

CONSUMER REDRESS LEGISLATION: SIMPLIFYING OR SUBVERTING THE LAW OF CONTRACT

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ABSTRACT

The growth of statutory consumer protection regimes in modern commercial societies has the potential profoundly to disrupt the private law landscape. Such schemes aim to increase access to justice for consumers by offering simplified and clear suites of rights and corresponding remedies. In so doing, however, they cut across core areas of private law rights and remedies, raising the spectre that they will come to undermine – or indeed replace – contractual principles and policies in the context in which they apply. The end result could be an incoherent system of private law with different principles and rules applying to commercial and to consumer transactions. In this context, understanding the nature and scope of the interaction between such redress schemes and their common law context is of primary and broad-ranging significance. Coherence in the law requires that lawyers abandon their traditional ‘oil and water’ attitudes to legislative schemes and confront directly the ways in which the relationship between these two bodies of law operating in overlapping fields of operation should be understood. This paper engages in that enquiry by considering the relationship between the relatively new consumer redress provisions in the *Consumer Protection from Unfair Trading Regulations* 2008 and general law principles.

I. INTRODUCTION

In this ‘age of statutes’¹ it is no longer possible (if it ever was) to adopt the comfortable view that legislation and common law are as ‘oil and water’²: inherently distinct and amenable to independent study and application.³ The principle of coherence that underpins all mature legal systems,⁴ requires that individual rules and doctrines must be applied in such a way that supports or promotes broader coherence in the law, in

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¹ G Calabresi *A Common Law for the Age of Statutes* (Harvard University Press, 1982) p 1.

² Jack Beatson, ‘Has the Common Law a Future’ (1997) 56 *Cambridge Law Journal* 291;

³ See W Gummow, *Change and Continuity: Statute, Equity and Federalism*, Oxford University Press, Oxford, 1999; D Wright, *Common Law in the Age of Statutes: the Equity of the Statute* (LexisNexis Butterworths, 2015); Elise Bant, ‘Statute and Common Law: Interaction and Influence in Light of Principles of Coherence’ (2015) 38(1) *UNSW Law Journal* 367; Andrew Burrows, ‘The Relationship of Common Law and Statute in the Law of Obligations’ (2012) 128 *LQR* 231; J Beatson, ‘The Role of Statute in the Development of Common Law Doctrine’ (2001) 117 *LQR* 247; Joachim Dietrich, ‘What is “Lawyering”? The Challenge of Taxonomy’ (2006) 65(3) *Cambridge Law Journal* 549; Paul Finn, ‘Statutes and the Common Law’ (1992) 22 *University of Western Australia Law Review* 7; Paul Finn, ‘Statutes and the Common Law: The Continuing Story’ in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52; Mark Leeming, ‘Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room’ (2013) 36 *UNSW Law Journal* 1002; Lord Robert Walker, ‘Developing the Common Law: How Far is Too Far?’ (2013) 37 *MULR* 232.

⁴ *Miller v Miller* (2011) 242 CLR 446. *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 518 [35], 520 [38], 523 [45] (French CJ, Crennan and Kiefel JJ) (*‘Equuscorp’*).

particular by producing outcomes consistent with any overriding prohibition or principle.⁵ In that context, the presence of a statutory scheme⁶ addressing the impugned behaviour signals the need to consider the statutory purpose as part of the wider enquiry. Indeed, it has been argued that rationality in the law requires that statutes and general law must, so far as is possible, be interpreted and applied in such a way as to form part of a coherent private law *as a whole*.⁷ Rather than seeing legislation as a piecemeal patchwork of statutory incursions into common law, this view embraces it as an integral part of our modern legal system. That does not mean, however, that statutory principle always constitutes an obvious and ready fit with its existing general law counterparts.⁸

The potentially disruptive impact of legislation in fields traditionally dominated by contract, tort and equity is particularly evident in the area of consumer protection. Statute has long operated in conjunction with private law doctrines of contract, tort and equity.⁹ However, unlike many statutory regimes that supplement or complement these general law doctrines,¹⁰ consumer protection legislation typically provides a new source of rights that, although they may have close analogues in contract, tort and equity, operate independently of that law. The relationship between these bodies of law is not straightforward. While consumer protection statutes operate alongside the general law, and in many ways resemble the general law, the driving purposes behind the statutory regimes are typically to promote consumer protection and fair market practices. These goals may operate to temper the often robust assumptions about personal responsibility that ground traditional contract doctrine. In this complex context, the question posed by the overriding demand of coherence is whether and to what extent schemes may cohabit with the broader legal context in which they are situated in a principled and coherent way.

This paper considers these questions from the perspective of the remedial regime accompanying the substantive rights granted by the *Consumer Protection from Unfair Trading Regulations 2008* (CPUTR).¹¹ Under the CPUTR, consumers have access to two tiers of ‘rights of redress’¹² that ‘approximate’ remedies in tort and equity,¹³ but apply in a simplified, or what might be termed a ‘cheap and cheerful’, form. The prescriptive and simplified form of the regime would appear to leave little scope for

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

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

⁷ Andrew Burrows, ‘The Relationship between Common Law and Statute in the Law of Obligations’ (2012) 128 *Law Quarterly Review* 232; Elise Bant, ‘Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence’ (2015) 38(1) *UNSW Law Journal* 362.

⁸ See K Barker and J Steele ‘Drifting Towards Proportionate Liability: Ethics and Pragmatics’ (2015) *Cambridge Law Journal* 49.

⁹ Mark Leeming, ‘Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room’ (2013) 36(3) *UNSW Law Journal* 1002.

¹⁰ See eg, *Misrepresentation Act 1967*, *Frustrated Contracts Act 1946*.

¹¹ *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277.

¹² CPUTR reg 3(1).

¹³ *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [5.18].

influence from the general law. Yet this approach raises the very real and nonsensical possibility of a conceptual quarantine between the regimes applying to contractual disputes involving consumers and those where all of the parties are either acting in a private capacity or are in business. A better approach – and one more consistent with the origins of the regime – would be to investigate the extent to which doctrines and principles drawn from general law of obligations, and in particular the law of contract, can and should inform the interpretation and application of analogous consumer protection statutes. This approach also requires consideration of the extent to which statutory schemes may exert an influence on the development of the general law itself. In this regard, the very confines of the legislative regime raise uncertainties that general law principles may be well placed to assist in resolving, and which may in turn assist to ensure some continued continuity in their parallel development.

A further complication, however, is that in interpreting the scheme, any process of principled and coherent integration of common law and statutory concepts must be mediated by the purposes of the consumer protection statute. The concept of coherence does not mandate compromising or actively undermining the legislative framework by the introduction of inconsistent assumptions drawn from the common law context of commercial disputes.

Part II commences this necessarily fine-grained enquiry by briefly outlining the rights to redress in the CPUTR. It then turns to consider the relationship between these statutory approximations of general law remedies and the general law principles and doctrines from which these statutory provisions are drawn. Part III discusses the test of causation adopted by the statute as a particular instance of the scope for interaction between, and indeed integration of, general law and statutory principle. Part IV considers the first tier of rights to unwind and to a discount while Part V considers the second tier right to damages. In both cases, the statutory scheme requires close attention to both the informing features of, and divergences from, the general law doctrines on which it was modelled. Part VI concludes by drawing from the preceding discussion some necessarily brief but important examples of the converse possibility of the legislation influencing the ongoing evolution of the general law.

II. CONSUMER PROTECTION REDRESS, STATUTES AND THE COMMON LAW

(a) *The Consumer Protection from Unfair Trading Regulations*

The CPUTR implement the European Union's *Directive on Unfair Commercial Practices* (the Directive').¹⁴ The Regulations contain a general prohibition on unfair commercial practices.¹⁵ The CPUTR also set out more specific forms of prohibited unfair practice, namely misleading actions,¹⁶ misleading omissions¹⁷ and practices that

¹⁴ *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council* [2005] OJ L 149, p. 22.

¹⁵ CPUTR reg 3(1).

¹⁶ CPUTR reg 5. Compare *Competition and Consumer Act 2010*, sch 2 *Australian Consumer Law* s 18.

