



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

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One unique feature of Australian Consumer Law is that the protection afforded by the statutory prohibition on misleading conduct is not limited to individual consumers but extends to all parties in 'trade or commerce'. Liability under the statutory regime does not require any element of fault and offers a broad range of remedies to successful plaintiffs. One might expect a diminished role for common law torts in this context. However, while this is perhaps true of the torts of passing off and deceit, the tort of negligent misrepresentation continues to influence commercial litigation. This article explores this trend and the possible reasons for it. What has happened in Australia in regard to the statutory prohibition on misleading conduct may provide lessons in other contexts and for other jurisdictions about the relationship between the common law and overlapping statutory claims.

Introduction

Australia is unique among many developed economies in containing in its statutory consumer protection law, a broad and categorical prohibition on misleading conduct,¹ which extends beyond protecting individual consumers to all transactions in trade or commerce and which is repeated, with some variation, in numerous accompanying statutes.² The statutory prohibition typically applies in a wider range of circumstances than torts operating in a similar field because liability is not premised on any element of fault and does not require proof of loss or damage. The statutory prohibition is further accompanied by an extensive scheme of remedies that will usually exceed what is available under the common law. The impact of the statutory prohibition in misleading conduct on commercial litigation and practice has, accordingly, been considerable. In these circumstances, we might have expected to see less prominence given to the common law torts with which the statutory prohibition overlaps in cases involving the commercial relationships to which the legislation applies. Yet, while this is largely true of the torts of passing off and deceit, negligent misstatement continues to be raised, argued

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1 Australian Consumer Law s 18, contained in Sch 2 of the Competition and Consumer Act 2010 (Cth). This prohibition was originally enacted in the Trade Practices Act 1974 (Cth) s 52.

2 See, eg, Corporations Act 2001 (Cth) s 1041H; Australian Securities and Investments Commission Act 2001 (Cth) s 12DA (ASIC Act).

and made the subject of considerable judicial attention in claims for compensation for misleading conduct causing economic loss in trade or commerce in Australia.

This article sets out to consider some of the possible reasons for this continued reliance on the tort of negligent misstatement in cases that might be resolved under the statutory prohibition on misleading conduct. The suggested reasons range from the fondness of lawyers for the common law to the complexity of Australian statute law in this context. The article also explores the way in which, despite the apparent imposition of strict liability for misleading conduct under the statutory regime, ideas about culpability remain central in assessing liability and in formulating a remedial response to contraventions of the statutory prohibition. It is hoped that the exploration of these issues will have lessons in other contexts and for other jurisdictions in understanding the important and complex relationship between statute and the common law in regulating commercial relationships. Indeed it notes by way of comparison developments in Singapore, which suggest a similar concern with proportionality between principles governing remedy and wrong doing in providing compensation for loss occasioned by wrongdoing under statute.

The article begins with an overview of the statutory prohibition and its policy rationales. It considers the relationship between the statutory prohibition and the torts of passing off, deceit and negligence. It then considers the high degree of attention given to negligence, at the expense of analysis of the statutory prohibition, in *ABN AMRO Bank NV v Bathurst Regional Council (ABN Amro)*,³ before turning to explore the possible reasons for the continued focus in this kind of case on the tortious claim.

Statutory and tortious liability for misleading conduct

The statutory prohibition

Section 18 of the Australian Consumer Law (ACL) provides:

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

This prohibition is repeated in regard to financial services and products in the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act)⁴ and the Corporations Act 2001 (Cth).⁵ The general prohibition in these statutes is then supplemented by prohibitions on a number of specifically identified types of misrepresentations.⁶

The general prohibition on misleading conduct operates as the central tenet of the consumer protection regime in Australia and has been described as instigating a 'revolutionary' change in Australian law.⁷ The apparently straightforward and uncompromising language of the prohibition imposes

3 (2014) 224 FCR 1; 309 ALR 445; [2014] FCAFC 65; BC201404937 (*ABN Amro*).

4 ASIC Act s 12DA.

5 Corporations Act s 1041H.

6 See, eg, ACL ss 29–34.

7 D W Greig and J L R Davis, *The Law of Contract*, Lawbook Co, 1987, p 799. See also A Terry, 'Consumer Protection for Business Interests: The Application of s 52 Trade

strict liability on defendants who engage in conduct that is misleading or likely to mislead.⁸ Liability does not require the defendant to be culpable or at fault. It is not necessary to show that any person has suffered loss or damage as a result of the proscribed conduct.⁹ A veritable ‘remedial smorgasbord’ of remedies is available in response to loss or damage that is caused by the misleading conduct.¹⁰ Many countries have similar prohibitions applying for the protection of consumers.¹¹ The difference in Australia is that the protective regime applies to business to business conduct. Although embedded in *consumer* protection legislation, the prohibition applies to all conduct ‘in trade or commerce’, regardless of the size or economic status of the parties involved.¹²

Claims under the statutory prohibition on misleading conduct are ubiquitous in commercial litigation.¹³ As a result, courts have developed an extensive body of case law interpreting and applying the statutory prohibition and its associated remedial regime. In this process the common law torts of deceit and, to some extent, negligence have been recognised as providing relevant insight into the interpretation of the statutory provisions.¹⁴ However, the High Court has repeatedly cautioned against the use of common law analogy without due regard to the words and purposes of the legislation.¹⁵ The High Court has, moreover, accepted that the legislation gives effect to ‘matters of high public policy’ and is to be construed so as ‘to give the fullest relief

Practices Act to Commercial Negotiations’ (1987) 10 *UNSWLJ* 260; K Barker et al, *The Law of Torts in Australia*, 5th ed, Oxford University Press, 2012, p 500.

- 8 *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357; 270 ALR 204; [2010] HCA 31; BC201007172 at [99] per Heydon, Crennan and Bell JJ (*Miller v BMW*).
- 9 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228; 18 ALR 639 at 647; 1B IPR 818 at 825; BC7800029; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191; 42 ALR 1; BC8200090. If a plaintiff does seek compensation, must a court assess what loss or damage has arisen ‘because’ of the defendant’s conduct: ACL ss 236(1)(a), 237(1)(a) and 238(1).
- 10 *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353 at 367; (1997) 143 ALR 457 at 470; 138 FLR 166 at 179 per Mason P; BC9701104.
- 11 See, eg, Consumer Protection (Fair Trading) Act (Singapore, cap 52A, 2009 rev ed) s 4(a); Consumer Protection from Unfair Trading Regulations 2008 (UK) SI 2008/1277 reg 5.
- 12 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 606, 610–11; 92 ALR 193 at 199, 202; 17 IPR 39 at 45, 48; BC9002935 (holding that the words of the provision should not be read down so as to apply only to conduct that misleads consumers.) On the background to this broad scope of the prohibition see Terry, above n 7.
- 13 J W Carter, *Contract Law in Australia*, 6th ed, LexisNexis Butterworths, 2012, at [19–01]; S G Corones, *The Australian Consumer Law*, 2nd ed, Lawbook Co, 2013, at [4.05].
- 14 For example, *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281 at 291; 131 ALR 363 at 369 per Brennan, Deane, Dawson, Gaudron and McHugh JJ; BC9506442. See further E Bant and J M Paterson, ‘Limitations on Defendant Liability for Misleading or Deceptive Conduct Under Statute: Some Insights from Negligent Misstatement’ in *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller*, K Barker, R Grantham and W Swain, Hart, 2015, ch 7.
- 15 *Henville v Walker* (2001) 206 CLR 459; 182 ALR 37; [2001] HCA 52; BC200105241 at [18] per Gleeson CJ, at [130] per McHugh J; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; 158 ALR 333; [1998] HCA 69; BC9805922 at [17] per Gaudron J, at [38] per McHugh, Hayne and Callinan JJ, at [103] per Gummow J; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109; 192 ALR 1; [2002] HCA 41; BC200205780 at [42]–[48] per Gaudron, Gummow and Hayne JJ.

which the fair meaning of its language will allow'.¹⁶

The policy informing the consumer protection regime in which the statutory prohibition on misleading conduct is found is the promotion of 'competition and fair trading'.¹⁷ The prohibition is premised on the belief that it is unfair and inefficient for a plaintiff to be misled and to suffer loss because of such conduct. A plaintiff who enters into a contract in reliance on misleading information has been denied the opportunity of making a genuinely welfare enhancing decision and may be financially worse off.¹⁸ A defendant who benefits from misleading conduct undermines the efficient operation of the market by distorting the price and quality signals that drive competition.¹⁹ It is not, however, entirely clear²⁰ why these concerns justified imposing a strict liability regime, as opposed to one based on fault.²¹ At least at the stage of liability, the statutory prohibition on misleading conduct prioritises protecting plaintiffs who have been misled over an inquiry into the culpability of the defendant. The prohibition imposes liability on a defendant on the basis of its conduct being judged misleading, regardless of whether the defendant intended to mislead the plaintiff or whether it has been shown that the defendant could reasonably have done any more to avoid the conduct being misleading. This means that a defendant who 'has acted honestly and reasonably may nevertheless be rendered liable'.²² Such a defendant is not morally blameworthy and is not in need of the incentive imposed by potential statutory liability to avoid fraudulent activity or to take reasonable levels of care.²³

One possible reason for the statute favouring the interests of a plaintiff who has been misled in this manner may lie in the evidentiary difficulties that otherwise exist for the plaintiff in establishing fault on the part of the defendant.²⁴ The primary prohibition in the statute is not premised on ideas of

16 *Marks v GIO Australia Holdings Ltd*, *ibid*, at [99] per Gummow J, citing *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 384 per Isaacs J.

