration but arguably the whole principle of legislative supremacy – a topic, once again, that unfortunately lies outside the bounds of this article.

51 [2013] NSWSC 1718 ('*Savage*').

52 (1939) 63 CLR 649.

53 [2013] NSWSC 1718, [105]–[106] (Adamson J).

mortgagee is to bring a claim based on the so-called ‘in personam’ exception to indefeasibility, an exception that was relevantly restricted in *Farah* to circumstances where the defendant was a ‘primary wrongdoer’ against the plaintiff.<sup>54</sup> Whatever that refinement may mean, it is clear that banks in such cases very rarely commit any wrong directly against the domestic surety, nor hold any direct responsibility for wrongs committed by third parties – quite apart from the point that many of these cases involve innocent misrepresentations by the third party, or unilateral mistakes by the domestic surety,<sup>55</sup> and so involve no breach of duty by anyone concerned with the transaction.<sup>56</sup> The failure to advert to the fact of registration in *Savage* was therefore critical to the wife’s success.

This point highlights another oddity of the treatment of Torrens legislation by Australian courts. Even when the statute is considered, cases raising common law or equitable claims against registered proprietors usually fail to ask the critical question, namely: would the allowance of this claim ‘in relation to registered title undermine the objectives of the Torrens system?’<sup>57</sup> This question directly engages the principle of coherence identified by the High Court. It demands that courts address openly the interplay between extant common law doctrines and the purposes of the statutory scheme.<sup>58</sup> It is accordingly far more transparent than the traditional language of ‘in personam’ exceptions and their newfangled ‘primary wrongdoer’ overlay, neither of which find expression in the text of the statutes and which distract from the critical issue.

On this preferred approach, the ‘in personam’ exception will largely be limited to cases where the registered proprietor has consented to encumber his or her title, or where he or she has personally committed some wrong which has that effect. This is because to permit these categories of claim will not generally undermine the objectives of the statutes discussed earlier. Proprietary rights that arise out of agreements to transfer title or declarations of trust by the registered proprietor, for example, are created consensually by the registered proprietor. There is no sense in which enforcing those rights would have the effect of undermining the security of title offered by the Torrens system of title by

---

54 *Farah* (2007) 230 CLR 89, 171 [195] (The Court).

55 As in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 (‘*Garcia*’).

56 *HL (Qld) Nominees Pty Ltd v Jobera Pty Ltd* [2009] SASC 165, [136]–[137] (Layton J); *Randi Wixs Pty Ltd v Kennedy* [2009] NSWSC 933. Cf *Tanzone Pty Ltd v Westpac Banking Corporation* (1999) 9 BPR 17 287.

57 Jonathon Moore, ‘Equity, Restitution, and In Personam Claims under the Torrens System’ (Pt 2) (1999) 73 *Australian Law Journal* 712, 715.

58 We have seen earlier that the diverse incarnations of the state Acts arguably share the same legislative purposes: see above n 47 and accompanying text. In that context, it is arguable that courts should interpret the particular state Act in such a way that promotes the united purpose of the system nationally: see above n 35. This argument may hold, despite the need to acknowledge and to give effect to any state differences in policy that inevitably pulls the other way: see above n 18 and accompanying text. A slightly different approach is to emphasise the need (expressed in *Acts Interpretation Act 1901* (Cth) s 15AA and equivalent state legislation) for courts to adopt the interpretation of the particular statute that best promotes the purpose of the Act, accepting that each state Act promote the same unified purpose of promoting a registration system in which land transactions are secure, quick, efficient and reliable: see above n 47 and accompanying text.

registration. Nor can a defendant who has committed a tort as registered proprietor be heard to complain that his or her statutory security is undermined by the liability arising from his or her wrongdoing. It follows that, on this approach, resulting or constructive trusts that arise under general law in response to wrongdoing<sup>59</sup> or consent<sup>60</sup> are unaffected by registration.<sup>61</sup>

Cases of mistake, innocent misrepresentation and other analogous claims are, on the other hand, arguably different. In these claims, no wrongdoing has been committed by the registered proprietor and if proprietary liability is imposed, it attaches independently of any consent on the part of the defendant. Further, it would seem to follow inexorably from the treatment of void transactions that a defendant to a transaction that is merely voidable for innocent misrepresentation or unilateral mistake should be protected by registration. Notwithstanding these considerations, Australian courts have struggled with implementing the clear terms of the Torrens statutes in a consistent manner.<sup>62</sup> Applying the deeply ambiguous ‘in personam’ exception to indefeasibility,<sup>63</sup> courts prior to *Farah* have both permitted and denied rescission for innocent misrepresentation and mistake, for example, in a manner that defies principled explanation.<sup>64</sup>

*Farah* should now lay these categories of claim to rest. On the High Court’s analysis, cases where there is no fault, let alone breach of duty, on the part of the defendant, such as cases of ‘innocent’ influence,<sup>65</sup> cases where the transfer was caused by the duress, undue influence or misrepresentation of a third party,<sup>66</sup>

---

59 As in cases of breach of fiduciary duty in circumstances such as those present in *A-G (Hong Kong) v Reid* [1994] 1 AC 324.

60 Such as informally created express trusts exemplified in *Rochefoucauld v Boustead* [1898] 1 Ch 550.

61 ‘Constructive’ and ‘resulting’ trusts are also exempt from the general formality requirements under the modern equivalents of the *Statute of Frauds 1677*, 29 Car 2, c 3 that otherwise apply to the creation and disposition of interests in land. However, the exemption does not independently justify the continued operation of such trusts in the context of the Torrens system of title by registration. The Torrens system presupposes the law relating to the creation of equitable interests in land (including those relating to formalities) to which registration requirements and consequences are then applied as a further regulatory overlay.

62 The cases are collected and discussed in Elise Bant, ‘Registration as a Defence to Claims in Unjust Enrichment: Australia and England Compared’ [2011] *Conveyancer and Property Lawyer* 309. For a recent example, see *Dixon v Barton* [2011] NSWSC 1525.

