MAPPING MISLEADING CONDUCT: CHALLENGES IN LEGISLATIVE DESIGN

JOSEPH SABBAGH,* ELISE BANT† AND JEANNIE MARIE PATERSON^

I INTRODUCTION

The Australian Law Reform Commission ('ALRC') is currently engaged in a major inquiry into 'whether, and if so what, changes to the *Corporations Act 2001* (Cth) ('Corporations Act') and the *Corporations Regulations 2001* (Cth) could be made to simplify and rationalise' financial services laws.[1] The inquiry is part of the federal government's response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, the final report of which was released in February 2019. In that report, Commissioner Hayne identified six key principles that underpinned the regulation of financial services law (and, it may be added, commercial law more generally).[2] He considered that these core principles had been badly undermined by a range of inappropriate legislative amendments and practices.[3]

Hayne's six core principles include the prohibition on 'misleading or deceptive conduct.' This principle first found legislative expression in 52 of the *Trade Practices Act 1974* (Cth) ('TPA'), now s 18 of the *Australian Consumer Law* ('ACL').[4] When introduced, s 52 expressed a powerful and novel prohibition of general application,[5] which proscribed conduct in trade or commerce that 'is misleading or deceptive or likely to mislead or deceive'. Designed to enhance 'the

* Solicitor, Herbert Smith Freehills
† Professor of Private Law and Commercial Regulation at the University of Western Australia, Professorial Fellow at the University of Melbourne
^ Professor of Law at the University of Melbourne.

[1] Australian Law Reform Commission, *Terms of Reference* (2020) <https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/terms-of-reference/> ('*ALRC Financial Services Inquiry*'); ALRC Financial Services Legislation Interim Report A (ALRC Report 137, November 2021) ('*Interim Report A*').

[2] Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (2019) 8–9. The six principles are: (1) obey the law; (2) do not mislead or deceive; (3) act fairly; (4) provide services that are fit for purpose; (5) deliver services with reasonable care and skill; and (6) when acting for another, act in the best interests of that other.

[3] Ibid 494-496.

[4] *Competition and Consumer Act 2010* (Cth) sch 2.

[5] Lisbeth Campbell, 'Drafting Styles - Fuzzy or Fussy' (1996) 3(2) *Murdoch University Electronic Law Journal* [1], [27] citing John Green, 'Fuzzy law - a Better Way to Stop Snouts in the Trough' (1991) 9(3) *Companies and Securities Law Journal* 144, 148.

welfare of Australians through the promotion of competition and fair trading and provision for consumer protection',[6] s 52 was lauded as 'elegantly simple'.[7] Building on, but not limited to related general law principles and doctrines,[8] it was supported by powerful private rights of redress that went well beyond rescission or simple compensatory damages, and embraced a veritable smorgasbord[9] of discretionary relief. The prohibition was also directly enforceable through regulator action, without the necessity of proving that any person had been misled or suffered loss because of misleading conduct. In these respects, the prohibition stands as a particularly powerful and pure expression of a core statutory norm which is now integral to Australian law and commerce.[10]

Against this background, this paper presents some of the key findings from a legislative review conducted as part of a broader project on rationalising the law of misleading conduct.[11] These findings underscore the potency of Commission

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

[7] *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028, Summary (Rares J) ('*Wingecarribee*').

[8] See further below in Section II.

[9] *Akron Securities Ltd v Iliffe* (1997) 143 ALR 457, 469 (Mason P) ('*Akron*'). For a recent analysis of courts' use of these options, see Elise Bant and Alex McCracken, 'Returning to Sample the Remedial 'Smorgasbord' for Misleading Conduct' (2022) UWA Law Review (forthcoming).

[10] Elise Bant and Jeannie Marie Paterson, 'Silence and the Regulation of Misleading Conduct: A Taxonomy' in E Bant and J M Paterson (eds), *Misleading Silence* (Hart Publishing, Oxford 2020) 10 ('*Misleading Silence*').

[11] The full list of publications is contained at https://www.uwa.edu.au/projects/developing-a-rational-law-of-misleading-conduct. On legislative design and misleading conduct, in particular, see Elise Bant and Jeannie Marie Paterson, 'Developing a Rational Law of Misleading Conduct' in J Eldridge, M Douglas and C Carr (eds), *Economic Torts in Context* (Hart Publishing, Oxford 2021) ('*Developing a Rational Law of Misleading Conduct*'); Bant and Paterson, 'Misleading Silence' (n 10) 3; Jeannie Marie Paterson and Elise Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2021) 44(1) *Journal of Consumer Policy* 1 ('*Should Australia Introduce a Prohibition on Unfair Trading?*'); Elise Bant and Jeannie Marie Paterson, 'Evolution and Revolution: The Remedial Smorgasbord for Misleading Conduct in Australia' (2020) 14(1) *FIU Law Review* 25 ('*Evolution and Revolution*'); Jeannie Marie Paterson and Elise Bant, 'Mortgage Brokers, Regulatory Failure and Statutory Design' (2020) 31(7) *Journal of Banking and Finance Law and Practice* 7; Elise Bant and Jeannie Marie Paterson, 'Misleading Conduct before the Federal Court of Australia: Achievements and Challenges' in P Ridge and J Stellios (eds) *The Federal Court's Contribution to Australian Law: Past, Present and Future* (Federation Press, 2018) 165 ('*Misleading Conduct before the Federal Court*'); Elise Bant and Jeannie Marie Paterson, 'Statutory interpretation and the critical role of soft law guidelines in developing a coherent law of remedies in Australia' in R Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU E Press 2017) 301 ('*Statutory Interpretation*'); Elise Bant and Jeannie Marie Paterson, 'Consumer Redress Legislation: simplifying or subverting the law of contract' (2017) 80(5) *Modern Law Review* 895; Jeannie Marie Paterson and Elise Bant, 'In the Age of Statutes, Why Do We Still Turn to the Common Law Torts?: Lessons from the Statutory Prohibitions on Misleading Conduct in Australia' (2016) 23(2) *Torts Law Journal* 1; Elise Bant and Jeannie Marie Paterson, 'Limitations on Defendant Liability for Misleading or Deceptive Conduct under Statute: Some Insights from Negligent Misstatement' in K Barker, R Grantham and W Swain (eds), *The Law of Misstatements: 50 Years on from* Hedley Byrne v Heller (Hart Publishing, Oxford 2015) 159

Hayne's observations and the pressing need for ongoing legislative reform, certainly including, but also extending beyond the financial services space. In brief, in the near-five decades since its enactment, s 52 has inspired successive parliaments at state and federal levels to repeat and reiterate the provision and its remedial scheme, often in subtly different terms, across a wide range of overlapping statutory regimes. Our research has identified at least 114 statutory prohibitions that now seek to regulate misleading conduct, in contexts ranging from financial services[12] to public lottery advertising.[13] This repeated use of the core prohibition speaks to its power. Unfortunately, however, the clarity of the core prohibition has been obscured by the repeated introduction of variations on the theme, through the use of different words and phrases to proscribe similar, if not the same, behaviour. Equally, this large number of prohibitions concerning misleading conduct becomes problematic where there are overlaps between the regimes that are difficult to navigate. Indeed, we see across 66 statutes and nine jurisdictions, a variety of prohibitions, threshold requirements, causal necessities, fault elements and remedies. We may accept that divergent expression is, in the absence of national uniform legislation, a matter for each individual parliament to consider when addressing a given mischief. It may reflect, for example, different needs, contexts, policy objectives and purposes. That said, it remains unclear from our review that many of these linguistic variations represent any considered choice over other options and, if so, the reasons for their adoption. Certainly, there are grounds for re-examining critically those choices, to ensure that any claimed benefits outweigh the identified costs of the current, complex landscape.[14]

The review suggests that, notwithstanding its increasingly granular and specific application across particular statutory contexts, the proliferation of versions on the core prohibition has in some key respects eroded its certainty, clarity and accessibility for stakeholders. The normative potency of the core prohibition lies in its simple directive, applicable to all engaged in trade or commerce. In that context, it is revealing that each fresh articulation of this core principle appears designed to serve the same purposes – to prohibit misleading conduct in commerce and to provide generous rights of redress that are effective

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('*Limitations on Defendant Liability*'); Elise Bant, 'Statute and Common Law: Interaction and Influence in the Light of the Principle of Coherence' (2015) 38(1) *University of New South Wales Law Journal* 367.

[12] *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA (**ASIC Act**).

[13] *Public Lotteries Act 1996* (NSW) s 39.

[14] For an example of this sort of evaluation, see ALRC, 'Interim Report A' (n 1) ch 13.

to protect consumers and deter misconduct. Additionally, however, the analysis suggests that the sheer volume and range of variations of the core prohibition have adversely affected courts' approach to interpreting the provisions. Here, the concern is not solely that scarce court and party resources are taken up with trying to determine which statutory scheme, or which particular form of prohibition, should apply.[15] Nor is it simply that courts are tasked with applying a range of statutory language to common patterns of fact. Rather, our analysis suggests that courts have sought to bring some clarity and coherence to the patchwork of provisions, in light of the broader legislative context, by engaging in a process of interpretive rationalisation. This has sometimes involved privileging in the interpretive process an identified commonality of purpose over clear drafting differences, without detailed analysis or discussion of the potential policy choices that might justify the distinctive language.[16] While understandable, this may undermine the rigour of courts' analysis and intrude upon the role of parliament as the primary purveyor of reform. Indeed, as Thawley J recently emphasised in *Australian Competition and Consumer Commission v Google LLC (No 2)*, 'it is the terms of the particular provision which must be applied to the facts'.[17] In that context, it is highly desirable that any considered reform of the statutory law of misleading conduct engages critically with the reasons (if any) for deviations in expression from the core prohibition, and considers whether those reasons remain valid and defensible.

Likewise, the range of remedial schemes that respond to misleading conduct, revealed through the survey of legislation, suggests there is room for reconsideration of the forms of private and regulator redress that should respond to contravention of the core principle against misleading conduct. As we will see, under some schemes, private rights of redress are largely limited to statutory damages while others reach to gain-based remedies and other, broader forms of relief.[18] The reasons for these differences are unclear. A careful review and

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[15] *ASIC v Fortescue Metals Group Limited* (2011) 190 FCR 364 [16], quoted with approval in *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486, 503 [27] (French CJ, Gummow, Hayne and Kiefel JJ); *Kadam v MiiResorts Group 1 Pty Ltd (No 2)* [2016] FCA 1343 [35] (Edelman J).

[16] See further ALRC, 'Interim Report A' (n 1) [13.131] and [13.132].

[17] [2021] FCA 367 [117] ('*ACCC v Google*').

[18] Elise Bant and Jeannie Marie Paterson, 'Exploring the boundaries of compensation for misleading conduct' (2019) 41(2) *Sydney Law Review* 155 ('*Exploring the boundaries of compensation*'). This process of review would benefit from looking sideways at related schemes. Thus, in the *Retail Leases Act 1994* (NSW) ss 62D and 62E, the private rights of redress for misleading or deceptive conduct do not include a smorgasbord of private redress equivalent to *ACL* ss 237 and 243. However, the private

refreshment, for example, of the core remedial schemes, may enable more effective deterrence of misconduct.[19] Likewise, it is important to examine closely the reasons for sequestering regulator redress by reference to more specific and restrictive forms of the core prohibition.

Overall, the data and accompanying analysis provides support for considering a return to the core prohibition, and reconsideration of the architecture and content of its accompanying remedial schemes, with a view to promoting greater rationality and efficiency in the law's regulation of misleading conduct. Consistently, and expressly drawing on the body of work developed pursuant to this project, the ALRC has recently proposed consolidating into a single provision the various proscriptions found under the Corporations Act and ASIC Act on conduct or representations that are false, misleading or deceptive.[20] As the report demonstrates, any reform process will require close assessment of the justifications and, conversely, costs of maintaining separate iterations of the core prohibition.

That broader reform agenda cannot be detailed here. Indeed, it is not our intention to demonstrate the irrationality, unsuitability or otherwise of individual statutory schemes. Rather, this article seeks to make clear the nature and scale of the challenge to developing a more rational and effective law of misleading conduct in Australia. To that end, it considers how those schemes operate as a coherent body of law, mapping the labyrinth of statutory misleading conduct regimes threading through Australian commercial and consumer legislation. The emerging picture also provides important context to assess related and ongoing reform debates,[21] including: the merits and roles of principles- over rules-based drafting;[22] the utilisation of carve-outs and

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rights of redress for unconscionable conduct do include an equivalent statutory smorgasbord: see *ACL* s 72AA; *Spuds Surf Chatswood Pty Ltd v PT Ltd (No 4)* [2015] NSWCATAP 11.

[19] Elise Bant, and Jeannie Marie Paterson, 'Should specifically deterrent or punitive remedies be made available to victims of misleading conduct under the Australian Consumer Law?' (2019) 25 *Torts Law Journal* 99.

[20] ALRC 'Interim Report A' (n 1) Proposal A23 and [2.58], [2.91], [2.106] and [13.81], [13.125].

[21] See, for example, ALRC, 'Interim Report A' (n 1) and the very similar questions posed by the Perth Casino Royal Commission discussion papers on regulatory design and definitions: WA Government, *Perth Casino Royal Commission* (2021) <https://www.wa.gov.au/government/government-initiatives-and-projects/perth-casino-royal-commission> ; Western Australia, Perth Casino Royal Commission – Discussion Paper on Regulation of Poker Machines and EGMs, *Discussion Paper* (2021); Western Australia, Perth Casino Royal Commission – Discussion Paper on Regulatory Framework, *Discussion Paper (*2021).

[22] Jeannie Marie Paterson and Elise Bant, 'Misrepresentation, Misleading Conduct and Statute through the Lens of Form and Substance' in A Robertson and J Goudkamp (eds) *Form and Substance in Private Law* (Hart Publishing, Oxford 2019) 401.

exceptions;[23] the role of 'safety net'[24] prohibitions alongside specific interventions; the roles for and interaction between overlapping legislative strategies to combat common forms of misconduct (focussed variously on standards, conduct, outcomes and process); the ALRC's recent emphasis on hierarchies of legislation;[25] and, relatedly, the role for soft law guidelines[26] that illustrate the law's operation without further burdening the statute books.

The article commences by outlining the nature and extent of the complexity evident in the statutory laws of misleading conduct and some ramifications for their principled application. It then turns to describe and interrogate the quantitative data gathered through legislative review. Throughout, the aim is to describe and probe the current regulatory landscape, with a view to promoting a better understanding of the required directions for reform.

II THE NATURE AND SCALE OF THE PROBLEM

The regulation of misleading conduct is ubiquitous in Australian law. At common law, it is the subject of numerous doctrines, including contractual warranty, deceit, negligent misstatement, injurious falsehood, defamation, rescission for fraudulent misrepresentation and passing off. In equity, relevant doctrines that regulate or respond to misleading conduct include rescission for fraudulent and innocent misrepresentation, estoppel and breach of fiduciary duty. These general law doctrines were colourfully referred by French J (as his Honour then was) as 'primeval broadacres grazed by slow-growing sauropods' under threat by a 'statutory comet'.[27] That comet came in the form of s 52 of the *TPA*, which established a core, novel statutory norm of 'fair trading'.[28] As

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[23] Bant and Paterson, 'Developing a Rational Law of Misleading Conduct' (n 11).

[24] See Bant and Paterson, 'Misleading Conduct before the Federal Court' (n 11); Paterson and Bant, 'Should Australia Introduce a Prohibition on Unfair Trading?' (n 11).

[25] ALRC, 'Interim Report A' (n 1) [2.133] – [2.163]. The ALRC has advised that the legislative hierarchy will be a central focus in its forthcoming Interim Report B.