17 Competition and Consumer Act s 2.

18 See generally M J Trebilcock, *The Limits of Freedom of Contract*, Harvard University Press, 1993.

19 A J Duggan, *The Economics of Consumer Protection: A Critique of the Chicago School Case Against Intervention*, Research Paper No 2, Adelaide Law Review Association, University of Adelaide, 1982, p 22.

20 Barker et al, above n 7, p 267.

21 On the role of fault in informing tort liability see generally S Perry, 'The Moral Foundations of Tort Law' (1991) 77 *Iowa L Rev* 449. On the place of strict liability in tort law see R A Epstein, 'A Theory of Strict Liability' (1973) 2 *J Legal Stud* 151 and R A Epstein, 'Defences and Subsequent Pleas in a System of Strict Liability' (1974) 2 *J Legal Stud* 165; T Honoré, 'Responsibility and Luck: The Moral Basis of Strict Liability' in *Responsibility and Fault*, Hart, 1999.

22 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 197; 42 ALR 1 at 5; 1A IPR 684 at 687 per Gibbs CJ; BC8200090. See, eg, *Greco v Bendigo Machinery Pty Ltd* (1985) ATPR 40–521; *Consolidated Bearing Co (SA) Pty Ltd v Molnar Engineering Pty Ltd* (1994) ATPR 46–122.

23 Compare Duggan, above n 19, p 51.

24 *Ibid*, p 49. A similar rationale informed the introduction of s 2(1) of the Misrepresentation Act 1967 (UK), see UK Law Reform Committee, *Tenth Report: Innocent Misrepresentation*, HMSO, July 1962. These issues of evidentiary onus have also influenced the development of product liability law see further J Stapleton, 'The Conceptual Imprecision of "Strict" Product Liability' (1998) 6 *TLJ* 260.

corrective justice that inform the law of torts²⁵ but with the regulatory objectives of promoting fair-trading. To achieve these purposes, the statute provides a simple and clear statement of prohibited conduct that lessens the burden on the plaintiff in establishing a remedial claim in response to conduct that is socially and economically undesirable. While actions in tort require a plaintiff to establish the elements of the claim — an intention to deceive or the existence of a duty of care and a breach of that duty — the statutory action merely requires conduct that from an objective perspective is likely to mislead. Reducing the complexity of the action for a plaintiff increases the likelihood that a fraudulent or careless defendant will be subject to sanction. This increased likelihood of sanction should strengthen the incentives for traders to avoid this type of undesirable conduct. The overall social benefit in increased levels of protection for plaintiffs and greater promotion of the efficiency of the market might then be thought to outweigh the risk that an entirely blameless defendant will be penalised. As we shall see, however, standards of fault-based responsibility have infused both the structure and the interpretation of the statutory regime, particularly at the stage of determining the appropriate remedial response to established misleading conduct. A real question therefore arises as to whether the efficacy of the regime has been undermined by ever-increasing layers of complexity in its application.

Statutory liability and tort

Given the apparent simplicity and breadth of the statutory prohibition on misleading conduct, it might reasonably have been predicated that the claim would come to dominate the field of liability for misleading conduct and that the prominence of those torts with which the statutory prohibition overlaps would be diminished.²⁶ Certainly, writing in 1986, French J envisaged dramatic consequences flowing from the statutory prohibition:

Resorting to florid metaphor, the dedicated legal modernist may depict the common law and its causes of action as primeval broadacres grazed by slow-growing sauropods. Upon this landscape the action for misleading or deceptive conduct falls as a kind of statutory comet threatening significant reductions in the species numbers of fraud, negligent misstatement, passing off, defamation, collateral warranty and contractual representation.²⁷

Current case law suggests that this prediction has proved only partly accurate. The statutory prohibition on misleading conduct has sidelined the torts of passing off and deceit in disputes arising in trade or commerce, although for

25 On corrective justice in tort law see further J C P Goldberg and B C Zipursky, 'Torts as Wrongs' (2010) 88 *Tex LR* 917; E J Weinrib, *The Idea of Private Law*, Harvard University Press, 1995.

26 Carter, above n 13, at [19–04]; J Dietrich, 'Teaching Torts in the Age of Statutes and Globalisation' (2010) 18 *TLJ* 141 at 142 (the economic torts, fraud, negligent misrepresentation, and passing off, are torts that may now be largely supplanted (in practice) by statutory remedies).

27 R S French 'A Lawyer's Guide to Misleading or Deceptive Conduct' (1989) 63 *ALJ* 250. Also 'The Law of Torts and Part V of the *Trade Practices Act*' in *Essays on Torts*, P D Finn (Ed), Lawbook Co, 1989, p 202 and K Barker, 'Negligent Misstatement in Australia — Resolving the Uncertain Legacy of *Esanda*' in Barker et al, above n 14, p 343 (comparing the risks of statutory domination to the demon in Fuseli's *Nightmare*).

different reasons.²⁸ The statutory prohibition may have stultified the development of aspects of the tort of negligent misstatement.²⁹ Nonetheless, in significant respects, the torts remain surprisingly prominent even beyond the confines of cases occurring in private or non-commercial transactions to which the statutory prohibition does not apply.

Passing off

The tort of passing off is directed to protecting the good will of the plaintiff and is in this sense narrower than the statutory prohibition on misleading conduct. Nonetheless, the claims will commonly overlap³⁰ and their elements are generally considered to be functionally similar.³¹ As Perram J explained in *Mars Australia Pty Ltd v Sweet Rewards Pty Ltd*:

Passing off protects the goodwill of the applicant. [The statutory prohibition on misleading conduct] by contrast, protects consumers from being misled or deceived. In a passing off case, the existence of conduct which damages the applicant's goodwill by wrongly suggesting a connexion between the respondent's wares and the applicant's will often also be misleading and deceptive. It is usual therefore in such cases for there to be an overlap between the passing off claim and the claim under [statute].³²

As a result, although the claims are commonly pleaded in the alternative, they are rarely independently analysed and cases are usually determined under the statutory prohibition.³³ The ongoing role of passing off is primarily to give a plaintiff access to different types of remedies, including exemplary damages³⁴ and an account of profits,³⁵ which are not available for a contravention of the ACL.³⁶

28 See, eg, Barker et al, above n 7, p 230.

29 See Barker, above n 27.

30 See also P Johnson and J Gibson 'The "new" tort of passing off' (2015) 131 *LQR* 476 (considering the impact of the Consumer Protection from Unfair Trading Directive (EU) on the tort of passing off in the United Kingdom). The rights vindicated by the tort are also protected by intellectual property legislation, such as the Design Act 2003 (Cth), Trade Marks Act 1995 (Cth), Copyright Act 1968 (Cth) and Patents Act 1990 (Cth).

31 *Telstra Corporation Ltd v Royall & Sun Alliance Insurance Australia Ltd* (2003) 57 IPR 453; [2003] FCA 786; BC200304197 at [52] per Merkel J.

32 *Mars Australia Pty Ltd v Sweet Rewards Pty Ltd* (2009) 81 IPR 354; [2009] FCA 606; BC200904981.

33 See, eg, *ibid*, at [27] per Perram J; *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* (2007) 159 FCR 397; 239 ALR 662; [2007] FCAFC 70; BC200703773 at [98] per Black CJ, Emmett and Middleton JJ; *Peter Bodum A/S v DKSH Australia Pty Ltd* (2011) 280 ALR 639; 92 IPR 222; [2011] FCAFC 98; BC201105891 at [264] per Greenwood J. Also J D Heydon, 'The Future of the Economic Torts' (1975) 12 *UWAL Rev* 1; A Sharpe, 'Protecting Business Reputation in Australia: Section 52 of the Trade Practices Act and Passing Off' (1982–1983) 13 *FLR* 253; W R Cornish, 'Unfair Competition Under Common Law and Statute' (1985) 10 *Adel L Rev* 32 at 33–4.