63 See Bant, above n 62.

64 A practical reason for permitting rescission against the clear policy of the statute is the grossly inappropriate and over-restrictive terms of the state indemnity funds. However, this is best tackled by amending the fund terms, rather than undermining the purpose of the registration system.

65 See, eg, *Allcard v Skinner* (1887) 36 Ch D 145; *Reid v Reid* (Unreported, Supreme Court of New South Wales, Bryson J, 30 November 1998). In these cases, the nature of the influence, arising out of a shared religious belief or love, is entirely benign. The problem is that it excessively interferes with the plaintiff’s autonomy, not that it is inherently wrongful: see James Edelman and Elise Bant, *Unjust Enrichment in Australia* (Oxford University Press, 2006) 233–6.

66 See, eg, *Giarrantano v Smith* (1985) NSW Conv R ¶55-267; Edelman and Bant, *Unjust Enrichment in Australia*, above n 65, 235 n 98.

*Yerkey v Jones*-style claims<sup>67</sup> and cases where the basis of the transfer failed without attributable blame to the defendant<sup>68</sup> should all be defeated by registration. More broadly, and to the extent that claims in unjust enrichment do not rest on any wrongdoing on the part of the defendant,<sup>69</sup> the ‘in personam’ exception should never apply to such cases.

Although *Farah* now appears to have settled the effect of registration consistently with this preferred analysis, the route taken by the High Court has only exacerbated the difficulties in managing the interplay between common law and statute. The High Court’s exclusion of ‘secondary’ wrongdoers in *Farah* from the effects of registration arose in the context of a claim of knowing receipt. On the authority of the same High Court, a defendant who has knowingly received a benefit in breach of trust, or breach of fiduciary duty, has thereby directly and personally breached an equitable duty owed to the plaintiff. Why, then, should such a defendant be awarded the protection of indefeasibility denied to the ‘primary wrongdoer’?<sup>70</sup> A much simpler and more transparent approach, conducive to coherence between common law and statute, is to ask whether permitting a claim in relation to registered title would undermine the objectives of the Torrens system. This would reach both personal and proprietary claims.<sup>71</sup>

## 2 *The Rule in Seddon’s Case*

A related illustration of an area where coherence in private law would be promoted through closer examination of the interplay between statute and common law concerns the much-maligned rule in *Seddon v North Eastern Salt Co Ltd*.<sup>72</sup> In England, the bar against rescinding completed contracts of

---

67 *Garcia* (1998) 194 CLR 395. The English counterpart is the line of cases related to *Barclays Bank plc v O’Brien* [1994] 1 AC 180. The joint judgment in *Garcia* expressly recognised that labelling the Bank’s attempt to enforce rights obtained as a result of a wife’s mistake as “unconscionable” is to characterise the result rather than to identify the reasoning that leads to the application of that description’: at 409 [34] (Gaudron, McHugh, Gummow and Hayne JJ) (citations omitted). Indefeasibility will not extend to a domestic surety’s personal obligations that are deemed ‘collateral’ to the registered proprietary interest, such as under a guarantee: *Consolidated Trust Co Ltd v Naylor* (1936) 55 CLR 423, 434–5 (Dixon and Evatt JJ). For a detailed analysis of the extent to which personal obligations contained within a registered document are incidentally protected by registration, see Matthew Harding, ‘Property, Contract and the Forged Registered Mortgage’ (2010) 24 *New Zealand Universities Law Review* 21.

68 *Muschinski v Dodds* (1985) 160 CLR 583.

69 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 378–9 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Equuscorp* (2012) 246 CLR 498, 517–18 [32] (French CJ, Crennan and Kiefel JJ).

70 See *Super 1000 Pty Ltd v Pacific General Securities Ltd* (2008) 221 FLR 427, 473 [217] (White J).

71 Matthew Harding and Michael Bryan, ‘Responding to Fraud in Title Registration Systems: A Comparative Study’ in Martin Dixon (ed), *Modern Studies in Property Law* (Hart Publishing, 2009) vol 5, 3, 13–16, 31–2; Kelvin F K Low, ‘Of Horses and Carts: Theories of Indefeasibility and Category Errors in the Torrens System’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 446. See also *Franzon v Registrar of Titles (WA)* [1975] WAR 107, 111–12 (Burt J); *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611. *Contra Super 1000 Pty Ltd v Pacific General Securities Ltd* (2008) 221 FLR 427, 478 [234]–[237] where White J regarded the question as remaining open for argument following *Farah*.

72 [1905] 1 Ch 326 (‘*Seddon’s Case*’).

conveyance for non-fraudulent misrepresentation<sup>73</sup> was abolished by section 1(b) of the *Misrepresentation Act 1967* (UK) c 7.<sup>74</sup> However, it continues to be recognised in some common law jurisdictions, Australia included.<sup>75</sup> The orthodox view in England and increasingly in Australia is that the bar, certainly so far as it pertained to transfers of chattels but perhaps also insofar as it affected transfers of land, was a mistake and rightly removed by Parliament.<sup>76</sup>

However, closer inspection reveals that the bar has proven tenacious outside England because it serves to protect an ongoing public interest in finality of transactions, particularly those involving interests in land.<sup>77</sup> This suggests that in jurisdictions such as Australia whose land title registration systems aim to promote that interest through a strong conception of ‘immediate indefeasibility’,<sup>78</sup> the bar is a vital supplement to the regulatory framework. This is particularly so given the ongoing confusion as to the role and extent of the ‘in personam’ exception to indefeasibility discussed previously. In that context, the conveyance bar serves as an important protection against decisions that perhaps unwittingly, but nonetheless indubitably, undermine the policy of the statute.

Unfortunately, some Australian state jurisdictions have rather blindly followed the English lead in abolishing (or mooted the abolition of) the conveyance bar without undertaking the necessary close and rigorous analysis of

---

73 The bar is variously described, often in terms as to whether the contract is ‘executed’. However, the general emphasis throughout is on performance (in particular conveyance): see M G Bridge, ‘Misrepresentation and Merger: Sale of Land Principles and Sale of Goods Contracts’ (1986) 20 *University of British Columbia Law Review* 53, 96.

