RETURNING TO SAMPLE THE REMEDIAL 'SMORGASBORD' FOR MISLEADING CONDUCT

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I INTRODUCTION

In *Akron Securities Ltd v Iliffe*[1] ('*Akron*') Mason P painted in colourful terms both the challenges and opportunities offered by the novel, illustrative list of discretionary orders for relief available under s 87 of the *Trade Practices Act 1974* (Cth) ('TPA') (now ss 237 and 243 of the *Australian Consumer Law* ('ACL'))[2] for misleading or deceptive conduct. Drawing on an increasingly rich seam of authorities on the topic, [3] his Honour emphasised the liberation of its operation, both from over-reliance on common law and equitable remedial analogues, and from assumptions based on its neighbouring provision of s 82 of the TPA/s 236 of the ACL statutory damages.[4] Mason P observed of the expansive range of the other, discretionary orders available to compensate victims of misleading or deceptive conduct under s 87:

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This article forms part of Australian Research Council Discovery Project DP18010093, entitled 'Developing a Rational Law of Misleading Conduct', led by Professor Jeannie Marie Paterson of Melbourne Law School and Professor Bant: see further https://unravellingcorporatefraud.com/developing-a-rational-law-of-misleading-conduct/. We would like to thank Professor Paterson for her insightful comments on an earlier draft and the anonymous reviewers. The authors have responsibility for all remaining errors and infelicities.
[1] (1997) 41 NSWLR 353 (Mason P, Priestley and Meagher JJA) ('*Akron*').
[2] *Competition and Consumer Act 2010* (Cth) sch 2 ('*ACL*').
[3] See, eg, *Mister Figgins Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23 (Northrop J) ('*Mister Figgins*'); *Deane v Brian Hickey Invention Research Pty Ltd* (1988) IPR 651 (Burchett J) ('*Deane*'); *Haydon v Jackson* (1988) ATPR 40-845 (Pincus J, Fisher and Lockhart JJ agreeing) ('*Haydon*'); *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546, 564, 571 (Lockhart, Burchett and Foster JJ) ('*Henjo*'); *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 43 (Gummow J, Black CJ and Cooper J agreeing) ('*Re Demagogue*'); *Farrow Mortgage Services Pty Ltd v Edgar* (1993) 114 ALR 1, 6 (Lockhart, Gummow and Lee JJ) ('*Farrow*'); *Russell & Sons Pty Ltd v Buxton Meats Pty Ltd* (1994) ATPR (Digest) 46-127, 53,614 (Ipp J) ('*Russel*'); *Kizbeau Pty Ltd v WG & B* (1995) CLR 281 (Brennan, Deane, Dawson, Gaudron and McHugh JJ) ('*Kizbeau*').
[4] See also *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 503–4 [17] (Gaudron J), 510 [38] (McHugh, Hayne and Callinan JJ), 529 [103] (Gummow J), 549 [152] (Kirby J) ('*Marks*'); *Tenji v Henneberry & Associates Pty Ltd* (2000) 98 FCR 342 (Carr J, French and Whitlam JJ agreeing) ('*Tenji*'); *Henville v Walker* (2001) 206 CLR 459, 501–2 [130]–[131] (McHugh J); *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 124–5 [42]–[48] (Gaudron, Gummow and Hayne JJ); *Murphy v Overton Investments Pty Ltd* 216 CLR 388 [44]–[45] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) ('*Murphy*'); *Awad v Twin Creeks Properties Pty Limited* [2012] NSWCA 200 (Allsop P, Macfarlan JA and Sackville AJA agreeing) ('*Awad*').

> Early case law took a narrow approach to s 87 of the *Trade Practices Act 1974* (Cth), with courts fearing to move far from the familiar coastline of traditional common law and equitable approaches. But it is now clearly established that s 87 is to be given no restrictive interpretation.[5]

His Honour memorably underscored the court's obligation to review the full range of options, in exercise of an active judicial discretion: 'There is no point in having a remedial smorgasbord if the table is not scanned at least briefly to see what is best on offer.'[6]

Some quarter-century later, this article reviews the case law following *Akron* to identify and investigate trends of reasoning relating to the range of discretionary orders available to remedy misleading or deceptive conduct, now prohibited through a huge range of parallel statutory schemes at the Commonwealth and State levels.[7] Our aim is to understand whether, where, and why courts have been prepared to heed the call and opportunity, to move beyond the safety of general law coastlines and move into deeper remedial waters. Or, to adapt the smorgasbord metaphor, what appetite have courts shown for crafting novel forms of statutory relief from the statutory ingredients on offer?

As we will see, the analysis suggests that courts have indeed moved to embrace the potential of s 87 of the TPA/ss 237 and 243 of the ACL orders to go beyond the relief available at common law or in equity. Strikingly, most involve commercial cases with corporate plaintiffs, so cannot readily be characterised in terms of instances of judicial sympathy for, or a particular protective policy favouring, consumer victims, although many also involve small businesses. Across the spread of cases, three main forms of orders have gained repeated endorsement and application. Statutory orders analogous to equitable rescission have been crafted in ways that take advantage of equitable insights, while being prepared to depart from these where the circumstances, statutory language, and purpose so require. Courts have also repeatedly exercised their remedial discretion to engage in partial avoidance and to vary terms of contracts entered into as a result of misleading or deceptive conduct. Moreover, consistently with Mason P's direction in *Akron*, in many cases, these orders were made on the judge's own initiative, rather than reflecting the parties' pleas for relief. In some jurisdictions, without the benefit of

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[5] *Akron* (n 1) 467 (Mason P). The reasons for that caution are the subject of careful analysis, connecting the caution to the initial, restrictive form of s 87 relief as ancillary to s 82 damages, by French J in *Tenji* (n 4). See also the discussion by the Full Federal Court of the legislative history of s 87 in *Mayne Nickless Limited v Multigroup Distribution Services Pty Limited* (2001) 114 FCR 108, 119–21 [34]–[42] (Wilcox, French and Drummond JJ).

[6] *Akron* (n 1) 364 (Mason P).

[7] For an early, seminal analysis cited in *Akron* (n 1), see Diane Skapinker, 'Other Remedies Under the Trade Practices Act: The Rise and Rise of Section 87' (1995) 21 *Monash Law Review* 188.

similar legislative schemes, such orders would likely be considered highly controversial and reflective, in some eyes at least, of a non-judicial function.[8]

However, our analysis also suggests that, far from disclosing exercise of some unfettered judicial appetite for 'discretionary remedialism',[9] courts have exercised considerable restraint when ordering relief through these provisions. The orders have tended to follow similar patterns of reasoning and limits, founded on a clear understanding of, on the one hand, the limits of 'once and for all' pecuniary relief in cases of ongoing contractual obligations induced by misleading or deceptive conduct and, on the other, the potentially disproportionate impact of orders effecting wholesale rescission.

However, in one respect, the trend of reasoning may be controversial.[10] In varying contracts, courts' orders have had the effect of placing the parties in the represented position, rather than the position the parties would have occupied had there been no misleading or deceptive conduct, or in the position they occupied prior to entry into the impugned transaction. This marks a clear departure from the usual tortious or rescission-like remedial approaches to statutory damages and 'other orders' in response to misleading or deceptive conduct.[11] Indeed, variation may go well beyond contractual measures of damages, as a once and for all remedy, to bind parties to fresh and ongoing contractual obligations consistent with the

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[8] See, eg, *Myddleton v Lord Kenyon* (1794) 2 Ves 391, 408; (1794) 30 ER 689, 698–9; *TSB Plc Bank v Camfield* [1995] 1 All ER 951, 958–9 (Nourse, Roch and Henry LJJ); *De Molestina v Ponton* [2002] 1 All ER (Comm) 587, 609. Cf *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102, 115–6 (Deane, Dawson, Toohey, Gaudron and McHugh JJ), where the High Court, taking its cue from statutory provisions permitting partial avoidance, exercised its equitable jurisdiction to set aside a guarantee for misrepresentation as to future indebtedness only. Like many of the variation orders discussed below, this appears to place the parties in the represented position. Interpretation the nature of the order in that case is, however, mixed. Cf Daniel Meikle, 'Partial Rescission – Removing the Restitution from a Contractual Doctrine' (2003) 19 *Journal of Contract Law* 40 (rectification); Mindy Chen-Wishart, 'Unjust Factors and the Restitutionary Response' (2000) 20(4) *Oxford Journal of Legal Studies* 557; Louis Proksch, 'Rescission on Terms' (1996) 4 *Restitution Law Review* 71 (rescission on terms). Further exploration of the influence, or potential influence, of statutory reasoning on general law remedial principles cannot be attempted here, but for some discussion see 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.

[9] Peter Birks, 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 (1) *University of Western Australia Law Review* 1. Cf Simone Evans, 'Defending Discretionary Remedialism' (2001) 23(4) *Sydney Law Review* 463.