34 See, eg, *Taleb v G M Holden Ltd* (2011) 286 ALR 309; 94 IPR 459; [2011] FCAFC 168; BC201110332.

35 *Hogan v Pacific Dunlop Ltd* (1988) 83 ALR 403 at 432; 12 IPR 225 at 254 per Gummow J; *Applied Business Technology Pty Ltd v Grandmaster Computers Pty Ltd* (1999) 161 ALR 31; 44 IPR 131; [1999] FCA 36; BC9900118 at [7] per Katz J.

36 Damages and compensatory orders must be made to compensate loss or damage: see ACL ss 236–239.

Deceit

Although the tort of deceit and the statutory prohibition on misleading conduct have different elements, there is a considerable overlap in the cases to which they apply. '[T]he tort of deceit provides a legal remedy for harm suffered in consequence of dishonesty.'³⁷ This type of conduct occurring in trade or commerce will usually also infringe the statutory prohibition on misleading conduct, without requiring a plaintiff to prove any mental element on the part of the defendant.³⁸ Again the primary attraction of an action in deceit in cases occurring in trade or commerce will be in the remedies potentially available and, in particular, the possibility of claiming exemplary damages.³⁹

Negligence

The statutory claim for misleading conduct may present considerable evidentiary and remedial advantages to plaintiffs over the tort of negligent misstatement. As the High Court commented in *Miller v BMW*, '[p]roof of the statutory claim will almost invariably be less onerous for a plaintiff than proof of negligence on the same facts'.⁴⁰ The remedies available under the statute in response to a contravention may exceed those available at common law⁴¹ and are considerably more flexible.⁴² Unsurprisingly⁴³ then, in most cases to which the statutory prohibition applies, although negligence may be pleaded, most prominence has been given to the statutory claim.⁴⁴ Nonetheless, in a smaller, but still significant body of cases, negligent misstatement has continued to attract considerable judicial attention in its own right in commercial litigation despite parallel findings of liability under the statute.⁴⁵ In these cases primary focus of the court has been on negligent misstatement

37 *Magill v Magill* (2006) 226 CLR 551; 231 ALR 277; [2006] HCA 51; BC200608953 at [17] per Gleeson CJ.

38 On the elements of deceit see *ibid*, at [114] per Gummow, Kirby and Crennan JJ.

39 See, eg, *Henderson v McSharer* [2015] FCA 396; BC201503156.

40 *Miller v BMW* (2010) 241 CLR 357; 270 ALR 204; [2010] HCA 31; BC201007172 at [99] per Heydon, Crennan and Bell JJ. See also *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640; 211 ALR 79; [2004] HCA 54; BC200407490 at [14] per Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ (questioning parties' assumption that liability under contract, tort and the statute would be the same).

41 Consider for example the power to vary a contract under ACL s 243(b)(1), which is not typically available under the general law.

42 Both damages under ACL s 236 and rescission like remedies using a combination of ACL s 243(a)(c) and (d) are potentially available.

43 *Miller v BMW* (2010) 241 CLR 357; 270 ALR 204; [2010] HCA 31; BC201007172 at [99] per Heydon, Crennan and Bell JJ.

44 See, eg, *ibid*; *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640; 211 ALR 79; [2004] HCA 54; BC200407490; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109; 192 ALR 1; [2002] HCA 41; BC200205780. Also *Tomasetti v Brailey* (2012) 274 FLR 248; 91 ATR 531; [2012] NSWCA 399; BC201209803; *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd* [2014] NSWCA 158; BC201403815; *OXS Pty Ltd v Sydney Harbour Foreshore Authority* [2016] NSWCA 120; BC201603866. See also Barker, above n 27, p 320 (describing negligent misstatement litigation as becoming a 'backwater').

45 *Derring Lane Pty Ltd v Fitzgibbon* (2007) 16 VR 563; [2007] VSCA 79; BC200703540; *Middleton v Aon Risk Services Australia Ltd* [2008] WASCA 239; BC200810399; *Kestrel Holdings Pty Ltd v APF Properties Pty Ltd* (2009) 260 ALR 418; [2009] FCAFC 144; BC200909373; *Doepel & Associates Architects Pty Ltd v Hodgkinson* [2008] WASCA 262; BC200811088; *Propell National Valuers (WA) Pty Ltd v Australian Executor Trustees Ltd*

and discussion of the statute has been sidelined, thus illustrating the ongoing vitality of the tort in a commercial context.

ABN AMRO Bank NV v Bathurst Regional Council

A good example of this trend is *ABN Amro*.⁴⁶ The case involved a structured financial product, designed by ABN Amro Bank (ABN), involving leveraged investment in synthetic or notional credit default swaps by reference to global indices that tracked pools of such investments.⁴⁷ The product was marketed in Australia as the ‘Rembrandt Notes’. ABN paid the ratings agency Standard and Poors (S&P) to rate the notes. This was common practice when a new financial product was devised and marketed, and S&P were a well-known and highly reputed ratings agency within the finance world. Structured finance is its own specialised field of knowledge and many potential investors would have great difficulty assessing the creditworthiness of the notes,⁴⁸ particularly in a context that was described as ‘grotesquely complicated’.⁴⁹ Rating the creditworthiness of the notes required expert modelling of the sort S&P was equipped to perform.⁵⁰ S&P assigned the Rembrandt notes an AAA rating, which indicated the product was a highly stable and relatively risk-free investment. Specifically, the AAA rating indicated a default probability of less than 0.728%. In fact, acting in response to directions, and even some considerable pressure, from ABN,⁵¹ S&P had adopted a flawed volatility basis and unduly favourable assumptions for its modelling which would make the notes seem more stable,⁵² while failing to acknowledge substantial risks inherent to the product, which were inconsistent with a rating of AAA.

On the basis of the AAA rating, alongside high expected returns compared to those available for similarly stable investments, ABN marketed the notes to Local Government Financial Services (LGFS), a private company that dealt with local governments. LGFS purchased \$10 million of the first issue of notes, and later \$45 million of the second issue of notes. The Rembrandt notes were on sold to local councils in NSW, and a portion were retained by LGFS.

(2012) 202 FCR 158; [2012] FCAFC 31; BC201201462; *ABN Amro* (2014) 224 FCR 1; 309 ALR 445; [2014] FCAFC 65; BC201404937; *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1; [2012] FCA 1028; BC201207287. Compare also *Charben Haulage Pty Ltd v Environmental & Earth Sciences Pty Ltd* (2004) ATPR (Digest) 46-252; [2004] FCA 403; BC200401766.

46 *ABN Amro*, *ibid.* See generally A Sahore, ‘*ABN AMRO Bank NV v Bathurst Regional Council*: Credit Rating Agencies and Liability to Investors’ (2015) 37 *SLR* 437.

47 *ABN Amro*, *ibid.*, at [32]–[36].

48 *Ibid.*, at [39], [580], [599].

49 *Ibid.*, at [2182], [3527].

50 *Ibid.*, at [44].

51 *Ibid.*, at [502] citing the primary judge:

ABN Amro undoubtedly made a fundamental error about a very important issue which has not been explained and repeated that error to S&P on a number of occasions, no doubt hoping and intending that it would have the desired effect of convincing S&P to reduce its volatility assumption from 35% to 25%. In fact, ABN Amro’s assertions, as noted, in one sense worked too well because S&P in fact rated the CPDO AAA on the basis of that belief, using an assumed 15% volatility to satisfy itself that the CPDO could be rated AAA. By 12 October 2006 at the latest ABN Amro knew 15% to be wrong and seriously so and ABN Amro also knew, if the error was corrected, it would mean that on S&P’s other assumptions the CPDO should not have been rated AAA.

52 *Ibid.*, at [563].

In 2007, market fluctuations caused the value of the Rembrandt notes to decrease dramatically. LGFS and the councils suffered significant losses on their investment in the notes.

Claims were brought by LGFS against ABN and S&P and by the councils against ABN, S&P and LGFS for negligent misrepresentation and for misleading conduct in contravention of various provisions of the Corporations Act and the Australian Securities and Investments Commission Act 2001 (Cth).⁵³ These claims were successful at first instance. Jagot J found that ‘S&P’s rating of the Rembrandt notes was unreasonable, unjustified and misleading’.⁵⁴ On appeal the Full Court of the Federal Court (Jacobson, Gilmore and Gordon JJ) upheld almost all of the first instance findings.