[26] Bant and Paterson, 'Statutory Interpretation' (n 11); Bant and Paterson, 'Misleading Conduct before the Federal Court' (n 11).

[27] Robert French, 'A lawyer's guide to misleading or deceptive conduct' (1989) 63(4) *Australian Law Journal* 250, 250 ('*A lawyer's guide to misleading or deceptive conduct*').

[28] Colin Lockhart, The Law of Misleading or Deceptive Conduct (LexisNexis Butterworths, 4th ed, 2015) 4-5 [1.2] ('*The Law of Misleading or Deceptive Conduct*'); Eileen Webb, 'Misleading or deceptive conduct: The new s 52, s 18 ACL' (2011) 106 *Precedent* 16, 17. See also *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340, 348, where Fox J notes that s 52 of the *TPA* 'does not purport to create liability at all; rather [it creates] a norm of conduct, failure to observe which has consequences provided for elsewhere in the same statute, or under the general law.'

articulated in s 52, and now contained in s 18 of the *ACL*,[29] the core prohibition provides that:

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

The provision was never restricted to consumer protection, and applied from the outset to business-to-business transactions. It therefore established a broad statutory norm applicable across the field of trade or commerce, for the benefit of traders as well as consumers. Reflecting its ubiquitous application, it quickly assumed, and retains, a central place in shaping the expected standards of fair commercial conduct in Australia.

In performing this central role, s 52 *TPA* (and its successor, s 18 *ACL*) is expressed with a 'beguiling simplicity'.[30] It dispenses with specificity and prescription for a normative and flexible approach that is capable of being adapted to particular situations. Its general, open-ended and principle-based words encourage a broad and remedial construction.[31] Rather than expressing detailed rules,[32] the s 18 paradigm expresses a fundamental principle that is implicitly higher in the normative hierarchy than a more specific rule[33] – that conduct in trade or commerce characterised as 'misleading or deceptive' is unfair and unacceptable.[34]

Reflecting its importance in the Australian commercial landscape, variations of s 52 have been adopted in myriad legislative contexts across Australia since the

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[29] Section 18 of the *ACL* differs from s 52 of the *TPA* insofar as it applies to a 'person' rather than a 'corporation'. This is because the constitutional basis of s 52 was the corporations power in s 51(xx) of the *Commonwealth Constitution*.

[30] French, 'A lawyer's guide to misleading or deceptive conduct' (n 27) 252.

[31] '[T]he evident purpose and policy underlying…s 52 [of the *TPA*], recommends a broad construction of its constituent provisions, the legislation being of a remedial character so that it should be construed so as to give the fullest relief which the fair meaning of its language will allow': *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470, 503 (Lockhart and Gummow JJ).

[32] For the characteristics of 'principles' as opposed to 'rules', see Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 27. See also Paul O'Shea and Charles Rickett, 'In Defence of Consumer Law: The Resolution of Consumer Disputes' (2006) 28(1) *Sydney Law Review* 139, 143 ('*In Defence of Consumer Law*'); Richard Nobles, 'Rules, Principles and Ombudsmen: Norwich and Peterborough Building Society v The Financial Ombudsman Service' (2003) 66(5) *Modern Law Review* 781, 784.

[33] Julia Black, Martyn Hopper and Christa Band, 'Making a success of Principles-based regulation' (2007) 1(3) *Law and Financial Markets Review* 191, 192.

[34] As the High Court noted in an early case brought under s 52 of the *TPA* 'the prohibition contained in [s 52] emerges as an important general prohibition against a corporation in the course of trade or commerce engage in a form of conduct, a trade practice, which is unfair': *Re Credit Tribunal; Ex parte GMAC* (1977) 137 CLR 545, 561 (Mason J (Barwick CJ, Gibbs and Stephen JJ agreeing)).

genesis of the *TPA*. Beginning in the 1980s Fair Trading Acts[35] were passed in Australian states and territories, reproducing the s 52 prohibition across these jurisdictions.[36] In 2010, the states and territories replaced the various local incarnations of the consumer protection provisions in the *TPA* by adopting the *ACL* (in a schedule to the Fair Trading Acts) as uniform law applying within their own jurisdictions, while retaining their own unique application provisions in the body of those Acts. [37] In the ensuing decades the s 52 paradigm continued to spread, from commercial tenancies[38] to corporations law,[39] entertainment classification,[40] food,[41] and the legal profession,[42] 'reach[ing] into almost every corner of commercial life and dominat[ing] the litigation landscape' in Australia.[43]

As we will see further below, this ongoing move to replicate the powerful and succinct prohibition in s 52 of the *TPA* in legislation nation-wide has been eroded by two factors. First, the *TPA*, and then the *ACL*, contain multiple

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[35] Lockhart, 'The Law of Misleading or Deceptive Conduct' (n 28) 9-10 [1.7]; *Houghton v Arms* (2006) 225 CLR 533 [21] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). *Fair Trading Act 1985* (Vic); *Fair Trading Act 1987* (WA); *Fair Trading Act 1987* (NSW); *Fair Trading Act 1987* (SA); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1990* (Tas); *Fair Trading (Australian Consumer Law) Act 1992* (ACT); *Consumer Affairs and Fair Trading Act 1992* (NT).

[36] *Zeus and Ra Pty Ltd v Nicolaou* (2003) 6 VR 606 [73] (Charles and Eames JA (Winneke P agreeing)). As their Honours explain, this uniform legislation, modelled upon the *TPA*, was a necessary result of '[c]onstitutional limitations on the legislative power of the Commonwealth result[ing] in the federal legislation being based principally on the corporations power, and having very limited reach in relation to the trading activities of individuals and partnerships'.

[37] On the constitutional arrangements and application of the ACL in the states and territories see further Jeannie Marie Paterson, *Corones' Australian Consumer Law* (Law Book Co of Australasia, 2019) ch 1.

[38] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s 16C.

[39] *Corporations Act 2001* (Cth) ss 670A, 728, 953A, 1022A, 1041E, 1041F, 1041H, 1308 and 1309 (**Corporations Act**).

[40] *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) ss 97, 65C; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) ss 23, 43; *Classification (Publications, Films and Computer Games) Act 1995* (SA) ss 50, 73; Cl*assification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) ss 19, 61; *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) ss 28, 53; *Classification of Publications Act 1991* (Qld) s 20B; *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT) ss 34, 54C; *Classification of Publications, Films and Computer Games Act 1995* (NT) ss 59, 86.

[41] *Food Act 2008* (WA) s 19; *Food Act 2006* (Qld) s 37; *Food Act 2003* (NSW) s 18; *Food Act 2003* (Tas) s 18; *Food Act 2001* (SA) s 18; *Food Act 1984* (Vic) s 13; *Food Act 2001* (ACT) s 24; *Food Act 2004* (NT) s 17.

[42] *Legal Profession Act 2008* (WA) s 159; *Legal Profession Act 2007* (Qld) s 172; *Legal Profession Act 2007* (Tas) s 172; *Legal Profession Act 2006* (ACT) s 162; *Legal Profession Act 2006* (NT) s 179.

[43] Bant and Paterson, 'Evolution and Revolution' (n 11) 25.

variations upon the core prohibition, applying to specific kinds of misleading conduct:

- false or misleading representations about goods or services;[44]
- false or misleading representations about the sale of land or grant of an interest in land;[45]
- misleading conduct in relation to persons seeking employment as to matters relating to employment;[46]
- misleading conduct in relation to the nature of goods; [47]
- misleading conduct in relation to the nature of services;[48] and
- misleading representations about certain business activities.[49]

Notably, the language of these more specific iterations is different to the core prohibition.[50] In particular, the reference in several sections is to 'false or misleading representations' rather than the misleading conduct of s 18.[51] The original reason for including these more specific iterations of the core prohibition was to make clear the scope of the protective legislation, in particular its application to land and employment.[52] A different concern, about spreading liability too widely, led to the civil pecuniary penalties regime introduced in the *ACL* being limited to the specific prohibitions on misleading conduct.[53] The outcome is a patchwork of responses that arguably runs counter to the original ideal of the core prohibition while achieving very little in terms of meaningful and purposeful law.

Second, the core language and accompanying remedial schemes in state and Commonwealth statutes outside the Fair Trading Act regimes have not remained consistent with the original model in s 52 of the *TPA*. Replication and reiteration has increased significantly the number and range of statutory prohibitions

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[44] *ACL* (n 4) s 29.
[45] Ibid s 30.
[46] Ibid s 31.
[47] Ibid s 33.
[48] Ibid s 34.
[49] Ibid s 37.
[50] See also Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [6.11], where the point is made that even greater variations in the language used were found in the *TPA*.
[51] A person must not make false or misleading representations in relation to goods and services, in relation to the sale of land or in relation to certain business activities: see *ACL* (n 4) ss 29–30, 151–152, 159.
[52] Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [6.14] – [6.18].
[53] See *ACL* (n 4) s 224. See similarly the criminal offences attaching to the equivalent of these provisions: *ACL* (n 4) ss 151-156, 159.

potentially applicable to common patterns of behaviour, often without obvious benefit to those subject to their operation.

To add to this complexity, as each novel prohibition of specific application emerged, misleading conduct prohibitions of more general application suffered 'carve-outs' – exceptions to the scope of their generality.[54] In some cases, this does not necessarily reflect an intention to amend the content of the core prohibition itself, but is a consequence of broader issues of legislative and regulatory design.[55] For example, subsequent federal provisions prohibiting misleading or deceptive conduct in the more specific financial arena necessarily exclude s 18 of the *ACL* in relation to 'financial services, or of financial products'.[56] Instead, where the misleading conduct concerns financial services or products, the relevant provisions may fall variously within s 12DA of the *ASIC Act*, s 1041H of the *Corporations Act* or 160D of the *National Consumer Credit Protection Act 2009* (Cth). Indeed, s 131A of the *ACL* clearly excises 'financial services' or 'financial products' (as defined in in ss 12BAA and 12BAB of the *ASIC Act*) from the *ACL*'s protective scope.[57] The messy 'division of labour' between statutes, and, correspondingly, in regulatory oversight, is part of the broader legislative context that tends to encourage the proliferation and repetition of core statutory norms.[58] Another example, which does affect the substance and impact of the core prohibition of misleading conduct, concerns civil pecuniary penalties. In general, these only attach to separate and specific iterations of the more general prohibition,[59] and sometimes expressly exclude particular contexts in which the general norm would be naturally applicable, such as misleading conduct in the context of company disclosure documents.[60]

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[54] *ACL* (n 4) s 131A(1).

[55] Productivity Commission, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business, Productivity Commission* (Final Report, January 2006) 7 [2.2]; See also, generally, ALRC, 'Interim Report A' (n 1).

[56] Ibid. Consider the relationship between *ACL* (n 4) s 18 and *ASIC Act* (n 12) ss 12DA, 12DB, 12DC, 12DF.

[57] 'Financial products' are defined in ss 12BAA of the *ASIC Act* as investment, risk management and payment facilities, which includes buying shares and bullion, insurance, and traveller's cheques. 'Financial services' are defined extensively in s 12BAB, and include providing advice, dealing or marketing financial products, and providing superannuation trustee services. These definitions, and their use to impose obligations and for jurisdictional purposes, is strongly criticised in ALRC, 'Interim Report' A (n 1) ch 7.

[58] See generally ALRC, 'Financial Services Inquiry' (n 1). For a similar trend relating to disclosure laws and misleading conduct, see Australian Law Reform Commission, Corporate Criminal Responsibility (Report No 136, 2020) 78–9.

[59] *ACL* (n 4) ss 29–34, 37.

[60] See for example *ASIC Act* (n 12) ss 12DA(1A), 12DB(2).

Whatever the reason, the common outcome is a profusion of enactments and provisions spread across multiple jurisdictions, and addressing both specific and general matters. While redundancy on its own may seem to present little harm beyond its effect on the volume of legislation, the progeny of the original scheme are often presented in slightly different forms, with different coverages, consequences and exclusions. As Rares J has pungently observed:

> 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 (such as s 18 of Sch 2 of the *Competition and Consumer Act 2010* (Cth)…and also in particular fields, such as s 1041H(1) of the *Corporations Act* and s 12DA(1) of the *ASIC Act.*[61]

The overall result of this burgeoning body of laws is to render them increasingly inaccessible, even for legal experts.[62] Ironically, it seems, a desire for specificity, clarity and legislative 'solutions' to problematic practices, supported by an ever-increasing legislative output, has been effective to demote the core prohibition relative to its more specific alternatives and to introduce restrictions upon its operation. This weakens the clear, expressive message of the original prohibition, and undermines more broadly the principle-based drafting style which underpinned its imposition. The clarity of the paradigm provision (once described as 'scary' in its straightforward application)[63] has become thoroughly muddied.

This confusion inevitably results in a waste of scarce legal resources, both for parties and for the courts. Indeed, the overlap in misleading conduct provisions has contributed unhelpfully to unnecessarily complex pleadings, duplication of threshold and substantive issues, and dense and expansive written and oral argument based substantially upon the same conduct.[64] As Rares J puts it, '[t]he

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[61] *Wingecarribee* (n 7) [947].
[62] Bernard McCabe, 'A foreword: Has the law of misleading or deceptive conduct itself become misleading?' (2013) 21(1) *Australian Journal of Competition and Consumer Law* 35, 35.
[63] John Green, 'Fuzzy law - a Better Way to Stop Snouts in the Trough' (1991) 9(3) *Companies and Securities Law Journal* 144, 148.
[64] Emily Klotz 'Misleading or deceptive conduct in the provision of financial services' (2015) 33(7) *Company and Securities Law Journal* 451, 456.

cost to the community, business, the parties and their lawyers, and the time for courts to work out which law applies have no rational or legal justification'.[65]

Perhaps most frustratingly, since misleading conduct claims generally turn upon the same alleged conduct, the end result, irrespective of the prohibition pleaded, will often (but not always) be identical.[66] For example, in *Re Idylic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs*,[67] contraventions were alleged to have been committed in respect of no less than six misleading conduct prohibitions relating to financial products or financial services: ss 1041E, 1041G and 1041H of the *Corporations Act* and ss 12DA, 12DB and 12DF of the *ASIC Act*.[68] Each contention succeeded in substance upon the same conduct.[69] An example to the opposite effect occurred in *Sunland Waterfront (BVI) Ltd & Anor v Prudentia Investments Pty Ltd & Ors (No 2)*.[70] The plaintiffs alleged contraventions of ss 52, 53(aa), 53(g) and 53A of the *TPA*, s 9 of the *Fair Trading Act 1999* (Vic) and the tort of deceit, all based upon the same purported conduct.[71] The trial judge was unable to find 'any representation or conduct on the part of any of the defendants to be "misleading" or "deceptive" or that there were any representations that could be characterised as "false"', and accordingly dismissed all claims.[72]

Courts engaged in interpreting and applying these provisions face a further challenge, namely how to undertake holistic and integrated forms of legal reasoning that connects shared statutory and common law principles concerning

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[65] *Wingecarribee* (n 7) Summary.
[66] Ibid [948].
[67] [2012] NSWSC 1276 (Ward J).
[68] Ibid [1424]. See also *Krypton Nominees Pty Ltd v Gutnick* [2013] VSC 446 [267], where the plaintiff alleged breaches of ss 12DA and 1041H of the *Corporations Act*, and 'alternatively s 52 [of the *Trade Practices Act 1974*] and/or s 9 of the *Fair Trading Act 1999* (Vic)'.
[69] Ibid [2324], [2325], [2343], [2344], [2345], [2346]. Finding in the plaintiff's favour in respect of s 1014H of the *Corporations Act*, Ward J referred (at [2343]) to his findings in respect of ss 1041E and 1041G and noted that '*[o]n the basis of the findings made earlier, I find that each of Mr Hobbs, Mr Collard, Ms Wu, FTC, PJCB, ISL and Secured Bond breached s 1041H of the Corporations Act by engaging in misleading or deceptive conduct in relation to a financial product or a financial service*'. His Honour made similarly brief comments in relation to the pleaded breaches of the *ASIC Act* at [2344]-[2346].
[70] (2012) 266 FLR 243 (Croft J) ('*Sunland*'). Upheld on appeal in *Sunland Waterfront (BVI) Ltd v Prudential Investments Pty Ltd & Ors; Sunland Group Ltd v Prudential Investments Pty Ltd & Ors* [2013] VSCA 237 (Warren CJ, Osborn JA and Macaulay AJA) [417].
[71] *Sunland* (n 70) [2], [12], [14]. The conduct related to representations regarding a land development site in Dubai.
[72] Ibid [244], [368], [424]. For a further example in respect of *Corporations Act* (n 39) s 1041H, *ASIC Act* (n 12) ss 12DA and 12DF and *National Consumer Credit Protection Act 2009* (Cth) s 160D, see *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 1644 (O'Callaghan J).

misleading conduct. The High Court of Australia has identified the principle of coherence as an overriding aim and requirement both of general law (here, comprising common law and equitable rules and doctrines) and statutory development.[73] In the context of this article, coherence requires consideration of the 'fit' between the range of overlapping statutory and general law principles that operate so as to forbid, deter and remedy misleading conduct. It also requires consideration of how to promote coherence between our overlapping statutory frameworks and provisions. As we will see below, Australian courts addressing the myriad of provisions addressing misleading conduct have, until recently, tended to emphasise their commonalities with the core prohibition, corralling the disparate versions into a cohesive, purposeful approach. This beneficent myopia had been assisted by party pleadings, in some cases, ignoring entirely specific iterations of the prohibition in favour of the original. While these approaches have promoted the widespread and consistent operation of the core statutory norm, it has been at the expense of principles of statutory interpretation and, it might be added, legislative supremacy. As we will see, the judicial trend favouring assimilation may not continue, following recent re-assertion of the primacy of the text. The consequence is that the substantive operations of the statutory prohibitions on misleading conduct are at risk of splintering, without obvious justification or benefit to the regulation of trade, or protection of consumers.