¹⁷ *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, Regulation 6.

are aggressive.¹⁸ These forms of prohibited unfair practice are accompanied by a blacklist of practices deemed unfair under any circumstance,¹⁹ which identify common forms of ‘deception and trickery’ by businesses.²⁰ The CPUTR render it a criminal offence for traders to engage in an unfair commercial practice²¹ and also provide a scheme for the public enforcement of the regulations.²² When initially implemented, the CPUTR did not contain any private rights of redress for consumers affected by an unfair practice.²³ This placed the CPUTR in stark contrast to consumer protection regimes in comparable jurisdictions.²⁴ In 2014, in response to recommendations from the United Kingdom and Scottish Law Commissions, a new Part 4A was added to the CPUTR,²⁵ providing a regime of private rights to redress in response to misleading or aggressive unfair practices.²⁶

Under this new scheme there are three conditions for a consumer to have a ‘right to redress’. The first condition is that the consumer must have entered into a contract or made payment to the trader for the supply of a product.²⁷ The second condition is that the trader engages in a prohibited practice in relation to the product,²⁸ namely a misleading action²⁹ or a practice that is aggressive.³⁰ The third condition is that the prohibited practice is a ‘significant factor’ in the consumer’s decision to enter into the contract or make the payment.³¹

Once the three conditions for a consumer obtaining a ‘right to redress’ are satisfied, the

¹⁸ *Consumer Protection from Unfair Trading Regulations 2008* (UK) SI 2008/1277, Regulation 7. Compare *Australian Consumer Law* s 50.

¹⁹ *Unfair Commercial Practices Directive* Annex I.

²⁰ H Collins (2010) ‘Harmonisation by example: European laws against unfair commercial practices’ (2010) 73 *MLR* 89, 97.

²¹ CPUTR regs 8-12. A trader convicted of an offence under the CPUTR may be ordered to pay compensation to affected consumers, the Law Commissions reported that this power has been little used: Law Commission, Scottish Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (2012, Law Com No.332; Scot Law Com No.226, Cm 8323) [2.44], [2.46]. Also *Chitty on Contracts* (32nd ed), [38-158].

²² CPUTR pt 4 and reg 26. See generally *Chitty on Contracts* (32nd ed) [38-159].

²³ *Chitty on Contracts* (32nd ed), [38-145].

²⁴ Compare, for example, the *Australian Consumer Law; Consumer Protection (Fair Trading) Act* (Cap 52A, 2009 Rev Ed, Sing).

²⁵ See *Chitty on Contracts* (32nd ed) [38-145].

²⁶ There are no private rights of redress in respect to misleading omissions for the ‘safety net’ catch-all category of unfair practices.

²⁷ CPUTR reg 27A(2).

²⁸ CPUTR reg 27A(4)(a). Under reg 27A(4)(b) in a case where a consumer enters into a business to consumer contract for goods or digital content the second condition will be satisfied where:

- (i) a producer engages in a prohibited practice in relation to the goods or digital content, and
- (ii) when the contract is entered into, the trader is aware of the commercial practice that constitutes the prohibited practice or could reasonably be expected to be aware of it.

²⁹ CPUTR reg 27B(1)(a). A prohibited misleading action is described in Reg 5.

³⁰ CPUTR reg 27B(1)(b). A prohibited aggressive practice is described in Reg 7.

³¹ CPUTR reg 27A(6).

regime utilises a two-tiered model of response.³² The first tier rights of redress are ‘the standard ones’ and apply ‘on a strict liability basis’.³³ These first tier rights provide a short term ‘right to unwind’ a contract or monetary payment³⁴ and, where this right is not available, a ‘right to a discount’ based on pre-set bands of percentages of the price of the contract.³⁵ The primary criterion for access to these rights of redress is that there is a causal connection between the unfair practice and the consumer’s decision to enter into the contract or make a payment in respect to which redress is sought. The second tier rights of redress provides a ‘right to damages’ for economic damage and for distress and inconvenience suffered by the consumer.³⁶ At this stage, in contrast to the first, the right to redress in the form of damages is subject to a limitation of foreseeability of loss³⁷ and to a due diligence defence on the part of the trader.³⁸

(b) *Access to justice and the statutory scheme*

The remedial scheme under the CPUTR clearly draws on the remedies of restitution, rescission and damages provided in response to equitable and tortious wrongs. However, the regime does not attempt to replicate these remedies in statutory form. According to the Law Commissions, the strategy informing the new regime was ‘to approximate the outcomes under the current law, but in a simplified way. It is a scheme that values certainty over flexibility.’³⁹ It is this objective that provides the uniquely distinct flavour to the regime, both in its relationship to the principles of contract, tort and equity from which it draws inspiration and in comparison to comparable consumer protection legislation in other jurisdictions.

The remedial scheme in the CPUTR obviously lacks the nuances of its general law analogues in responding to consumers affected by unfair practices. However, the policies informing the regime were firmly founded on the instrumental objectives of improving the efficacy of the prohibitions on unfair practices and promoting access to justice, rather than building upon the achievements of the general law in promoting a taxonomically elegant and juridically complete scheme of corrective justice. In providing redress the statute is clearly informed by corrective justice considerations,⁴⁰ but these are being applied within a context of the social and economic goals of a consumer protection regime.

The stated objectives of the EU Directive that the CPUTR implement are to strike the right balance between achieving a high level of consumer protection and the

³² See also the *Consumer Rights Act 2015* ss 19-24.

³³ *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [5.19]

³⁴ CPUTR reg 27H.

³⁵ CPUTR reg 27I.

³⁶ CPUTR reg 27J

³⁷ CPUTR reg 27J(4).

³⁸ CPUTR reg 27J(5). Chitty states that the provision was intended to reflect the position under s 2(1) of the *Misrepresentation Act 1967*: *Chitty on Contracts* (32nd ed) [38-185].

³⁹ *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [8.19].

⁴⁰ Both the introduction of the regime and the rules against double compensation discussed below may be seen as illustrations of this influence.

competitiveness of enterprises.⁴¹ Rights of private redress play an important part in promoting these objectives, through ensuring consumers are not left worse off as a result of an unfair practice and also as an incentive to traders to avoid such practices. The rights of redress in the CPUTR were introduced following recommendations from the English and Scottish Law Commissions, which expressed concern about the lack of redress for consumers and the consequent disadvantage experienced by vulnerable consumers subject to unfair trading practices.⁴² The joint report noted that consumers in this situation had to rely on general law doctrines such as misrepresentation,⁴³ undue influence and duress and that the law governing remedies for these doctrines was ‘fragmented, complex and unclear’.⁴⁴ The purpose of the new provisions was therefore to ‘simplify the consumer remedies against misleading practices and to improve protection against aggressive practices’.⁴⁵

How successfully these goals have been implemented may be debated. However, the substantive consumer rights under the CPUTA are arguably easier to understand and assert than their common law analogues. The rights are expressed in relatively simple language, they are provided in a logical structure and the options available to consumers are set out in a fairly high degree of detail. Some lack of nuance in the remedial provisions may well be compensated by the gains in access to justice provided by these features of the new scheme.

The drive to simplify and clarify the relevant law must be understood by reference to the realities of most consumer disputes. Many consumers, particularly vulnerable or disadvantaged consumers, will not have the funds or expertise to hire lawyers and pursue a claim in court.⁴⁶ Moreover, most disputes between traders and consumers involve relatively small amounts of money, and the value of the claim will not justify the expense of seeking legal advice or going to court.⁴⁷ In many cases consumers and traders may prefer a quick resolution to their dispute over the long drawn-out process of litigation. Even to the extent that consumer trader disputes cannot be resolved through negotiation, most claims will not be resolved in court. While consumers pursuing litigation to vindicate consumer rights may have access to a small claims track

⁴¹ Clause 4 of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011.

⁴² *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [1.13], [1.15], [3.50], [3.55] and [8.58]. See also *R v X Ltd* [2013] EWCA Crim 818, [2014] 1 WLR 591.

⁴³ The Law Commissions considered the redress provided under the *Misrepresentation Act 1967* was equally difficult from a consumer perspective: see *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [S14], [3.20], [3.21], [3.22], [4.6], [4.15].

⁴⁴ *Consumer Redress for Misleading and Aggressive Practices* Law (Com No.332; Scot Law Com No.226, 2012) [S 12].

⁴⁵ *Consumer Redress for Misleading and Aggressive Practices* Law Com No.332; Scot Law Com No.226 (2012) [1.4].

⁴⁶ M A Noone, “Public Interest Law and Access to Justice: the Need for Vigilance” (2011) 37 *Monash UL Rev* 57.