For our purposes the most interesting part of the case is the claim by the councils and LGFS against S&P. S&P argued that the imposition of a duty of care in these circumstances would lead to indeterminate liability.⁵⁵ While S&P had a contractual relationship with ABN to rate the notes, no such relationship existed between S&P and LGFS and the councils.⁵⁶ S&P did not create, market or sell the Rembrandt notes.⁵⁷ S&P performed none of its analysis work in Australia.⁵⁸ S&P regarded its conduct as a ‘predictive opinion about the future likelihood of repayment by an issuer’.⁵⁹ S&P published tens of thousands of ratings per year, and offered these opinions to the world through its website.⁶⁰

The Full Federal Court rejected these arguments. The applicable principles as regards negligence were not in dispute, namely:

for there to be a duty to exercise reasonable care in making a statement or giving advice:

- (1) The speaker must realise, or the circumstances must be such that the speaker ought to have realised, that the recipient of the information or advice intends to act on that information or advice in connexion with some matter of business or serious consequence; and
- (2) The circumstances must be such that it is reasonable in all the circumstances for the recipient to seek, or to accept, and to rely upon the utterance of the speaker.⁶¹

53 ABN and S&P were further found to owe equitable compensation to LGFS for the settlement with state cover. LGFS was also found to have breached its fiduciary duty to the councils, and to be liable in tort for negligence and for misleading and deceptive conduct under the statute.

54 *ABN Amro* (2014) 224 FCR 1; 309 ALR 445; [2014] FCAFC 65; BC201404937 at [563].

55 *Ibid.*, at [571].

56 *Ibid.*, at [570].

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*, at [571].

60 *Ibid.*

61 *Ibid.*, at [573], citing *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1; 178 ALR 634; [2001] HCA 19; BC200101436 at [47] per Gleeson CJ, Gummow and Hayne JJ, at [75] per Gaudron J, each adopting in substance Barwick CJ’s statement of the principle in *Mutual Life & Citizens’ Assurance Co Ltd v Evatt* (1968) 122 CLR 556 at 571; BC6800860. On the uncertainties as to which test should apply in this type of scenario see further Barker, above n 27, p 337.

S&P knew that potential investors in the Rembrandt notes would rely on S&P's opinion as to the creditworthiness of the notes in deciding whether to invest in those notes.⁶² Moreover, S&P knew that the only purpose of its rating was 'to facilitate the marketability of the product'.⁶³ S&P did not take steps to ensure that any person relying on its ratings had read any report accompanying that rating and did not expect that such investors would read any accompanying reports or have the expertise to second-guess the rating.⁶⁴ It was reasonable for recipients of the S&P rating to rely on that rating as S&P's expert opinion.⁶⁵ S&P was in the business of providing independent expert opinions on creditworthiness and the only available information as to the creditworthiness of the notes was S&P's rating.⁶⁶

In these types of circumstances there was no requirement for S&P to know the precise identity of recipients of the information.⁶⁷ S&P's very business model was structured on the need for expert information in modern commercial life.⁶⁸ Through this business model S&P assumed for reward the risk of liability to those persons 'who invested in the Rembrandt notes in reliance on the rating and who then suffered loss caused by the fact that the creditworthiness of the notes was much lower than that disclosed by S&P's rating'.⁶⁹ The class to whom the duty was owed was not indeterminate but consisted of investors in the Rembrandt notes.⁷⁰ The councils and LGFS were reliant on S&P exercising reasonable care in forming and expressing its opinion about the credit risk of the Rembrandt notes and were therefore vulnerable in that dealing.⁷¹

The court held that S&P breached its duty of care to LGFS and the councils to exercise reasonable care and skill in forming and expressing the relevant opinion about the credit risk of the notes.⁷² A disclaimer included in the presale report stated that the rating was an expression of opinion as to risk, not a warranty or investment advice. The court held that the disclaimer would not objectively have been understood to have been directed to the representation conveyed by the statement of S&P's opinion, that S&P had reasonable grounds for the opinion or exercised reasonable care and skill in forming the opinion. It therefore could not defeat the claim against S&P.⁷³

The court also held that S&P engaged in misleading conduct⁷⁴ in contravention of s 1041H of the Corporations Act⁷⁵ and s 12DA of the ASIC

62 *ABN Amro*, *ibid*, at [580].

63 *Ibid*.

64 *Ibid*.

65 *Ibid*, at [581].

66 *Ibid*.

67 *Ibid*, at [591].

68 *Ibid*.

69 *Ibid*.

70 *Ibid*, at [593].

71 *Ibid*, at [600].

72 *Ibid*, at [722], [1005], [1257], [1303].

73 *Ibid*, at [609]–[610].

74 *Ibid*, at [773], [1006].

75 Corporations Act s 1041H:

A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

Act,⁷⁶ which contain the general prohibitions on misleading conduct and also s 1041E of the Corporations Act,⁷⁷ which is a more specific prohibition dependent on establishing the state of mind of the defendant. The court considered that S&P's rating of the notes as AAA conveyed two representations, being that: (i) in S&P's opinion the capacity of the notes to meet all financial obligations was 'extremely strong'; and (ii) S&P had reached this opinion based on reasonable grounds and as the result of an exercise of reasonable care and skill.⁷⁸ The Full Court agreed with the findings of the trial judge that neither representation was true and that the conduct of S&P was misleading and deceptive.⁷⁹

S&P sought to rely on its disclaimer to show that a reasonable investor would have understood that any representation should not be relied on in making the decision to invest and that there would be no recourse to S&P if it were relied on.⁸⁰ This argument was rejected by the Full Court for much the same reasons it was rejected in regard to the claim in tort. In particular, a reasonable person would not understand the disclaimer as meaning the rating could not be relied on, because that would render the rating an 'exercise in futility'.⁸¹

The Full Federal Court found that there was no contributory negligence by the LGFS or the councils in connection with their losses.⁸² In particular the councils were not obliged to understand the 'mechanics of credit default swaps' and could reasonably rely on the AAA rating from S&P as the 'best independent information available' about the creditworthiness of the planned investment.⁸³ In regard to the claims that were subject to apportionment under legislation, LGFS, S&P and ABN Amro were equally responsible for the

76 ASIC Act 2001 s 12DA:

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

77 Corporations Act s 1041E:

A person must not (whether in this jurisdiction or elsewhere) make a statement, or disseminate information, if:

- (a) the statement or information is false in a material particular or is materially misleading; and
- (b) the statement or information is likely:
 - (i) to induce persons in this jurisdiction to apply for financial products; or
 - (ii) to induce persons in this jurisdiction to dispose of or acquire financial products; or
 - (iii) to have the effect of increasing, reducing, maintaining or stabilising the price for trading in financial products on a financial market operated in this jurisdiction; and
- (c) when the person makes the statement, or disseminates the information:
 - (i) the person does not care whether the statement or information is true or false; or
 - (ii) the person knows, or ought reasonably to have known, that the statement or information is false in a material particular or is materially misleading.

78 *ABN Amro* (2014) 224 FCR 1; 309 ALR 445; [2014] FCAFC 65; BC201404937 at [723].

79 *Ibid*, at [753], [773], [1305]–[1308].

80 *Ibid*, at [768].

81 *Ibid*, at [771].

82 *Ibid*, at [1473], [1477], [1505].

83 *Ibid*, at [1486].

councils' losses and were each liable for one-third of the councils' losses.⁸⁴ The court also found that damages for contravention of s 1041E were not apportionable.⁸⁵ Thus, ABN Amro and S&P were each liable for 100% of the PA councils' losses for the conduct they engaged in in contravention of s 1041E.⁸⁶

Overlap and lost opportunities?

The finding in *ABN Amro* of liability for both negligence and misleading conduct contrary to statute has led at least one commentator to comment:

It appears that much the same evidence and argumentation will apply to both [types of claim] and that, perhaps contrary to intuition, negligence is not more circumscribed than the statutory actions.⁸⁷

The nature of the impugned conduct in *ABN Amro* meant that the claim under statute necessarily had a considerable overlap with negligent misstatement. Indeed, in the course of the litigation, S&P accepted that the statutory claim was 'relevantly indistinguishable' from the tort claim.⁸⁸ This is because the claim of misleading conduct under statute was based on the giving of an opinion. In stating an opinion a defendant is usually found to have made an implied representation that it actually held the opinion and had a reasonable basis for holding the opinion.⁸⁹ In this manner, the care taken in making the representation becomes relevant to statutory liability in much the same manner as in negligence.⁹⁰ However, one way of approaching this overlap would be to identify the points of commonality and difference in respect to the claims. It would then be possible to use case law under both heads of claim to inform and enrich the analysis of each in the areas of commonality, and use the areas of difference to shed light on the boundaries of each cause of action. This approach would have ensured the development of the case law surrounding the relevant statutory provisions and also potentially enriched the understanding of the common law action.⁹¹

Disappointingly, the Full Federal Court in *ABN Amro* did not take up the opportunities the case presented to explore possible differences between the statutory prohibition and the claim in tort. The primary focus of the court was on the claim for negligent misstatement.⁹² Yet the statutory liability was not an area lacking in opportunities for legal analysis. The relevant legislative

84 Ibid, at [1512], [1516].

85 Ibid, at [1520], [1521], [1608]

86 Ibid, at [1611].

87 Sahore, above n 46, at 450.

88 *ABN Amro* (2014) 224 FCR 1; 309 ALR 445; [2014] FCAFC 65; BC201404937 at [766].