[10] See, eg, the robust criticisms levelled at *Murphy* (n 4) in *Jamieson v Westpac Banking Corporation* [2014] QSC 32 [188]–[194] (Jackson J) ('*Jamieson*'), which his Honour considered would support damages awards under *Trade Practices Act 1974* (Cth) s 82 ('*TPA*')/*ACL* (n 2) s 236 that have the effect of operating as a contractual guarantee: 'it gives [the plaintiffs] a benefit they could not and would not have obtained if there had been no misleading or deceptive conduct.' An appeal against the decision was dismissed in *Westpac Banking Corporation v Jamieson* [2015] QCA 50 (Applegarth J, McMurdo P and Morrison JA agreeing).

[11] The exception to this trend being *Murphy* (n 4) which has, however, itself been usually distinguished and confined to its facts. See *Jamieson* (n 10) for a sample of the criticism.

represented position. How this aligns with the statutory prohibitions on misleading or deceptive conduct, and the gateway requirement that the court's discretion be used to prevent or reduce loss or damage likely to be suffered because of misleading or deceptive conduct, remains fully to be explained. We consider some possibilities briefly, in addressing the cases.

After setting out briefly the methodology adopted in undertaking this review, the analysis commences with statutory orders that operate akin to equitable rescission ('statutory rescission'), including through consideration of the decision in *Akron* itself. The analysis is timely, given the proper approach to be adopted by courts in making orders for statutory rescission has recently been the subject of extended analysis by the Full Federal Court. It is also valuable because courts have repeatedly and expressly reflected, at length, on the distinctions between the analogous statutory and general law orders effecting rescission, and on the preconditions, or gateway, for relief that must be cleared in order for the court to exercise its remedial discretion. Indeed, we consider that the analysis of statutory rescission, and courts' principled departures from more traditional patterns and limits of equitable reasoning and limitations in that space, may explain courts' readiness to use partial rescission and variation orders, the subject of the next two sections. The earlier analysis of statutory rescission also highlights the novel aims of many variation orders, which seek to make good the loss of the defendant's represented position.

II METHODOLOGY AND OPENING OBSERVATIONS

As explained previously, our aim in reviewing the case law following *Akron* was to see the extent to which courts have been prepared to move beyond the safety of general law coastlines into deeper remedial waters. As part of an Australian Research Council project examining the regulation of misleading or deceptive conduct across common law, equity and statute, teams of researchers have 'mapped' the many iterations of the core prohibition on misleading or deceptive conduct and their remedial schemes.[12] At least 114 statutory prohibitions on misleading or deceptive conduct were identified, spanning 69 statutes and nine jurisdictions. These contained a variety of prohibitions, threshold requirements, causal necessities, fault elements and associated remedies. We used this data to identify equivalent remedial provisions across the statute books to the paradigm provisions of s 87 of the TPA and ss 237/243 of the ACL.

[12] See Unravelling Corporate Fraud: Repurposing Ancient Doctrines for Modern Times (Web Page, 2021) < https://unravellingcorporatefraud.com/>. The initial analysis of this data is contained in Joseph Sabbagh, Elise Bant and Jeannie Paterson, 'Mapping Misleading Conduct' (forthcoming).

Using the current provisions as our prototype, as is well-known, s 237(1) of the ACL ('Compensation orders etc on application by an injured person or the regulator') provides that a court may 'on application of a person (the injured person) who has suffered, or is likely to suffer, loss or damage because of' misleading or deceptive conduct 'make such order or orders as the court thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct'. Viewed against general law remedial principles, this section is distinctive in three ways: its embrace of an active judicial discretion; for the availability of relief (where 'the court thinks appropriate') in respect of loss or damage that has not yet occurred ('likely to suffer'), and for its application against third parties 'involved in' the misconduct. Section 237(2) of the ACL further provides that any order made under s 243 'must be an order that the court considers will: (a) compensate the injured person, or any such injured persons, in whole or in part for the loss or damage; or (b) prevent or reduce the loss or damage suffered, or likely to be suffered'. Again, the broad, compensatory aim to prevent or reduce loss or damage likely to be suffered is a distinctive feature of this sub-provision, consistent with and guiding the discretionary authority conferred by s 237(1).

Section 243 then states the 'Kinds of orders that may be made':

> Without limiting section 237(1), 238(1) or 239(1), the orders that a court may make under any of those sections against a person (the respondent) include all or any of the following:
>
> (a) an order declaring the whole or any part of a contract made between the respondent and a person (the injured person) who suffered, or is likely to suffer, the loss or damage referred to in that section, or of a collateral arrangement relating to such a contract:
>
> (i) to be void; and
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> (ii) if the court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
>
> (b) an order:
>
> (i) varying such a contract or arrangement in such manner as is specified in the order; and
>
> (ii) if the court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
>
> (c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;
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> (d) an order directing the respondent to refund money or return property to the injured person;

> (e) except if the order is to be made under section 239(1)—an order directing the respondent to pay the injured person the amount of the loss or damage;
> (f) an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that had been supplied by the respondent to the injured person;
> (g) an order directing the respondent, at his or her own expense, to supply specified services to the injured person;
> (h) an order, in relation to an instrument creating or transferring an interest in land, directing the respondent to execute an instrument that:
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> (i) varies, or has the effect of varying, the first mentioned instrument; or
>
> (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first mentioned instrument.

Our review of the broader statutory landscape to identify equivalent provisions revealed some interesting features. In particular, it is apparent that the prohibitions on misleading or deceptive conduct in many legislative instruments regulating particular forms of trade or commerce do not give rise to equivalent, or any, rights of consumer redress, but are enforceable through regulator action.[13] In other statutes, the private rights of redress for misleading or deceptive conduct do not include an equivalent to the statutory smorgasbord under s 243 of the ACL,[14] or only do so in relation to the companion prohibition on unconscionable conduct.[15] Why this is so is unclear. Given the clear value of these orders to consumers and traders alike, discussed below, their omission constitutes a real gap in legislative protection.[16]

Further, where analogous provisions are included, some have been the subject of only very limited, or no, judicial consideration.[17] The paradigm provisions (here,

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[13] See, eg, *Work Health and Safety Act 2011* (Cth) s 260; *Property Occupations Act 2014* (Qld) s 173; *Property and Stock Agents Act 2002* (NSW) s 215; *Totalizator Act 1997* (NSW) s 102; *Veterinary Chemical Control and Animal Feeding Stuffs Act 1976* (WA) s 64.

[14] See, eg, *Credit Act 1984* (WA) ss 117, 121; *Credit Act 1984* (Vic) ss 117, 121; *Disability Service Safeguards Act 2018* (Vic) s 267(2); *Industrial Relations Act 2016* (Qld) ss 289, 293; *Land Sales Act 1964* (NSW) s 12(3); *Public Health Act 2010* (NSW) s 99; *Public Lotteries Act 1996* (NSW) s 39; *Residential (Land Lease) Communities Act 2013* (NSW) ss 18, 25; *Sale of Land Act 1962* (Vic) s 12; *Security and Investigation Industry Act 1995* (SA) ss 17, 37; *Security Industry Act 1997* (NSW) s 33(1).

[15] See, eg, *Retail Leases Act 1994* (NSW) ss 62D, 62E, where the private rights of redress for misleading or deceptive conduct do not include an equivalent statutory smorgasbord. However, the private rights of redress for unconscionable conduct do include an equivalent statutory smorgasboard: see s 72AA; *Spuds Surf Chatswood Pty Ltd v PT Ltd (No 4)* [2015] NSWCATAP 11.

[16] Even with the smorgasbord offerings there are some noteworthy gaps: see 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; Sabbagh, Bant and Paterson 'Mapping Misleading Conduct' (n 12).

[17] See, eg, *National Consumer Credit Protection Act 2009* (Cth) s 178; *Major Sporting Events (Indicia and Images) Protection Act 2014* (Cth) s 16; *Olympic Insignia Protection Act 1987* (Cth) s 45;

including those replicated in State fair trading acts) were by far and away the most commonly addressed, followed by those in the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') and the *Corporations Act 2001* (Cth) ('Corporations Act'). This observation in turn raises a question mark over the value of burdening our statute books with parallel and overlapping consumer protection regimes, which seem largely otiose and unused.[18]

Having identified the provisions the subject of judicial decision, we attempted to identify all cases that have addressed or considered the operation of these provisions since *Akron*. We cross-checked these more specialised searches with more generalised methods, such as searching Austlii, Lexis Advance and Westlaw AU for cases that cited *Akron*, or other leading authorities in the field (limited by date), such as *Re Demagogue Pty Ltd v Ramensky* ('*Re Demagogue*'),[19] which combined phrases such as 'misleading conduct' and potential remedial markers such as 'rescission', 'partial rescission', 'avoidance,' 'refund' and so on.