74 The relevant section states:

Where a person has entered into a contract after a misrepresentation has been made to him, and ... the contract has been performed; ... if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled ... notwithstanding the [fact that the contract has been performed].

75 In Australia, as relating to land, see *Svanosio v McNamara* (1956) 96 CLR 186, 198–9 (Dixon CJ and Fullagar J), 210–12 (McTiernan, Williams and Webb JJ); *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, 585 (Brennan, Deane, Gaudron and McHugh JJ); *Baird v BCE Holdings Pty Ltd* (1996) 40 NSWLR 374, 380 (Young J), although the bar insofar as it relates to chattels is far less secure: see *Leason Pty Ltd v Princes Farm Pty Ltd* [1983] 2 NSWLR 381, 387D (Helsham CJ in Eq), where his Honour refused to apply the rule. However, as recently as 1986, the rule was applied with respect to the sale of a business: eg, *Vimig Pty Ltd v Contract Tooling Pty Ltd* (1986) 9 NSWLR 731, 736–7 (Wood J). Legislative reform has gradually begun to limit the application of the bar, particularly but not solely in relation to chattel sales, discussed immediately below. In Canada, the bar insofar as it relates to land has been confirmed at the highest level in a series of cases: *Cole v Pope* (1898) 29 SCR 291; *Redican v Nesbitt* [1924] SCR 135; *Shortt v MacLennan* [1959] SCR 3. Again, cases of conveyances of chattels continue to be more erratic and law reform has increasingly been advocated.

76 The seminal article is H A Hammelmann, ‘*Seddon v North Eastern Salt Co*’ (1939) 55 *Law Quarterly Review* 90. But see also Bridge, above n 73. For Canadian and Australian initial perspectives, see Peter MacFarlane and Lindy Willmott, ‘Rescission of an Executed Contract at Common Law for an Innocent Misrepresentation’ (1998) 10 *Bond Law Review* 58. For a rare article supporting the bar, see M Howard, ‘The Rule in *Seddon’s Case*’ (1963) 26 *Modern Law Review* 272.

77 The cases are addressed in detail in E Bant, ‘*Seddon’s Case*: Sense or Nonsense?’ [2013] *Conveyancer and Property Lawyer* 30. But see, eg, *Redican v Nesbitt* [1924] SCR 135, 146 (Duff J); *Shortt v MacLennan* [1959] SCR 3, 6 (Judson J).

78 See earlier discussion above at Part III(A)(1).

the interplay between it and the domestic Torrens statute.<sup>79</sup> In some cases, this inadvertence has produced what appears to be an almost careless stultification of the ongoing aims of the Australian Torrens system to reduce significantly the delay, expense and risks of transacting with property. For example, the Australian Capital Territory legislation<sup>80</sup> follows the South Australian lead<sup>81</sup> in expressly removing the conveyance bar notwithstanding the registration of the conveyancing document. The result is an incoherent approach to indefeasibility of registered title between Australian states that finds no justification in the wording of the Torrens statutes, or in any express shift in broader legislative policy. What has been forgotten, or neglected, in all this is that the English law reform provisions (which have proven so influential in Australian law reform) were enacted within a different land registration context. The *Land Registration Act 2002* (UK) c 9<sup>82</sup> clearly permits rescission of registered contracts of conveyance induced by the innocent misrepresentation of the registered purchaser, or by the innocent registration of a forged transfer, except where the purchaser is in possession. That is, there is a very restricted form of immediate indefeasibility compared to the Australian system. On the other hand, under the English statute an innocent purchaser of the land *from the original party to the affected transaction* generally will obtain indefeasible title in a form of deferred indefeasibility. Again, this is quite distinct from the Australian position. Most importantly, seen in that statutory context, the abolition of the conveyance bar by the *Misrepresentation Act 1967* (UK) c 7 is entirely consistent with that jurisdiction's statutory regime.

The conveyance bar not only affects land transfers: it also affects chattel transactions. Could it be argued that there is also a legitimate public interest in the finality of commercial transactions involving chattel sales that justifies the retention of the bar?<sup>83</sup> The (also much-reviled) 'saving provisions' in the Sale of Goods Acts,<sup>84</sup> by which equitable rescission was apparently excluded,<sup>85</sup> could at one time perhaps have been justified on the basis that the Acts were intended to

---

79 For critical treatment of the bar in Australian law reform reports, which do not mention registration, see Law Reform Commissioner (Vic), *Innocent Misrepresentation*, Report No 7 (1978) 8–9 [7]–[8]; New South Wales Law Reform Commission, *Sale of Goods*, Report No 51 (1987) 25 [2.25]. A notable exception to this criticism is Law Reform Commission of Western Australia, *Equitable Rules in Contracts for the Sale of Goods*, Discussion Paper No 1 (1995).

80 *Civil Law (Wrongs) Act 2002* (ACT) s 173.

81 *Misrepresentation Act 1972* (SA).

82 The key provisions for current purposes are ss 28–9, examined in detail in Bant, above n 62.

83 Law Reform Commission of Western Australia, above n 79, 39–40; Law Reform Commission of Western Australia, *Equitable Rules in Contracts for the Sale of Goods*, Discussion Paper No 2 (1995) 36 [2.53]–[2.55]. The opportunity to extinguish or criticise the rule as it relates to chattels was notably left in *Svanosio v McNamara* (1956) 96 CLR 186; see also *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563.

84 Taken from *Sale of Goods Act 1893*, 56 & 57 Vict, c 71, s 62(2).

85 *Riddiford v Warren* (1902) 20 NZLR 572, 576 (Williams J), 582–3 (Denniston J), 583 (Conolly J agreeing), 583–4 (Edwards and Cooper JJ agreeing); *Watt v Westhoven* [1933] VLR 458, 462 (Mann ACJ), 465–6 (Lowe J); *Re Wait* [1927] 1 Ch 606, 635 (Atkin LJ). These examples from England and Australia were criticised in Law Reform Commissioner (Vic), above n 79, 10–11 [11]–[17]; New South Wales Law Reform Commission, above n 79, 12 [2.11].

reinforce a sales system in which efficiency, certainty and bright line rules of the Acts, the common law and ‘laws merchant’ were favoured over the more nuanced, complex, uncertain and hence costly equitable rules.<sup>86</sup> On this analysis the rule in *Seddon’s Case* could and should operate just as much in the chattels context as it did for land transactions.