III MAPPING THE LAWS

A *Methodology*

Before cataloguing the range of legislative pathways currently taken to regulate misleading conduct, a brief outline of our methodology is required. An important, initial caveat is that the review is not exhaustive of the provisions that may operate, as a matter of practice if not legislative design, to regulate, or affect the regulation of, misleading conduct in commerce. For example, the many and varied statutory disclosure regimes were not captured within the survey. Disclosure provisions may serve a range of ends, including avoidance of mistake, misleading conduct, promotion of full and informed consent, market efficiency and more.[74] Moreover, as the ALRC has demonstrated, many forms of disclosure

[73] *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 518, 520, 523; *Miller v Miller* (2011) 242 CLR 446, 454. See also Bant and Paterson, 'Evolution and Revolution' (n 11) 30.
[74] Bant and Paterson, 'Misleading Silence' (n 10) 11.

rules are so complex and voluminous as to demand sustained attention in their own right.[75] That being said, the review does seek to capture a wide range of representative statutory provisions regulating misleading conduct across Australian jurisdictions. This includes both Commonwealth legislation, and the legislation of the states of New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, and the legislation of the Australian Capital Territory and Northern Territory.

Two criteria drawn from the paradigm misleading conduct provision contained in s 18 of the *ACL* were required for inclusion within the dataset, both to ensure relevance and to manage the volume of potential provisions. First, the statutory provision had to be directed towards the prohibition or remediation of behaviour that is misleading. In the vast majority of identified prohibition provisions (90.4%, or 103), this association was indicated by the use of the word 'mislead' either (i) directly, (ii) in conjunction with other words (for example, 'liable to mislead'), or (iii) as a base word to which a suffix was added (for example, 'mislead*ing*'). The remaining 10.6% (11) of prohibitions identified did not use any derivation of the word 'mislead'. Instead, these provisions (mostly found in the *ACL* and the *ASIC Act*)[76] were directed toward the very conduct captured by the paradigm phrase 'misleading or deceptive', namely; conduct which leads or is likely to lead the person or persons to whom it is made into error.[77] This included prohibitions on offering rebates, gifts or prizes with the intention of non-provision,[78] bait advertising,[79] referral selling[80] and wrongly accepting payment without the ability or intent to supply.[81] Within this minority, a small number of provisions (4, or 3.5%) identified were designed to prohibit the commercial use of sporting symbols in an unauthorised manner.[82]

Second, the prohibition concerned had to be directed toward conduct in the course of commercial activity, indicated either by the use of the phrase 'trade or

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[75] For example, Australian Law Reform Commission, *Unnecessary complexity in Australia's financial services laws* (2021) <https://www.alrc.gov.au/wp-content/uploads/2021/02/Complexity-in-Aust-Financial-Services-Laws-Fact-sheet.pdf>, observing that the product disclosure statement regime for financial products under the *Corporations Act* is itself affected by 83 different legislative instruments, as well as a substantial number of regulations.

[76] *ACL* (n 4) ss 32, 35, 36; *ASIC Act* (n 12) ss 12DE, 12DG, 12DH, 12DI.

[77] *Miller and Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 [15] (French CJ and Kiefel J).

[78] *ACL* (n 4) s 32; *ASIC Act* (n 12) s 12DE.

[79] *ACL* (n 4) s 35; *ASIC Act* (n 12) s 12DG.

[80] *ASIC Act* (n 12) s 12DH.

[81] *ACL* (n 4) s 36; *ASIC Act* (n 12) s 12DI.

[82] *Major Sporting Events (Indicia and Images) Protection Act 2014* (Cth) s 16; *Commonwealth Games Arrangements Act 2011* (Qld) s 51; *Olympic Insignia Protection Act 1987* (Cth) ss 8, 36.

commerce' (although similar phrases such as 'commercial purposes',[83] 'sale'[84] or even 'sells' were also identified) or the character of the legislation (including legislation regulating the provision of a commercial service, industry or workplace).[85]

Within the framework of these criteria, the authors identified 131 sections spanning 66 statutes and nine jurisdictions (excluding state- and territory-based Fair Trading Acts which replicate the provisions of the *ACL*).[86]

Amongst the reviewed set, to prevent undue duplication, identical prohibitions extending across more than one section in an Act were grouped together as single operative 'schemes'. For example, the prohibitions in ss 29 and 151 of the *ACL* ('False or misleading representations about goods or services') may incur a pecuniary[87] or criminal[88] penalty. As a single prohibition with redress available across two sections, ss 29 and 151 were counted together. Taking such statutory arrangements into account, 131 sections were distilled into 114 identifiable 'prohibition schemes'.[89]

The following data on each prohibition scheme was collected:

- Prohibition
- Conduct element
- Fault element
- Causation requirement
- Availability of a private right of action
- Loss or damage requirement
- Limitation period

Available remedial redress was grouped as follows:

- Action for damages
- Compensation order
- Injunction
- Restitution
- Account of profits/Disgorgement

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[83] *Major Sporting Events (Indicia and Images) Protection Act 2014* (Cth) s 16; *Olympic Insignia Protection Act 1987*(Cth) s 36.
[84] *Olympic Insignia Protection Act 1987* (Cth) s 8(1)(d).
[85] Ibid s 8(1)(e).
[86] For a complete list of legislation, see Annexure A. For a list of Fair Trading Acts, see above n 365.
[87] *ACL* (n 4) s 29(1).
[88] *ACL* (n 4) ss 151(1), (4).
[89] For completeness, it must be noted that ss 51 and 52 of the *Commonwealth Games Arrangements Act 2011* (Qld) expired as of July 2020 (see s 79 of that same Act). However, as of January 2021 they have not been formally repealed, and are therefore included within the dataset for analysis.

- Civil penalty
- Criminal offence
- Other remedies

Access to the raw dataset, comprehensively reviewed in January 2021, is available at https://unravellingcorporatefraud.com/publications-drlmc/. The information presented below, whether in textual, graphical or tabular form, is, unless otherwise indicated, based upon this dataset.

In delineating the legislative labyrinth, we primarily seek to describe how the prohibition schemes across jurisdictions differ from the s 18 paradigm. The second-order question of why these differences appear is more difficult to answer and can only be the subject of brief and necessarily speculative comment in this paper.

B *Taxonomy of language*

1 *The variety of prohibitory phrases*

At the outset, 17 unique prohibitory phrases have been identified across 114 prohibition schemes identified (see Table 1). The total of prohibitory phrases used (151) exceeds 114, as a number of these schemes utilise several prohibitory phrases, in a 'scattergun' approach.[90] Among the prohibitory phrases identified, use of the word 'mislead' (or a derivation thereof) is pre-eminent, appearing in 7/17 formulations. By contrast, use of the word 'deceive' (or its derivations) is rarer, appearing in only 4/17 prohibitory phrases. We observe that this may be a linguistic rather than policy choice. Indeed, the words 'misleading' and 'deceptive' are often treated as tautologous, insofar as the conduct captured by the word 'misleading' captures that covered by 'deceptive'.[91] If correct,[92] the redundancy of the latter would render its lesser use unsurprising. Use of the word 'false' appears in less than one-fifth (3/17) of prohibitory phrases identified. Total usage in Table 1 confirms that the paradigm phrasing ('misleading or

[90] By way of example, the *Residential Tenancies Act 2010* (NSW) s 26(1) prohibits conduct that is 'false, misleading or deceptive' *and* the 'concealment of a material fact'.

[91] *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 198 (Gibbs CJ).

[92] Note that there is an argument that separate expression of the prohibition of 'deceptive' conduct is significant at the stage of assessing penalties, where courts regularly emphasise the relevance of defendant culpability and have repeatedly drawn attention to regulator failures to plead deliberate, deceptive conduct: see Jeannie Marie Paterson and Elise Bant, 'Intuitive Synthesis and Fidelity to Purpose?: Judicial Interpretation of the Discretionary Power to award Civil Penalties under the Australian Consumer Law' in P Vines and S Donald (eds) *Statutory Interpretation in Private Law* (Federation Press, Leichhardt 2019) 154 ('*Intuitive Synthesis*').

deceptive'/'mislead(s) or deceive(s)') is the most common prohibitory expression in misleading conduct legislation.[93] This is followed some distance behind by phrases incorporating notions of 'falsity'.

Prohibition	Usage
'Misleading or deceptive'	50
'False or misleading'	27
'False, misleading or deceptive'	23
'Mislead or deceive' / 'Misleads or deceives'	20
'Concealment of a material fact'	6
'Mislead'	5
'Reasonable grounds for believing that the person will not be able to'	4
'Using a protected image/expression'	3
'With the intention of not (verb)'	3
'Intends not to (verb)'	2
'Materially different'	2
'Conduct causing a person to believe'	1
'Deception or misrepresentation'	1
'False or misleading or other offensive conduct'	1
'Fraudulent or obvious imitation'	1
'Induce by representation'	1
'Misleading'	1

[93] Indeed, 90% of prohibition schemes (103/114) use some variant of the word 'mislead'. However, it must be noted that the use of the word 'misleading' or 'mislead' *by itself* is relatively rare, appearing only six of 151 times. Given the above suggestion that deceptive conduct is a mere subset of misleading conduct, it is unusual that this is not more common. Perhaps parliaments often intend for the scope of conduct that is 'misleading' to be coloured by the interpretation of the word 'deceptive' (or indeed, even 'false').

TOTAL	151

Table 1 - Use of prohibitory phrases

2 *Competing phrases*

Until recently,[94] and despite the use of divergent prohibitory phrases, courts have considered it settled[95] and non-contentious[96] that there is no meaningful difference between the phrases 'misleading or deceptive', 'mislead or deceive', 'false or misleading'[97] or 'mislead'.[98] This conclusion has been reached in interpreting the varying phrases in ss 52 and 53 the *TPA*,[99] ss 18, 29, 33 and 152 of the *ACL*,[100] ss 1041A, 1041B, 1041H of the *Corporations Act*,[101] and ss 12DA and 12DB of the *ASIC Act*.[102] The expressions 'false or misleading' and 'misleading or deceptive' have even been described as composite phrases which simply capture the same conduct.[103] Although a decision of the Full Court of the Federal Court treated this phrasal equivalence with some caution,[104] as a matter

[94] Discussed in Part 3 below.
[95] *Australian Competition and Consumer Commission v H.J. Heinz Company Australia Limited* (2018) 363 ALR 136 [36] (White J) ('*ACCC v Heinz*').
[96] *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liquidation) (No 2)* [2017] FCA 709 [25] (Beach J).
[97] Ibid.
[98] Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2014] 317 ALR 73 [37]-[40] (Allsop CJ) ('*ACCC v Coles*').
[99] *Australian Competition and Consumer Commission v Yellow Page Marketing BV (No 2)* [2011] FCA 352 [28] (Gordon J) ('*ACCC v Yellow Page Marketing*').
[100] *Commissioner for Consumer Protection v Standley* [2014] WASC 45 [31] (Allanson J); *ACCC v Coles* (n 98) [40] (Allsop CJ). In the latter case, the Chief Justice stated at [40] that '[t]here is no meaningful difference between the words and phrases "misleading or deceptive" and "mislead or deceive" (s 18), "false or misleading" (s 29(1)(a)) and "mislead" (s 33)', citing *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 [14] (Gordon J). See also *Australian Competition and Consumer Commission v Energy Watch Pty Ltd* [2012] FCA 425 [109] (Marshall J) (FCA) [109]; *Chok Man Chan v Chen* [2013] FCA 1191 [34] (Dodds-Streeton J).
[101] *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* 266 FCR 147 [2263] (Beach J); *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* (2019) 140 ACSR 561 [95] (O'Bryan J).
[102] Ibid; *Australian Securities and Investments Commission v MLC Nominees Pty Ltd* [2020] FCA 1306 (Yates J).
[103] *Commissioner for Consumer Protection v Standley* [2014] WASC 45 [31] (Allanson J). For more on composite phrases, see Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles* (Thomson Reuters, 2013) 93 ('*Statutory Interpretation Principles*').
[104] *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2020] FCAFC 130 [20] (Wigney, O'Bryan and Jackson JJ). The Full Court went on to note at [21] that '[a]lthough s 18 [of the *ACL*] takes a different form to s 29, the prohibitions are similar in nature. Whilst s 29 uses the phrase "false or misleading" rather than "misleading or deceptive", *it has been said* that there is no material difference in the two expressions' (emphasis added): *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2020] FCAFC 130 (Wigney, O'Bryan and Jackson JJ). Compare this to the firmer language in an earlier judgment of Foster J in *Australian Competition and*

of precedent the conclusion appeared near unassailable – the prohibitory phrases are interpreted identically.[105]

In essence, this interpretative approach distils a range of competing prohibitory phrases to the equivalent of the single principle-based concept outlined in the paradigm provision. As a result, the principles to be applied to nearly 70% of prohibitory phrases used in misleading conduct schemes are the same.[106] We observe that, given the variety of synonymic phrases identified above, this court-led process of simplification is, perhaps, unsurprising. Indeed, as the High Court has noted in a different context:

> …whilst it must be accepted that words chosen by the legislature should be given meaning and endeavours should be made to avoid them being seen as redundant, they should not be given a strained meaning, one at odds with the scheme of the statute. Moreover, it has been recognised more than once that Parliament is sometimes guilty of "surplusage" or even "tautology". The possibility that Parliament may not have appreciated that the [section] was not necessary, and was liable to confuse, is not a reason for giving it a literal interpretation.[107] (citations omitted)

While it may be a judicious strategy to equate the meaning of the phrase 'misleading or deceptive' with other prohibitory analogues, little ink has been spilt reconciling this conclusion with the basic tenet of statutory interpretation that courts must strive to give effect to every word of every provision of an

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Consumer Commission v Jetstar Airways Pty Ltd (2016) ATPR ¶42–523, where his Honour observed at [122] that '[t]here is *no meaningful difference* between the phrases "misleading or deceptive" and "mislead or deceive" as used in s 18(1) of the ACL and "false or misleading" as used in s 29(1)(i) and s 29(1)(m) of the ACL'.