Once a pool of relevant cases was identified, it became clear that there were four main bodies of legislative regimes in play: the paradigm provisions and their equivalents in State fair trading acts, and parallel provisions under the ASIC Act and the Corporations Act. Moreover, the kinds of orders fell into three main groups. Statutory rescission, generally combining some combinations of ss 243(a), (d) and (e) of the ACL or equivalent, was by far the most usual 'other order' sought and awarded in response to misleading or deceptive conduct. Orders varying a contract pursuant to s 243(b) of the ACL or equivalent, or expressly effecting partial statutory rescission (again, generally using s 243(a), (d) and (e) but in respect of some part only of the impugned transaction), were far less common but also repeated relatively frequently, compared to other orders. In many cases, orders were made without specifying a particular subsection but in a manner consistent with these provisions or some combination of them. There were a handful of cases in which courts refused to enforce a contractual clause pursuant to s 87(2)(ba) of the TPA, the precursor to s 243(c) of the ACL. Some of these, however, seemed to fall within a broader set of orders designed to effect statutory rescission, or to provide

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Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA) s 16D; *Commonwealth Games Arrangements Act 2011* (Qld) s 63; *Home Building Contracts Act 1991* (WA) s 17.

[18] For discussion of some consequences of this proliferation, see Sabbagh, Bant and Paterson 'Mapping Misleading Conduct' (n 12); Elise Bant and Jeannie Marie Paterson, 'Misleading Conduct before the Federal Court: Achievements and Challenges' in Pauline Ridge and James Stellios (eds), *The Federal Court's Contribution to Australian Law: Past, Present and Future* (The Federation Press, 2018); Elise Bant and Jeannie Marie Paterson, 'Developing a Rational Law of Misleading Conduct' in John Eldridge, Michael Douglas and Claudia Carr (eds), *Economic Torts and Economic Wrongs* (Hart Publishing, 2021) (forthcoming).

[19] *Re Demagogue* (n 3). For a range of cases expressing similar approaches, including *Akron* (n 1), see, eg, *Mister Figgins* (n 3); *Deane* (n 3); *Haydon* (n 3); *Henjo* (n 3); *Re Demagogue* (n 3); *Farrow* (n 3); *Russel* (n 3); *Kizbeau* (n 3).

relief from a specific contractual provision without revoking the transaction as a whole. To that extent, they were similar in function to partial rescission or variation orders. Similarly, orders to rescind contracts in relation to the transfer of land did not necessarily invoke s 243(h) explicitly, but rather appeared to proceed under the more general order under s 243(a).

Overall, these features suggest that courts have been eschewing a formalistic approach to the range of orders offered in s 243 of the ACL and equivalents. Rather, courts are taking a functional approach, which (we will see) is designed to meet the particular compensatory objective necessary to meet the justice of the case, consistent with the language and protective purpose of the ACL. As Allsop P put it in *Awad v Twin Creeks Properties Pty Limited*,[20] relief under s 87 of the TPA 'should be viewed not by reference to general law analogues but by reference to the rule of responsibility in the statute that is directed against misleading and deceptive conduct…'[21] His Honour expanded on this observation:

> Involved in that rule of responsibility is the public policy of protection of people in trade and commerce from being misled, and the width of the powers given by the TPA that are apt to be employed in a manner conformable with the just compensation or protection of the representee. Whether or not to grant a form of rescission under s 87, or to limit a plaintiff to damages under s 82, is a question in the nature of a discretion to be approached by reference to the facts of the particular case, the policy and underpinning of the TPA and the evaluative assessment of what is the appropriate relief to compensate for, or to prevent the likely suffering of, loss or damage "by" the conduct.[22]

For these reasons, we have not structured our discussion by reference to discrete sub-provisions, which would not reflect the trend of courts' discretionary reasoning, but rather functionally, by reference to the overall effect of the form of order delivered in the cases under consideration.

In concluding these opening remarks, we note that the final stage of active research was to analyse the identified cases by reference to a range of criteria. These included: the nature of the transactions the subject of misleading or deceptive conduct; the nature of the plaintiff (natural or corporate person) and, if a corporate person, whether the corporation was effectively the corporate vehicle for a natural person; the forms of relief sought; the form of orders made and refused; specific sub-provisions identified in making the order for relief; and, last but not least, the substantive reasoning and arguments that underpinned the determination. Importantly, throughout, the aim has not been to engage in some quantitative

[20] *Awad* (n 4).
[21] Ibid [43].
[22] Ibid.

exercise or exhaustive survey of cases. Rather, the aim is to identify a representative sample of authorities that may then be subject to an interpretive analysis, to identify and explore trends of judicial reasoning in respect of the available range of orders. It is to this interpretive task that we now turn.

II STATUTORY RESCISSION

The recent Full Federal Court decision in *Harvard Nominees Pty Ltd v Tiller*[23] is a valuable starting point for interrogating the 'other orders' made under ss 237/243 of the ACL for a number of reasons. Of broader interest is likely to be the extended, critical discussion of the High Court's direction in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[24] concerning the obligation of lower courts to follow 'seriously considered dicta' of the High Court.[25] For current purposes, however, we focus on three other, significant features. First, the Court engages in the most rigorous analysis of the meaning of the phrase 'loss or damage' for the purposes of s 87 of the TPA/s 237 of the ACL since the seminal decision of *Re Demagogue*, on which Mason P's reasoning in *Akron* itself firmly rested. This meaning is critical, as it forms the 'gateway' to the remedial smorgasbord in s 243 of the ACL. Second, the Court considers closely the distinctive features of equitable rescission compared to statutory rescission. Third, the reasoning of the Court illustrates the subtle, creative and yet principled approach we consider has been adopted by courts in exercising the remedial discretion conferred by ss 237/243. In this exercise, the Court drew heavily on leading authorities, including *Akron*, that elucidate the metes and bounds of statutory relief. In these respects, it provides a solid foundation for thinking more broadly about the key considerations and patterns of analysis that characterise the range of court orders envisioned by s 243 of the ACL.

Harvard involved a complex set of overlapping transactions including lease surrenders, new grants of leases and transfers of leases relating to farming land. Stripped to its essentials (and collapsing the various sub-leases and sub-lease surrenders for narrative purposes), Mr Tiller was a tenant of farms owned by Harvard Nominees Pty Ltd ('Harvard Nominees'). He was suffering from severe financial difficulties. Mr John Carratti, the director and 'mind and will' of Harvard Nominees, decided to enter into a series of related transactions on terms generous to Mr Tiller, to assist him through the difficult period. Following surrender of

[23] (2020) 385 ALR 595 (Lee, Anastassiou and Stewart JJ) ('*Harvard*').
[24] (2007) CLR 89 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).
[25] Ibid 159 [158].

various related leases, Harvard Nominees granted fresh leases of farming land to Mr Tiller and his company, Dimension Agriculture Pty Ltd ('Dimension').

Subsequently Harvard Nominees became aware that Dimension was a vehicle of a third party, Mr Nicoletti, and had been structured to conceal this fact from Mr John Caratti. This was important for two reasons: the first was that Mr John Carratti 'bore a great deal of animosity' towards his brother, Mr Allen Carratti, and regarded Mr Nicoletti as a very close associate of ('bonded to') his brother;[26] secondly, Mr Nicoletti had the capacity to pay a significantly higher rent than that proposed under the new lease documents. The identity of the lessee was thus a crucial consideration in both entry into the leases and their terms. As explained in Harvard Nominees' opening submission:

> [Harvard Nominees'] complaint is that control of the Farms passed from someone it was prepared to support in times of difficulty to someone who deserved no such support, and the circumstances in which that took place was effectively through the auspices of [Mr Tiller, Mr Nicoletti] and [Mr Bryce] acting in concert to give Harvard [Nominees] the misleading impression that he would be assisting [Mr Tiller] at a time of personal crisis when, in reality, he would be providing assistance to [Mr Nicoletti], whom he knew and did not wish to assist in any way at all.[27]

As soon as it became aware of the ruse, Harvard Nominees purported to 'rescind' the leases and to enter into fresh leases in favour of the Fowler family, on far more commercially advantageous terms. However, Mr Tiller and Dimension refused to vacate the farming land and, as a result, Harvard Nominees could not give the Fowler family the required vacant possession. Unbeknownst to Harvard Nominees, moreover, Mr Tiller had, in the interim, wholly assigned his interests under the lease to Dimension and agreed to withdraw entirely from the farming activities on the property.