However, a profound ‘push back’ against the primacy of any public interest in the finality of chattel sales underpinned both the abolition of the rule in *Seddon’s Case* under the Misrepresentation Acts<sup>87</sup> and the modification by express parliamentary intervention, or by judicial interpretation, of the savings provisions in the various Sale of Goods Acts.<sup>88</sup> In Australia, this trend is underscored by the extraordinary rise of consumer protection legislation, in particular the provisions now found in the *ACL*.<sup>89</sup> This legislation has as a core principle that no transaction entered into in trade or commerce as a result of misleading or deceptive conduct (whether or not the contract has been fully performed) should be allowed to stand unchallenged. The legislation has now evolved so that, although embedded in consumer protection legislation, its prohibition on misleading or deceptive conduct applies to transactions ‘in trade or commerce’, regardless of the status of the plaintiff as consumer or trader.<sup>90</sup> It applies equally to protect members of the public and commercial entities in their dealings with each other. The Act expressly gives to courts the greatest latitude not only to avoid contracts, but to remake them,<sup>91</sup> to achieve results in conformity with the overarching purpose of the statute to promote ‘competition and fair trading and provision for consumer protection.’<sup>92</sup> More generally, courts have emphasised the need to apply the statutory remedial scheme generously and in a way that supports the legislative policy.<sup>93</sup> Given the national adoption of the legislation and its infiltration of virtually every aspect of daily trade and commerce, it is unsurprising that its remedial provisions equating to rescission<sup>94</sup> have been held not to be subject to the rule in *Seddon’s Case* in a case involving the sale of shares.<sup>95</sup> In that context, it must be doubted that the conveyance bar

86 Raised in *Bridge*, above n 73, 91. However it was ultimately rejected on the basis that law and policy has subsequently changed: at 101–6.

87 *Civil Law (Wrongs) Act 2002* (ACT) s 173; *Misrepresentation Act 1972* (SA) s 6; *Misrepresentation Act 1967* (UK) c 7, s 1(b).

88 See, eg, Law Reform Committee (UK), *Innocent Misrepresentation*, Cmnd 1782 (1962) 8; Law Reform Commissioner (Vic), above n 79, 10–11 [11]–[17]; New South Wales Law Reform Commission, above n 79, 15 [2.25].

89 Formerly the *Trade Practices Act 1974* (Cth).

90 *ACL* s 18.

91 *ACL* s 243(b).

92 *Competition and Consumer Act 2012* (Cth) s 2.

93 *Akron Securities v Iliffe* (1997) 41 NSWLR 353, 364 (Mason P): ‘A court should not restrict the exercise of its discretion “by imposing upon itself technicalities which might defeat the policy of the section”’: *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23 at 56, per Northrop J’.

94 *ACL* ss 243(a), (d).

95 *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353, 366C (Mason P), citing *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 37–8 (Gummow J). See also *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd [No 1]* (1988) 39 FCR 546, 564 (Lockhart J), 571 (Foster J).

will be permitted to continue to affect private contracts for sale that are not caught expressly by the *ACL*.

Of course, this in turn raises a question as to the interaction between consumer protection regimes such as the *ACL* and the Torrens system (the latter supported by the rule in *Seddon's Case*) in respect of transactions involving interests in land. Under the *ACL*, its competition and consumer protection aims override any concern for finality of transactions (the main purpose of a Torrens system). Given the statutory aims differ, how should they be aligned when their application potentially conflicts? It would be possible to take a fairly blunt approach to the problem by saying that, where the conflict involves state enactments of the *ACL* and the local Torrens framework,<sup>96</sup> to the extent of any conflict, the most recent statute must prevail. On this approach, the fact of Torrens registration will never be a bar to relief under the state enactments of the *ACL*. Where the claim is brought under the Commonwealth legislation, by contrast, it may be possible to argue that the state Torrens statute is invalid to the extent of any inconsistency under section 109 of the *Australian Constitution*.<sup>97</sup> But neither argument has yet to be squarely addressed by the courts. Given the longevity of both statutes, this is remarkable in its own right.

This brief discussion highlights the importance of situating traditional common law rules within their broader statutory contexts. It also demonstrates that statutory choices between public goods (for example, security and finality of transactions on the one hand and consumer protection on the other) can and do change over time. To the extent possible, any application or reconsideration of common law principles should be made following full consideration of the applicable legislative context and its aims. This will require consideration not only of the interaction between common law and statute, but the comparative and potentially conflicting aims of overlapping statutory regimes.

## **B Statutory Liability for Accessories and Third Party Recipients**

In the final sections of this article, the discussion turns to examples of private law areas in which statutory analysis may shed light on the development of cognate common law doctrines. The aim is not to examine the areas in any detail but, rather, to demonstrate how common law reasoning can be enriched by advertence to its statutory context.

The travails of the equitable doctrines of knowing receipt and knowing assistance are well documented. Confusion and controversy have reigned over the scope and operation of each of the so-called 'limbs of *Barnes v Addy*'.<sup>98</sup> In the broadest of terms, the first limb addresses the liability of a defendant recipient of assets transferred in breach of trust or fiduciary duty. The second concerns the liability that arises where a defendant has assisted a breach of trust or fiduciary duty. The main controversy has centred on the degree of knowledge on the part

---

96 See above n 48.

97 My thanks to the independent referee for this suggestion.

98 Named after *Barnes v Addy* (1874) LR 9 Ch App 244.



of the ‘stranger’ to the trust<sup>99</sup> that is required to trigger liability.<sup>100</sup> The case law has ranged the whole gamut from actual knowledge<sup>101</sup> through to strict liability,<sup>102</sup> with no obvious justification for the varying conditions of defendant liability. This has understandably enough triggered a welter of scholarly commentary seeking a more coherent way forward.<sup>103</sup>