⁴⁷ See A Duggan, “Consumer Access to Justice in Common Law Countries: A Survey of the Issues from a Law and Economics Perspective” in C Rickett and T Telfer (ed) *International Perspectives of Consumers’ Access to Justice* (Cambridge University Press, 2003).

in the court system,⁴⁸ parties will usually first be expected to attempt to resolve the claim through mediation, using an alternative dispute resolution scheme of their choice or a court appointed mediator.⁴⁹ In that context, the statute must be to some extent self-executing, in the sense of directing parties to the appropriate standards of conduct demanded by the regime and the resolution of any disputes that develop. The remedial provisions therefore have a strong expressive purpose not only in speaking to those engaged in consumer transactions generally but also to parties (claimants, defendants, mediators as well as courts) engaged in resolving disputes which fall under the legislation.

(c) *Informing principles from general law*

Despite this emphasis on alternative dispute resolution in the consumer context, it remains consistent with the goal of promoting access to justice to seek to ensure that the remedial regime under the CPUTR is treated seriously as law and is supported by a rigorous body of scholarly insight and, where possible, judicial exposition to allow it to fulfil its consumer protection purpose in a fair and effective manner. This process of interpretation must primarily be guided by the words of the statute in question and the purposes informing it. However, another resource is the general law, which may 'represent an accumulation of valuable insight and experience which may be useful in applying the Act'.⁵⁰

The prescriptive, structured nature of the redress rights under the CPUTR reduces the scope for recourse to the general law in the interpretation of the provisions. This places the regime in stark contrast to other comparable statutory regimes. Thus in Australia, for example, the primary consumer law regime provides a 'remedial smorgasbord'⁵¹ that allows courts to draw on the values, principles and doctrines of the general law as shaped by an understanding of legislative purpose in determining the meaning and scope of the relevant provisions. Nonetheless, the general law remains potentially relevant in filling out the gaps and uncertainties in the redress rights provided under the CPUTR that will inevitably arise in any new statutory scheme. Indeed, these general law principles and concepts play a critical role in ensuring that the law relating to consumers (comprising not only the statutory regime, but also the common law and equitable doctrines that operate to provide consumer redress) develops so far as is possible in a coherent and coordinated way.

General law principles and doctrines may properly be drawn upon where they are consistent with the language and purposes of the statutory scheme as a whole. In such cases, principles and concepts of contracts, torts and equity may actively serve to clarify and inform orders available under the statutory remedial scheme in a manner that nonetheless promotes its protective policies. A rigorous engagement with the principles and doctrines of contract, tort and equitable remedies is also necessary properly to chart the borders of this body of remedies under the CPUTR. The CPUTR provide that the availability of a remedial response to an unfair practice does not affect 'the ability of a consumer to make a claim under a rule of law or equity, or under an enactment, in

⁴⁸ <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part27>.

⁴⁹ <https://www.citizensadvice.org.uk/law-and-rights/legal-system/taking-legal-action/small-claims/>.

⁵⁰ *Henville v Walker* (2001) 206 CLR 459, 470 [18] (Gleeson CJ).

⁵¹ *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353, 364 (Mason P).

respect of conduct constituting a prohibited practice.’⁵² The regulations also affirm the general law principle against double compensation, so that a consumer cannot make a ‘claim to be compensated’ under both the statute and a ‘rule or law or equity’.⁵³ Thus, it will be important to understand when the statutory remedies effect compensation and when they pursue a different remedial goal.⁵⁴

III. CAUSATION

The first point of contact to be examined between statutory and general law principles in this way is causation. Causation operates at two very different stages in the CPUTR, which are differently structured and perform very distinct roles. An understanding of the first stage informs the second.

(a) *Its role in determining whether a commercial practice is prohibited*

At a first level of enquiry, causal concepts are employed under the CPUTR to determine whether a commercial practice is prohibited or not. At this level it is not necessary to show that any particular consumer has changed position on the basis of the impugned practice. It is sufficient either that it did cause, or was likely to cause ‘an average consumer to take a transactional decision he [or she] would not have taken otherwise’⁵⁵. At this stage, the enquiry engages the ‘but for’ test of causation, a matter to which we return below. For present purposes, however, it is worth noticing that the regulations stipulate that the ‘average consumer’ is treated as ‘being reasonably well informed, reasonably observant and circumspect’.⁵⁶ This assists a court to develop the simulated

⁵² CPUTR reg 27L(1). But note that a consumer who has a right to redress under the CPUTR does not have a right to damages under s 2 of the *Misrepresentation Act 1967*: *Misrepresentation Act 1967* s 2(4) and also *Chitty on Contracts* (32nd ed) [38-188].

⁵³ CPUTR reg 27L(2).

⁵⁴ See also *Chitty on Contracts* (32nd ed) [38-184].

⁵⁵ CPUTR reg 5(1)(2):

A commercial practice [is misleading]—

(a) if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and

(b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

CPUTR reg 7(1) states:

A commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances—

(a) it significantly impairs or is likely significantly to impair the average consumer’s freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and

(b) it thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise.

⁵⁶ The CPUTR creates a qualification where especially vulnerable consumers are concerned. Regulation 2(5) states:

In determining the effect of a commercial practice on the average consumer—

or hypothetical pattern of reasoning of an average consumer, against which the likely impact of the defendant's conduct is assessed, using the 'but for' test.

It is also notable that at this point in the enquiry, the common law provides a wealth of experience in determining the likely impact of misleading behaviour, or indeed other facts or matters, on a claimant's course of conduct, or consumer conduct more generally. Courts commonly employ a 'rule of thumb' that stipulates that where some conduct was of a nature to have induced a reasonable person to act in a certain way, and the defendant did so act, then it is open for courts to infer that the one caused the other — in the absence of any evidence to the contrary.⁵⁷ This same working rule has been adopted in deceit,⁵⁸ estoppel,⁵⁹ duress⁶⁰ and in relation to the *Australian Consumer Law* prohibition on misleading or deceptive conduct.⁶¹ As a joint judgment of French CJ, Crennan, Bell and Keane JJ of the Australian High Court stated in relation to the consumer redress provisions under the *Australian Consumer Law*:⁶²

It has long been recognised that, where a representation is made in terms apt to create a particular mental impression in the representee, and is intended to do so, it may properly be inferred that it has had that effect. Such an inference may be drawn more readily where the business of the representor is to make such representations and where the representor's business benefits from creating such an impression.

(b) *Its role as a gatekeeper requirement for obtaining a 'right to redress'*

At a second level of enquiry, causal concepts play a critical gatekeeper function for access to the consumer remedial options provided by the regulations. We have seen that the three conditions are (1) that the consumer has entered into a relevant transaction with a trader; (2) that the trader engaged in a prohibited practice and (3) that the prohibited practice was 'a significant factor' in the consumer's decision to enter into the impugned transaction. Condition 3 requires an enquiry into causation that differs from that used at the first stage. It does not adopt the 'but for' test of causation used to establish the fact of the prohibited practice. Rather, a consumer who proceeds to seek

(a) where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and

(b) where the practice is likely to materially distort the economic behaviour only of that group,

a reference to the average consumer shall be read as referring to the average member of that group.

⁵⁷ Notably, this rule of thumb is consistent both with application of a 'but for' test (in which the reasonable person's assumed patterns of decision-making form the basis for the application of the test) and the 'a factor' test (a reasonable person would take this factor, amongst others, into account in reaching the decision to act). In that sense, the working rule is agnostic as to the proper test of causation.

⁵⁸ *Gould v Vaggelas* (1985) 157 CLR 214, 238 (Wilson J).

⁵⁹ See, eg, *Pickard v Sears* (1837) 6 Ad & E 469; 112 ER 179; *Smith v Chadwick* (1884) 9 App Cas 187 (House of Lords); *Hayward v Zurich Insurance Company plc* [2016] UKSC 48.

⁶⁰ *Barton v Armstrong* [1976] AC 104, 118–20 (Lord Cross) (Privy Council); see also *Antonio v Antonio* [2010] EWHC 1199 (QB).

⁶¹ *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54 (2013) 88 ALJR 176, 185 [55] (French CJ, Crennan, Bell and Keane JJ). For a good, recent illustration, see *Redmond Family Holdings v GC Access Pty Ltd* [2016] NSWSC 796.