The trial judge found that both this, and the concealment of the lessee's true identity, constituted misleading or deceptive conduct. However, his Honour denied relief on the ground that Harvard Nominees had suffered no 'loss or damage' for the purposes of s 237 of the ACL, the gateway to relief through s 243 orders.[28] On appeal, the Full Federal Court considered that this conclusion was possibly due to his Honour's expectation that Mr Tiller, facing as he did severe financial difficulties, may have ended up being incapable of performing the original leases and, hence, his surrender of the original leases and entry into subsequent leases may

[26] *Harvard* (n 23) 597 [1].
[27] Ibid 602 [25].
[28] *Harvard Nominees Pty Ltd v Tiller (No 2)* [2020] FCA 604, [533] (Jackson J).

have left Harvard Nominees overall in a better financial position than if no new transactions had been entered at all.[29]

From the outset, the Full Federal Court noted that the case was unusual, being squarely based on statutory relief and, in particular, statutory rescission only. This had apparently led to some confusion below about what Harvard Nominees was purporting to do in 'giving notice of rescission' to Tiller and Dimension and any consequences of that notice. Presumably, this is because of the potentially proprietary consequences effective rescission at common law or in equity might have yielded, although as we will see, both in this case and below, statutory rescission is wholly capable of unpacking events retroactively to great effect.[30] In any event, Harvard Nominees' litigation strategy made satisfaction of the conditions for relief under s 237 of the ACL critical. As the Court explained:

> given the absence of any relief sought in equity or at common law, the "gateway" to the granting of statutory rescission or the further orders required proof by Harvard of loss or damage (actual or potential in the sense of "likely") "because of" the contravening conduct.[31]

In overturning the trial judge's decision on this point, the Full Federal Court endorsed the approach taken in *Re Demagogue*, also cited with approval in *Akron* by Mason P, that 'loss or damage' for the purposes of s 87 of the TPA/s 237 of the ACL is broader than that taken in s 82 of the TPA/s 236 of the ACL. Not only does it extend beyond economic loss, but it may be satisfied by entering into contractual obligations because of the misleading or deceptive conduct. More specifically, the Court endorsed:

> [t]he relevant dictum in *Demagogue* … that the loss or damage contemplated by s 87(1A) (now s 237 of the ACL) includes the detriment suffered by being bound to a contract unconscionably induced (at FCR 32; ALR 610 per Black CJ and FCR 44 per Gummow J), or that it includes the disadvantage of incurring contractual obligations which would not have been incurred but for the conduct complained of (at FCR 47; ALR 625 per Cooper J).[32]

In reaching this view, the Court considered in detail, and rejected, arguments (accepted at first instance) that *Re Demagogue* had, on this point, been disapproved by a majority of the High Court in *Marks v GIO Australia Holdings* ('*Marks*')[33] or

[29] *Harvard* (n 23) 622 [87].
[30] See also *Platz v Creatives's Landscape Design Centre Pty Ltd* (1989) ATPR 40-947, 53,020–2 ('*Platz*'); *Tenji* (n 4) 332–3 [17] (French J); *ZX Group Pty Ltd v LPD Corporation Pty Ltd* [2013] VSC 542, [142] (Williams J) ('*ZX Group*').
[31] *Harvard* (n 23) 599 [12].
[32] Ibid 620 [77].
[33] *Marks* (n 4).

was inconsistent with other High Court authority on s 82 of the TPA/s 236 of the ACL damages, in particular *Wardley Australia Ltd v Western Australia* ('*Wardley*').[34] Having taken that position, however, the Full Federal Court went on to explain that, in any event, the contractual relationship established through misleading or deceptive conduct in the case before it was clearly 'prejudicial' or 'disadvantageous', in a broad sense of 'loss or damage' that goes beyond purely economic loss.[35] This expansive meaning has been clearly endorsed by the High Court both in *Marks* and *Wardley*, as satisfying s 87 of the TPA/s 237 of the ACL.[36] Here, Harvard Nominees entered into leases with Mr Tiller and Dimension on terms that were unduly advantageous to the latter, because of Harvard Nominees' misapprehension that it was dealing with Mr Tilbury, not (in effect) Mr Nicoletti. Hence its loss and damage could be understood, relevantly, as 'being bound to a contract with someone it strenuously wishes not to be contracted to on terms it would not have agreed'.[37]

In revisiting Harvard Nominees' pleas for relief, the Court accepted that rescission of the full suite of transactions was not possible because of the interlocking nature of the various historical lease-surrender and subsequent lease transactions, which involved third parties.[38] This did not, however, necessarily preclude a more precise role for statutory rescission. Here, the Court considered that relief must be assessed by reference to 'the particular loss or damage that Harvard [Nominees] identifies as having been caused by the contravening conduct such as to justify the relief that it seeks'.[39] The relevant loss or damage was that Harvard Nominees had been yoked into an ongoing contractual relationship with an unwanted lessee. It was therefore arguable that only statutory rescission could release Harvard Nominees from that relationship:

> Any economic benefit that Harvard [Nominees] might hypothetically have enjoyed as a consequence of the suite of transactions as a whole would not offset that particular form of loss or damage on which it relies for the rescission relief that it seeks.

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[34] (1992) 175 CLR 514 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Wardley*').
[35] *Harvard* (n 23) 613 [47].
[36] *Wardley* (n 34) 526; *Marks* (n 4) 513 [46].
[37] *Harvard* (n 23) 621 [82].
[38] Whether this could be challenged on the basis that the other parties were 'associated' with the misconduct seems not to have been addressed. The Court noted that no party wished to return to the pre-contractual position. Contrast Mason P's approach in *Akron* (n 1) excerpted immediately below, *Macfarlane v Heritage Corporation (Aust) Pty Ltd* [2003] QSC 350 (Williams JA, McMurdo P and Mullins J agreeing) ('*Macfarlane*') and *Morellini v Adams* [2011] WASCA 84 (McLure P, Pullin and Newnes JJA agreeing) ('*Morellini*'). In the latter, refund orders were made personally against the director of the corporation whose shares where the subject of the dispute.
[39] *Harvard* (n 23) 622 [86].

> Rescission (or termination), as opposed to statutory damages, is the only relief that can cure that loss or damage.[40]

On this point, the Full Federal Court cited *Metz Holdings Pty Ltd v Simmac Pty Ltd (No 2)*,[41] in which Barker J of the Federal Court had similarly noted that 'to leave the first applicants without the remedy of rescission, and merely to order damages (which would be no precise task in any event), would be to condemn the first applicants to a continuation of a sale transaction that was tainted from the outset with the fundamental misrepresentations…'[42]

The Court further noted that, because Harvard Nominees' notice of 'rescission' had been rejected, it had been unable to take the benefit of the more advantageous effect of the Fowler leases. Statutory damages under s 236 of the ACL reflecting that loss might be coupled with statutory rescission under ss 237/243.[43] Conversely, in exercising statutory rescission, it may be necessary to take into account in the orders, changes in the lessee's position, which apparently had spent millions of dollars on the lease properties.[44] This would be consistent with the position for equitable rescission. However, as the Court noted, the date from which statutory rescission was effected would be critical to this question, implicitly there re-emphasising its separation from the equitable remedy. The Full Court remitted the matter to the trial judge to settle these questions.

Another recent, good example of the full power and proportionate use of statutory rescission, coupled with other orders under ss 237/243 of the ACL, is *Henderson v McSharer* ('*Henderson*').[45] This is a case that involves some interesting, shared features with, and salient points of divergence from, *Harvard*. As Gilmour J of the Federal Court explained, this was a case of commercial dishonesty. Similarly to *Harvard*, Mr and Mrs Henderson were farmers facing severe financial difficulties. However, unlike in that case, no beneficent fellow-farmer offered the Hendersons assistance. Rather, the respondent, Mr McSharer, engaged in misleading or deceptive conduct, unconscionable conduct (involving a combination of deceptive, bullying and intimidatory tactics) and deceit towards the

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[40] Ibid.
[41] [2011] FCA 981 (Barker J).
[42] Ibid [873]. See also *Awad* (n 4) [43]–[46] (Allsop P).
[43] Presumably, compensation under *ACL* (n 2) ss 237/243 would also be available, but not as of right.
[44] See also *Smolonogov v O'Brien* (1982) 44 ALR 347, 362–4; *Platz* (n 30) 50,320–2 ('*Smolonogov*'); *Tenji* (n 4) 332–3 [17] (French J); *Jewelsnloo Pty Ltd v Sengos (No 2)* [2016] NSWSC 61, [166]–[167], [184] (Macfarlan JA, Beazley ACJ and Payne JA agreeing) ('*Jewelsnoo*'). Whether this should be so is contestable, potentially depending on whether any of the expenditure resulted in wanted or lasting improvements to the land and whether the Mr Nicoletti could be regarded as having engaged in good faith changes of position, which must be doubtful: see Elise Bant, 'Rescission, Restitution and Compensation' in Simone Degeling and Jason Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (1st edn, Hart Publishing, 2017).
[45] [2015] FCA 396 (Gilmour J) ('*Henderson*').

Hendersons, in which his wife, Mrs McSharer, and a company controlled by him, Astraea, were involved, for their joint profit. More specifically, Mr McSharer induced the Hendersons into engaging him as their business consultant, and transferring a flock of valuable sheep to Astraea at a gross undervalue, which were then sold. The Hendersons never received any of the sale proceeds. Throughout, the Hendersons acted in reliance on Mr McSharer's false representations that he was a qualified business consultant and lawyer who was able to help them out of financial difficulty.