Of particular pertinence here, unjust enrichment theorists had argued that liability under the first limb should be strict.<sup>104</sup> However, mitigating the severity of this approach, the plaintiff would only be entitled to restitution, which would be capped at the value of the received benefit and subject to the operation of the defence of change of position. Unjust enrichment scholars have also increasingly accepted that such a strict liability claim could sit alongside a fault-based equitable wrong of knowing participation, which would capture both cases where a defendant received with knowledge, and cases where the defendant otherwise participated or assisted a breach of trust or fiduciary duty. This fault-based regime would require actual or Nelsonian knowledge, or dishonesty, and would not extend to cases of lesser forms of constructive knowledge or notice. In this alternative claim, the equitable wrong would support a wider array of remedial responses than would arise under the strict liability claim, including compensation and account of profits. Moreover, the defendant’s scope of liability would not be subject to a change of position defence. The perceived benefit of this two-pronged analysis was that, if a defendant was still enriched by his or her receipt, he or she would be required to give that value back, but would not be exposed to greater liability (for example, through an order for compensation or an account of profits) unless he or she was knowingly concerned in the defendant’s breach.

This scholarship met with trenchant criticism in *Farah*,<sup>105</sup> in which the High Court of Australia dismissed the strict liability analysis as unprincipled, unhistorical and conducive to incoherence in the law. Although not articulating the knowledge requirement involved, it has generally been accepted in

---

99 Ibid 251–2 (Lord Selborne).

100 The main cases and commentary are closely reviewed in Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3<sup>rd</sup> ed, 2011) 416–31.

101 *Re Montagu’s Settlement Trusts* [1987] 1 Ch 264.

102 *Harrison v Pryse* (1740) Barn Ch 324; 27 ER 664.

103 See, eg, Charles Harpum, ‘The Stranger as Constructive Trustee’ (Pt 2) (1986) 102 *Law Quarterly Review* 267; Simon Gardner, ‘Knowing Assistance and Knowing Receipt: Taking Stock’ (1996) 112 *Law Quarterly Review* 56; Lord Nicholls, ‘Knowing Receipt: The Need for a New Landmark’ in W R Cornish et al (eds), *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing, 1998) 231.

104 Spearheaded by Peter Birks: see, eg, Peter Birks, ‘Misdirected Funds: Restitution from the Recipient’ [1989] *Lloyd’s Maritime and Commercial Law Quarterly* 296; Peter Birks, ‘Receipt’ in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing, 2002) 213. For Australian advocates, see, eg, Peter Creighton and Elise Bant, ‘Recipient Liability in Western Australia’ (2000) 29 *University of Western Australia Law Review* 205; Michael Bryan, ‘The Liability of the Recipient: Restitution at Common Law or Wrongdoing in Equity?’ in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 327.

105 (2007) 230 CLR 89.

subsequent cases and writings on the topic<sup>106</sup> that the High Court left in place a fault-based regime for both limbs, which set the relevant knowledge bar at the fourth point of the *Baden*<sup>107</sup> scale of knowledge, namely that the recipient knows of facts that would indicate the facts constituting the breach of fiduciary duty to an honest and reasonable person. The ultimate position taken by the Court occupies accordingly a halfway house between the two approaches (strict liability and knowledge-based) advocated by unjust enrichment scholars.

This might be considered the end of the matter. However, subsequent brilliant and independent analyses of Joachim Dietrich and Michael Bryan show that it is too early to consider the case against combining a strict liability regime with a more rigorous fault-based alternative as entirely closed. Dietrich's article considers the guidance that might be offered for knowing assistance claims from statutory approaches to accessory liability adopted in the *ACL* and *Corporations Act 2001* (Cth).<sup>108</sup> What is striking from the analysis is that in both statutory instances (and, indeed, in cognate criminal law contexts), accessory liability that yields compensatory relief requires *actual knowledge or dishonesty* on the part of defendants. Dietrich's analysis<sup>109</sup> suggests that the High Court's analysis in *Farah* can be criticised for imposing an equitable liability regime on third parties implicated in a principal's wrongdoing that is inconsistent with its statutory counterparts – which often apply on materially identical fact patterns.<sup>110</sup>

A similar method of analysis of claims in knowing receipt is made to converse effect by Michael Bryan,<sup>111</sup> drawing insights from the statutory treatment of creditor avoidance transactions<sup>112</sup> and the provision of strict liability claims involving trustees under provisions such as section 65 of the *Trustees Act 1962* (WA). Bryan's analysis shows consistent statutory adoption of a *strict*

106 See, eg, *Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* (2008) 39 WAR 1, 612 [4748] (Owen J); *Ashrafinia v Ashrafinia* [2013] NSWSC 1442, 73 [225] (Slattery J); *Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd* [2013] VSC 543, [91] (Almond J); *Re Annesley Plant Hire Pty Ltd* [2014] VSC 56, 33–4 [155]–[156] (Robson J); *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 362–3 [267]–[268] (The Court); Rob Chambers, 'Knowing Receipt: Frozen in Australia' (2007) 2 *Journal of Equity* 40, 47–8, 53.

107 Named after the analysis in *Baden v Société générale pour favoriser le développement du commerce et de l'industrie en France SA* [1993] 1 WLR 509, 575H–576A (Peter Gibson J).

108 Joachim Dietrich, 'The Liability of Accessories under Statute, in Equity, and in Criminal Law: Some Common Problems and (Perhaps) Common Solutions' (2010) 34 *Melbourne University Law Review* 106.

109 Dietrich himself concludes that, although the High Court seems to endorse a lesser requirement, in practice the difference may not be significant: *ibid* 126.

110 Whether the standard of actual knowledge, drawn in part from the criminal law, is always appropriate in the statutory context is another matter. Eg, adopting a more generous standard of constructive knowledge in respect of the accessory liability provisions of the *ACL* and the *Corporations Act 2001* (Cth) may be thought to enable regulators better to achieve the public interest objectives of the legislation such as protection of the public and general deterrence. This point, suggested by one of the independent referees, is precisely the sort of 'integrated' analysis that is currently missing from the broader debate.