⁶² *Ibid.*

redress for an unfair practice must show that the prohibited practice was ‘a significant factor in the consumer's decision to enter into the contract or make the payment’.⁶³ Consistently with this analysis, in the context of the consumer redress provisions of the CPUTR, the Law Commissions recognised that in structuring the right to redress ‘putting no weight on causation would be inconsistent with the compensatory aim of private rights’.⁶⁴ However, they rejected the use of a ‘but for’ test for establishing causation between the prohibited practice and the consumer's decision on the ground that it placed too great a burden on consumers.⁶⁵ The causal requirement arrived at by the Law Commissions raises a number of issues. The first is the potential scope of the causal enquiry that might have been demanded under the CPUTR in order for a consumer to qualify for a right of redress. The second is the nature of the enquiry into factual causation when addressing cases of ‘decision causation’, not least in order to reveal why the Commissions likely considered the ‘but for’ test to be inapt in this context. We will see that this enquiry has significant implications for the choice and meaning of the statutory ‘significant factor’ test. The final question is whether the statutory test brings in normative ‘scope of liability’ considerations. We address these issues in turn.

(i) The potential scope of the causal enquiry under the statute

Insights drawn from the general law, and also from the application of remedial rights under comparable legislation such as the *Australian Consumer Law*, tells us that causation is a contested and often complex concept. It frequently comprises quite separate and distinct enquiries.⁶⁶ At common law, factual causation is a primary hurdle to recovery of any amount by way of compensation for breach of contract or tort. This enquiry may then be refined by subsequent, second-order considerations that limit the scope of a defendant's liability for the loss factually caused by his breach, such as through concepts of remoteness, apportionment on the basis of fault and mitigation. Although both enquiries are often collapsed under a single label of causation (in Australia, ‘common sense’ causation),⁶⁷ their independence is increasingly being articulated by courts and also by legislatures. Thus in Australia, the recently enacted Civil Liability and Wrongs Acts all expressly adopt a two-stage enquiry into, first, factual causation and secondly, scope of liability considerations.⁶⁸ While this evidently has not been done in the case of CPUTR, an important question remains whether the redress provisions intend, by the language of ‘significant cause’, to denote simply the factual causal enquiry, or to demand additionally the full investigation into normative

⁶³ CPUTR reg 27A(6).

⁶⁴ *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [7.108].

⁶⁵ *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [7.108]. It is a pity, in that light, that the Guidance on the Consumer Protection (Amendment) Regulations published by the Department for Business Innovation and Skills continues to employ the language of ‘but for’ causation almost unconsciously, in their example used to illustrate the operation of the ‘significant factor’ test.

⁶⁶ See for example *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94 [163] (Edelman J); *Rosenberg v Percival* (2001) 205 CLR 434, [83]-[85] (Gummow J).

⁶⁷ *March v E & MH Stramare* (1991) 171 CLR 506, 515-516 (Mason CJ).

⁶⁸ See eg *Civil Law (Wrongs) Act 2002* (ACT), s 45(1); *Civil Liability Act 2002* (NSW), s 5D(1); *Civil Liability Act 2003* (Qld), s 11(1); *Civil Liability Act 1936* (SA), s 34(1); *Civil Liability Act 2002* (Tas), s 13(1); *Wrongs Act 1958* (Vic), s 51(1); *Civil Liability Act 2002* (WA), s 5C(1).

reasons informing the defendant's scope of liability. Notably, while the Guidance on the Consumer Protection (Amendment) Regulations published by the Department for Business Innovation and Skills⁶⁹ asserts that the enquiry into significant cause is a 'matter of fact'⁷⁰ there is nothing in the regulations themselves that expressly addresses this question. We return to the potential responses to this question that may be inferred from the language, structure and purpose of the statute further below.

(ii) 'Factual causation'

The rights to redress clearly require at minimum a factual, causal connection between the trader's misleading or aggressive practices and the claimant's decision to enter into the impugned transaction. Even at the stage of simple factual causation, the general law draws on different tests to establish the requisite link between the putative cause (for example, the wrongful conduct of the defendant) and the result that in fact occurred (often, the loss to be compensated). The law tends to favour a 'but for' test as the test for factual causation. Consistently with this preference, we have seen that this test expressly underpins the test of what constitutes a 'prohibited practice' under the CPUTR. By contrast, in accessing redress, the regulations require that the conduct was 'a significant factor' in the consumer's decision to enter the impugned transaction. The 'but for' test was avoided by the Law Commissions on the ground that 'often there will be no way of telling why a consumer acted in that particular way following an aggressive or misleading practice'.⁷¹ Again, insights from the general law are instructive in understanding the reasons for and the implications of this choice to avoid 'but for' causation in the consumer redress scheme.

The starting point is to acknowledge that in the area of decision causation (the context of the consumer redress provisions), an unmodified⁷² 'but for' test is problematic. One of the most striking difficulties is that consumer decisions are frequently over- or under-determined, so that the 'but for' test may operate to exclude as causally irrelevant some fact or matter, notwithstanding that it seems clearly to have contributed to the claimant's decision-making.⁷³ The problem is illustrated by *Edgington v Fitzmaurice*.⁷⁴ The claimant advanced money to a company for debenture bonds in reliance on certain statements contained in the company's prospectus. The claimant admitted that but for his own, mistaken understanding that the loan would be secured, he would not have

⁶⁹ Department for Business Innovation and Skills, "Misleading and Aggressive Commercial Practices: Guidance on the Consumer Protection Amendment Regulations" (2014) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/409334/bis-14-1030-misleading-and-aggressive-selling-rights-consumer-protection-amendment-regulations-2014-guidance.pdf, published August 2014.

⁷⁰ Ibid [18] p 7.

⁷¹ *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [7.108].

⁷² Variants of the test, such as Richard Wright's 'NESS' test, seek to address some of these issues, in particular the challenge of over-determination, usually in non-decision contexts. Space does not permit discussion of the extent to which they succeed. For present purposes, it is sufficient to note that their existence accepts that the but-for test can appear to work poorly in some scenarios.

⁷³ For examples of this concern leading in Australia to adoption of the 'common sense' approach to causation, see *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310, 351-52; *March v E & MH Stramare* (1991) 171 CLR 506, 515-516 (Mason CJ).

⁷⁴ (1885) LR 29 CH D 459.

entered into the transaction. This appeared to identify the mistake as the operative cause of the claimant's decision. However, the claimant further argued that the misstatements had also influenced his decision, in the sense of being one of the reasons why he entered into the transaction. The Court of Appeal held that this sufficed. Lord Justice Bowen explained that the relevant question of causation in such cases is 'if his mind was disturbed by the misstatement of the Defendants, and such disturbance was in part the cause of what he did'.⁷⁵ This 'a factor' approach is not restricted to deceit or fraudulent misrepresentation. In *Barton v Armstrong*,⁷⁶ a case of duress, the defendant's threat to kill the claimant was one of the reasons that the claimant agreed to enter into a transaction. There were also strong commercial reasons influencing that decision. The majority accepted that 'it may be that Barton would have executed the documents even if Armstrong had made no threats' but that nonetheless the threats had 'contributed' to the decision.⁷⁷ Causation was established if Armstrong's threats were 'a' reason for him entering into the transaction.⁷⁸ As Lords Wilberforce and Simon put it, on this test, it was sufficient 'that the illegitimate means used was *a* reason (not *the* reason, nor the *predominant* reason nor the *clinching* reason) why the complainant acted as he did'.⁷⁹

The decisions made by the claimants in both *Edgington* and *Barton* were 'overdetermined' in the sense that there may have been more than one reason that was independently sufficient to justify the claimant's decision. However, the same difficulties apply where (as is frequently the case) a claimant's decision may be influenced by many factors, *none* of which taken singly were necessary to produce the decision alone (and so none would satisfy the 'but for' test of causation). If the 'but for' test was the sole determinant of causation, there would be very many of these 'under-determined' cases of decisions that had no cause – a conclusion that seems strikingly unsatisfactory.

The 'a factor' test meets these difficulties of over- and under-determination while still requiring that the particular fact or matter played an active or positive role in inducing the claimant's decision.⁸⁰ Beyond deceit and duress, the 'a factor' test is now well established as the test of causation for misrepresentation in Australia.⁸¹ The test also is applied in cases involving the claimant's unilateral mistake,⁸² undue influence⁸³ and

⁷⁵ *ibid* 483; see also 481 (Cotton LJ), 485 (Fry LJ). See also *Nicholas v Thompson* [1924] VLR 554; *Wilcher v Steain* [1962] NSW 1136.