[105] In addition to the above, see also *State of Escape Accessories Pty Limited v Schwartz* [2020] FCA 1606 [151] (Davies J)*; Parker trading as on Grid Off Grid Solar v Switchee Pty Ltd trading as Australian Solar Quotes* [2018] FCA 479 [59] (Gleeson J); *Director of Consumer Affairs Victoria v Gibson* [2017] FCA 240 [120] (Mortimer J); *Australian Competition and Consumer Commission v Jewellery Group Pty Ltd* (2012) 293 ALR 335 [67] (Lander J); *Australian Competition and Consumer Commission v SMS Global Pty* (2011) ATPR ¶42–364 [12] (Murphy J). See also Miller's Annotated Trade Practices Act (Thomson Lawbook Company, 31st ed, 2010) 662 [1.53.5].

[106] For example, see *Australian Competition and Consumer Commission v European City Guide S L* [2011] FCA 804, where Moore J noted that '[a]lthough [*TPA*] ss 52 and 53 were relevantly concerned with "misleading and deceptive conduct" and "false or misleading representations" respectively, the principles to be applied for each are fundamentally the same'.

[107] *Western Australian Planning Commission v Southregal Ltd* (2017) 259 CLR 106 [55] (Kiefel and Bell JJ).

enactment.[108] Known as the principle of 'surplusage' or 'redundancy',[109] it is a 'basic'[110] proposition that:

> [i]n the interpretation of Statutes…[s]uch a sense is to be made of the whole as that no clause, sentence, or word shall prove superfluous, void or insignificant, if by any other construction they may all be made useful and pertinent.[111]

Consider for example the phrases 'misleading or deceptive' and 'false or misleading' as they appear in ss 18 and 29 of the *ACL*. Equating these phrases *within* the Act risks engaging the principle of redundancy, insofar as the latter is rendered superfluous or insignificant. The practice likely also offends the parallel presumption that different words have different meanings.[112] Where the meaning of distinct prohibitory phrases are likened *across* enactments, it may be that the courts simply 'abandon the task' of wrestling with unique statutory language altogether – an impermissible transgression.[113] Rather, the usual process of interpretation requires courts to consider the ordinary meaning of statutory text, having regard to its context and purpose.[114] The overriding nature of these concurrent considerations has been emphasised by the High Court on a number of occasions.[115] When legislative text is considered this way, it is arguable

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[108] Herzfeld and Prince, *Statutory Interpretation Principles* (n 103) 100.
[109] *Tabcorp Holdings v Victoria* (2016) 90 ALJR 376 (French CJ, Kiefel, Bell, Keane and Gordon JJ) [74].
[110] *Attorney-General for New South Wales v Melco Resorts & Entertainment Limited* (2020) 102 NSWLR 47 [88] (Bathurst CJ, Bell P and Gleeson JA).
[111] *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ), endorsed in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [71] (McHugh, Gummow, Kirby and Hayne JJ). See also Dennis Pearce, Statutory Interpretation in Australia (LexisNexis Butterworths, 9th ed, 2020) 67-68; *Plaintiff M70/2011 v Minister for Immigration & Citizenship* (2011) 244 CLR 144 [97] (Gummow, Hayne, Crennan and Bell JJ); *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 [39] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1, 12–13 (Mason CJ); *R v Berchet* (1690) 1 Show KB 106, 108.
[112] *King v Jones* (1972) 128 CLR 221, 266 (Gibbs J); *Commissioner of Taxes (Vic) v Lennon* (1921) 29 CLR 579, 590 (Higgins J) (dissenting); *Eureka Funds Management Ltd v Freehills Services Pty Ltd* (2008) 19 VR 676 [4] (Neave and Redlich JJA), [52] (Cavanaugh AJA). See also Herzfeld and Prince, *Statutory Interpretation Principles* (n 103) 102.
[113] To use the language of Windeyer J in *R v Holmes; Ex parte Altona Petrochemical Co Ltd* (1972) 126 CLR 529, 562.
[114] *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 [26] (French CJ, Hayne, Kiefel and Bell JJ) ('*Australian Education Union*'). Note that although particular meaning may be afforded to legal technical words (for example 'trademark' in *Attorney-General (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469), affording identical interpretations to a range of distinctly expressed phrases is analytically distinct.
[115] *Australian Securities and Investments Commission v King* (2020) 94 ALJR 293 [23] (Kiefel CJ, Gageler and Keane JJ); *Mondelez Australia Pty Ltd v AMWU; Minister for Jobs and Industrial Relations v AMWU* (2020) 94 ALJR 818 [13] (Kiefel CJ, Nettle and Gordon JJ), [66] (Gageler J), [98]

that divergently drafted prohibition schemes are not intended to be treated as synonymous.

Perhaps the most egregious example of this type of problematic drafting is found in s 59 of the *Veterinary Practice Act 1997* (Vic):

> **59 Advertising**
>
> (1) A person must not advertise a veterinary practice or veterinary services in a manner which is *false*.
>
> Penalty: For a natural person, 50 penalty units.
>
> For a body corporate, 100 penalty units.
>
> (1A) A person must not advertise a veterinary practice or veterinary services in a manner which is *misleading*.
>
> Penalty: For a natural person, 50 penalty units.
>
> For a body corporate, 100 penalty units.
>
> (1B) A person must not advertise a veterinary practice or veterinary services in a manner that is *deceptive*.
>
> Penalty: For a natural person, 50 penalty units.
>
> For a body corporate, 100 penalty units.
>
> (1C) A person must not advertise a veterinary practice or veterinary services in a manner which is intended to be *false, misleading or deceptive*.
>
> Penalty: For a natural person, 50 penalty units.
>
> For a body corporate, 100 penalty units.
>
> (emphasis added)

(Edelman J); *New South Wales v Robinson* (2019) 94 ALJR 10 (Bell, Gageler, Gordon and Edelman JJ); *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 [20] (Edelman J), [66] (Gageler J); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 [4] (French CJ), [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Victoria)* (2001) 207 CLR 72 [9] (Gaudron, Gummow, Hayne and Callinan JJ), [46] (Kirby J); *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 [30] (Gleeson CJ, Gummow, Hayne and Heydon JJ), [167]-[168] (Kirby J).

Here, one might be forgiven for assuming that the separation of the prohibitory words 'false', 'misleading' and 'deceptive' indicates distinct meaning. This would also be suggested by the reiteration of all three words as a composite phrase ('false, misleading or deceptive').[116] Yet on the common judicial approach to these prohibitory phrases in other, parallel statutory regimes, there is real likelihood of the four distinct sub-sections being subject to an identical interpretation (with the possible exception of 'false'),[117] rendering s 59 a masterwork in tautologous drafting.[118] Yet it remains for the legislature, not courts, to make the policy (and linguistic) choices involved in legislative design.[119]

3 *Purpose, language and policy in interpretation and legislative design*

Judicial rationalisation of discrete provisions, by emphasising commonality of statutory purpose over language in the process of statutory interpretation, raises a number of issues.

First, as a matter of practice, it means that where an Act utilises a number of distinct prohibitions, a finding of 'misleading or deceptive' conduct will likely control the outcome in respect of other prohibitions. For example, in *ACCC v Coles*,[120] the Australian Competition and Consumer Commission (**ACCC**) alleged that Coles had engaged in misleading conduct in respect of its contentions regarding 'freshly' baked bread.[121] The ACCC made allegations pursuant to ss 18, 29(1)(a) and 33 of the *ACL*, which prohibit conduct that is 'misleading or deceptive', 'false or misleading' and 'liable to mislead' respectively.[122] Chief Justice Allsop found that each misleading conduct claim was made out, observing that '[t]here is no meaningful difference between the words and phrases "misleading or deceptive" and "mislead or deceive" (s 18),

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[116] Yet, the addition of a specific 'intent' fault element in s 59(1C), which would generally indicate greater culpability, has no bearing on the penalty, which remains unchanged.
[117] Section 59 of the *Veterinary Practice Act 1997* (Vic) has not attracted judicial consideration (as of January 2021).
[118] Although, perhaps ironically, breaking legislation into sub-sections in this manner is characteristic of plain English drafting, and examination of previous incarnations of s 59 indicate that its present form may be the result of plain English re-drafting.
[119] *Commissioner of the Australian Federal Police v Kalimuthu [No 2]* (2018) FLR 1 [449] (Murphy and Beech JJA). Although the interpretation of statutes cannot be divorced from reality and must be 'pragmatic', this pragmatism must not be unprincipled, but rather informed by the text, context and purpose of the legislation at hand: *Australian Education Union* (n 114) [26] (French CJ, Hayne, Kiefel and Bell JJ).
[120] Above n 98 (Allsop CJ).
[121] Ibid [1].
[122] Ibid [37].

"false or misleading" (s 29(1)(a)) and "mislead" (s 33)'.[123] Notably, an overarching finding of misleading conduct in the supply of goods under ss 18 and 29 of the *ACL* opens the door to both consumer redress and regulatory responses under s 18 *and* to regulator initiated civil penalties enforcement pursuant to s 29.[124]

The fact that the same misconduct appears to be captured by each provision,[125] raises questions as to the policy justification for leaving s 18 without a possible court award of civil pecuniary penalties. We might ask, if the outcome of each separate prohibition is controlled by the meaning of 'misleading or deceptive', why have separate prohibitions at all? The answer may be found by paying close attention to the specific framing of the prohibition. As discussed below, the framing of the various prohibitions on the core wrong of misleading conduct varies. We have observed above that the reasons for this reiteration and demarcation may lie in a legislative desire to make explicit the consequences of misconduct in particular contexts, as well as to assuage stakeholder anxieties over a 'one size fits all' approach to contravention and penalty.[126] Further, there are often good forensic reasons to plead alternative provisions to the core prohibition in certain circumstances (for example, in the specific circumstance that an account of profits is sought for unauthorised use of a sporting symbol).[127] Finally, we can expect practitioners to be careful to avoid introducing unnecessary complexity to their cases, pleading in the alternative only sparingly to avoid 'planting a forest of forensic contingencies', diminishing judicial comprehension and distracting attention from the central issues.[128] However, these benefits may be offset by the volume of divergent yet redundant phrases

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[123] Ibid [40].

[124] *Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd* [2020] FCA 1672 [601] (Wheelahan J). Additional remedies include pecuniary penalties (*ACL* (n 4) s 224(1)(a)(ii)), adverse publicity orders (*ACL* (n 4) s 247(1)(a)), corporate management disqualification orders (*ACL* (n 4) s 248(1)(a)(ii)) and a strict liability offence (*ACL* (n 4) s 151(m)).

[125] See also *Sunland* (n 70) [1304]. For similar examples, see *ACCC v Yellow Page Marketing* (n 99) [28] (Gordon J); *Telstra Corp Ltd v Phone Directories Co Pty Ltd* (2014) 316 ALR 590 [389] (Murphy J).

[126] Bant and Paterson, 'Developing a Rational Law of Misleading Conduct' (n 11) 290. See also Ross Grantham, 'To Whom Does Australian Corporate and Consumer Legislation Speak' (2018) 37 *University of Queensland Law Journal* 57.

[127] *Major Sporting Events (Indicia and Images) Protection Act 2014* (Cth) ss 16, 44.

[128] *Forrest v Australian Securities and Investments Commission & Anor; Fortescue Metals Group Ltd v Australian Securities and Investments Commission & Anor* (2012) 247 CLR 486 [27] (French CJ, Gummow, Hayne and Kiefel JJ). See however *Kadam v MiiResorts Group 1 Pty Ltd (No 2)* (2016) 118 ACSR 1 [35] (Edelman J), criticising the practice of pleading 'every possible permutation' of the law relating to misleading conduct.

that must be navigated, and the consequential loss to clarity, linguistic and remedial consistency.

On the other hand, any process of reconciling divergent provisions requires courts to emphasise a commonality of purpose over distinctive language. Distinctive terms may reflect deliberate legislative policy choices. For this reason, as discussed below, consideration of the language used and the choice of prohibition to which civil or pecuniary penalties attach has been (and ought to be) given more weight in the interpretive process.

Second, judicial rationalisation of distinct prohibitory phrases means that phrases capturing the same conduct will overlap, potentially rendering some legislative schemes otiose. In these authors' review of the judicial consideration of 83 prohibition schemes,[129] it was observed that, as of January 2021, the vast majority of misleading conduct prohibitions schemes (89.15%, or 74/83) have *never* attracted judicial consideration. Of course, this is not necessarily a reflection of the value of any given prohibition scheme. Some cases settle before trial or judgment, while others are dependent on regulator enforcement. Nevertheless, it remains striking that nearly 90% of misleading conduct provisions in Australia have never been formally considered. It may of course be that parties subject to those provisions are being guided on their operation by reference to the paradigm prohibition. Indeed, of the 9 prohibitions which have attracted judicial consideration, 8/83 (9.65%) had been interpreted by analogy or as analogous to the paradigm s 18 prohibition.[130] The remaining prohibition scheme was interpreted in a seemingly analogous manner but did not specifically invoke *ACL* or *TPA* authority.[131] Perhaps of more significance is that s 18 of the *ACL* was also pleaded (primarily or alongside the additional prohibition scheme) in more than half (5/9) of these cases.[132] It may be that phrasal overlap and a

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[129] This sample excludes the repetitive provisions found in the *ACL*, the *Corporations Act* and the *ASIC Act*, and includes only the remaining misleading conduct schemes found in state and federal legislation.

[130] *Fair Work Act 2009* (Cth) ss 345, 349; *National Consumer Credit Protection Act 2009* (Cth) s 160D; *Retail Leases Act 1994* (NSW) s 62D; *Home Building Contracts Act 1991* (WA) s 15A; *Olympic Insignia Protection Act 1987* (Cth) (s 36); *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s 16C; *Sale of Land Act 1962* (Vic) s 12.

[131] *National Consumer Credit Protection Act 2009* (Cth) s 225; *Callychurn v Australian Securities and Investments Commission* [2017] FCA 29 [56]-[60] (Beach J).