89 See eg *Bateman v Slatyer* (1987) 71 ALR 553; 8 IPR 33; *RAIA Insurance Brokers Ltd v FAI General Insurance Co Ltd* (1993) 41 FCR 164; 112 ALR 511; ATPR 41-225; BC9304639. See also *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82; 55 ALR 25.

90 *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd*, *ibid*, at FCR 88; ALR 31; *Havyn Pty Ltd v Webster* (2005) 12 BPR 22,837; ASAL 55-143; [2005] NSWCA 182; BC200503459.

91 Compare *Tomasetti v Brailey* (2012) 274 FLR 248; 91 ATR 531; [2012] NSWCA 399; BC201209803 (findings in negligence followed those for misleading conduct contrary to statute).

92 The Full Federal Court spent 156 paragraphs to analyse the claim in tort, and 50 paragraphs

provisions raised issues that might be thought equally as interesting and important as those raised by the tort action. There are numerous nuances in the prohibitions on misleading conduct and associated remedies in the Corporations Act that were not explored by the court. For example, the court might usefully have considered the statutory standard for assessing when a statement is 'materially misleading'⁹³ and when a person 'ought reasonably to have known'⁹⁴ that a statement is false or misleading. It would have useful to know whether this standard is met in any case where the defendant failed to use reasonable care and skill in making the statements. The court might have addressed the nature of the causal connection between misleading conduct and the loss required to establish a claim for damages under the statute. Instead its inquiry into causation for losses proceeded by reference to the tort action, which was governed by the two-stage analysis laid down by the Civil Liability Act 2002 (NSW) s 5D(3).⁹⁵ It is not at all clear that the same type of inquiry is dictated by the remedial provisions in the Corporations Act, which instead require the court to consider whether the loss or damage for which a plaintiff is seeking compensation be suffered 'because of' the impugned conduct.⁹⁶ The court also might have considered the operation of the statutory contributory negligence provisions, which raise the difficult question of how to assess the relative contribution to the losses for which compensation was being sought by any contributory negligence on the part of the plaintiff⁹⁷ in a context where the defendant's liability is not premised on a failure to take reasonable care.⁹⁸

The degree of attention given in cases such as *ABN Amro* to the common law claim over the statutory prohibition is to the detriment of the analysis of the mire of unanswered issues in the application of the statute, especially given that the ultimate finding for the plaintiff was more generous under the statute. It prompts the question: what explains the preference for resolving disputes through the lens of negligent misstatement rather than an independent analysis of the legislative regime?

for misleading conduct contrary to statute of which 42 paragraphs were analysing whether the legislation applied to the matters in dispute.

93 Corporations Act s 1041E(a).

94 Ibid, s 1041E(c).

95 *ABN Amro* (2014) 224 FCR 1; 309 ALR 445; [2014] FCAFC 65; BC201404937 at [774]ff.

96 For example, Corporations Act s 1041E:

(1) A person who suffers loss or damage by conduct of another person that was engaged in in contravention of section 1041E, 1041F, 1041G or 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.

97 Ibid, s 1041H(1B).

98 B McDonald, 'Proportionate Liability in Australia: The Devil in the Detail' (2005) 26 *Aust Bar Review* 29 at 35.

Possible reasons for turning to the common law

Statute as the elephant in the room

One possible reason for courts turning to tort over statute is that statute in a common law context remains very much the ‘elephant in the room’,⁹⁹ consistently sidelined despite its potential breadth of coverage in the field.¹⁰⁰ As Dietrich has commented ‘[m]any lawyers, it seems, do not like statutes’.¹⁰¹ For many lawyers, the analysis of claims in negligence will be familiar to the point of having become intuitive. By contrast the legislative regime is complex, often lacks a sustained body of interpretative case law and may frequently be changing. It is also possible that many lawyers consider the persuasive force of potentially controversial judgments is buttressed by a finding in negligence, which is backed by a rich body of case law and a relatively clear moral premise. These factors were perhaps all the more influential in *ABN Amro*, which raised, for the first time, the liability of a ratings agency for misrepresentation in a case that had already attracted considerable international attention.¹⁰²

The complexity of the legislative regime

A second possible reason for the focus on tort over statute relates to the sheer uncertainty and complexity of the statutory regime in Australia.¹⁰³ In Australia, the common law tort of negligence has been modified by state and territory Civil Liability Acts that prescribe criteria for establishing the standard of care, a framework for causation, defences, proportionate liability for economic loss and property damage, contributory negligence and limitations on damages.¹⁰⁴ These Acts have undoubtedly contributed to the complexity of negligence actions.¹⁰⁵ Nonetheless, the elements of the claim and the progression of argument remain in most respects reasonably well understood. The complexity in the tort of negligence introduced by the Civil Liability Acts is arguably surpassed by that found in the various statutes regulating misleading conduct.

99 M Leeming, ‘Theories and Principles Underlying the Development of the Common Law — The Statutory Elephant in the Room’ (2013) 36 *UNSWLJ* 1002.

100 See further on this issue T T Arvind and J Steele, *Tort Law and the Legislature*, Hart, 2013. Also D Wright, *Common Law in the Age of Statutes: The Equity of the Statute*, LexisNexis Butterworths, 2015; E Bant, ‘Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence’ (2015) 38 *UNSWLJ* 367; A Burrows, ‘The Relationship between Common Law and Statute in the Law of Obligations’ (2012) 128 *LQR* 231; J Beatson, ‘The Role of Statute in the Development of Common Law Doctrine’ (2001) 117 *LQR* 247; J Dietrich, ‘What is ‘Lawyering’? The Challenge of Taxonomy’ (2006) 65 *CLJ* 549; P Finn, ‘Statutes and the Common Law’ (1992) 22 *UWALR* 7; P Finn, ‘Statutes and the Common Law: The Continuing Story’ in *Interpreting Statutes*, S Corcoran and S Bottomley (Eds), Federation Press, 2005, p 52.

101 Dietrich, above n 26, at 144. See also Burrows, *ibid*, at 233.

102 Sahore, above n 46, at 455.

103 Dietrich, above n 26.

104 Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 2002 (NSW); Civil Liability Act 2003 (Qld); Civil Liability Act 1936 (SA); Civil Liability Act 2002 (Tas); Wrongs Act 1958 (Vic); Civil Liability Act 2002 (WA).

105 See B McDonald, ‘Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia’ (2005) 27 *SLR* 443.

The general prohibition on misleading conduct is repeated in a number of statutes, primarily the ACL,¹⁰⁶ the Corporations Act¹⁰⁷ and the ASIC Act.¹⁰⁸ The ACL does not apply to the supply of financial services and financial products¹⁰⁹ and the Corporations Act and the ASIC Act contain highly complex definitions of the products that come within their scope.¹¹⁰ The most basic financial service, credit, is not a financial product for the purposes of the Corporations Act.¹¹¹ Meanwhile securities, including debentures — a basic form of credit — are financial products. The definition of a debenture is itself riddled with uncertainty and has been the topic of sustained analysis in the cases in which it has been raised.¹¹²

The general statutory prohibitions on misleading conduct are accompanied by an extensive and unique remedial regime. It is possible, some of the difficulties in interpreting and applying the regime may lie in the ‘mixed messaging’ that arises between the primary prohibition on misleading conduct which is expressed in absolute terms in order to promote the regulatory objective of fair trading and the remedial regime which is premised on a goal of compensation for loss or damage thereby invoking the ideas of corrective justice that inform the general law torts. Mediating between these objectives is a task of no minor complexity for the courts charged with the resolution of disputes under the statute.

Each of the remedial regimes in the various relevant statutes is accompanied by its own rules on contributory negligence¹¹³ and proportionate liability for concurrent wrongdoers¹¹⁴ in respect to economic loss or damage to property.¹¹⁵ Each of these provisions has its own unique application criteria. Thus, for example, provisions for proportionate liability only apply to claims under the general prohibition on misleading conduct¹¹⁶ and not to claims under the more specific prohibitions on false or misleading conduct.¹¹⁷

The consequence of these layers of rights and limitations is a regime of byzantine complexity. The frustration occasioned by this state of affairs is

106 ACL s 18 (general prohibition) and also more specific prohibitions in ss 29 and 30.

107 Corporations Act s 1041H (general prohibition) and also more specific prohibitions in ss 1041B, 1041C, 1042E and 1041F.