⁷⁶ *Barton v Armstrong* [1976] AC 104.

⁷⁷ *Ibid* 120 (Lord Cross, delivering the majority judgment).

⁷⁸ *Ibid* 118-119

⁷⁹ *Ibid* 121 (Lords Wilberforce and Simon) (emphasis in original); see also at 118 (Lord Cross).

⁸⁰ In *Barton v Armstrong* itself, the minority considered the threat had played 'no part' (was not a factor) in Barton's decision to enter into the transaction

⁸¹ *Gould v Vaggelas* (1985) 157 CLR 215, 236 (Wilson J), 250-1 (Brennan J); *San Sebastian Pty Ltd v Minister Administering the Environmental Planning & Assessment Act 1979* (NSW) (1986) 162 CLR 340, 366-7 (Brennan J).

⁸² *Salib v Gakas* [2010] NSWSC 505 (21 May 2010) [328]; *Lahoud v Lahoud* [2010] NSWSC 1297 (10 November 2010) [176].

⁸³ Demonstrated, for example, by the point that to rebut the presumption of operative undue influence, the influence must be shown to have played no part in inducing the claimant's decision: see further J Edelman and E Bant, *Unjust Enrichment* (Hart Publishing, Oxford 2016) 235-242.

estoppel.⁸⁴ In all cases, it suffices to show that the fact or matter was ‘a factor’ in the claimant’s decision to change her position in the way that is the subject of her cause of action. Precisely the same approach has also now been adopted in respect of misleading or deceptive conduct under the *Australian Consumer Law*.⁸⁵ Most recently, the UK Supreme Court in *Hayward v Zurich Insurance Company plc*⁸⁶ adopted the same test in a case involving fraudulent misrepresentation, drawing on the analogous treatment of causation in duress.

There has been increasing speculation in Australian courts considering statutory claims of misleading conduct that this test of ‘contribution’, or the ‘a factor’ test, might reflect particular concerns not only about the issues of under- and over- determination discussed earlier, but more generalised concerns about the uncertain aetiology of decision-making.⁸⁷ While the matter has yet to be fully considered, there are some particular issues arising from decision-making that render the ‘but for’ test difficult to justify, let alone apply, in consumer law contexts. The chief difficulty was put powerfully by Peter Birks in the context of the law of unjust enrichment:

mental processes cannot be weighed and measured. Will-power has no voltage. So, if we ask, in relation to the mental process which goes into a decision to transfer wealth, how much disturbance shall count as an operative, restitution-yielding vitiation ... the truth is that there can be no exact answer.⁸⁸

The ‘but for’ test may work tolerably well at the liability stage of the ‘prohibited conduct’ enquiry, where the test is satisfied by reference to what ‘average’, reasonably informed and circumspect, hypothetical consumers would likely do in certain situations. Courts in that context are free to make a range of assumptions about the characteristics, behavioural patterns and decision-making processes consistent with that of the ‘reasonable’ (rational, cautious etc) consumer. This provides a hypothetical pattern of behaviour to which the but-for test may readily apply. However, at the point of determining factual causation in particular instances, a number of recurrent problems present themselves. Unless the consumer is a repeat player, with established patterns of decision-making against which the but for test can be tested, consumers might very well genuinely, and quite reasonably, fail to understand or be in a position to identify all, or even most, of the factors that influenced their decision to enter into a particular transaction. This will mean that they will be constitutionally incapable of satisfying the ‘but for’ test of causation. This seems likely seriously to undermine the statutory purpose of consumer protection.

By contrast, consumers might far more readily be able to identify (and courts may well be able to infer, in the way discussed previously⁸⁹) that the defendant’s misleading conduct contributed to the consumer’s decision to enter the impugned transaction. A consumer might be able to say no more than that she relied *to some extent* on the

⁸⁴ Eg estoppel: *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84, 104– 05 (Robert Goff J), affirmed on appeal; *Sidhu v Van Dyke* [2014] HCA 19, (2014) 251 CLR 505 [71] – [74] (French CJ, Kiefel, Bell and Keane JJ).

⁸⁵ *Henville v Walker* (2001) 206 CLR 459.

⁸⁶ [2016] UKSC 48 [26]-[40].

⁸⁷ *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424, [59] (Edelman J); *Brosnan v Katke* [2016] FCAFC 1 [123]-[124] (the Court).

⁸⁸ P Birks, *An Introduction to the Law of Restitution* (Revised edn) (Clarendon Press, Oxford 1989) 157.

⁸⁹ In section III(a).

defendant's conduct, without being able to confirm or deny that there might have been other reasons that were independently sufficient to bring about her decision, or that the defendant's conduct was sufficient by itself to bring about entry into the transaction. On the 'a factor' test, this will be sufficient to establish causation.

In the context of decision causation, the 'a factor' test meets the difficulties presented by the 'but for' test while still requiring that the particular fact or matter plays an active role in inducing the claimant's decision.⁹⁰ However, the test favoured by the Law Commissions and reflected in the CPUTR seems to go further than requiring merely an 'a factor' causal link between the impugned conduct and entry into the contract. In specifying that the prohibited practice must have been 'a *significant* factor in the consumer's decision to enter into the contract or make the payment', the CPUTR appear to require a quantitative, and even possibly a normative, judgment about the degree to which the unfair practice was an operative influence on the consumer's decision.

We have seen that any quantitative evaluation is highly contentious: in the absence of any proven or assumed pattern of decision-making, a particular consumer's decision cannot be unpacked and simulated as if it were a bullet fired from a gun. This intuition is supported by studies in behavioural economics, which show that in making decisions individuals are not cognitively well-equipped to process large amounts of information and consequentially tend to focus on a few key factors, which may vary with the circumstances, as well as relying on certain personal biases and rules of thumb.⁹¹ This understanding undermines the assumption that we can *ex post* dissect a decision to identify the relative weight assigned to the various potentially relevant considerations.

From a normative perspective, it is difficult to see how a commercial practice that was 'likely to cause an average consumer to make a decision that he or she would not otherwise have made' (and so constituted a prohibited practice) and which did in fact play *some* role in inducing the consumer's decision, could be regarded as anything other than a significant factor. This is perhaps the deciding consideration. A misleading or aggressive practice that has been characterised as unfair should by virtue of that very characterisation normally satisfy the remedial causation test.

Faced with a similar conundrum, Australian courts have adopted an approach that may well recommend itself to courts or parties applying the CPUTR:

Acknowledging that people are often swayed by several considerations, influencing them to varying extents, the law attributes causality to a single one of those considerations, provided it had some substantial rather than negligible effect.⁹²

On this approach, the requirement in the CPUTR that the prohibited practice must have been a 'significant' factor requires that the event be 'a factor' in the process that ended with claimant's decision to enter the transaction, but excludes trivial contributions. On

⁹⁰ In some cases, the 'a factor' test is more demanding than 'but for', as where a decision is made in ignorance of some fact of matter that did not inform a positive assumption on which the claimant acted, but would have changed the decision had it been known at relevant time, discussed in J Edelman and E Bant, *Unjust Enrichment* (Hart Publishing, 2016) 191.

⁹¹ See Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 *University of Chicago Law Review* 1203; Melvin Aron Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 *Stanford Law Review* 211.

⁹² *Como Investments Pty Ltd (in liq) v Yenald Nominees Pty Ltd* (1997) 19 ATPR ¶41-550, 43 619, quoted with approval in *Henville v Walker* (2001) 206 CLR 459, 494 [109] (McHugh J).

either the ‘significant factor’ or ‘a factor’ formulation, if the defendant’s misleading conduct made a positive, non-trivial (or ‘significant’) contribution to the claimant’s decision to enter the transaction, it will still be sufficient to count as a ‘cause’ of that decision, even if it was unnecessary for it.⁹³

The threshold requirement of causation should not be elevated to a burdensome (and indeed wholly speculative) enquiry into relative contributions to the consumer’s decision. Under the CPUTR it would seem appropriate given the statutory purpose, and would be consistent with the general law approach to causation in decision-making and to the ‘rule of thumb’ identified earlier, to prioritise the consumer protection purposes of the legislation with a generous approach taken to what amounts to a significant factor influencing a consumer’s decision to contract. We have seen that an unfair practice is one that is likely to cause the average consumer to enter into contract. If a particular, ‘average’ consumer has been subject to an unfair practice within a period of reasonable proximity to the decision to contract, then it should ordinarily be possible to infer that the practice was a significant factor influencing the consumer’s decision to enter into that contract.