[132] For example, in *OXS Pty Ltd v Sydney Harbour Foreshore Authority* [2016] NSWCA 120 (Gleeson JA, Macfarlan and Leeming JJA agreeing) s 62D of the *Retail Leases Act 1994* (NSW) was pleaded in concert with s 18 of the *ACL*. See also *Australian Olympic Committee Inc v Telstra Corporation Limited* (2017) 258 FCR 104 (Greenwood, Nicholas and Burley JJ); *Sully v Englisch t/as Alpine Property* [2020] VCAT 378 (Member Johnson); *Pei & Anor v Yuan* [2018] VCC 651 (Judge Woodward); *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018]

desire to promote consistent judicial treatment encourages parties to bring their claims on a single, well-litigated footing – s 18 of the *ACL*.[133]

Third, courts have paid attention, in the relatively few cases in which the issue has been raised, to differences in the precise words that frame the various prohibitions on behaviour that misleads. Whether we agree with them or not, these reflect choices in legislative design that should inform the interpretive process. They may appear messy, or reflect an inconsistent or unpersuasive policy, but in the absence of error or oversight it is difficult for courts to ignore such drafting decisions. Thus, in the recent Federal Court of Australia case of *ACCC v Google*, Thawley J held that the different text, purpose and historical genesis of ss 18 and 29 of the *ACL* demanded their distinctive treatment.[134] These varied iterations were not matters of drafting oversight or untidiness, but reflected distinctive underlying policies, resulting in different consequences for contravening parties.[135]

His Honour noted that s 29 is a civil penalty provision, drawn from an earlier provision in s 53 of the *TPA* that created criminal offences.[136] For these reasons, it should be treated as a penal provision and construed strictly. By contrast, s 18 has a purpose of setting a minimum standard of conduct and is beneficial legislation, which is construed more liberally.[137] The application of s 29 to 'representations' (not 'conduct') that are 'false or misleading', is another critical and meaningful difference. For these reasons, his Honour considered that the formulation in s 29 operates more strictly than its s 18 counterpart.[138]

Similarly, his Honour approached ss 33 and 34 of the *ACL* (which prohibit 'conduct that is liable to mislead the public' in relation to the provision of, respectively, goods and services) as having a distinctive ambit and mode of operation.[139] His Honour followed earlier authorities to hold that '"liable to mislead" is a higher standard than "likely to mislead or deceive" under s 18'.[140] Likewise, the concept of a representation made to the public appears to be more restrictive than the assessment undertaken for s 18, requiring that the approach

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FCA 1644 (O'Callaghan J); *Australian Education Union v Royal Melbourne Institute of Technology* [2018] FCA 1985 (Wheelahan J).

[133] Or its equivalents across the *ACL*, or in the *Corporations Act* and the *ASIC Act*.

[134] *ACCC v Google* (n 17) [102]-[119].

[135] Ibid.

[136] Ibid [105]-[106].

[137] Ibid [106].

[138] Ibid [106]-[107], [120].

[139] See also *Australian Competition and Consumer Commission v GlaxoSmithKline Consumer Healthcare Australia Pty Ltd* [2019] FCA 676, (2019) 371 ALR 396 [6] and [7] (Bromwich J).

[140] *ACCC v Google* (n 17) [125].

is 'general and at random and secondly, the number of people who are approached is sufficiently large'.[141]

As a matter of statutory interpretation, Thawley J's rigour is to be commended. From a broader perspective of the effective and principled regulation of misleading conduct, his Honour's reasoning underscores the reality that divergent drafting choices create new law. Here, we may criticise the drafting adopted to impose tighter boundaries on the penal operation of the more specific provisions. For example, a representation may be 'false' yet not misleading, as in cases of 'mere puffery'. Such an interpretation of 'falsity' may reflect a legislative intent to restrict the trigger for liability under s 29 of the *ACL*, reducing the protective scope of the normative standard. Without criticising the analysis in *ACCC v Google*, thresholds relating to liability in this way are deserving of a more definite exposition by parliament. Moreover, if we accept, as Thawley J does, that the varied linguistic iterations present in the *ACL* reflect conscious policy choices,[142] we observe that imposing more restrictively-framed standards in this way is a blunt tool to meet concerns about proportionality. Courts are well-positioned to take account of varying degrees of defendant culpability through the sentencing process, which involves a granular and multi-factorial approach. Any concerns that stakeholders should be well aware of the consequences of prohibition may be met through more appropriate, educative tools, such as soft law guidelines.[143]

C Taxonomy of elements: structure and substance

Having considered prohibitory phrases, it is necessary to paint a broader picture by considering the structural aspects of the identified prohibition schemes, including their composition, fault and causal elements, and available forms of private and regulator rights of redress.

1 *Singular, multiple and conjoint prohibitory phrases*

An initial structural drafting distinction may be drawn between 'singular', 'multiple-singular' and 'conjoint' prohibition schemes. 18.5% (21/114) of the

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[141] Ibid [127] citing *Trade Practices Commission v J & R Enterprises* (1991) 99 ALR 325, 347-348 (O'Loughlin J).

[142] Indeed, we note that Thawley J reaches his conclusion as to the significance of 'false' in 29 of the *ACL* on a textual analysis upon which reasonable minds may differ. His Honour did not draw support for this interpretation from any secondary materials to which recourse is permitted: *ACCC v Google* (n 17) [102]-[120].

[143] Bant and Paterson, 'Misleading Conduct before the Federal Court' (n 11) 184; Bant and Paterson, 'Developing a Rational Law of Misleading Conduct' (n 11) 300.

examined prohibition schemes utilised a conjoint prohibition – that is, a prohibition which combines two or more prohibitory phrases which could otherwise stand alone. The paradigm example is s 18 of the *ACL*, which prohibits conduct which is '*misleading or deceptive* or *likely to mislead or deceive*'. Conjoint prohibitions are uniquely broad in that they operate to capture conduct that is apt to mislead, as well as cases where that potential has been realised. All conjoint prohibitions identified utilised 'likely' as the adjectival standard to capture conduct apt to mislead,[144] reflecting the paradigm s 18 formula and capturing a broader range of conduct than the word 'liable' (see Figure 1 for the use of adjectival standards across the dataset).[145] Conjoint formulations appear across the nation, at Commonwealth level (4), as well as across New South Wales (3), Victoria (3), Western Australia (3), Tasmania (2), Queensland (2) and South Australia (2).[146] Excluding for a moment the four Commonwealth prohibitions (which mimic the general prohibition found in s 18 of the *ACL*), conjoint prohibitions are most commonly found in the areas of (i) food regulation,[147] (ii) health,[148] (iii) tenancies/leases[149] and (iv) charity.[150] It is possible that these reflect a protective policy that, whether physiological (shelter, food and charity) or safety-related (health) needs, the broadest possible net should be cast to capture conduct inimical to the basic exigencies of human subsistence.[151]

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[144] Several individual prohibition schemes contain more than one prohibitory phrase, resulting in the total seen in Figure 1.

[145] *ACCC v Heinz* (n 95) [36] (White J); *ACCC v Coles* (n 98) [44] (Allsop CJ).

[146] Each Territory utilises only a single conjoint prohibition, in their respective Food Acts: *Food Act 2001* (ACT) s 24; *Food Act 2004* (NT) s 17.

[147] Ibid; *Food Act 2008* (WA) s 19; *Food Act 2006* (Qld) s 37; *Food Act 2003* (NSW) s 18; *Food Act 2003* (Tas) s 18; *Food Act 2001* (SA) s 18; *Food Act 1984* (Vic) s 13.

[148] *Disability Service Safeguards Act 2018* (Vic) s 267(2); *Health Practitioner Regulation National Law (South Australia) Act 2010* (SA) s 133; *Health Practitioner Regulation National Law (WA) Act 2010* (WA) s 133; *Health Practitioner Regulation National Law Act 2009* (Qld) s 133; *Public Health Act 2010* (NSW) s 99.

[149] *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA); *Retail Leases Act 1994* (NSW) s 62D.

[150] *Collections for Charities Act 2001* (Tas) s 12(2); *Fundraising Act 1998* (Vic) s 7.

[151] Indeed, *ex-ante* prohibitions are far more common (and indeed may even attract national uniform legislation) where the subject of trade or commerce relates to the necessities at the bottom of Maslow's hierarchy. See generally Abraham Maslow, 'A Theory of Human Motivation' (1943) 50(4) *Psychological Review* 370.

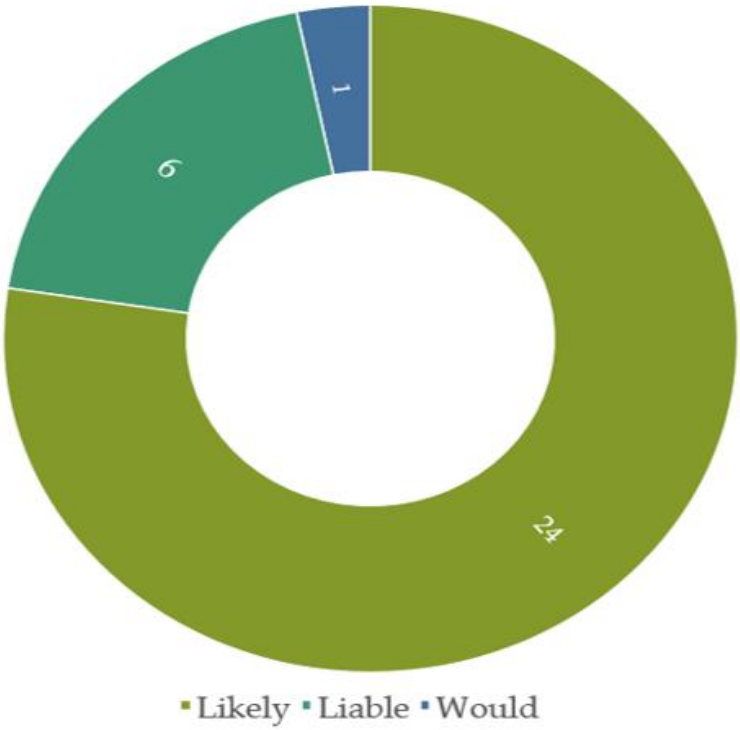

Figure 1 - Use of modifying adjectives across all prohibitions

By contrast, a singular prohibition scheme, like 'misleading or deceptive', utilises a sole prohibitory phrase – the most common formulation.[152] As Figure 2 illustrates, the vast majority (70/80, or 87.5%) of singular prohibitions require that conduct have been misleading or deceptive. In the rare instance that a singular prohibition is expressed to apply to conduct apt to mislead, the expression '*liable*' to mislead is usually adopted. The outlier – s 44(2) of the *Tourism Tasmania Act 1996* (Tas) – uses a '*likely* to mislead' formulation. 'Likely' has been said to apply to a broader range of conduct than 'liable', and requires only an actual probability that the public would be misled.[153] Consistently where singular prohibitions are expressed in terms of conduct apt to mislead, they adopt the narrower of the two expressions.

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[152] For example, a co-operative contravenes s 72 of the *Co-operatives National Law (South Australia) Act 2013* (SA) if there is 'a *misleading or deceptive* statement in the disclosure statement …'.
[153] *ACCC v Heinz* (n (n 95) [36] (White J); *ACCC v Coles* (n 98) [44] (Allsop CJ); *ACCC v Google* (n 17) [125] (Thawley J).

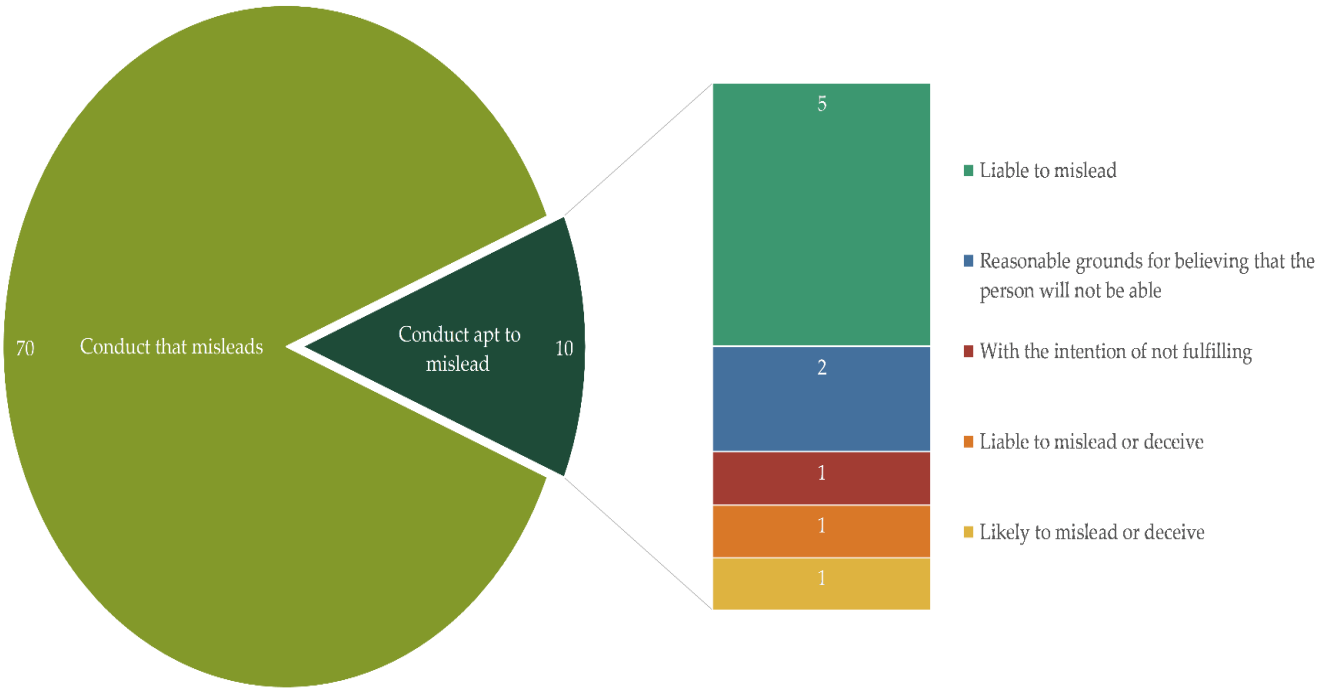

Figure 2 - Application of singular prohibitions to conduct that misleads/is apt to mislead

In *ACCC v Google*, Thawley J questioned whether it was strictly necessary to introduce the language of 'likely to mislead' in section 52:

> The amendment which was made in 1977 to s 52 of the TPA was apparently motivated by an intention to make clear that, in order to establish a contravention of s 52, it was not necessary to adduce evidence that someone had actually sustained loss or was in fact misled...It may be questioned whether the amendment was strictly necessary. Section 52 set a standard of conduct. It is not necessary to establish loss in order to establish a failure to meet a certain standard of conduct. It would have been necessary to prove loss if a person sought a remedy in respect of contravening conduct, and the relevant remedy was premised on loss being suffered (for example under s 82 of the TPA). Further, leaving loss to one side, if the proper inference to draw is that a reasonable person was likely to have been misled by relevant conduct, the Court would ordinarily conclude that the conduct was "misleading or deceptive".[154]

The cogency of this observation again underscores the need to examine closely whether and why the current range of variations should be maintained.

[154] *ACCC v Google* (n 17) [119].

The least common drafting combination constitutes multiple-singular prohibitions that utilise more than one specific separate prohibitory phrase. For example, s 52 of the *Property, Stock and Business Agents Act 2002* (NSW) prohibits representations that are 'false, misleading, or deceptive' and the 'concealment of a material fact'. This approach is rare, found in only 13/114 prohibition schemes (11.5%). Their limited adoption may reflect deliberate policy choices or, perhaps more likely, a dubious desire for increased clarity of scope in drafting. Indeed, s 52 above is characteristic of prohibitory phrases found in state property legislation designed to make clear that certain facts (such as a murder on the premises)[155] must be divulged to buyers.[156] These additional phrases seek to render explicit the operation of the general prohibition. Perhaps ironically, such provisions are among the worst examples of the repetitive expression characterising the law of misleading conduct in Australia.[157] The clarifying effect of their drafting is at least open to doubt in light of the above discussion of synonymic drafting and interpretation.