As in *Harvard*, on realising their position, the Hendersons purported to rescind the transactions by notice to the respondent, which was rejected. Unlike that case, however, Gilmour J was not concerned to identify whether this was common law or equitable rescission, or some other act. The important point from the perspective of exercising the statutory discretion was not satisfaction of some doctrinal requirement of notice to rescind, but that as a substantive consideration, the Hendersons never affirmed the transactions through subsequent behaviour and the giving of notice was wholly consistent with that position.[46]

Gilmour J had no difficulty declaring void, in their entirety, the engagement, stock transfer and settlement agreements that had all resulted from this misconduct, including where these involved Mrs McSharer and Astraea.[47] His Honour supported the declaration with orders that the respondents supply detailed information regarding the whereabouts of the transferred stock and their products (eg lambs and wool bales), expansive injunctive relief preventing any further dealings with the stock and their products by the respondent or associated entities, and orders that all animals and products be delivered up to the Hendersons. Gilmour J also made an order preventing the sale of shares in the corporate vehicle involved in the transactions. Additionally, his Honour assessed compensation on the assumed basis that all sheep and wool had been sold, and including an amount for lost income from the sheep. This compensatory order was stayed pending delivery up of any sheep and wool bales pursuant to his earlier order, and was ordered to be offset against the value of those sheep and wool bales. His Honour provided that the amount by which the compensation order will be reduced will be assessed by an expert valuer appointed by the Court.[48] Finally, it is worth noting that these comprehensive orders were coupled with exemplary damages for deceit.[49]

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[46] Ibid [882]–[883]. See also *Platz* (n 30) 50,313–4; *Tenji* (n 4) 334 [22] (French J); *ZX Group* (n 30) [142].
[47] *Henderson* (n 45) [885]–[886], [924].
[48] See ibid [887]–[936] for discussion of the range of supporting orders.
[49] Ibid [924]–[936].

As these cases make clear, in considering orders to effect statutory rescission, courts will consider whether it is possible and appropriate to return the parties to the position they occupied prior to the impugned conduct.[50] This is consistent with (although not limited by) the operation of rescission in equity, which seeks to return the parties in substance to their former position. This is normally achieved through restitution and counter-restitution of benefits transferred between the parties to the transaction, subject to allowances and offsets, to restore the parties in substance to their former position.[51] A simple example is where a court declares a contract for the sale of land *void ab initio* and orders refund of a deposit.[52] This aim can be contrasted with the traditional approach to the tortious measure of compensation, generally adopted for s 82 of the TPA/s 236 of the ACL statutory damages, which is to return the plaintiff to the position she would have occupied had the tort not occurred. Notwithstanding, statutory rescission can be understood as consistent with the broad compensatory aim of s 87 of the TPA/s 237 of the ACL, in particular through returning the parties to their former positions, so preventing or reducing loss or damage.[53] This is fully consistent with the dual regard in s 237 to ex post 'loss or damage' suffered and ex ante 'likely to be suffered'.

The reviewed cases demonstrate that statutory rescission, like its equitable relation, has a range of practical advantages over an award of damages. It may avoid valuation difficulties. Thus, in *Donald Financial Enterprises Pty Ltd v APIR Systems Ltd*,[54] Edmonds J preferred statutory rescission to attempting to ascertain the true value of shares purchased as a result of misleading or deceptive conduct.[55] Further cases involving sales of shares are explored immediately below. Statutory rescission may also give more complete relief, as in *Henderson*, where locating and returning the sheep and lambs restored income-generating assets that, one assumes, may also be relatively unique in terms of blood-lines and market value. The same

[50] See *Jewelsnloo* (n 44) [184]; *ZX Group* (n 30) [118].
[51] See, eg, *Tenji v* (n 4) 353 [130] (French J), which engages in a complex undoing of the transaction consistent with orders of restitution, counter-restitution and compensation for expenditure incurred in reliance on the transaction. Whether the latter can be understood in terms of an acknowledgment of detrimental good faith changes of position cannot be addressed here: see Elise Bant and Jeannie Marie Paterson, 'Exploring the Boundaries of Compensation for Misleading Conduct: The Role of Restitution Under the Australian Consumer Law' (2019) 41(2) *Sydney Law Review* 155. See also *Macfarlane* (n 38), where denial of relief in respect of a defendant's changes of position, as part of the process of restitution and counter-restitution, can be understood as reflecting the defendant's lack of good faith change of position. Earlier, important cases are *Haydon* (n 3); *Platz* (n 30).
[52] See, eg, *Smolonogov* (n 44); *ZX Group* (n 30).
[53] See Bant and Paterson, 'Exploring the Boundaries of Compensation for Misleading Conduct: The Role of Restitution Australian Consumer Law' (n 51).
[54] [2008] FCA 112 (Edmonds J).
[55] Ibid [190]–[191]. See also *Morellini* (n 38) [38]; *Ng v Chan* [2020] NSWSC 954, [162]–[163] (Slattery J); *Storm Industries Ltd trading as trustee of T&L Trust v Unicar Australia Pty Ltd* [2020] NSWDC 51, [329], [333] (Abadee DCJ) ('*Storm*').

observation is, of course, applicable to other assets regarded by the law as unique, such as land, where it is generally accepted that monetary damages will provide inadequate relief.[56]

Another advantage of statutory rescission is in addressing the practical likelihood of a contravening defendant satisfying an order for statutory damages. Statutory rescission that enables recovery of property transferred to an impecunious or recalcitrant defendant may be the most effective remedy to advance the protective purpose of the statute.[57] Conversely, statutory orders resembling rescission may be issued against parties involved in the misleading or deceptive conduct in a way that maximises chances of recovery, while reflecting the culpability of those involved. A good example is *Storm Industries Pty Ltd trading as trustee of T&L Trust v Unicar Australia Pty Ltd* ('*Storm*').[58] A gullible and over-confident investor was induced by the misleading or deceptive conduct of the second and third respondents to invest $300,000 through his investment company, Storm Industries Pty Ltd ('Storm'), towards shares in the first respondent company, Unicar Australia Pty Ltd ('Unicar'). The second and third respondents were directors of Unicar and responsible, not only for the misleading or deceptive conduct but for the significant mismanagement of Unicar that affected its value and prospects for success throughout. Abadee DCJ considered that the true value of the shares was uncertain and speculative both at the time of purchase and at trial. Any market for the shares had disappeared. It further appeared that there was a real risk that Unicar was hopelessly insolvent. Abadee DCJ purported to effect statutory rescission by ordering the directors personally (not Unicar) to pay the value of the investment to the plaintiff, in proportion to their responsibility for the misleading or deceptive conduct. On receiving these payments, the plaintiff was required to transfer its shares in Unicar to the directors, in proportion to those payments.

Clearly, this is a significant departure from what would be effected in equity. However, it is a plausible and practical response to the realities of the situation in that case. Importantly, Abadee DCJ conceived of the payments from the directors to the plaintiff as 'compensation' for loss suffered and likely to be suffered, for misleading or deceptive conduct.[59] On that basis, it was no bar to the remedy that the investment funds were, in theory, paid to Unicar.[60] The order was not

[56] See also *Macfarlane* (n 38). The same principle applies to apartments: see, eg, *Byers v Doreta Pty Ltd* (1986) 96 ALR 715 (Pincus J) ('*Byres*'); *Remta v Osprey Property Pty Ltd* [2011] FCA 786 (North J) ('*Remta*'); *Nifsan Developments Pty Ltd v Buskey* [2011] QSC 314 (Applegarth J) ('*Nifsan*').
[57] See, eg, *Macfarlane* (n 38).
[58] *Storm* (n 55). An earlier and similar example is *Deane* (n 3) 655.
[59] *Storm* (n 55) [364].
[60] As a matter of practical reality, it seems likely that the funds were used by at least one director for a range of inappropriate, personal benefits: see discussion at *Storm* (n 55) [121], [331].

restitutionary in nature. Further, the consequence of the order was that the risk of the loss of value of the shares was transferred to those who had induced the plaintiff to purchase them in the first place. Indeed, from this perspective, the order of statutory rescission takes on the aspect of a forced purchase.

A similar case, on which Abadee DCJ relied, is *Morellini v Adams* ('*Morellini*'),[61] a decision of the Supreme Court of Western Australia Court of Appeal. In that case, the respondents had purchased shares in a mining company in reliance on its director's misleading or deceptive conduct. Again, valuation was difficult and the respondents were 'locked in' to the purchase, as there was no market for the shares due, in no small part, to the director's misconduct and mismanagement. McLure P (with whom Pullin and Newnes JJA agreed) upheld the trial judge's decision to order the director to pay compensation under s 77 of the *Fair Trading Act 1987* (WA) ('FTA'), the equivalent of s 87 of the TPA, in the value of the purchase price of shares paid by the respondents to the company. On receipt of that payment, the respondents were required to transfer the purchased shares to the appellant. In this case, the appellant expressly argued that the statutory 'refund' orders could only apply where the contravener was the recipient of the money or property in question. McLure P swiftly dismissed the objection:

> In my view, the words 'refund' and 'return' in s 77(3)(d) are intended to refer and relate to the person who paid the money or handed over the property, not to limit the scope of the persons against whom the order may be made, being the person who engaged in the conduct or a party to the contravention.[62]

Statutory rescission has, however, a further and important advantage over statutory damages for victims of misleading or deceptive conduct, which we consider has been a particular powerful factor in courts' reasoning in respect of s 87 of the TPA/s 237 of the ACL. This is that statutory rescission may be the only means of avoiding parties being locked in to ongoing contractual relationships and, through that relationship, significant prejudice or detriment, broadly-construed. In some cases, this ongoing contractual effect may be largely economic: for example, where purchasers have purchased shares in circumstances where there is no market for sale of the shares, as in *Storm* and *Morellini.*[63] Another example is where the contract excludes the plaintiff from ongoing income generation, as in *Henderson*. In others (including, we may think, in the farming cases),[64] the ongoing damage