In summary, this analysis demonstrates a considerable degree of consistency in the statutory and general law approaches to the issue of factual causation in decision-making. This comparative analysis both explains and justifies the particular test adopted under the CPUTR and provides principled guidance for its application. However, it may be noted that the ramifications of the analysis reach much further. The coherent approach to causation that is revealed across such a wide variety of private law claims throws into sharp relief those pockets of areas at common law where ‘but for’ remains the assumed and dominant test of factual causation in decision-making.⁹⁴ This is an important and general insight for general principles of liability, going well beyond the interpretation and application of the CPUTR, and to which we return in the final section.

(iii) Scope of liability

In concluding this analysis of causation under the consumer redress provisions, the question remains whether the language of a ‘significant factor’ not only encompasses the cause-in-fact enquiry discussed, but may be sufficiently wide to encompass broader conceptions of the defendant’s legal responsibility or ‘scope of liability’ for the claimant’s decision to enter into the transaction in reliance on the proscribed commercial practice. It is possible, for example, that a defendant’s commercial practices may have been ‘a significant factor’ in the claimant’s decision to enter the transaction as a purely factual question of causation, but nonetheless courts may wish for the consumer’s redress to be reduced or denied for other, normative or policy-based reasons. It is here that we most strongly witness the tension between the desire for coherent integration of statutory and general law principles and the need to remain faithful to the language and purpose of the statute.

We will see below that the redress provisions themselves do not on their face leave a great deal of room for judicial discretion in the type or degree of relief that may be

⁹³ J Stapleton, ‘Unnecessary Causes’ (2013) 129 *LQR* 39.

⁹⁴ Most English unjust enrichment scholars and courts, for example, propound a baseline ‘but for’ test of causation: see eg the discussion in A Burrows, *The Law of Restitution* (3rd edn, Oxford University Press, Oxford, 2012) 91-95; C Mitchell, P Mitchell and S Watterson, *Goff & Jones The Law of Unjust Enrichment* (8th edition) [9-50]-[9-53]; G Virgo, *The Principles of the Law of Restitution* (3rd edn, Cambridge University Press, 175-176.

ordered. Indeed, the first tier rights of redress appear to be predicated on a form of strict liability in which the defendant's relative lack of culpability is irrelevant. Is it possible and desirable, therefore, to bring these 'scope of liability' concerns within the enquiry into what constitutes 'a significant factor'? Possible examples of this mode of reasoning, drawn from deceit and the *Australian Consumer Law*, are where there were alternative supervening influences on the consumer's decision that may lead the 'chain of causation' to be broken,⁹⁵ for example where the consumer had taken independent advice or themselves had special expertise that counter-balanced the effect of any unfair practice.

Importantly, if this step is to be taken, it must be recognised that these considerations are not factual, causal enquiries into the process by which the claimant's decision was reached. The language of a 'break' in the causal chain is in this sense misleading. Rather, they constitute normative considerations relevant to the defendant's scope of liability. They should only therefore be employed following close scrutiny of the language and policy of the redress provisions and to the extent to which such considerations are consistent with and promote the regulatory framework.

There are some provisions within the CPUTR that may be seen to support scope of liability limitations on redress under the statute. For example, we have seen earlier that the regulations are explicit that in determining whether a commercial practice is misleading, 'account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect'.⁹⁶ This reduces a defendant's risk of exposure to consumer redress at the earlier stage of determining liability in the same way, for example, as does determining the existence of a duty of care and breach in cases of negligent misstatement. However, it is possible that it could also support the view that, for example, a gross failure on the part of the claimant to take obvious steps to mitigate her loss may justify courts in treating the exacerbated loss as outside the defendant's scope of liability, as not having been 'caused' by the trader's behaviour, for the purpose of the statutory principles concerning consumer redress. On this approach, the statutory concept of causation would combine both factual causation and scope of liability issues. This has been the approach taken by courts applying conceptions of causation under the *Australian Consumer Law*, albeit in a context where the language of the statute is far less specific than its UK counterpart:⁹⁷

The relationship between conduct of a person that is in contravention of the statute, and loss or damage suffered, expressed in the word 'by', is one of legal responsibility. Such

⁹⁵ See eg *HTW Valuers v Astonland* (2004) 217 CLR 640, 659 (extrinsic losses); *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 119–20 (grossly unreasonable conduct by the claimant may reduce defendant liability as a supervening cause); *Henville v Walker* (2001) 206 CLR 459 (loss that was not reasonably foreseeable may have been excluded) and *Hay Property Consultants Pty Ltd v Victorian Securities Corporation Ltd* [2010] VSCA 247 (drawing from the law of negligence, criminal acts by a third party held to 'break the chain' of causation).

⁹⁶ CPUTR reg 2(2).

⁹⁷ See *Henville v Walker* (2001) 206 CLR 459, 489–91 [96]–[98], 504 [136] (McHugh J, with whom Gummow J agreed); *Wardley Australia Ltd v Western Australia* [1992] HCA 55; (1992) 175 CLR 514, 525 (Mason CJ): '[Section] 82(1) should be understood as taking up the common law practical or common-sense concept of... except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act. Had parliament intended to say something else, it would have been natural and easy to have said so.'

responsibility is vindicated by an award of damages. When a court assesses an amount of loss or damage for the purpose of making an order under s 82, it is not merely engaged in the factual, or historical, exercise of explaining, and calculating the financial consequences of, a sequence of events, of which the contravention forms part. It is attributing legal responsibility; blame. This is not done in a conceptual vacuum. It is done in order to give effect to a statute with a discernible purpose; and that purpose provides a guide as to the requirements of justice and equity in the case. Those requirements are not determined by a visceral response on the part of the judge assessing damages, but by the judge's concept of principle and of the statutory purpose.⁹⁸

On balance, it is suggested that this approach is not consistent with the wording and structure of the CPUTR and may, moreover, undermine the statutory purpose. The provisions in question direct attention to whether the prohibited behaviour was a significant factor in the consumer's decision to enter into the transaction – *not* whether it was a significant factor in bringing about *loss to the consumer*. As we will see below, it is strictly unnecessary to demonstrate loss (in the sense of factual loss) on the part of the consumer to access the remedial scheme. The critical nexus is between the behaviour and the decision – not what then follows. And structurally, the gatekeeping function of causation arises independently of and analytically anterior to the issue of the particular remedy to be granted. These factors suggest that the question of what constitutes 'a significant factor' is meant to be restricted to a wholly factual enquiry. Notably in this context, remoteness and other scope of liability rules in the general law are most commonly found as means of restricting defendants' liability *for loss* factually caused by some breach of duty. They are intimately associated with the remedy of compensation in response to breach. By contrast, the scope of liability rules are much less developed and much more contentious in non-loss contexts, such as where a transaction is rescinded. It is also notable that while there clearly are mechanisms in those contexts that operate to shape the parties' respective liabilities,⁹⁹ this is not done through any causal requirement.

However, even if scope of liability considerations were considered desirable in the context of the regulatory scheme, on the ground that they produced a more balanced approach to consumer redress for misleading or aggressive commercial practices, there is a further reason why significant caution should be exercised before introducing them into the causal requirement through some process of statutory interpretation. This is that while potentially introducing a more nuanced approach to consumer redress, it would also threaten to undermine the simple, 'cheap and cheerful' redress scheme offered by the regulations. As we will see below, the redress provisions consciously attempt to approximate, not replicate, their common law counterparts in an effort to produce accessible remedies for consumers. Not all mechanisms that limit parties' respective liability relevant to rescission, for example, are reproduced in the statutory scheme. And while remoteness considerations are expressly provided for under the Act in relation to second tier claims for consequential and distress damages, concepts of mitigation and apportionment are not expressly addressed. This may reflect a

⁹⁸ *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 119 [25]–[26] (Gleeson J).