2 *Fault element required*

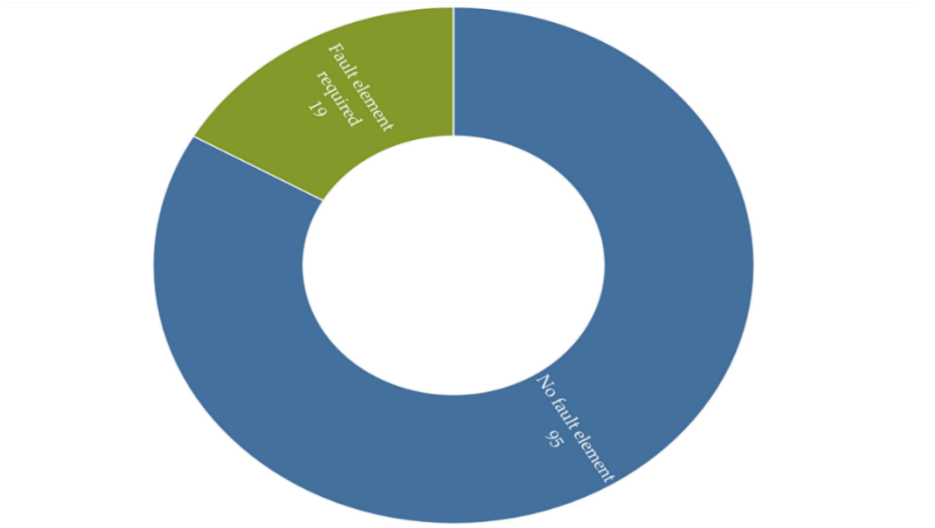

Figure 3 – Whether a fault element is required

[155] See *Hinton v Commissioner of Fair Trading* [2007] NSWADTAP 17, where the NSW Administrative Decision Tribunal held that the fact that the property offered for sale had been the location of a triple murder was a 'material fact' that the buyer ought to have been made aware of.
[156] *Property Occupations Act 2014* (Qld) s 209; *Residential Tenancies Act 2010* (NSW) s 26(1); *Sale of Land Act 1962* (Vic) s 12.
[157] *ACL* (n 4) ss 36, 158; *Australian Consumer Law and Fair Trading Act 2012* (Vic) s 45; *ASIC Act* (n 12) ss 12DC, 12DI; *Fair Trading (Motor Vehicle Repair Industry) Act 2010* (ACT) s 49; *Security Industry 1997* (NSW) s 33(1); *Security and Investigation Act 1995* (SA) s 17; *Veterinary Chemical Control and Animal Feeding Stuffs Act 1976* (WA) s 54.

Prohibition schemes utilising a fault element are rare, accounting for only 19/114 schemes identified (see Figure 3). Their scarcity highlights a major distinction between statutory misleading conduct and its older general law analogues (such as negligent misrepresentation), which are often founded upon the fault of the impugned actor.[158] Of the 19 schemes importing an element of fault, the majority (11) are found in Commonwealth legislation, and use language in keeping with s 5.1 of the *Criminal Code Act 1995* (Cth) ('intention', 'knowledge' or 'recklessness'). This use of modern terminology is, however, jurisdictionally inconsistent. Indeed, as is apparent from Figure 4, where state prohibitions import an element of fault (3 of which are found in New South Wales, 3 in Queensland and 2 in Victoria) the older 19th century language[159] of 'wilfulness' and 'fraudulence' is still used.[160]

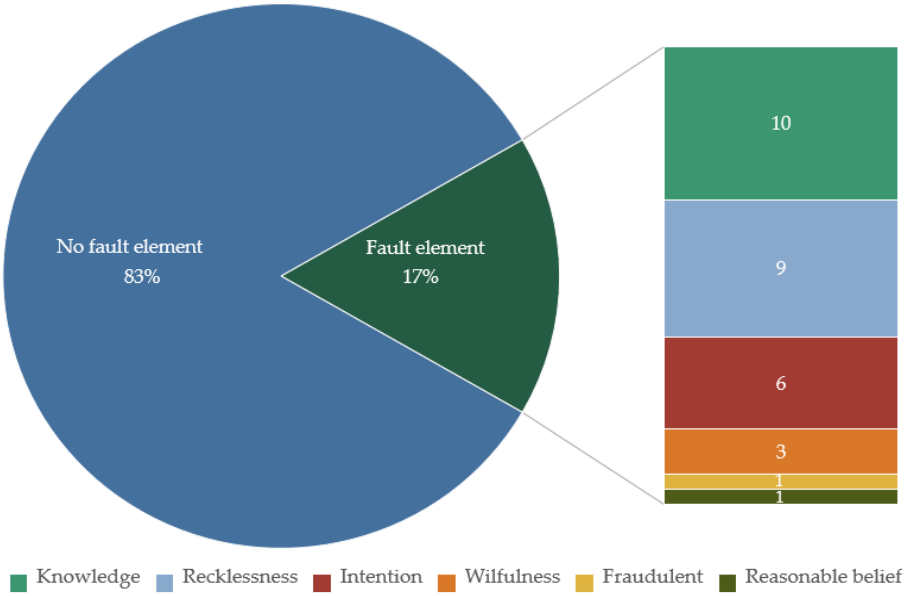

Figure 4 – Type of fault element required

The form of prohibitory phrase utilised where fault is an element is mixed, with 7 distinct prohibitory phrases emerging from 19 prohibition schemes. Fault-

[158] Lockhart, 'The Law of Misleading or Deceptive Conduct' (n 28) 92 [3.13].
[159] Attorney-General's Department, *Commonwealth Criminal Code: Guide for Practitioners* <https://www.ag.gov.au/crime/publications/commonwealth-criminal-code-guide-practitioners-draft/part-22-elements-offence/division-5-fault-elements/51-fault-elements> 5.1 ('*Criminal Code: Guide for Practitioners*').
[160] See, for example *Property Occupations Act 2014* (Qld) s 209; *Sale of Land Act 1962* (Vic) s 12; *Security Industry Act 1997* (NSW) s 33(1).

based prohibitions depart from the s 18 paradigm and frequently rely upon notions of 'falsity' (see Figure 5).[161] By contrast, the most common prohibitory phrase used in provisions of strict liability remains the paradigm 'misleading or deceptive', with parliaments seemingly content to marry this fault framework with a variety of attendant prohibitory phrase(s) (see Figure 6). Of note, several prohibitory phrases are unique to fault-based offences, including 'materially different', 'intends not to [*verb*]' and 'with the intention of not [*verb*]'. Prohibition schemes with a fault element commonly address fair work, industrial relations and employment issues (8/19), suggesting a targeted legislative approach to these areas which opts against strict liability.

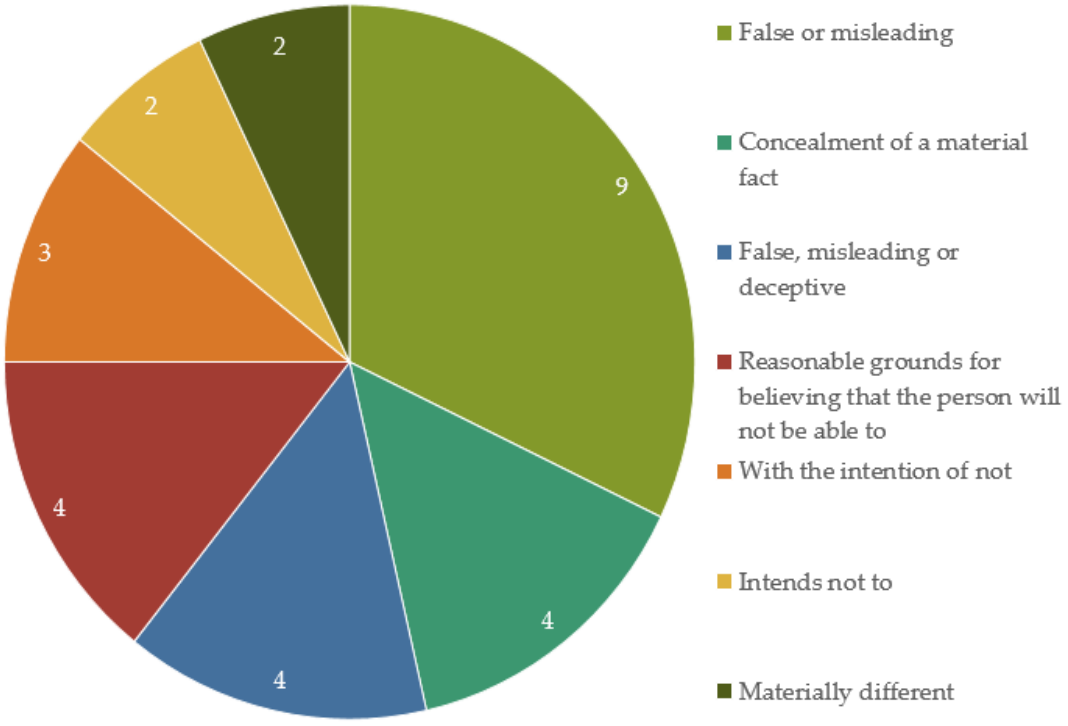

Figure 5 – Prohibitory phrases used where prohibition schemes utilise a fault element

[161] By contrast, 'false or misleading' was used in only 17/95, or 14%, of all strict liability prohibition schemes.

3 *No fault element required (strict liability prohibitions)*

A strict liability prohibition is, by definition, characterised by the absence of any requirement of defendant fault.[162] This is not to deny that proof of fault, particularly intention, may be 'of powerful evidentiary value' in a finely balanced case.[163] Strict liability prohibitions are nonetheless visibly more demanding of their subjects,[164] sending a uniform normative message to potential wrongdoers irrespective of their varying degrees of culpability. When articulated as offences, they are used to place persons 'on notice to guard against any possible contravention', to 'enhance the effectiveness of the enforcement regime', and where there are 'legitimate grounds for penalising persons lacking 'fault''.[165]

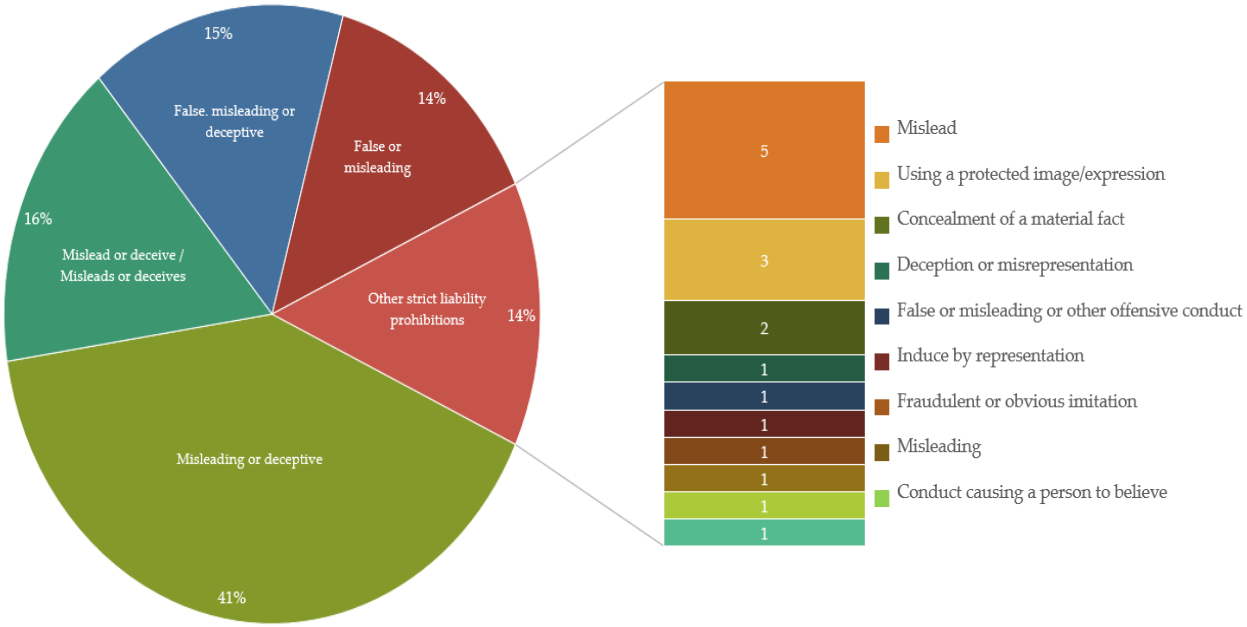

Figure 6 - Prohibitory phrases used in prohibition schemes of strict liability

As Figures 3 and 4 indicate, the vast majority of misleading conduct prohibition schemes do not require proof of fault at the stage of establishing a

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[162] For general information on strict liability offences at Commonwealth level, see Attorney-General's Department, '*Criminal Code: Guide for Practitioners*' (n 159) 6.1.
[163] Under the *ACL*/*TPA* at least: *Telmak Teleproducts (Aus) Pty Ltd v Coles Myer Ltd* (1989) 89 ALR 48, 65 (Wilcox and Einfeld JJ).
[164] See, for example, *Criminal Code Act 1995* (Cth) s 80.1AA.
[165] Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (Report No 112, March 2010) 9.70.

contravention. Indeed, all Territory prohibition schemes are strict liability, as are all prohibition schemes in Western Australia, South Australia and Tasmania. These 95 strict liability prohibition schemes are associated with 123 instances of 14 prohibitory phrases (see Figure 6).

Notwithstanding, as a matter of practice considerations of fault continue to play an important role even in these statutory contexts as a result of judicial interpretive approaches to characterising defendant misconduct, defendant 'scope of liability' considerations, and perhaps most importantly, in applying pecuniary penalty regimes.[166] This pervasive, ongoing role for fault allows courts to draw important distinctions between varying degrees of defendant culpability for remedial and deterrent purposes. However, it also underscores the difficulty in identifying a coherent, principled basis for the different drafting choices.

4 *Causation – causal connection required*

Of all prohibition schemes identified, just over half (58/114, or 51%) have one or more possible causation requirements. These express the requisite causal nexus between the conduct contravening the prohibition scheme and the harm for which redress is sought in a number of different ways, without accompanying definition (see Figure 8).[167] This statutory complexity may reflect general law equivocation over the meaning and role of causation. The causal question is variously framed at general law as a metaphysical enquiry into what would have resulted 'but for' the putative cause,[168] a 'commonsense conception'[169] of cause and effect closely associated with conceptions of responsibility, or as a historical enquiry into a process of 'contribution'.[170] In the reviewed provisions, the leading causal phrase identified is 'because of', which is apparent in around one-quarter of prohibition schemes. Nine

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[166] Bant and Paterson, 'Limitations on Defendant Liability' (n 11); Bant and Paterson, Intuitive Synthesis (n 92). The apportionment provision in s 137B in the *Competition and Consumer Act 2010* (Cth) is replicated in *Corporations Act* (n 39) s 1041I(1B) and *ASIC Act* (n 12) s 12GF(1B), but has not been introduced in their state and territory-based legislative counterparts.

[167] This may be contrasted with the civil liability and wrongs Acts, which define and outline the application of the causal test to be applied: *Civil Liability Act 1936* (SA) s 34(1); *Civil Liability Act 2002* (NSW) s 5D(1); *Civil Liability Act 2002* (Tas) s 13(1); *Civil Liability Act 2003* (Qld) s 11(1); *Civil Liability Act 2002* (WA) s 5C(1); *Wrongs Act 1958* (Vic) s 51(1); *Civil Law (Wrongs) Act 2002* (ACT) s 45(1). See further Elise Bant and Jeannie Marie Paterson, 'Statutory Causation in Misleading Conduct: Lessons from and for the Common Law' (2017) 24 *Torts Law Journal* 1 ('*Statutory Causation*').

[168] Cf. *Timbu Kolian v The Queen* (1968) 119 CLR 47, 68-69 where Windeyer J, quoting Sir Frederick Pollock, notes that 'the lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the ideas of cause'.

[169] *Wardley Aust Ltd v WA* (1992) 175 CLR 514, 525 (Mason CJ, Dawson, Gaudron and McHugh JJ). See also Lockhart, 'The Law of Misleading or Deceptive Conduct' (n 28) 391 [10.2] and the cases cited therein.

[170] Bant and Paterson, 'Statutory Causation' (n 167) 6-17.

additional phrases account for the remainder, including 'by', 'as a result of' and 'because'.