[61] *Morellini* (n 38).
[62] Ibid [39].
[63] *Morellini* (n 38) [68]; *Storm* (n 55) [331].
[64] See, eg, *Henderson* (n 45), where the Hendersons' experiences became 'traumatic' and 'humiliating', including being wrongly arrested by police (acting on information given by the defendants) when trying to protect their remaining sheep following their notice of rescission: see discussion at [697]–[701].

suffered from being locked into a contractual relationship is more subtle, personal and profound. As put in another leading s 87 case, *Tenji v Henneberry & Associates Pty Ltd*: [65]

> Avoidance under s 87 must serve a compensatory purpose but may serve other purposes in doing justice between the parties. There are cases in which a party who enters a contract as a result of misleading or deceptive conduct may be compensated in a pecuniary sense by an award of monetary damages but is left nonetheless with a continuing burden of unforeseen risk, a transaction soured by the events that surrounded it and a property, once the repository of hope for the future that is now an albatross around its neck.[66]

The holistic assessment undertaken by courts in the reviewed cases reflects a consistent and broad approach to 'loss or damage' under s 87 of the TPA/s 237 of the ACL, and which underscores the independence of statutory rescission from its general law counterparts. In *Akron* itself, Mason P explained that the statutory response to misleading or deceptive conduct may be subtle and multifaceted, combining statutory damages, as well as avoidance of transactions in whole or in part and subject to complex and tailored provisions and conditions:

> In granting a remedy under s 87, the Court is not restricted by the limitations under the general law upon a party's right to rescind for misrepresentation. Relevant to the present case is the availability of s 87 to support remedies dismantling a series of interlocking contractual arrangements, not all of which involve the immediate parties to the s 52 breach. This means that "unlike the position at general law with the administration of the equitable remedy of rescission of contracts, orders under s 87 may be made not only against parties to the contract but also against third parties, being persons involved (within the meaning of s 75B) in the contravention as a result of which the plaintiff entered into the contract". Nor is the Court restricted in granting a remedy under s 87 by the general law's limitations upon a party's right to rescind for breach of contract or misrepresentation. These include the limitations deriving from the much criticised decision in *Seddon v North Eastern Salt Co Ltd* [1905] 1 Ch 326, and possible blindness in the sharp eye of equity to collateral taxation advantages…[67]

As we have seen, the cases following *Akron*, and effecting statutory rescission, have combined a wide range of more specialised orders tailored to the circumstances at hand, including: orders declaring contracts and clauses to be *void ab initio* or from a particular date, orders to refund money, pay compensation for

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[65] *Tenji* (n 4).
[66] Ibid 333–4 [20]. See also *Remta* (n 56), where the plaintiff purchased a luxury apartment 'off the plan' on the basis of misleading or deceptive conduct that ground floor businesses would not include licensed liquor trading; *Nifsan* (n 56), where the plaintiff purchased a luxury apartment 'off the plan' on the basis of misleading or deceptive conduct that the views from the apartment would be 'uninterrupted' over existing buildings and buildings proposed to be built.
[67] *Akron* (n 1) 366 (some citations omitted) (Mason P).

loss suffered in performing contracts or likely to be suffered, orders to deliver up and transfer property, injunctive orders, orders to pay interest, orders conditional or contingent on other relief or acts, as well as consequential and ancillary orders, such as producing information about the whereabouts of assets the subject of the orders.

In concluding this section, we turn to subject the orders made in *Akron* itself to closer scrutiny, as they offer an important analytical segue into cases where some lesser or more particular form of relief than rescission is required, the subject of the following sections. As is well known, the case involved a complex series of interlocking investment and loan transactions relating to shares in a horse-breeding venture. The respondent investors entered into the transactions in reliance on misleading or deceptive conduct as to the existence of what was called, variously, a minimum receipt or return 'guarantee' or 'insurance' on their investment. At first instance, the trial judge avoided the transactions in their entirety. On appeal, having concluded that the trial judge had erred in not considering whether lesser or more tailored relief was warranted, a far more nuanced approach to relief was taken, in the exercise of the Supreme Court of New South Wales Court of Appeal's discretion under s 87 of the TPA, exercised afresh. Thus, Mason P considered that avoidance of the loan agreements should not be made conditional (as it would in equity) on counter-restitution or repayment of the loan principal. This was, in part, because the principal had never in substance been received or enjoyed by the investors but effectively been paid over for the venture induced through the misleading or deceptive conduct. To require it to be repaid, therefore, would have added to, rather than protected the investors from, loss or damage suffered because of that misconduct.

The Court also refused to rescind the connected investment transactions as a whole: here, Mason P emphasised that relief must be 'proportionate to the wrong'.[68] His Honour rather focussed on the particular loss or damage suffered by the plaintiff, in the form of 'being locked into an otherwise proper set of contractual arrangements that lacked the promised minimum receipts "guarantee" by NZI'.[69] Focussing on that loss, the Court ordered statutory damages under s 87 of the TPA in a sum equivalent to the represented guarantee. This approximates an expectation, rather than reliance or restitutionary, measure, and to that extent foreshadows the variation orders to which we return below. In reaching this nonetheless more limited form of relief, the Court took into account the significant taxation benefits received by the plaintiff by entering into the transactions. Importantly, these benefits had not been received from the appellant: this was not a case, therefore, of

[68] Ibid 368.
[69] Ibid 370.

ordering restitution and counter-restitution pursuant to a statutory equivalent of rescission. Rather, the broader (less doctrinal) point was that 'the total unravelling of the transaction after the respondents have enjoyed the taxation and other benefits (including the benefit of possible gain) during the life of the Venture strikes me as remedial overkill'.[70]

Courts since *Akron* have adopted a number of the more specialised options articulated by Mason P, as part of holistic and substantive approaches to crafting orders for private redress for misleading or deceptive conduct, to which we now turn. Arguably, they reflect the key insight from the cases considering statutory rescission that, in some cases, relief from loss or damage that is likely to result on an ongoing basis from misleading or deceptive conduct, in particular where contractual arrangements have been entered with ongoing effect, will require relief that goes beyond a once and for all statutory damages award. Being yoked to a contract unconscionably induced represents ongoing, subtle and invidious damage that can go right to the heart of victims' autonomy and wellbeing. Statutory rescission is adept at producing powerful relief: a permanent cure for the ill. However, in some cases wholesale avoidance of impugned transactions, even when coupled with orders for related consequential relief, will be impossible or disproportionate. It is here that orders that effect partial avoidance of the contract, or that vary the contract, will be of particular value. These provide more targeted relief which avoids the potential for harmful or excessive side-effects, including for third parties to the contravening conduct.

III PARTIAL STATUTORY RESCISSSION

As we have already explained, 'partial rescission' is an umbrella term that captures a range of more discrete orders, the purpose of which is to combine to undo in a targeted way the transactions entered into as a result of misleading or deceptive conduct. This form of relief is consistent with the statutory imprimatur to 'prevent or reduce' ongoing loss or damage likely to be suffered by victims of contraventions of the prohibition. As *Akron* itself demonstrates, this statutory flexibility is particularly valuable where complex, interlocking dealings are in play.

A good example is *Fico v O'Leary*,[71] a case involving multiple natural and corporate parties involved in dealings revolving around the sale of a pharmaceutical

[70] Ibid. Cf *Osric Investments Pty Ltd v Clout (as liquidator of Woburn Downs Pastoral Pty Ltd*) [2001] FCA 1402, [177]–[199] (Drummond J).
[71] (2004) ATPR 46-259 (EM Heenan J) ('*Fico*').

business and lease of premises to Mr Fico.[72] Pared to its basics, a small shopping centre with an associated medical centre was being built by the third defendant, Marena Holdings Pty Ltd ('Marena'). The Meshgin family was heavily associated with the development: Mr M Meshgin was a director of Marena; the construction was being carried out by another company, a director of which was his brother; one daughter was a GP who intended to take up suites in the medical centre; and another, the fourth defendant Mrs Deena Meshgin Ashoorian, was a qualified pharmacist who originally intended to take on the shopping centre pharmacy business and lease. Mrs Ashoorian sold the business and transferred its lease to Mr Fico, a young pharmacist who had been looking to set up a business on his own account. Further dramatis personae included Mr Brendan O'Leary, the first defendant, who was a representative of the pharmaceutical company and second defendant, Sigma Company Limited ('Sigma'). Sigma operated as a 'facilitator' of the transactions throughout, with an eye to its future profit in supplying pharmaceuticals to the new business. This self-interest was not made apparent, nor was its dual role (through Mr O'Leary) in actively encouraging and advising both sides of the transaction.