⁹⁹ Chiefly through the requirement of *restitutio in integrum*, which encompasses both counter-restitution and change of position considerations, examined in E Bant, 'Rescission, Restitution and Compensation' in J Varuhas and S Degeling (eds) *Equitable Compensation and Disgorgement* (Hart Publishing, Oxford 2017) Chapter 13.

considered aim of making the regulatory scheme as simple and uncomplicated as possible. Further, it is notable that the defence provisions, which also operate at the second tier stage, do contemplate enquiries into issues of relative fault and responsibility. However, these provisions focus not on the defendant's responsibility for *loss caused by the prohibited practices*, but on the defendant's responsibility for the *prohibited practice itself*. Where the defendant's culpability or responsibility is sufficiently diminished, the consequence is that the consumer's claim for second tier compensation is defeated entirely.

The conclusion must be that the full panoply of 'scope of liability' mechanisms prevalent in the general law have deliberately not been replicated under the statute. By limiting the statutory scope of liability mechanisms to second tier remedies only, and then to the 'reasonable foreseeability' requirement, and by introducing a novel due diligence defence, the statute has opted for a subtly different means of balancing consumer and trader interests than taken under the general law. This choice has important access to justice implications, in terms of making it possible for lay parties to know their likely rights and liabilities without access to formal litigation, to facilitate settlement and mediation of disputes and to ensure some degree of consistency in the application of the Act (which may occur in more informal arbitration and mediation environments). Certainly, these objectives would likely be undermined if the sort of very difficult enquiries we common see in the common law context into issues of remoteness, contributory fault, mitigation, intervening causes and the like were to be imported wholesale into the act through the causation requirement. Rather, the regulations provide for a tiered system of redress that seeks to provide adequate, not perfect justice, and in relation to which only certain limited scope of liability rules arguably apply. It is to that remedial scheme that we now turn.

IV. FIRST TIER RIGHTS OF REDRESS

(a) *The strict nature of the first tier remedies*

For a consumer to access the first tier remedies of a right to unwind or a right to a discount there is no need to prove that the contract was financially disadvantageous to the consumer. Essentially the tainting of the transaction by an unfair practice is enough to justify this tier of relief being granted to the consumer. This approach might be justified on the ground that where an unfair practice has been a significant factor in inducing a consumer to enter into a contract, the consent of the consumer was compromised so as to justify the setting aside of the transaction. This would align this body of statutory law with the general law of unjust enrichment, which responds (at least in part) to vitiated consent transfers. On the other hand, a consumer in these circumstances may be regarded as having suffered normative harm by being bound by a contract that was unfairly induced.¹⁰⁰ Equitable relief from unconscionable dealing in this respect becomes a viable source of informing principle, as does the remedial law arising out of torts such as deceit, particularly in so far as the first tier remedies are considered compensatory in nature.

In this regard, it should not be considered incoherent that the statute offers different measures of relief that potentially reflect different normative sources of liability. It is well accepted in the general law, for example, that the one act of fraudulent misrepresentation may give rise to strict liability to make restitution or rescission for mistake, or to compensation for deceit. Further, in the law of rescission, there is

¹⁰⁰ *Demagogue Pty Ltd v Ramensky* (1992) FCR 31, 33 (Black CJ).

authority for some accumulation of remedies, provided that the claimant avoids over-compensation,¹⁰¹ an issue to which we return below. With its twin emphasis on prohibiting certain practices and responding to the impact of any prohibited practice on a claimant's decision-making the statute, like the common law, is sufficiently flexible to meet both concerns without necessary contradiction. It could be considered that there exists a further, punitive element to the awards which aims to deny a trader who has engaged in an unfair practice any benefit from that wrongdoing. There is here another parallel in the approach of equity in the case of equitable fraud or unconscionability. The granting of relief in those circumstances is not 'to extend sympathetic benevolence to a victim of undeserved misfortune' but one which 'denies to those who have acted unconscientiously the fruits of their wrongdoing.'¹⁰²

The difference is of course that the liability of a trader under the first tier of remedies is strict; the conscience of the trader need not have been touched by the conduct and an absence of fault is no defence. A trader may have acted entirely innocently and still be liable to make redress. Again this is a familiar feature of consumer protection law, which seeks to instil an almost prophylactic barrier against misleading and other unfair conduct.¹⁰³ As we have already noted, in a consumer protection context, a statutory redress scheme fulfils goals beyond corrective justice. These statutes have instrumental purposes, not least of which is to promote fair trading practices. These concerns go beyond the particular parties before the court (or in dispute). In that context, there is good reason to apply a strict liability approach to consumer redress, particularly where it involves winding back parties to restore them to their former positions (as opposed to imposing penalties, for example, in which case the culpability of the defendant should properly be front and centre). In this respect, the strict liability approach adopted in the law of unjust enrichment and restitution assumes a particularly fruitful source of insight into the ways in which the statutory right to unwind echoes, but also diverges from, general law concepts, a question to which we now turn.

(b) *The right to unwind*

One first tier right of redress under the CPUTR is the right to unwind the impugned transaction.¹⁰⁴ Under the CPUTR a consumer has a right to unwind if the consumer indicates to the trader that she rejects the product within the relevant period¹⁰⁵ and at a time when the product is capable of being rejected.¹⁰⁶ The consumer must not have already exercised the right to discount for the same contract and prohibited practice.¹⁰⁷

¹⁰¹ Eg *Newbigging v Adam* (1886) 34 Ch D 582 (CA) 592 (Bowen LJ), affirmed in (1888) 13 App Cas 308; *McAllister v Richmond Brewing Co (NSW) Pty Ltd* (1942) 42 SR (NSW) 187, 192 (Jordan CJ) (NSWSC); *Yorke v Ross Lucas Pty Ltd* (1982) 69 FLR 116; *Archer v Brown* [1985] QB 401; D O'Sullivan, S Elliott and R Zakrewski, *The Law of Rescission* (2nd edn, Oxford, Oxford University Press, 2015) [2.03]–[2.04].

¹⁰² *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 48 (citations omitted), quoting *Blomley v Ryan* (1956) 99 CLR 362, 429.

¹⁰³ Cf *Australian Consumer Law* ss 18 and 21.

¹⁰⁴ See also the right to reject in the *Consumer Rights Act 2015* ss 20 and 22.

¹⁰⁵ CPUTR reg 27E(1)(a). The relevant rejection period is 90 days, in most cases starting from the later of the day on which the contract was made and the day on which the consumer first received delivery or performance: CPUTR reg 27(3) and (4).

¹⁰⁶ CPUTR reg 27E(1)©.

¹⁰⁷ CPUTR reg 27E(10).

A product will not be capable of being unwound if the goods have been fully consumed or the services have been fully performed.¹⁰⁸

If the consumer exercises the right to unwind for a business to consumer¹⁰⁹ contract:

- (a) the contract comes to an end so that the consumer and the trader are released from their obligations under it,
- (b) the trader has a duty to give the consumer a refund¹¹⁰ and,
- (c) if the contract was for wholly or partly for the sale or supply of goods, the consumer must make the goods available for collection by the trader.¹¹¹

The Law Commissions thought that the unwinding provided under the CPUTR was similar to equitable rescission.¹¹²

The aim of equitable rescission is to return both parties in substance to their original positions.¹¹³ The remedy is broadly restitutionary in nature and often incorporates change of position considerations.¹¹⁴ The aim is that the parties should not be left without justification in a worse position as a result of having entered into a transaction in circumstances where the claimant's consent to the transaction was impaired or was affected by wrongful conduct. The CPUTR approximate this aim with basic requirements of restitution and counter-restitution on the part of trader and consumer alike. However, the CPUTR do not provide for adjustments for use of the product by consumers, or other forms of more subtle adjustment of the redress between the parties when the contract is unwound in the same way as do courts of equity when supervising rescission.¹¹⁵ This was a deliberate choice by the Law Commissions, which considered that 'requiring an allowance for use would remove the simplicity and usefulness of the remedy.'¹¹⁶ The Commissions also considered that 'any over-compensation would be limited because the complaint must be made within three months.'¹¹⁷ The approach is consistent with that taken under the *Consumer Rights Act 2015*, which provides for a

¹⁰⁸ CPUTR reg 27E(8).

¹⁰⁹ Slightly different rules apply where the consumer has supplied a product to the trader, see CPUTR reg 27G.

¹¹⁰ The obligation to give the consumer a refund is qualified where the contract was for the ongoing supply of a product, see CPUTR 27F(7)-(10).

¹¹¹ CPUTR reg 27F(1).