111 Michael Bryan, 'Recipient Accountability: The Persistence of Strict Liability' (Speech delivered at the Law Summer School, University of Western Australia, 22 February 2013).

112 The article focuses on the *Corporations Act 2001* (Cth) s 565; *Property Law Act 1969* (WA) s 89 and statutory counterparts in the UK: *Bankruptcy Act 1914*, 4 & 5 Geo 5, c 59, s 42; *Property Law Act 1925*, 15 & 16 Geo 5, c 20, s 172; and more lately the *Insolvency Act 1986* (UK) c 45, ss 423, 425.

*liability analysis subject to a change of position defence* in respect of fact patterns closely conforming to those in issue in cases of knowing receipt. He notes the ironic consequence is that the statutory schemes commonly provide an alternative avenue for plaintiffs to the fault-based *Barnes v Addy* approach adopted by the High Court.

It is unnecessary for present purposes to examine the arguments in any detail. What is relevant is that the analyses provide fresh support for the view that there is room for *both* forms of liability in an integrated private law system concerned to respond to the outcomes of trust and fiduciary breach and, in particular, the impact of third parties who have been implicated in the breach. Having the alternative forms of claim (one strict liability, one knowledge-based) is not superfluous: they have independent elements that lead to quite different (but not inconsistent) remedial outcomes. One cannot but reflect that had these statutory analyses been available to the High Court, the broader ‘fit’ of the unjust enrichment thesis with the broader expanse of private (statutory and general) law might have been appreciated and its denunciation as tending to incoherence correspondingly muted.

### C Lawful Act Duress

Another example of an area in which consideration of the statutory context might well shed light on the development of common law doctrine is the case of ‘lawful act duress’. It is uncontroversial that threats of unlawful action that cause one person to confer a benefit on another will generally constitute ‘illegitimate pressure’ or duress. The converse is not, however, true: ‘the fact that the threat is lawful does not necessarily make the pressure legitimate.’<sup>113</sup> The difficult question is how to determine when lawful pressure may nonetheless be illegitimate. Professor Birks pinpointed the potential dangers of a category of lawful act duress in a passage quoted by Steyn LJ in *CTN Cash & Carry Ltd v Gallaher Ltd*:

Can lawful pressures also count? This is a difficult question, because, if the answer is that they can, the only viable basis for discriminating between acceptable and unacceptable pressures is not positive law but social morality. In other words, the judges must say what pressures (though lawful outside the restitutionary context) are improper as contrary to prevailing standards. That makes the judges, not the law or legislature, the arbiters of social evaluation.<sup>114</sup>

---

113 *R v A-G (England and Wales)* [2003] EMLR 24, 506 [16] (Lord Hoffman, delivering the majority judgment); see also *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] 1 Lloyd’s Rep 501, 506–7 [26]–[29] (Cooke J). Cf the tort of intimidation, which continues to require that the threat be unlawful: see, eg, *Berezovsky v Abramovich* [2010] EWHC 647 (Comm), [161] (Colman J). The genesis and continuation of this inconsistency between intimidation and duress is criticised in James Edelman, ‘A Historical Essay on Duress, Intimidation and Menaces’ (2011) 1 *Journal of Corporate Affairs and Corporate Crimes* 1.

114 [1994] 4 All ER 714, 718F–718H, quoting Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, revised ed, 1989) 177.

Similar concerns about the potentially indeterminate nature of lawful act duress led the New South Wales Court of Appeal in *Australia & New Zealand Banking Group v Karam* to reject its existence outright.<sup>115</sup> In a joint judgment, the Court of Appeal limited duress to threatened or actual *unlawful* conduct. In this way, it sought to limit duress to what Birks would call categories of illegitimate pressure founded in positive law.

If it were true that lawful act duress necessarily dissolved into a finding of social morality, or was inherently uncertain as a legal concept, then it might well be necessary to abandon it as non-justiciable and contrary to the rule of law. However, the picture of lawful act duress that emerges from closer consideration of the case law and, importantly, cognate statutory provisions, is not so bleak. Although comparatively rare, the authorities disclose a number of circumstances in which lawful pressure has been found to be illegitimate. A relatively common example is where a defendant has threatened to invoke a legal process to extract a benefit from the plaintiff. It is well accepted that while it is legitimate to threaten to invoke the legal process to protect a defendant's rights, it is not legitimate to do so where the person threatened does not owe the duty in question,<sup>116</sup> or where the benefit claimed is disproportionate to the defendant's entitlement. Thus transactions entered into under the threat of invoking the legal process to recover debts owed by relatives of the plaintiff,<sup>117</sup> or to recover amounts in excess of the defendant's entitlement,<sup>118</sup> or to obtain benefits unrelated to the defendant's entitlement,<sup>119</sup> have all been set aside on the ground of illegitimate pressure. This pattern of cases suggests that underpinning lawful act duress is a disproportionality or lack of reasonable connection between the lawful threat, the legitimate goal which that threat properly supports and the demand in fact made. As McLure P (Newnes JA agreeing) stated in the recent case of *Electricity Generation Corporation v Woodside Energy Ltd*:

If the pressure involves an actual or threatened unlawful act, it is prima facie illegitimate. If the pressure is lawful, it may be illegitimate if there is no reasonable or justifiable connection between the pressure being applied and the demand which that pressure supports ...<sup>120</sup>

Turning to consider the statutory position, in *Karam*, the Court of Appeal suggested that if unlawful act duress is not made out, an agreement may still be set aside for undue influence, unconscionable conduct or on statutory grounds. In particular, it identified statutory provisions such as those found in the *Trade Practices Act 1974* (Cth) as being more precise than the concept of 'lawful act

---

115 (2005) 64 NSWLR 149, 168–9 [66]–[67] (The Court) ('*Karam*').

116 See, eg, *Flower v Sadler* (1882) 10 QBD 572, 576 (Cotton LJ); *Scolio Pty Ltd v Cote* (1992) 6 WAR 475, 484 (Ipp J), 482 (Seaman J agreeing).

117 *Williams v Bayley* (1866) LR 1 HL 200.

118 *Smith v Cuff* (1817) 6 M & S 160; 105 ER 1203.