108 ASIC Act s 12DA (general prohibition) and also more specific prohibitions in ss 12DB, 12DC and 12DF.

109 The ACL does not apply ‘to the supply, or possible supply, of services that are financial services, or of financial products’: Competition and Consumer Act s 131A.

110 See, eg, Corporations Act ss 9 and 761D(1).

111 Ibid, s 765A(1)(h).

112 See, eg, *ABN Amro* (2014) 224 FCR 1; 309 ALR 445; [2014] FCAFC 65; BC201404937 at [620]–[700]; *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1; [2012] FCA 1028; BC201207287 at [1186]–[1205].

113 Competition and Consumer Act s 137B; Corporations Act s 1041I(1B); ASIC Act s 12GF(1B).

114 Competition and Consumer Act Pt VIA; Corporations Act ss 1041I, 1041L and 1041N; ASIC Act ss 12GP and 12GR.

115 See generally McDonald, above n 98.

116 Competition and Consumer Act s 87CC; Corporations Act s 1041M; ASIC Act s 12GQ.

117 See *Selig v Wealthsure* (2015) 255 CLR 661; 147 ALD 46; [2015] HCA 18; BC201503711 at [37] per French CJ, Kiefel, Bell and Keane JJ; *Williams v Pisano* (2015) 90 NSWLR 342; 299 FLR 172; [2015] NSWCA 177; BC201505727 at [64].

apparent in the statement of Rares J in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)*:

For many years all one had to know was that the elegantly simple s 52(1) of the *Trade Practices Act 1974* (Cth) prohibited a corporation from engaging in conduct, in trade or commerce, that was misleading or deceptive or likely to mislead or deceive. For some purpose that is not evident the Parliament decided to remove elegant simplicity in its statutory drafting some years ago. Now the community and the Courts must grapple with a labyrinth of statutes, all prohibiting such conduct, in relatively general fields and also in particular fields

Of course, each Act has a myriad of complex definitions of what is a financial product or a financial service or are financial services. Each Act gives a person, who suffers loss or damage by conduct of another in contravention of the prohibition, the right to compensation coupled with substantively identical related exceptions and qualifications concerning proportionate liability. Since the end result of this legislative morass seems to be the same, it is difficult to discern why the public, their lawyers (if they can afford them) and the courts must waste their time turning up and construing which of these statutes applies to the particular circumstance. Why does a court have to waste its time wading through this legislative porridge to work out which one or ones of these provisions apply even though it is likely that the end result will be the same? As Edmund Davies LJ lamented in *The 'Putbus'* [1969] P 136 at 152:

'Were bewilderment the legitimate aim of statutes, the *Merchant Shipping (Liability of Shipowners and Others) Act, 1958*, would clearly be entitled to a high award. Indeed, the deep gloom which its tortuositities induced in me has been lifted only by the happy discovery that my attempt to construe them has led me to the same conclusion as my brethren.'¹¹⁸

In this legislative environment it is perhaps not altogether unexpected, albeit disappointing from the perspective of the development of the law interpreting the statute, that lawyers might seek to focus their analysis on the relative secure domain of common law negligence in cases otherwise falling within the scope of this myriad of legislative provisions governing relief for misleading conduct such as *ABN Amro*.

The continued relevance of fault

A third reason for the courts preferring tort over statute relates to the continued attraction of fault as a basis of liability. As we have seen, 'liability for misleading conduct under the statute is strict'.¹¹⁹ However, fault-based ideas have proved tenacious in eroding the strictness of liability under the primary prohibition in the relevant statutory regimes.¹²⁰ The phenomenon is apparent in both the more specific provisions accompanying the general prohibition on

¹¹⁸ *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1; [2012] FCA 1028; BC201207287 at [947]–[949].

¹¹⁹ *Miller v BMW* (2010) 241 CLR 357; 270 ALR 204; [2010] HCA 31; BC201007172 at [99] per Heydon, Crennan and Bell JJ. See also *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640; 211 ALR 79; [2004] HCA 54; BC200407490 at [14] (per Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ (questioning parties' assumption that liability under contract, tort and the statute would be the same).

¹²⁰ This pattern of purportedly strict statutory liability qualified by exceptions is also apparent under product liability regimes, such as in Pts 3–5 of the ACL: see further Stapleton, above n 24.

misleading conduct and also in the courts' approach to interpreting and applying the statutory regime, particularly at the remedial stage where the public policy objectives of the statute have less prominence and recourse to general law theme of corrective justice are more directly applicable.

Fault and the statutory regime

While the general statutory prohibition on misleading conduct is expressed in absolute terms, the remedial consequences of contravening conduct are, in a number of respects, scaled to the degree of fault attributable to the defendant. In particular, the statutory regimes containing the prohibitions on misleading conduct include provision for enforcement action by the regulator, who is able to seek the award of civil pecuniary penalties against transgressing corporations in response to specified forms of misleading conduct.¹²¹ In quantifying these penalties, the culpability of the wrongdoer is one of the factors that the court will take into account.¹²²

Additionally, the proportionate liability regimes, providing for contribution between defendants,¹²³ are 'limited to circumstances where there is a lesser degree of moral culpability on the part of the wrongdoer'.¹²⁴ At least under the Corporations Act, contraventions of the more specific provisions involve a higher level of moral culpability than the conduct caught only by the general prohibition:

Contravention of any of those provisions constitutes an offence. Section 1041E concerns the making of a statement or disseminating information that is false in a material particular or is materially misleading in circumstances when the offending person does not care whether the statement or information is true or false, or the person has actual or putative knowledge of those matters. Section 1041F contains elements of knowing or reckless conduct which is misleading, false or deceptive. Section 1041G involves dishonest conduct.¹²⁵

The proportionate liability regimes also do not apply to reduce the liability of a concurrent wrongdoer who intentionally or fraudulently caused the loss the subject of the claim.¹²⁶ Equally, the provisions providing for the reduction of

121 See, eg, ACL s 224.

122 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424; BC201603031.

123 Competition and Consumer Act s 87CC; Corporations Act s 1041M; ASIC Act s 12GQ.

124 *Williams v Pisano* (2015) 90 NSWLR 342; 299 FLR 172; [2015] NSWCA 177; BC201505727 at [63]. But see also K Barker and J Steele 'Drifting Towards Proportionate Liability: Ethics and Pragmatics' (2015) 74 *CLJ* 49 (arguing that proportionate liability regimes are not driven by coherent moral currents).

125 *ABN Amro* (2014) 224 FCR 1; 309 ALR 445; [2014] FCAFC 65; BC201404937 at [1565], [1568]–[1570].

126 Corporations Act s 1041M:

Nothing in this Division operates to exclude the liability of a concurrent wrongdoer (an *excluded concurrent wrongdoer*) in proceedings involving an apportionable claim if:

- (a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or
- (b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.

Also Competition and Consumer Act s 87CC; ASIC Act s 12GQ.

damages by reason of the contributory negligence of a plaintiff do not apply where the loss or damage was caused by intentional or fraudulent conduct on the part of a defendant.¹²⁷

These features of the legislative framework governing liability for misleading conduct supported the conclusion of the court in *ABN Amro* that the statutory proportionate liability regimes¹²⁸ apply only to claims under the general prohibition on misleading conduct and not to claims under the more specific prohibitions on false or misleading conduct.¹²⁹ In *Williams v Pisano* the NSW Court of Appeal commented that the framework 'is consistent with a legislative intention that the proportionate liability provisions be limited to circumstances where there is a lesser degree of moral culpability on the part of the wrongdoer'.¹³⁰

This kind of acknowledgement of the relevance of moral culpability in assessing the remedial response to misleading conduct sits in contrast to the strict liability of the core prohibition. From a policy perspective there is a danger that the different uses of fault at different stages of the analysis will muddy the otherwise clear policy message provided by the core prohibition of, effectively, 'don't engage in conduct likely to mislead'. On the other hand, the more severe response to intentional or reckless conduct found in the statutory remedial regime should act to provide a stronger deterrent to deliberate

127 Corporations Act s 1041I:

(1) A person who suffers loss or damage by conduct of another person that was engaged in in contravention of section 1041E, 1041F, 1041G or 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.

..
(1B) Despite subsection (1), if:

(a) a person (the *claimant*) makes a claim under subs (1) in relation to:

- (i) economic loss; or
- (ii) damage to property;

caused by conduct of another person (the *defendant*) that was done in contravention of s 1041H; and

(b) the claimant suffered the loss or damage:

- (i) as a result partly of the claimant's failure to take reasonable care; and
- (ii) as a result partly of the conduct referred to in paragraph (a); and

(c) the defendant:

- (i) did not intend to cause the loss or damage; and
- (ii) did not fraudulently cause the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

Also Competition and Consumer Act s 137B(d); ASIC Act s 12GF(1B)(c).