Relevantly for current purposes, Heenan J of the Supreme Court of Western Australia found that a range of misleading or deceptive conduct on the part of the defendants had induced Mr Fico to buy the pharmacy business and take on its lease. The question, though, was how best to undo the transactions and to prevent ongoing harm to Mr Fico, in a way that reflected the relative responsibility of the defendants. From the outset, the pharmacy had traded at a loss. Mr Fico had swiftly fallen into arrears on his rent and, eventually, abandoned the premises following the threat of eviction. Sigma had supplied products for which it remained unpaid. Mr Fico had sold what products he could but, as he abandoned the business, ended up giving away some products to friends and family that were on the point of expiry and could not be sold. As at the date of trial, he remained liable under the contract of purchase for some $15,000. Responding to these complexities, Heenan J combined statutory damages under s 82 of the TPA/s 79 of the FTA for the trading losses suffered by Mr Fico in running the pharmacy business with orders avoiding Mr Fico's ongoing obligations under the lease and purchase contracts.[73]

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[72] This case is very similar in terms of factual pattern and orders to the earlier case of *Jacques v Cut Price Deli Pty Ltd* (1993) ASC 56-221 (Spender J) (the first instance judgment); *Cut Price Deli Pty Ltd v Jacques Ltd* (1994) 49 FCR 397 (Jenkinson, Einfeld and Lee JJ) (the appeal judgment), where the applicants were induced to enter into a franchise agreement, deed of agreement for sub-lease and personal guarantees by misleading representations regarding the turnover, gross profit margins and profitability of the business.

[73] *Fico* (n 71) [252]–[253]. His Honour also made a series of contribution orders between the parties, reflecting their coordinate liability for misleading or deceptive conduct and, with respect to the first and second defendants, for breach of fiduciary duty, with respect to the pharmacy transactions. These orders

Another good example of the more commercial tenor of the cases involving partial rescission is the 'mega litigation' involved in *Seven Network News Ltd v News Ltd*.[74] Seven Network News Ltd ('Seven') brought claims against 19 respondents involved, broadly speaking, in the broadcasting industry, alleging anti-competitive and other unfair trading practices. This litigation barrage included claims against Optus that, contrary to an 'exclusivity clause' under sports channel supply agreements with Seven, Optus had engaged in negotiations with Foxtel companies for alternative supply. However, Sackville J found that Seven had itself engaged in misleading or deceptive conduct as part of the negotiations which saw Optus agree to variations of the original supply agreement, including the exclusivity clause. Optus sought orders avoiding the variation agreements with Seven in their entirety and damages under s 82 of the TPA. Citing *Akron*, his Honour decided:

> A brief scan of the s 87(2) smorgasbord suggests that I should select the least intrusive order that achieves the protection to which Optus is entitled. A declaration of voidness is unnecessary in the present context and may create other difficulties. In my view, it is appropriate to make an order pursuant to s 87(2)(ba) of the TP Act refusing to enforce the Exclusivity Clause. Alternatively, it may be enough simply to dismiss Seven's damages claim against Optus.[75]

While this was a refusal to enforce case, the same result could equally have been reached by deleting the offending provision, thus constituting partial rescission of the contract or, indeed, varying the contract as a whole. Functionally, the outcome would have been much the same.

The final example of the complex commercial cases to which s 87 of the TPA/s 237 of the ACL orders have applied is *Prosperity Group International Pty Ltd v Queensland Communication Co Pty Ltd (No 3)*.[76] Prosperity Group International Pty Ltd ('Prosperity') and WorldNet Corporation Limited Pty Ltd ('WorldNet') entered into contracts for the provision of telecommunication services and rental of office equipment by Clear Telecoms (Aust) Pty Ltd ('Clear'), Australian Equipment Rentals Pty Ltd ('AER') and Quick Fund (Australia) Pty Ltd ('Quick Fund'), respectively the third, fourth and fifth respondents. At first instance, Logan J of the Federal Court found that the applicants entered the contracts a result of the misleading or deceptive conduct of the respondents' agent, Mr Croom. More particularly, Mr Croom had induced the plaintiffs to change service providers,

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were adjusted to take account of the varying degrees of benefit they enjoyed from those transaction, as well as their role in respect of the varying forms of losses suffered by the plaintiff: see discussion at [242]–[248]. See also *Frith v Gold Coast Mineral Springs Pty Ltd* (1983) 65 FLR 213 (Fitzgerald J).

[74] [2007] FCA 1062 (Sackville J).

[75] Ibid [3174] (citations omitted).

[76] [2011] FCA 1122 (Logan J).

which they were reluctant to do, with promises that the services would be subject to a fixed monthly 'cap' of $6,000 and come with free office equipment. He had no reasonable basis for making these representations. The services and equipment were duly supplied by Clear, but there was no monthly cap and the office equipment was also subject to rental fees. The applicants sought to rescind the transactions *ab initio*, while Clear cross-claimed for payment of outstanding invoices in respect of telecommunications services it had supplied to the applicants. Relevantly for current purposes, Logan J declared the office equipment agreements to be *void ab initio*. This aspect of the case was subsequently overturned by the Full Federal Court on appeal, on the basis that Mr Croom had not acted as agent of the suppliers of the office equipment (AER and Quick Fund) and, hence, his misconduct could not be brought home against them.[77] Logan J's other orders were not the subject of appeal. Here, Logan J assessed damages for overpayment of the telecommunication services by reference to notional cap. Only amounts paid in excess of the cap were recoverable. Conversely, Clear's cross-claim was also capped by reference to the notional $6,000. The consequence was that the respondents were largely confined to the represented position. As with the order in *Akron*, this form of relief foreshadows a developing trend in variation orders, to which we now turn.

IV VARYING THE TERMS OF THE CONTRACT

We may suppose that, in reaching the view in *Akron* that the remedial landscape in respect of s 87 of the TPA had changed, and that courts had increasingly embraced the statutory discretion bestowed upon them, Mason P was influenced by the (then very recent) High Court decision in *Kizbeau Pty Ltd v WG & B Pty Ltd* ('*Kizbeau*').[78] That case clearly endorsed the legitimacy of varying terms of contracts induced by misleading or deceptive conduct. Kizbeau Pty Ltd ('Kizbeau') purchased a motel business and lease of the premises in reliance on the misleading representation by the owner that an upstairs portion of the premises could lawfully be used for seminars and conferences. Kizbeau used the premises unlawfully for that purpose until it became aware of applicable council limitations.

The High Court varied the sum of statutory damages awarded below under s 82 of the TPA, in the sum of the difference in value between the business as purchased and received, to take into account the valuable (albeit unauthorised) interim use of the conference facilities. However, as the High Court noted, this order would fail to take into account the ongoing contractual obligations, in particular the ongoing

[77] *Quikfund (Australia) Pty Ltd v Prosperity Group International Pty Ltd (In Liq)* (2013) 209 FCR 368, 389–90 [89] (Foster, Barker and Griffiths JJ).
[78] *Kizbeau* (n 3).

rent payable for the hotel subject to the restrictions as now revealed. The Court accordingly varied the terms of the rent to reflect the diminished value of the lease, effective as from the date when Kizbeau became aware of the restrictions. On the other hand, the High Court refused to delete that part of the rent review clause that provided for minimum rent increases of 6%, even though it accepted that this would eventually render the business unviable. Here, two reasons appear to have been critical. First, the rent review clause was not induced because of the misleading or deceptive conduct. It was a stand-alone clause commonly included in commercial leases of the time. Secondly, and relatedly, this was a commercial lease negotiated at arms-length between commercially experienced parties. Kizbeau was controlled by Mr and Mrs Shiels. Mr Shiels was 'a very experienced and successful businessman'[79] and conceded that the minimum rate clause was reasonable. The High Court concluded:

> No doubt in some cases, it may be appropriate for a court, when making an order under s 87, to rewrite a contractual term that was not brought about by the misleading conduct of a defendant. Thus, in a case where a court would wish to, but cannot for practical reasons, grant rescission, it might be proper to rewrite an unfair provision in an agreement even though it was not induced by the defendant's conduct. But this case is not in that category. The case is not one for rescission, and once Kizbeau is awarded damages and has the rent varied in the manner that we have indicated, it is in the same position that it would have been if there had been no misrepresentation.[80]

The High Court's variation order can be seen to be consistent with the deceit measure of loss or damage, which seeks to place the parties in the position they would have occupied had the tort not occurred.[81] Here, however, rather than taking as the hypothetical position that the plaintiff would not have entered into the transaction at all, the parties are placed into the contractual position they would have occupied in the absence of misleading of deceptive conduct, which addresses the loss on an ongoing basis. This aspect of the order reflects the close relationship between the availability of rescission and varying the terms of a contract. The latter order, which permits more targeted relief than rescission, enables ongoing relief to 'prevent or reduce the loss or damage suffered, or likely to be suffered'. It also signposts the close connection between variation and partial rescission. Partial rescission, as the name suggests, might involve partial setting aside of provisions. These often can be characterised, in the alternative, as deletion (the ultimate form

[79] Ibid 299.
[80] Ibid.
[81] See *Holmes v Jones* (1907) 4 CLR 1692, 1702–3 (Griffith CJ, O'Connor and Isaacs JJ); *Toteff v Antonas* (1952) 87 CLR 647, 650–1 (Dixon, Williams and McTiernan JJ); *Gould v Vaggelas* (1985) 157 CLR 215, 220, 255, 265 (Gibbs CJ, Murphy Wilson, Brennan and Dawson JJ). See also *Mister Figgins* (n 3) 59; *Lubidineuse v Bevanere Pty Ltd* [1985] FCA 265 (Wilcox J).

of variation) of a provision. Moreover, effecting partial rescission might often involve a combination of orders tailored to undo and prevent further loss or damage resulting from misleading or deceptive conduct.