119 *Unwin v Leaper* (1840) 1 Man & G 747; 133 ER 533.

120 [2013] WASCA 36, 15 [25] (McLure P), reversed on another point in *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7.

duress' and thus a preferable avenue to relief.<sup>121</sup> Such provisions allow for a contract to be set aside if its provisions were not 'reasonably necessary for the protection of the legitimate interests' of the stronger party.

This statutory test closely resembles the test of proportionality, or lack of reasonable or justified connection, which we have seen underlies the lawful act economic duress cases at common law. Far from being more precise, the approaches adopted in both contexts are aligned. The statutory criteria therefore suggest that adopting an equivalent test of disproportionality in cases of lawful act duress does not and would not promote unbridled judicial discretion. Moreover, recognition of the test at common law would promote a coherent approach in analogous cases, whether brought on a common law or statutory basis.

#### D Commercial Standards of Conduct

The final area to be touched upon in this enquiry is the role of statutes in establishing private law standards of conduct, especially in the commercial context. Of particular note is the role of the *ACL* and related protective legislation<sup>122</sup> in promoting higher standards of conduct on the part of commercial contracting parties than were traditionally demanded under contract law. It can be argued that the pervasive operation of the statutory scheme is affecting transacting parties' base expectations of what constitutes commercially reasonable and acceptable conduct. Courts are alive to this potential ambit of influence. In *Director of Consumer Affairs Victoria v Scully*, Santamaria JA (Neave and Osborne JJA concurring) stated:

the intentional breach or reckless disregard of certain norms or standards amounts to statutory unconscionability. Those norms or standards must be more than those that happen to be personal to the court or tribunal charged with the responsibility of deciding whether conduct is unconscionable. Certainly, they will include norms of honesty and fair dealing and norms which exclude exploitation and deception. Some such norms and standards may be detected in the principles of public policy immanent in legislation such as the *Competition and Consumer Act* and the *Australian Consumer Law* and *Fair Trading Act 2012*. As the Federal Court said in *ACCC v Lux Distributors*:

The task of the Court is the evaluation of the facts by reference to a normative standard of conscience. That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with consumers. The content of those values is not solely governed by the legislature, but the legislature may illuminate, elaborate and develop those norms and values by the act of legislating, and thus standard setting. The existence of State legislation directed to elements of fairness is a fact to be taken into account. It assists the Court in

---

121 See now *ACL* s 22(1)(b); *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CB–12CC ('*ASIC Act*') for equivalent provisions.

122 Such as found in the *ASIC Act* and the *National Consumer Credit Protection Act 2009* (Cth).

appreciating some aspects of the publicly recognised content of fairness, without in any way constricting it. Values, norms and community expectations can develop and change over time. Customary morality develops ‘silently and unconsciously from one age to another’, shaping law and legal values: Cardozo, *The Nature of the Judicial Process* (Newhaven, Yale University Press, 1921) pp 104–105. These laws of the States and the operative provisions of the *ACL* reinforce the recognised societal values and expectations that consumers will be dealt with honestly, fairly and without deception or unfair pressure. These considerations are central to the evaluation of the facts by reference to the operative norm of required conscionable conduct.<sup>123</sup>

For the purposes of this article, such judicial reflections on the evolving norms of commercial conduct set by dominant statutes such as the *ACL* prompt the question: to what extent can and should such normative standards affect the application and evolution of substantive common law doctrines? This is a very large question. However, a small example illustrates the mode of reasoning that might apply to answer that question.<sup>124</sup>

The common law frequently considers the legal ramifications of risk-taking behaviour on the part of transacting parties.<sup>125</sup> A common mechanism used to moderate this issue is the requirement of ‘reasonable reliance’, found in areas such as estoppel,<sup>126</sup> misrepresentation<sup>127</sup> and negligent misstatement.<sup>128</sup> On an integrated approach to statutory and common law interaction, it is arguable that courts should consider whether it is possible and proper for the statutory standards discussed in the extract above to influence the operation of that substantive common law requirement. For example, in estoppel, the requirement of reasonable reliance underpins each of estoppel by conduct, and promissory and proprietary estoppel. Courts should consider whether they should advert to the applicable regulatory standards in determining whether the plaintiff’s reliance on a defendant’s conduct was reasonable. Relevant standards might include those arising from prohibitions against misleading and deceptive conduct,<sup>129</sup> unconscionable conduct<sup>130</sup> and the responsible lending provisions.<sup>131</sup> These are subtle but powerful contextual factors that potentially make a real difference to the assessment of reasonable reliance.

---

123 (2013) 303 ALR 168, 186 [56] (citations omitted), citing *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] ATPR ¶42-447, 43 463 [23] (Allsop CJ, Jacobson and Gordon JJ).

124 Other examples are very usefully considered by Mason, above n 14.

125 Discussed in detail in E Bant and M Bryan, ‘Fact, Future and Fiction: Risk and Reliance in Estoppel’ (2015) forthcoming *Oxford Journal of Legal Studies*.

126 See, eg, *Standard Chartered Bank Aust Ltd v Bank of China* (1991) 23 NSWLR 164, 180 (Giles J).

127 Often clothed in the language of ‘materiality’: see, eg, *Blakiston v London & Scottish Banking Corporation Ltd* (1894) 21 R 417, 421 (Lord Kinneir, Lord Adam concurring), 426–7 (Lord M’Laren).

128 See, eg, *Williams v Natural Life Health Foods* [1998] 1 WLR 830, 837 (Lord Steyn).

129 *ACL* s 18; *ASIC Act* s 12DA.

130 *ACL* ss 20–2; *ASIC Act* ss 12CA–12CC.

131 *National Consumer Credit Protection Act 2009* (Cth) ch 3.