128 Competition and Consumer Act s 87CC; Corporations Act s 1041M; ASIC Act 2001 s 12GQ.

129 *ABN Amro* (2014) 224 FCR 1; 309 ALR 445; [2014] FCAFC 65; BC201404937 at [1565], [1568]–[1570]; *Williams v Pisano* (2015) 90 NSWLR 342; 299 FLR 172; [2015] NSWCA 177; BC201505727 at [62]. But cf *Selig v Wealthsure* (2015) 255 CLR 661; 147 ALD 46; [2015] HCA 18; BC201503711 at [37] per French CJ, Kiefel, Bell and Keane JJ (it is not necessary to have regard to legislative purpose to explain the operation of the apportionment provisions).

130 *Williams v Pisano*, *ibid*, at [63].

wrongdoing.¹³¹ A more nuanced approach to balancing culpability and remedial response may also correspond with a community sense of morality, whereby we consider that an innocent defendant should not be treated in the same way as the deliberate wrongdoer, at least at the stage of determining the remedial consequences of misleading conduct.

In this context it can be suggested that the common law torts may provide a convenient touchstone for the types of moral assessments of fault that remain relevant to liability under statute. For example, a finding of negligence may be useful to courts even under the statute in assessing the degree to which the defendant's liability to pay damages should be reduced on grounds of the contributory negligence of the plaintiff. There are clear difficulties for courts in apportioning responsibility between a defendant who has engaged in misleading conduct and a plaintiff who has contributed to its own loss through a lack of reasonable care in a context where the defendant's liability is not premised on negligence.¹³² It may be that a concurrent finding in negligence on the part of the defendant gives comfort to courts in this task by providing a benchmark of fault against which each party's contribution to the loss can be assessed.

Fault and judicial interpretation of the statutory regime

Ideas about the role of fault in allocating liability have also influenced the courts' interpretation of the core prohibition on misleading conduct and the remedial responses to such a contravention under statute. An analogy from deceit¹³³ underlies the suggestion that courts may make an inference that the plaintiff relied on the misleading conduct of the defendant in circumstances where the conduct in question was calculated to induce that reliance.¹³⁴ Principles from the tort of deceit have likewise been influential in determining the scope of the losses for which the defendant will be held responsible for conduct that is misleading under the statute.¹³⁵

As we have seen from *ABN Amro*, the care taken by a defendant in

131 Compare *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640; 304 ALR 186; [2013] HCA 54; BC201315601 at [66] per French CJ, Crennan, Bell and Keane JJ.

132 *Caffey v Leatt-Hayter (No 3)* [2013] WASC 348; BC201303357 at [503] per Beech J.

133 *Gould v Vaggelas* (1985) 157 CLR 215 at 236 per Wilson J, at 250 per Brennan J.

134 See, eg, *Ricochet Pty Ltd v Equity Trustees Executor and Agency Co Ltd* (1993) 41 FCR 229 at 233; 113 ALR 30 at 35; BC9304709; *Lord Buddha Pty Ltd (in liq) v Harpur* (2013) 41 VR 159; [2013] VSCA 101; BC201302258 at [132] per Vickery AJA (Weinber and Tate JJA agreeing). Courts have also emphasised that inferences of reliance drawn in this manner may be rebutted by the circumstances of the transaction: *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304; 257 ALR 610; [2009] HCA 25; BC200906574 at [143] per Gummow, Hayne, Heydon and Kiefel JJ; *De Bortoli Wines Pty Ltd v HIH Insurance Ltd (in liq)* [2012] FCAFC 28; BC201201434 at [67], [91]–[94] per Jacobson, Siopis and Nicholas JJ; *Razdan v Westpac Banking Corporation* [2014] NSWCA 126; BC201402678 at [15]–[18] per McColl JA.

135 *Henville v Walker* (2001) 206 CLR 459; 182 ALR 37; [2001] HCA 52; BC200105241 at [19] per Gleeson CJ, at [130]–[134] per McHugh J; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; 158 ALR 333; [1998] HCA 69; BC9805922 at [41] per McHugh, Hayne and Callinan JJ, at [102]–[103] per Gummow J, at [137]–[138] per Kirby J; *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640; 211 ALR 79; [2004] HCA 54; BC200407490 at [65] per Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ.

expressing an opinion is relevant to liability under the statutory prohibitions on misleading conduct, in that it is usually inferred that a person expressing an opinion is representing that he or she has reasonable grounds for that opinion. Ideas of responsibility to take reasonable care have also been influential in considering the reasonable response of the audience to whom the defendant's conduct was directed in order to determine whether that conduct was misleading. The statute prohibits conduct that is 'misleading or deceptive, or likely to mislead or deceive'. To find the conduct was misleading, 'there must be a sufficient causal link between the conduct and error on the part of persons exposed to it'.¹³⁶ This requirement typically directs courts to consider the reasonableness of the response by the plaintiff on the impugned conduct.¹³⁷ While the protection afforded by the statutory prohibition is not 'restricted to the careful or the astute',¹³⁸ some level of reasonable care on the part of the plaintiff is expected.¹³⁹ In *Parkdale Customer Built Furniture Pty Ltd v Puxu Pty Ltd* Gibbs CJ explained:

It seems clear enough that consideration must be given to the class of consumers likely to be affected by the conduct. Although it is true, as has often been said, that ordinarily a class of consumers may include the inexperienced as well as the experienced, and the gullible as well as the astute, the section must in my opinion be regarded as contemplating the effect of the conduct on reasonable members of the class. The heavy burdens which the section creates cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests.¹⁴⁰

Given the continuing influence of standards of reasonable care in assessing liability under the statute, it is perhaps unsurprising that in a complex case such as *ABN Amro* a court might turn to the tort of negligence as a way of framing the competing considerations raised by the statutory regime.

Misrepresentation Acts

The attraction of standards of fault in informing both the form and the interpretation of legislation is not unique to the Australian prohibition on misleading conduct. It is also apparent in the Misrepresentation Act 1967 (UK), and legislation based upon it.¹⁴¹ Section 2(1) of this legislation provides:

¹³⁶ *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640; 304 ALR 186; [2013] HCA 54; BC201315601 at [39] per French CJ, Crennan, Bell and Keane JJ.

¹³⁷ See Bant and Paterson, above n 14.

¹³⁸ *Henville v Walker* (2001) 206 CLR 459; 182 ALR 37; [2001] HCA 52; BC200105241 at [13] per Gleeson CJ.

¹³⁹ *Campomar Sociedad Limitada v Nike International Ltd* (2000) 202 CLR 45; 169 ALR 677; [2000] HCA 12; BC200000767 at [102], citing *Parkdale Customer Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199; 42 ALR 1 at 6; 1A IPR 684 at 689 per Gibbs CJ. See also *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112 at 136; 94 ALR 719 at 742 per Hill J.

¹⁴⁰ *Parkdale Customer Built Furniture Pty Ltd v Puxu Pty Ltd*, *ibid*, per Gibbs CJ. See also *Miller v BMW* (2010) 241 CLR 357; 270 ALR 204; [2010] HCA 31; BC201007172 at [22] per French CJ and Kiefel J.

¹⁴¹ Civil Law (Wrongs) Act 2002 (ACT) s 174(1); Misrepresentation Act 1971 (SA) s 7(1).

Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true.

This section provides significant advantages to a plaintiff seeking damages for misrepresentation as compared to an action for damages in tort for fraudulent or negligent misstatement. The plaintiff does not need to establish fault on the part of the defendant, in the form of intentional, reckless or negligent conduct, or the existence of a duty of care. Fault remains relevant to the equation but it is for the defendant to establish that he or she had reasonable grounds for believing the representation.

Section 2(1) was enacted in response to concerns expressed by the Law Reform Committee that the existing law did not provide an adequate remedy to plaintiffs who had been misled in a context where fraud, with its associated more generous suite of remedies, was difficult to prove. The commission concluded that:

we think that where one of the parties was at fault in making the representation, the other ought to be entitled to damages as of right. We also think that the onus should be on the representor to satisfy the court that he was not at fault.¹⁴²

It is well-established that the measure of damages under s 2(1) is based in tort not contract.¹⁴³ The prevailing authority suggests that the relevant measure of tort damages is that for deceit.¹⁴⁴ It follows that the remoteness rules in deceit will apply and the defendant will be liable for all loss that is a direct and natural consequence of the misrepresentation, regardless of whether such loss was reasonably foreseeable.¹⁴⁵ This characterisation of liability follows from the ‘fiction of the fraud’ device employed by the statute, which treats a non-fraudulent defendant as if they had been fraudulent for the purposes of

¹⁴² UK Law Reform Committee, above n 24, at [17].