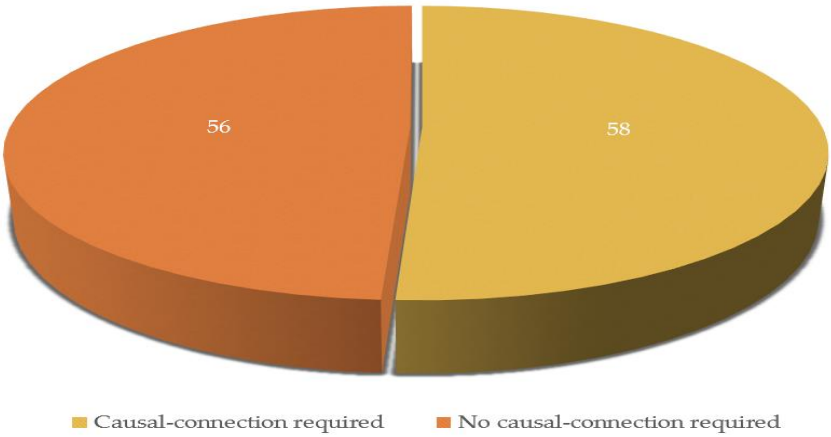

Figure 7 - Causal requirements across all 114 prohibition schemes

Notwithstanding these various iterations of the causal enquiry, our research suggests that courts have increasingly supported 'a factor' (over 'but for' or commonsense) tests of contribution in the statutory context. This is consistent with its adoption at general law in analogous contexts involving 'decision causation'.[171] This approach reduces incoherence across the statutory regimes and rationalises the causal enquiries at general law and under statute, but raises additional questions regarding the cogent basis (if any) underpinning the varying drafting choices.[172]

[171] Ibid 17-22.
[172] Ibid 2.

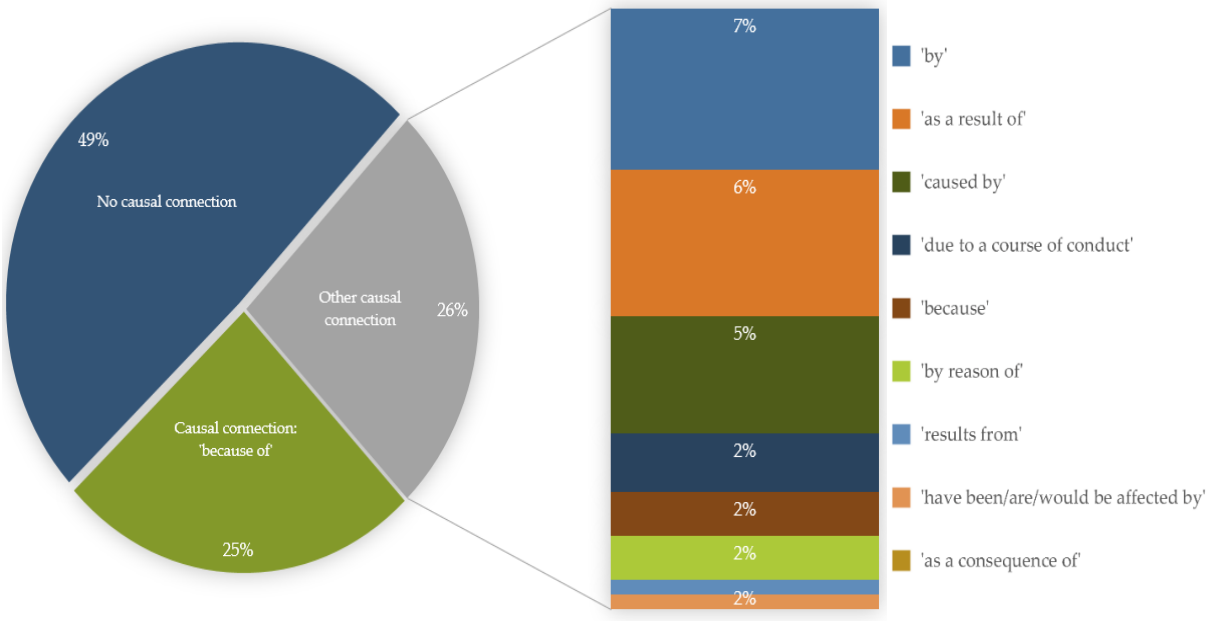

Figure 8 – Causal language across all 114 prohibition schemes

Where causation arises in statutory misleading conduct prohibition schemes, it generally does so in the context of private rights of redress, providing the necessary causal link between loss and damage and wrongdoing.[173] Indeed, of the 56 prohibition schemes with private rights of redress, 55 (or 98.2%) require proof of a causal link.[174] This approach is consistent with the general law demand for correlative and connected breach of duty on the one hand, and loss on the other.

5 *Causation – no causal connection required*

Of the 59 prohibition schemes that do not support any private right of redress (i.e. regulatory prohibitions), 53 do not utilise any causation requirement.[175] This reflects the position that contravention of the prohibition is generally actionable by a regulator without proof of causally-connected loss or damage. Given that causation is irrelevant to liability in 56/114 (49%) of all prohibition schemes, it also seems that prohibitions which do not rely on a causal nexus are overwhelmingly regulatory in nature (53/56). In such cases, these schemes reflect

[173] Cf. *Fair Work Act 2009* (Cth) ss 345, 349; *Retail Leases Act 1994* (NSW) s 62D.
[174] Cf. *Residential Tenancies Act 2010* (NSW) s 26(1).
[175] Of the 5 regulatory prohibition schemes which do require a causal nexus, 4 are reiterations of the same provision across the various state Legal Profession Acts: *Legal Profession Act 2006* (NT) s 179; *Legal Profession Act 2006* (ACT) s 162; *Legal Profession Act 2007* (Qld) s 172; *Legal Profession Act 2008* (WA) s 159. See also *Property Occupations Act 2014* (Qld) s 209.

a very pure and distinctively statutory instantiation of the normative prohibition on misleading conduct.[176]

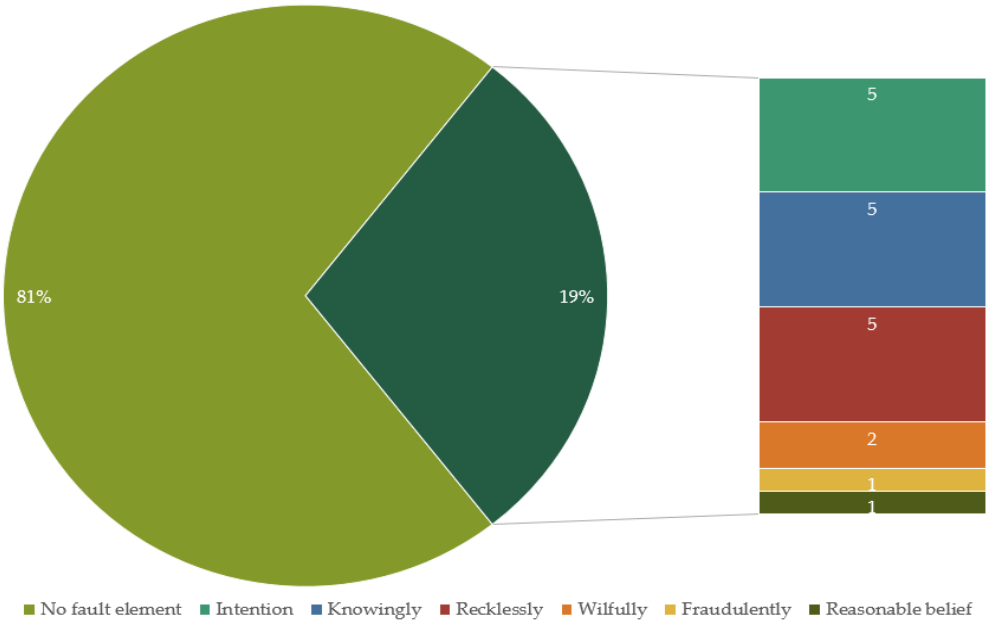

Figure 9 - Use of fault elements where causal connection is required

Jurisdictional priorities and regulatory frameworks appear to underpin the use of causation as part of misleading conduct prohibition schemes offering private redress. Indeed, 37 examples of such schemes are found in Commonwealth legislation, compared to 18 in state and territory legislation (led by New South Wales with a mere 5).[177] It is unclear whether this is suggestive of cross-jurisdictional divergence in preferring private over public models of enforcement.

[176] Bant and Paterson, 'Misleading Silence' (n 10) 9-10.
[177] Note that, as outlined in the Methodology section, this number does not include the state-based Fair Trading Acts, which follow from and apply the Commonwealth *ACL* at state level.

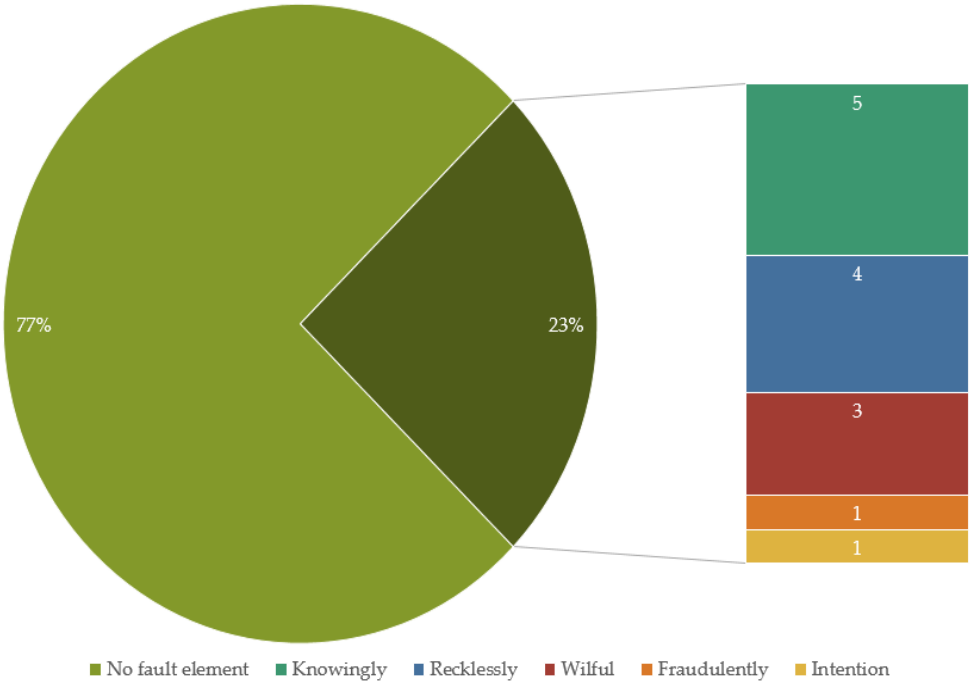

Figure 10 - Use of fault elements where no causal connection is required

More generally, beyond consideration of private rights of redress, prohibition schemes without causation requirements are typically strict liability in nature (43/56) (see Figure 10 below, and compare Figure 9 above). Of the prohibition schemes with a causal connection, 47 also do not require proof of fault (see Figure 9). We observe that where a strict liability prohibition scheme lacks a causal requirement, the focus is inevitably drawn to whether the defendant has engaged in the prohibited conduct *simpliciter*. This reinforces the strict liability nature of the prohibition scheme by avoiding any questions of blameworthiness which might otherwise be raised during a broad-based 'legal causation' enquiry into the defendant's scope of liability.[178] This approach to defendant liability may seem at odds with the law's traditional concern for individual autonomy, where liability follows only from losses caused or contributed to by the defendant's misconduct. However, it arguably reflects the public interest (expressly acknowledged in the statutory purposes) in prohibiting this form of misconduct, which is seen as being harmful beyond individuated cases to markets more generally.

[178] Simon Douglas, *Liability for Wrongful Interferences with Chattels* (Hart Publishing, 2011) 203-205, cited in James Edelman, *Unnecessary Causation* <https://www.supremecourt.wa.gov.au/_files/Unnecessary%20Causation.pdf> 19.

Purely regulatory schemes (which do not support private rights and often lack causation requirements) are generally strict liability in nature (52/59), and reflect this same public interest via regulatory enforcement. The 7 instances of regulatory schemes which retain fault may reflect particular policy considerations or stakeholder concerns. It seems, for example, that workplace legislation more commonly includes requirements to prove knowledge or recklessness as a condition of liability where, for example, false or misleading representations are made by workplace representatives and agents.[179] The retention of a fault element here (generally 'knowledge' or 'recklessness') may reflect some concern at the ease with which an innocent misrepresentation might be made,[180] confining the scope of the prohibition to conduct characterised by a lack of *bona fides*. It is clearly important that this distinctive legislative treatment is a measured and appropriate response to identified policy issues. We have seen earlier that courts elsewhere have proven eminently capable of assessment graduations of defendant culpability in the course of, for example, the penalty process.

Finally, as regulatory schemes, proof of loss or damage is not required in 54/59 instances.[181] Note however that, overall, 52/114 schemes require loss or damage to be proven (see Figure 11).

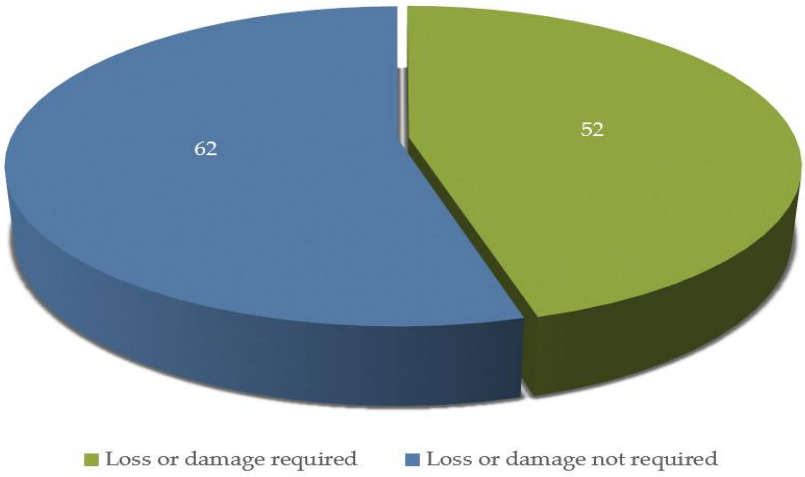

Figure 11 - Loss or damage required

[179] *Industrial Relations Act 2016* (Qld) s 289; *Entertainment Industry Act 2013* (NSW) s 2(9); *Work, Health and Safety Act 2011* (Cth) s 109.

[180] For example, a workplace relations representative might, without *mala fides*, make incorrect representations as to a worker's collective bargaining rights.

[181] Cf. *Legal Profession Act 2006* (NT) s 179; *Legal Profession Act 2006* (ACT) s 162; *Legal Profession Act 2007* (Qld) s 172; *Legal Profession Act 2008* (WA) s 159; *Property Occupations Act 2014* (Qld) s 209.

6 *Remedies & other redress*

For the purposes of the following analysis, it is helpful to categorise available remedies and other redress (sometimes referred to in the law of misleading conduct as a 'remedial smorgasbord')[182] thematically. Private law remedies are sometimes grouped by reference to the relationship between the remedy granted and the broader aims of the law (for example, punishment, deterrence, declaration, compensation or restitution).[183] One approach to remedial categorisation is therefore, broadly, to identify the goal sought to be achieved and group individual remedies against that aim.[184] This paper adopts a proximate division on the basis of function, both for reasons of pragmatism and because this approach tends to map the way in which these remedies are referred to in statute. Despite any taxonomical defects, and without attempting to formally map out the private law of remedies in Australia, this general and functional division is as follows:

- Action for damages
- Compensation order
- Injunction
- Restitution
- Account of profits/Disgorgement
- Civil penalty
- Criminal offence
- Other remedies[185]

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[182] *Akron* (n 9) 469 (Mason P).