There is no doubt that estoppel and consumer law protective provisions can and do overlap. A prime example is *E K Nominees Pty Ltd v Woolworths Ltd*.<sup>132</sup> In that case (factually reminiscent of the seminal decision in *Waltons Stores (Interstate) Ltd v Maher*)<sup>133</sup> the plaintiff landlord undertook extensive works on lease premises for Woolworths, with whom it was negotiating a commercial lease. Woolworths' Board had given approval to the lease, subject to the execution of lease documentation, which was in the final stages of negotiation. Unbeknown to the defendant, Woolworths commenced separate negotiations with respect to another site and ultimately decided to withdraw from negotiations. The plaintiff sought relief<sup>134</sup> both on the grounds of misleading and deceptive conduct under the *ACL* and pursuant to estoppel. In particular, the plaintiff alleged that in the context of the close and mature stage of negotiations between the parties, the fact that the plaintiff necessarily had to commence work to meet Woolworths' demands regarding the proposed lease and Woolworths' failure to disclose its investigation of the alternative site, Woolworths had represented that there was no change to its commitment to the plaintiff's site indicated by Board approval. The plaintiff had changed its position in reasonable reliance on this conduct by incurring significant expenditure for which it sought compensation.

Woolworths argued that it was not reasonable to expect it to inform the plaintiff that an alternative opportunity had arisen. As a commercial party operating at arms length to the plaintiff, and indeed subject to confidentiality obligations with respect to the alternative site transaction, it was entitled to stay silent to its commercial advantage – particularly given the pre-contractual context. Justice White disagreed: the surrounding context made it reasonable for the plaintiff to assume that if any change in Woolworths' commitment to the lease project occurred, it would be notified.<sup>135</sup>

This is a case where the *ACL* commitment to promoting standards of commercial dealing that include norms of honesty and fair dealing and norms which exclude exploitation and deception<sup>136</sup> profoundly influenced both the conduct prohibited under the *ACL* and the outcome of application of the doctrine of estoppel. In that context, the case presents a striking contrast to the English case of *Baird Textile Holdings Ltd v Marks & Spencer plc*.<sup>137</sup> In that case, the plaintiff was the long-term supplier of clothing to the retailer, Marks & Spencer (the defendant). The parties had a very close and long-standing commercial relationship, whereby the plaintiff would supply clothing to the defendant under annual supply contracts. The defendant ended the relationship without warning,

---

132 [2006] NSWSC 1172 (*E K Nominees*).

133 (1988) 164 CLR 387.

134 It sought and was awarded equitable compensation from the time it incurred expenditure with Woolworths' knowledge and encouragement: *E K Nominees* [2006] NSWSC 1172, [281] (White J).

135 *Ibid* [137]–[139], [147] (in relation to *ACL*), [261], [268] (in relation to estoppel).

136 *Director of Consumer Affairs Victoria v Scully*, (2013) 303 ALR 168, 186 [56] (Santamaria JA, Neave and Osborne JJA concurring), extracted at above n 123 and accompanying text.

137 [2001] CLC 999.

having decided to use other suppliers. The plaintiff brought an action against the defendant in estoppel.<sup>138</sup> The gist of the complaint was that the defendant should not have terminated the relationship without reasonable notice. Given the longevity of the relationship and the investment that the plaintiff had made in gearing itself to Marks & Spencer's particular needs, it was reasonable for the plaintiff to have assumed that it would be advised if Marks & Spencer was reconsidering the supply relationship. This closely resembles the plaintiff's successful argument in *E K Nominees*. However, unlike that case, the plaintiff's estoppel claim in *Baird Textile* failed. Critical to that result was that the defendant (to the knowledge of the plaintiff) had deliberately abstained throughout the relationship from regulating their long-term arrangements by contract, in order to achieve greater flexibility in their mutual dealings. The Court of Appeal considered that, at best, there was some sort of 'bare assurance'<sup>139</sup> arising out of the course of past dealings. The Court considered that, viewed against that fact, the plaintiff took a known risk in proceeding with the relationship and no estoppel arose. This is orthodox reasoning premised on traditional contractual norms that promote self-interested and autonomous behaviour in commercial dealings.

It has to be asked whether an Australian court would come to the same decision. It is entirely possible that it would not. In the Australian context, just as it was reasonable for the landlord in *E K Nominees* to assume that it would be advised if Woolworths was reconsidering its lease options, and to act in reliance on that assumption, so too it could be argued that it was reasonable for a supplier such as that in *Baird Textile* to assume that its long-time retail partner would advise it if it was contemplating changing supplier. It can be argued in this context that the *ACL* and related legislation has effected a profound change in the norms of commercial contracting behaviour in Australia.<sup>140</sup> These underlying norms differ significantly from the archetype of self-interested and equal autonomous contracting parties that underpin many traditional rules of commercial law, and arguably cases such as *Baird Textile*. In particular, they acknowledge ingrained and structural inequalities in the dealings and relationships between traders and consumers (including small business consumers) and, against that background, promote a protective and ethical environment that supports just commercial outcomes.

The potential ambit of influence of this broader, statutory-inspired normative context on neighbouring private law doctrines remains to be determined. In particular, it remains to be seen how existing and disparate legal conceptions of proper commercial conduct will adjust to accommodate each other in the light of the overriding principle of coherence. What can safely be predicted is that the requirement of reasonable reliance in estoppel is but one of many points at which overarching protective schemes such as the *ACL* potentially exert considerable

---

138 The relief sought was damages: *ibid* [11] (Mance LJ). This again echoes *EK Nominees*: above at n 134.

139 *Ibid* [90] (Mance LJ).

140 *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 38 (Gummow J).



gravitational force. The significant challenge which remains is to identify and explore those points of influence, as part of the broader process of developing a coherent system of private law.

#### **IV CONCLUSION**

The purpose of this article is modest. It is to raise awareness of the potential benefits of taking a more integrated approach to the application of common law and statute in private law contexts. This is not to deny that the two sources of law are distinct, may reflect different policy positions and yield diverse remedial outcomes. However, if anything, that underscores the need to recognise opportunities for the application and indeed evolution of each in a way that is coherent and consistent where that it is possible and appropriate. The article suggests just a handful of areas where such an approach would yield considerable benefits. It can be confidently predicted that they represent just the tip of the iceberg. The benefits of a more sustained effort to identify and explore points of interaction and influence between common law and statute for parties to private law transactions, and indeed for the promotion of the rule of law, are with respect, obvious.