Another example of this interaction is *Gregg v Tasmanian Trustees Ltd* ('*Gregg*'),[82] delivered shortly after *Akron*. Mrs and Mr Gregg granted a mortgage over their family home. Mrs Gregg entered into the mortgage as a result of separate misleading or deceptive conduct by both the lender and her husband. She sought rescission of the mortgage to protect the family home. This was refused: rather, Merkel J exercised his discretion to avoid the mortgage in respect of her interest in the property. His Honour further varied the mortgage to limit Mr Gregg's ongoing liability as mortgagee to the principal sum that had originally been represented to Mrs Gregg. The partial rescission could as easily be described as a variation of the contract to remove Mrs Gregg as mortgagee and alter the value of the principal secured.

However, we note that by varying the terms of the contract in this way, the form of relief in *Gregg* in respect of the husband holds the contravening party to the represented position. It is neither seeking to return the parties to the position they would have occupied absent the misleading or deceptive conduct, nor to the position they occupied prior to entering into the transaction. In this aspect, it more closely resembles a form of rectification.[83] As we have seen, this is not without precedent, and serves to release the victim from ongoing obligation. It does not substitute the court's own sense of what is just for what the defendant, after all, represented to be the parties' ongoing agreement. In these respects, it is a structured discretionary response to the ongoing liability that would otherwise be suffered because of misleading or deceptive conduct. The fact that the variation operates to release the victim from obligation, rather than to impose new performance obligations on the defendant, may be another important feature of the court's reasoning in fashioning this form of relief. It is, nonetheless, potentially controversial. As has been explained elsewhere, the prohibition on misleading or deceptive conduct does not on its terms require those engaging in misleading or deceptive conduct to conform to or make good a misrepresented position.[84] That is the approach taken in the consumer guarantees regime, not under the safety-net provision that prohibits misleading or deceptive conduct. The prohibition on misleading or deceptive conduct is not a promise-based regime: this is why deceit

[82] (1997) 73 FCR 91 (Merkel J).
[83] A similar explanation has been offered by Meikle in respect of partial rescission in equity: see Meikle (n 8).
[84] Bant and Paterson, 'Exploring the Boundaries of Compensation for Misleading Conduct: The Role of Restitution Under the Australian Consumer Law' (n 51).

has been a natural source of analogical reasoning for courts contemplating the measure of damages under s 82 of the TPA/s 236 of the ACL.

Following *Kizbeau* and *Gregg*, there appears to be a gap of decisions addressing variation. When these recommence around 2010, we observe a clear trend to use variation orders to effect relief which gives effect to the represented position, including by imposing further or more extensive performance obligations on the defendant. Thus, in *Classified Transport Pty Ltd v IDI Enterprises Pty Ltd*,[85] the parties agreed that the purchase price of a hotel would be $280,000, $201,000 of which was incorporated into the written contract. The balance was agreed orally to be made by way of vendor loan, to be repaid in instalments. In fact, the purchaser never had any intention of making the agreed repayments, but intended rather to deny this oral component of the sale agreement. Herriman J varied the written contract to incorporate the full price. While it could be argued that this simply reflected the usual measure of 'loss or damage' under s 82 of the TPA, being the difference in value between what was paid for and what was received, there was no evidence of the true value of the hotel. Further, his Honour was explicit that the variation was required to compensate for 'loss of the benefit of the appellants' promise to pay $79,000.'[86] Like *Gregg*, this resembles a form of rectification however, unlike that case, increased the value of the defendant's performance obligation, rather than relieving the plaintiff from ongoing obligation.

In *City of Sydney v Streetscape Projects (Australia) Pty Limited*,[87] Einstein J cited Mason P in *Akron* at length on the breadth of discretion involved in s 87 of the TPA, whilst also observing the need for caution in imposing upon the parties a regime that they have not agreed.[88] Again, this contractual lens appears consistent with a willingness of courts to vary contractual obligations, but to do so in a way that holds the defendant to the represented position. Thus, in exercising his remedial discretion, Einstein J considered that Streetscape had:

> represented, without any reasonable basis for doing so, that the Adepoles were produced only for the City of Adelaide and would be sold only to that entity. For this reason, the most appropriate remedy to alleviate the damage suffered by the City, without altering the terms of the arrangement beyond what was fairly agreed, is to vary clause 5(a) of the Second Deed of Variation such that it has the effect that from the date of entering into this deed, the City vested intellectual property in the

[85] (2011) 111 SASR 155 (Peek J, Doyle CJ and Vanstone J agreeing).
[86] Ibid 167 [49] (Peek J).
[87] (2011) 94 IPR 35 (Einstein J) ('*City of Sydney*').
[88] Ibid [347]. See also *McPhillips v Ampol Petroleum (Victoria) Pty Ltd* (1990) ATPR 41-014, 51,258 (Woodward J); *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 2)* (1991) 27 FCR 492, 503 (Lockhart, Gummow and von Doussa JJ); *Allied Westralian Finance Ltd v Wenpac Pty Ltd* (1992) ATPR 46-082, 53,311 (Murray J).

> Adepole…only to the extent that the pole is designed for the Adelaide City Council and is to be sold to that council. This variation most clearly reflects Streetscape's representations to the City and the City's understanding of the effect of the agreement being entered into.[89]

This order was upheld by the Supreme Court of New South Wales Court of Appeal on appeal.[90]

In some cases, this approach has operated to expand significantly the existing contractual obligations between the parties. In *Sahin v National Australia Bank Ltd*,[91] the borrowers (Mrs and Mr Sahin) refinanced a loan with National Australia Bank ('NAB') to complete the construction of their family home. The refinance was structured as a fresh loan, which paid out the existing loan leaving an additional sum for completing construction. The Sahins had taken out insurance with National Australia Financial Management Ltd ('the insurer'), a subsidiary of NAB, in respect of the first loan. They assumed this would be rolled over for the second. The Supreme Court of Victoria Court of Appeal found that the Sahins made this assumption as a result of the misleading or deceptive conduct of NAB. In fact, the insurance policy had been terminated with the discharge of the first loan. When Mrs Sahin (who was the sole earner of income at the time) was injured at work, the Sahins were advised for the first time that the insurance policy had been terminated. The Court responded to the claim by varying the terms of the (terminated) original policy to extend it to the second loan and, subject to payment of appropriate premiums, resuscitating it with effect from the date of the restructure. The Court then ordered the insurer to pay out on the policy from the date of Mrs Sahin's injury. It also made orders to relieve the Sahins from paying any amounts otherwise due under the second loan contract and to restore their loan account to its proper position. A less striking, but consistent example is *Coco v Westpac Banking Corporation*,[92] where, for the purposes of calculating damages, the contract was treated as amended to reflect what was represented.[93]

V CONCLUSION

This paper has investigated trends of reasoning adopted by courts following *Akron*, in making discretionary orders for relief available pursuant to the 'remedial

[89] *City of Sydney* (n 87) [352].
[90] *Streetscape Projects (Australia Pty Ltd) v City of Sydney* (2013) 295 ALR 760, 798 [214] (Barrett JA, Meagher and Ward JA agreeing).
[91] [2011] VSCA 64 (Hargrave JA, Harper and Hansen JA agreeing).
[92] [2012] NSWSC 565 (Hammerschalg J).
[93] Ibid [99].

smorgasbord' offered under s 87 of the TPA and equivalents. These reveal striking consistencies in approach, including in courts' close attention to the particular forms of transactions under consideration and a willingness to make remedial orders on courts' own initiative.

The analysis reveals three families, or functional groupings, of discretionary orders, which largely follow similar patterns of reasoning and limits. At the hands of the courts, statutory rescission has developed its own character and parameters, drawing upon, and diverging, from equitable principles for reasons supported by the terms and protective purposes of the statutory regime. Courts have also repeatedly exercised their remedial discretion to engage in partial avoidance and to vary terms of contracts entered into as a result of misleading or deceptive conduct. In all cases, these orders reflect express recognition of the limits of once and for all pecuniary relief in cases of ongoing contractual obligations, together with the potentially disproportionate impact of orders effecting wholesale rescission, particularly in complex and interlocking transactions. We also observe that, in respect of some forms of variation akin to rectification, the orders have the effect of holding the parties to the represented position. This suggests a judicial willingness to depart from the usual approach to relief for misleading or deceptive conduct, and which is yet to be fully explicated in the authorities.

What is indisputable, and a matter no doubt of interest to legislatures, regulators and the regulated alike, is the potency of the remedial regime as a means of promoting fair business practices. Courts' regular use of the options 'on the table' presents a powerful case for reform to ensure that the smorgasbord is available across the full range of statutory schemes addressing misleading or deceptive conduct. This rationalisation could, and arguably should, be a key aim in any broader enquiry into principled simplification of our commercial and consumer law landscape.[94]

[94] Here, see the important work underway in Australian Law Reform Commission, *Review of the Legislative Framework for Financial Services regulation* (Web Page, 11 September 2020) < https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/>.