[183] Kit Barker, 'Private and Public: The Mixed Concept of Vindication in Torts and Private Law' in S Pitel, J Neyers and E Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013) 59 ('*Vindication in Torts and Private Law*').

[184] Katy Barnett and Sirko Harder, *Remedies in Australian Private Law* (Cambridge University Press, 2014) 12 ('*Remedies in Australian Private Law*'). The authors note that, although reminiscent of grouping by aim, the division adopted in this paper is not the same. 'Damages' (see s 236 of the *ACL*), can, for example, overlap with compensation orders (see ss 237-239), both of which respond to loss or damaged suffered because of the defendant's misleading conduct. Similarly 'injunction' has been referred to as a species of vindication, where a court acts positively (and sometimes pre-emptively, in the case of a *quia timet* injunction) to affirm a right. For further discussion, see Bant and Paterson, 'Exploring the boundaries of compensation' (n 18).

[185] Although not specifically discussed below due to their piecemeal availability, these may be canvassed in the dataset.

As Figure 12 illustrates, remedial redress varies widely in focus. Compensation orders (excluding 'damages' orders, which may also have compensatory aims) are available in only 46/114 of prohibition schemes, suggesting that these orders are not the primary remedial focus of statutory misleading conduct prohibition schemes. Taken together with 'damages' orders however, an overwhelming 91/114 (80%) instances of remedies are compensatory in nature. By contrast, disgorgement awards (which require the defendant to 'give up' a profit obtained, even where the benefit has not necessarily come from the plaintiff's assets or labour)[186] are extremely rare and used only in highly specific circumstances, such as where the plaintiff has suffered no direct loss as a result of the defendant's use of a sporting symbol.[187]

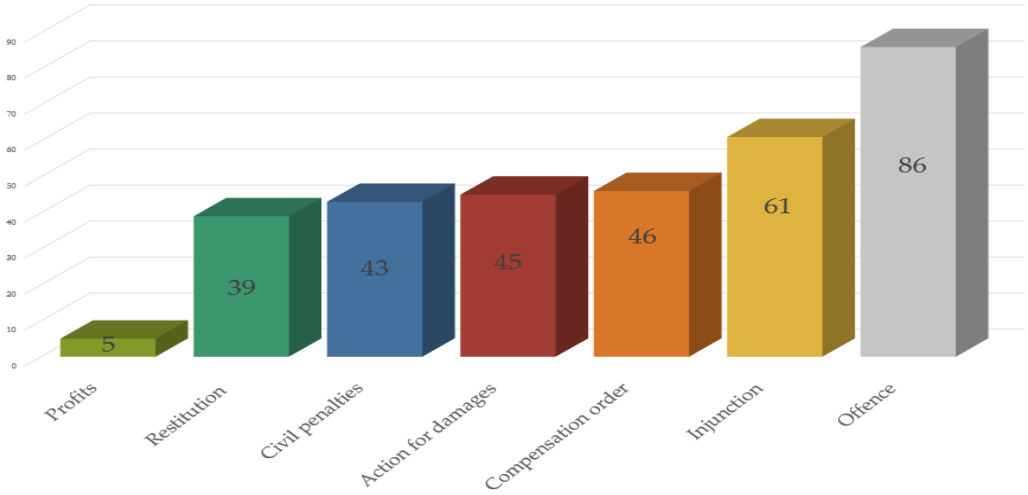

Figure 12 – Range of redress available (total)

[186] Bant and Paterson, 'Exploring the boundaries of compensation' (n 18) 158, citing *Anderson v McPherson* (No 2) (2012) 8 ASTLR 321 (Edelman J); James Edelman, James Varuhas and Simon Colton, *McGregor on Damages* (Sweet & Maxwell, 20th ed, 2018) ch 14.

[187] *Major Sporting Events (Indicia and Images) Protection Act 2014* (Cth) s 16; *Olympic Commonwealth Games Arrangements Act 2011* (Qld) ss 51, 52; *Insignia Protection Act 1987* (Cth) ss 8, 36.

Where sub-categories of remedial orders are not aggregated however, it is apparent that a dominant focus of the remedial regime is deterrent or punitive. 84/114 prohibition schemes (74%) resort to criminalisation of conduct (offences) as means for redress, either alone or alongside the imposition of civil penalties. These awards serve the ends of retribution and deterrence in a way that the compensatory focus of the regime may not, imposing upon the defendant 'an unwelcome consequence which goes beyond the obligation to compensate a plaintiff's loss and beyond stripping her of any net gain made from a rights infringement'.[188] The widespread availability of deterrent and punitive orders in the consumer protection sphere may also provide an opportunity to mark the court's disapproval of misleading conduct, stigmatise the defendant's misconduct, acknowledge the plaintiff's rights, and reverse intangible loss that is not captured by traditional monetary awards. [189] Notably, where a prohibition scheme has no causation requirement, and regulator enforcement is the primary response, available remedies are narrower and far more likely to have a punitive focus. Indeed, of the 56 schemes lacking a causal requirement, 47 have no available remedial redress other than deterrent or punitive remedies (penalties or offences). The large majority of these schemes (34/47) rely only upon offence-based redress, with 12 allowing for both penalties and offence and one relying solely upon penalties.

	Commonwealth	New South Wales	Victoria	Queensland	Western Australia	South Australia	Tasmania
Damages	●	◐	◐	◐	◐	◐	◐
Compensation	●	◐	◐	◐	◐	◐	◐
Injunction	●	◐	◐	◐	◐	◐	◐
Restitution	●	◐	◐	◐	◐	◐	◐
Disgorgement	○	⊗	⊗	○	⊗	⊗	⊗
Penalties	●	◐	◐	◐	◐	◐	◐
Offences	●	◐	◐	◐	◐	◐	◐
Other	○	○	○	○	○	⊗	○

	Australian Capital Territory	Northern Territory
Damages	◐	◐
Compensation	◐	◐
Injunction	◐	◐
Restitution	◐	◐
Disgorgement	⊗	⊗
Penalties	◐	◐
Offences	◐	◐
Other	○	○

Key

● = 20 or more instances

◐ = 10 or more instances

○ = 1 or more instance(s)

⊗ = Unavailable

Table 2 - Availability of redress across jurisdiction

[188] Barker, 'Vindication in Torts and Private Law' (n 183) 78.
[189] Ibid.

The availability of private rights of redress also varies widely across jurisdictions. When all 114 prohibition schemes are considered together, each scheme has a mean of 2.82 associated private remedies. Surprisingly, the median and modal availability of remedial redress is a meagre 1, driven down by the considerable number of prohibition schemes which rely solely on offence-based redress. Considering only state and territory prohibition schemes, the average number of remedies drops to 2, with a median availability of 2 and a modal availability of 1. However, when Commonwealth prohibition schemes are considered alone, the average number of remedies available rises sharply to 4.28, with a median of 4 and a modal availability of 6. This reflects a major federal-state divide as to the availability of private rights of redress (apparent in Table 2). Indeed, it appears that Commonwealth statutory remedies are rather dualist in nature – once liability has been determined, the court is given some latitude to exercises its discretion to choose the most appropriate remedy (the variety of remedies available for under the *ACL* a leading example). By contrast, state misleading conduct legislation appears relatively monist – the remedy often mirroring the plaintiff's cause of action and set by the law as appropriate to the specific primary right in question.[190] To some extent, this dichotomy may reflect the nature of principle-based prohibition schemes, which are more flexible, and are structured to avoid the static, unresponsive dangers of fixed rules and remedies.[191] Given the greater availability of remedial redress at Commonwealth level, it may also be less surprising that state misleading conduct prohibitions are relatively infrequently pleaded, and thus attract less judicial attention than their Commonwealth counterparts. That said, the existence of a private right of action, like the requirement for a causal connection, is almost evenly split (see Figure 13).

7 *Limitation periods*

Although statutory limitation periods are included within the dataset, analysis proved problematic, as a large number of limitation periods are conditional upon the occurrence or non-occurrence of particular events, or differ according to the

[190] For example, an infraction of s 121 of the *Credit Act 1984* (Vic) or *Credit Act 1984* (WA) s 121 may be remedied only by an action for damages. See generally Barnett and Harder, *Remedies in Australian Private Law* (n 184) 5.
[191] O'Shea and Rickett, 'In Defence of Consumer Law' (n 32) 145.

remedy sought.[192] Where these conditional and differential limitation periods are excluded from the data analysed, the mean limitation period is 4 years, with a modal period rising to 6 years. Given the number of conditional limitation periods (and lack of clarity in certain prohibition schemes, as marked in the dataset) we can only encourage those interested in this facet of the statutory landscape to examine the published raw data themselves for further information.

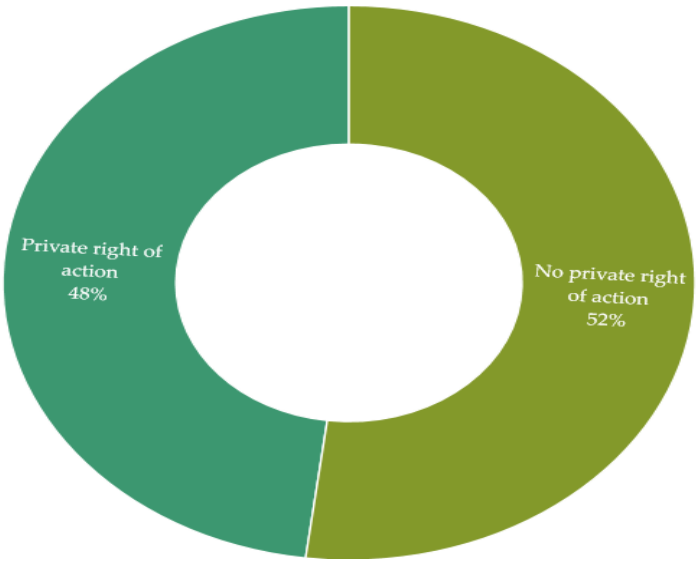

Figure 13 - Availability of a private right of action

VI Conclusion

This article provides a mud-map of the statutory laws that operate to regulate misleading conduct in Australia. It is not exhaustive, and leaves to one side the deeper questions of policy and principle that must be addressed for meaningful and beneficial reform. Nonetheless, the review provides significant support and, indeed, guidance, for pursuing a reform agenda aimed at principled simplification.

In particular, the survey discloses a wide range of points of divergence, overlap and redundancy in reiterations of the core prohibition found in s 18 *ACL*, none of which seems particularly helpful in pursuing what, overall, remain largely shared protective purposes. Rather, the consequence is to render the law more voluminous and varied, and consequently less accessible and certain. Courts

[192] For example, an action concerning a false, misleading or deceptive representation contrary to s 17 of the *Security and Investigation Industry Act 1995* (SA) must be brought within 2 years, or 5 years with Ministerial approval: s 44.

grappling with this complexity have generally adopted a robust interpretive approach designed to bring coherence and clarity to the position, but at the expense of the words of the provisions themselves. This approach reduces difference to redundancy, itself emphasising the desirability of reform. Conversely, recent authority has applied a rigorous, interpretive approach giving full effect to drafting differences that reflect distinctive legislative policy choices. However, those policies appear to be weak bases for sustaining the suite of variations on the core theme, and may be more sensibly addressed through other mechanisms. This includes an appreciation of the role of the courts in interpreting and applying the legislation, and the role of soft-law guidelines.

Structurally, this review shows how the many reiterations on the paradigm provision combine singular, multiple-singular and conjoint prohibitory phrases, again without clear rhyme or reason. Similarly, the elements and substance both of the applicable statutory standards and accompanying remedial schemes vary considerably. While we have not sought to assess the cogency of these changes in any great detail, we have seen that at least some reasons identified by courts (for example, those that adjust standards for civil penalty provisions to protect defendants from excessive liability) are open to significant doubt as to whether they are necessary or appropriate to achieve such ends.

Overall, the review suggests there is considerable merit in returning to the core prohibition, applicable across the spectrum of trade and commerce, and in revisiting its accompanying remedial schemes to ensure they support the protective and deterrent purposes of that overarching statutory norm. It also suggests more broadly a pressing need to continue and expand the ALRC's review of financial services legislation, prompted by the final report in the Financial Services Royal Commission. Indeed, against its findings, it seems well and truly time for parliaments across this nation to fundamentally reconsider any assumption that more legislation makes for better law. Rather, a pithy guiding principle as reform efforts continue may be 'less is more'.

ANNEXURE A

Australian Consumer Law

Australian Consumer Law and Fair Trading Act 2012 (Vic)

Australian Securities and Investments Commission Act 2001 (Cth)

Betting and Racing Act 1998 (NSW)

Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (ACT)

Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (Vic)

Classification (Publications, Films and Computer Games) Act 1995 (SA)

Classification (Publications, Films and Computer Games) Enforcement Act 1995 (NSW)

Classification (Publications, Films and Computer Games) Enforcement Act 1995 (Tas)

Classification (Publications, Films and Computer Games) Enforcement Act 1996 (WA)

Classification of Publications Act 1991 (Qld)

Classification of Publications, Films and Computer Games Act (NT)

Co-operatives (Adoption of National Law) Act 2012 (NSW)

Co-operatives (Adoption of National Law) Act 2015 (NT)

Co-operatives Act 2009 (WA)

Co-operatives National Law (South Australia) Act 2013 (SA)

Collections for Charities Act 2001 (Tas)

Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)

Commonwealth Games Arrangements Act 2011 (Qld)

Competition and Consumer Act 2010 (Cth)

Corporations Act 2001 (Cth)

Credit Act 1984 (Vic)

Disability Service Safeguards Act 2018 (Vic)

Education Services for Overseas Students Act 2000 (Cth)

Entertainment Industry Act 2013 (NSW) sch 1

Fair Trading (Motor Vehicle Repair Industry) Act 2010 (ACT)

Fair Work Act 2009 (Cth)

Food Act 2004 (NT)

Food Act 1984 (Vic)

Food Act 2001 (ACT)

Food Act 2001 (SA)

Food Act 2003 (NSW)

Food Act 2003 (Tas)

Food Act 2006 (Qld)

Food Act 2008 (WA)

Fundraising Act 1998 (Vic)

Health Practitioner Regulation National Law (South Australia) Act 2010 (SA)

Health Practitioner Regulation National Law (WA) Act 2010 (WA)

Health Practitioner Regulation National Law Act 2009 (Qld)

Home Building Contracts Act 1991 (WA)

Industrial Relations Act 2016 (Qld)

Land Sales Act 1964 (NSW)

Legal Profession Act (NT)

Legal Profession Act 2006 (ACT)

Legal Profession Act 2007 (Qld)

Legal Profession Act 2007 (Tas)

Legal Profession Act 2008 (WA)

Major Sporting Events (Indicia and Images) Protection Act 2014 (Cth)

National Consumer Credit Protection Act 2009 (Cth) sch 1

Olympic Insignia Protection Act 1987 (Cth)

Property Occupations Act 2014 (Qld)

Property, Stock and Business Agents Act 2002 (NSW)

Public Health Act 2010 (NSW)

Public Lotteries Act 1996 (NSW)

Residential (Land Lease) Communities Act 2013 (NSW)

Residential Tenancies Act 1997 (Vic)

Residential Tenancies Act 2010 (NSW)

Retail Leases Act 1994 (NSW)

Sale of Land Act 1962 (Vic)

Security and Investigation Industry Act 1995 (SA)

Security Industry Act 1997 (NSW)

Totalizator Act 1997 (NSW)

Tourism Tasmania Act 1996 (Tas)

Veterinary Chemical Control and Animal Feeding Stuffs Act 1976 (WA)

Veterinary Practice Act 1997 (Vic)

Work Health and Safety Act 2011 (Cth)