¹⁴³ *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297 at 304–5; [1991] 3 All ER 294 at 298–9 per Balcombe LJ. Also *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 at 216; 21 ACSR 199 at 206; [1996] 3 All ER 365 at 374; *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 at 267, 283; 22 ACSR 656 at 663, 677; [1996] 4 All ER 769 at 779, 793; [1997] 1 BCLC 350 at 360, 374.

¹⁴⁴ *Royscot Trust Ltd v Rogerson*, *ibid.* See also *William Sindall plc v Cambridgeshire County Council* [1994] 1 WLR 1016 at 1037; *Bridgegrove Ltd v Smith* [1997] 2 EGLR 40 at 42; *Spice Girls Ltd v Aprilia World Service BV* [2002] EMLR 27 at [12]; *Ng Buay Hock v Tan Keng Huat* [1997] 1 SLR(R) 507; *South Australia Asset Management Corporation v York Montague Ltd*, *ibid.* The question was however left open in *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 267; 22 ACSR 656 at 663; [1996] 4 All ER 769 at 779; [1997] 1 BCLC 350 at 360 per Lord Browne Wilkinson, at AC 283; ACSR 677; All ER 793; BCLC 374 per Lord Steyn.

¹⁴⁵ *Doyle v Olby* [1969] 2 QB 158 at 167; [1969] 2 All ER 119 at 122 per Lord Denning MR; *Smith New Court Securities Ltd v Citibank NA*, *ibid.* AC 264–7; ACSR 661–3; All ER 777–9; BCLC 358–60 per Lord Browne Wilkinson, at AC 283; ACSR 677; All ER 793; BCLC 374 per Lord Steyn.

allowing the plaintiff access to damages.¹⁴⁶ The approach has however been subject to considerable criticism.¹⁴⁷ Scholars have argued that it is incongruous to hold a defendant who has at most made a negligent misrepresentation to the more demanding remedial responsibilities arising from liability in deceit when the sole purpose of the statute was merely to allow the plaintiff a damages remedy in the absence of established fraud on the part of the defendant.¹⁴⁸

In Singapore these types of concerns led Andrew Phang Boon Leong JA (delivering the judgment of the court), to a quite different interpretation of s 2(1) in *RBC Properties Pte Ltd v Defu Furniture Pte Ltd*,¹⁴⁹ although a concluded view on the matter was not necessary to resolve the dispute. Andrew Phang Boon Leong JA quoted Lord Steyn in *Smith New Court Ltd v Scrimgeour Vickers (Asset Management) Ltd*¹⁵⁰ on the rationales for the generous measure of damages in deceit: '[f]irst it serves a deterrent purpose in discouraging fraud' and '[s]econd, as between the fraudster and the innocent party, moral considerations militate in favour of requiring the fraudster to bear the risk of misfortunes directly caused by his fraud'.¹⁵¹ In his Honour's opinion, these justifications simply had no application to a claim for damages under s 2(1) of the Singapore Misrepresentation Act.

Andrew Phang Boon Leong JA considered that the difficulty of applying this measure of damages to liability under s 2(1) was that the section 'does not concern a situation that pertains to *actual fraud* as such, but one that, on the contrary, falls *short* of it'.¹⁵² These situations lack the 'moral turpitude' attributable to a situation of fraudulent misrepresentation.¹⁵³ His Honour expressed the view that the use of the language of 'fraud' in s 2(1) was 'intended to signal the fact that s 2(1) offered a *statutory* remedy for damages which was hitherto available only in the context of the (more serious) situation of fraudulent misrepresentation or deceit'.¹⁵⁴ Instead, s 2(1) operated as the 'analogue of the common law action for negligent misrepresentation'.¹⁵⁵ Andrew Phang Boon Leong JA considered that this moral scale supported the measure of damages under s 2(1) being based on negligent misstatement, rather than fraud.¹⁵⁶

Indeed, as we have already noted, there is no reason in both logic and principle why a plaintiff should be as well-placed as he would have been had the misrepresentation

¹⁴⁶ J Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, 3rd ed, Sweet and Maxwell, 2012, at [7–33].

¹⁴⁷ See *ibid*; R Hooley, 'Damages and the Misrepresentation Act 1967' (1991) 107 *LQR* 547; I Brown and A Chandler, 'Deceit, Damages and the Misrepresentation Act 1967, s. 2(1)' [1992] *LMCLQ* 40; H Beale, *Chitty on Contracts*, 31st ed, Sweet and Maxwell, 2012, at [6–075]; E Peel, *Treitel on the Law of Contract*, 13th ed, Sweet and Maxwell, 2011, at [9–066].

¹⁴⁸ Cartwright, above n 146.

¹⁴⁹ [2015] 1 SLR 997. See also *Xia Zhengyan v Geng Changqing* [2015] SGCA 22 at [97].

¹⁵⁰ [1996] UKHL 3.

¹⁵¹ *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 at [82].

¹⁵² *Ibid*, at [83].

¹⁵³ *Ibid*, at [84] per Andrew Phang Boon Leong JA.

¹⁵⁴ *Ibid*.

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid*.

concerned taken place in a situation of actual fraud or deceit since, ex hypothesis, the situation is in fact not one that pertains to actual fraud or deceit but on the contrary one that falls short of it.¹⁵⁷

This suggested interpretation of s 2(1) bases the measure of damages not on the fraud mentioned expressly in the section but on the liability in negligence that the section substantially overlaps. Given the common law distinguishes between the scope of liability for damages for negligence and fraudulent misstatement through remoteness rules, the suggestion is that these developments should equally be reflected in the interpretation of the legislation because they correspond to the relative moral turpitude of the wrongdoer. There are parallels here with both the form and interpretation of the proportionate liability regime accompanying the statutory prohibition on misleading conduct in Australia. In Singapore, concern that a non-fraudulent misrepresentation should not expose a defendant to the same level of liability for damages as fraudulent conduct led Andrew Phang Boon Leong JA to suggest a narrow reading of s 2(1) of the Misrepresentation Act. In Australia, as already discussed, courts have used the allocation of fault-based liability across the legislative regime to support an interpretation that restricts proportionate liability to defendants liable under the general prohibition on misleading conduct and not the more specific prohibitions that apply in the presence of fault. The similarity in the general tenor of these responses to statutory regimes in different jurisdictions illustrates the persuasive force of the principle that remedial responses should be scaled to the degree of fault involved in the primary wrong in a common law context.

Conclusion

In Australia, the common law tort of negligent misrepresentation remains surprisingly prominent in commercial transactions, despite the existence of statutory prohibitions providing relief from the consequences of misleading conduct. The salient factors likely to be contributing to this outcome can be summarised quite simply:

- First, lawyers like common law.
- Second, the Australian legislative regimes dealing with misleading conduct are almost impenetrably complex.
- Third, fault-based standards are attractive to both the legislature and courts in defining the scope of defendant liability.

These insights do not entirely explain the prominence given to the tort of negligent misstatement over the statutory prohibition on misleading conduct in cases such as *ABN Amro*. But they do identify some of the reasons why courts may turn to the common law rather than engaging directly with the statute. Where concepts and standards familiar to the common law are invoked by or inferred from the legislation, and the legislative regime is exceedingly complex, reasoning patterns present in the common law may provide a useful framework for analysing difficult or controversial cases.¹⁵⁸

¹⁵⁷ Ibid.

¹⁵⁸ See, eg, *Bilta (UK) Ltd (in liq) v Nazir* [2015] 2 All ER 1083; [2015] 2 WLR 1168; [2015] 1 BCLC 443; [2015] UKSC 23 at [15] per Lord Neuberger.

There are also lessons for legislators in Australia and beyond in this story. Legislative incursions into the domain of the common law are often motivated by concerns to promote economic and social goals, such as fair trading and competition, by reducing the evidentiary burden on plaintiffs and by simplifying the law. For the legislation to have any real likelihood of achieving these goals, careful consideration needs to be given to the relationship between the statutory regime, the common law with which it overlaps and also with other statutes. Without this type of consideration the statutory regime may become unmanageably complex for the very parties it was intended to benefit. It also appears that, despite a commitment to strict liability in the central statutory prohibition on misleading conduct, the idea that liability should be scaled to a defendant's culpability familiar from the common law continues to have considerable resonance with legislators and courts in Australia. Indeed the introduction of a proportionate liability regime and provision for a plaintiff's damages to be reduced by reason of contributory negligence makes a comparison of relative culpability as between defendants and between defendants and plaintiffs unavoidable. This continued incursion of fault into the statutory domain may reflect a deep-seated community commitment to fault-based liability in cases of purely economic loss. In any event, the continued role of fault under the statutory regime should be acknowledged in order to ensure the ongoing integrity and efficacy of that regime.



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