¹¹² *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [8.28].

¹¹³ *Erlanger v The New Sombrero Phosphate Company* (1878) 3 App Cas 1218 (HL) 1278–79 (Lord Blackburn) and *Alati v Kruger* (1955) 94 CLR 216, 224 (Dixon CJ, Webb, Kitto and Taylor JJ); D O'Sullivan, S Elliott and R Zakrewski, *The Law of Rescission* (2nd edn, Oxford, Oxford University Press, 2015) [13.01].

¹¹⁴ E Bant, 'Rescission, restitution and compensation' in J Varuhas and S Degeling (eds), *Equitable Compensation and Disgorgement* (Hart Publishing, Oxford 2017) Chapter 13.

¹¹⁵ For examples of the possible adjustments, see *Newbigging v Adam* (1886) 34 Ch D 582 (CA); *Brown v Smitt* (1924) 34 CLR 160; *Alati v Kruger* (1955) 94 CLR 216.

¹¹⁶ *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [8.91].

¹¹⁷ *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [8.91].

discount for use from amounts refunded to consumers where goods fail to conform to the contract, except where the goods are returned within six months of purchase.¹¹⁸

The relative equities as between a consumer who has had the use of the goods and a trader who engaged in an unfair practice probably justify this approach. If the consumer has been misled or subjected to an aggressive practice, thereby inducing entry into a contract, then the consumer has not in any valid sense made a decision that advances his or her own best interests. In these circumstances it seems entirely fair to suggest that the consumer should not have to make restitution to the trader for having had the opportunity to use the goods prior to unwinding the contract. Equally, though, the trader is not required to pay interest on the purchase price paid by the consumer and thus is allowed to benefit from the opportunity to use the money over the relevant period when the consumer has had the use of the goods.

(c) *The Right to a Discount*

The other first tier right of redress available to a consumer in response to an unfair practice is a right to a discount.¹¹⁹ The CPUTR specify the amount of the discount that can be claimed by reference to the gravity of the prohibited unfair practice. The discounts are as follows:

- (a) if the prohibited practice is more than minor, it is 25%,
- (b) if the prohibited practice is significant, it is 50%,
- (c) if the prohibited practice is serious, it is 75%, and
- (d) if the prohibited practice is very serious, it is 100%.¹²⁰

There is an exception to the application of these bands of discount where the amount payable under the contract is more than £5,000, the market price of the product was lower than the amount payable for it under the contract and there is clear evidence of the difference between the market price and the price payable under the contract.¹²¹ In such cases the relevant percentage is ‘the percentage difference between the market price of the product and the amount payable for it under the contract.’¹²²

The Law Commissions viewed the right to a discount as a simplified approximation of tort damages,¹²³ approximating a ‘reliance approach’ to remedies.¹²⁴ However, damages in tort for fraudulent misstatement are usually based on the difference between the price paid under the contract and the real value of the product, so as effectively to return the consumer to the position he or she would have been in had the representation not occurred.¹²⁵ Clearly, the standard measure used in the CPUTR is not the same as in

¹¹⁸ *Consumer Rights Act 2015* s 24.

¹¹⁹ CPUTR reg 27I. Compare the right to a price reduction in the *Consumer Rights Act 2015* s 24.

¹²⁰ CPUTR reg 27I(4).

¹²¹ CPUTR reg 27I(6).

¹²² CRUTR reg 27I(7).

¹²³ *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [8.119].

¹²⁴ *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [8.2].

¹²⁵ *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, 167 (Lord Denning MR), approved *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, [1996] UKHL 3;

tort, other than in exceptional cases.¹²⁶ The measure of discount under the CPUTR is based on the gravity of the prohibited practice discounted from the purchase price, not the loss to the consumer arising from the failure of the value of the goods to meet the price paid for them.¹²⁷ The parallel with tort is perhaps in the attempt in this form of damages to recognise that the consumer may not have obtained what they paid for: they were duped or pressured into a contract worth less than they paid. It may reflect an assumption that the greater the deception, the greater the likely disparity between what was paid for and what was received. Notwithstanding these uncertainties, what is clear is that the measure does not in any form attempt to replicate the damages used in contract that compensate consumers for their lost expectations.¹²⁸

As a simplified version of tort damages, the Commissions characterised the right to a discount as ‘compensatory’.¹²⁹ The authors of *Chitty on Contract* dispute this characterisation,¹³⁰ arguing that because the right to a discount is based on the gravity of the prohibited practice, it seems ‘to be partly aimed at compensation for loss of value and partly a form of civil penalty’.¹³¹ Certainly, the idea of focusing on the nature and degree of wrongful conduct of the defendant to calculate the redress payable by him or her is familiar from exemplary damages. The object of exemplary damages is to punish the defendant and deter future wrongful conduct¹³² and therefore focuses on conduct of the defendant and his or her disregard of the claimant’s rights.¹³³ The award of civil pecuniary penalties under the *Australian Consumer Law* similarly focuses on the nature of the contravening conduct and its impact on the claimant.¹³⁴

The characterisation of the right to a discount may influence the way in which courts approach the task of assessing the degree of seriousness of the unfair conduct. If exemplary, courts will consider the consequences of the award for the goal of deterrence and are likely to focus on the conduct of the trader and the degree to which that conduct evinced a contumelious disregard for the interests of the consumer.¹³⁵ If the goal is compensation, albeit in a form dictated by the statute rather than as undertaken under the general law, then courts are likely to put greater emphasis on the

Potts v Miller (1940) 64 CLR 282; *Toteff v Antonas* (1952) 87 CLR 647; *Gould v Vaggelas* (1985) 157 CLR 215; *HTW Valuers v Astonland Pty Ltd* (2004) 217 CLR 640.

¹²⁶ CRUTR reg 27I(7).

¹²⁷ *Chitty on Contracts* (32nd ed) [38-184].

¹²⁸ *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [8.6].

¹²⁹ *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [5.21].

¹³⁰ *Chitty on Contracts* (32nd ed) [38-184].

¹³¹ *Chitty on Contracts* (32nd ed) [38-184].

¹³² See eg *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, 77 (Knox CJ), 81 (Isaacs J); *Rookes v Barnard* [1964] AC 1129, 1221 (Lord Devlin).

¹³³ *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, 77 (Knox CJ).

¹³⁴ *Australian Consumer Law* s 224(2). For a discussion of the process see *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (No 7)* [2016] FCA 424, [21]-[23] (Edelman J).

¹³⁵ Compare *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, 77 (Knox CJ); *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448, 471 (Brennan J); *Gray v Motor Accident Commission* [1998] HCA 70, (1998) 196 CLR 1 [22] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

impact of the unfair practice on the consumer and the extent to which he or she is worse off as a result.

The characterisation of the right to a discount as compensation or something different also has consequences for a consumer who aims to seek redress for an unfair practice both under the Act and in tort or contract. It will be remembered that the CPUTR do not preclude a claim for relief under the general law in addition to the redress awarded under the statute. However the CPUTR also provide that a consumer may not make a claim to be 'compensated under a rule of law or equity' in respect of such conduct if the consumer has been compensated under the statute.'¹³⁶ The authors of Chitty argue that:

The practical implication of this analysis is that the award of a discount could be that its award would not affect any further amount that a consumer may be able to recover on some other basis, such as damages for fraud or for breach of contract, as Pt 4A prevents double recovery only of 'compensation.'¹³⁷

This analysis would seem to neglect the purpose of the provisions. The outcome of the regime may not be to effect perfect compensation and may contain a punitive element. However in considering whether there would be double recovery by a claimant who claims in tort and under the CPUTR the question is whether the consumer has been compensated *under* the CPUTR. Given the apparent purpose of the provisions is to effect a simplified version of compensation, the award of a right to a discount should be enough to preclude additional compensation under the general law. Moreover, it is recognised under the general law that compensatory damages may have a punitive element, while still retaining that characterisation.¹³⁸

V. SECOND TIER RIGHTS OF REDRESS

(a) *The fault-based nature of second tier remedies*

The second tier of redress available to a consumer in response to a prohibited unfair practice is a right to damages, available regardless of whether the consumer has exercised the right to unwind or the right to redress.¹³⁹ Importantly, that right is completely defeated in the event that the trader's responsibility or culpability for the prohibited practice is sufficiently diminished by certain, listed factors. To this extent, and in contrast to the first tier remedies, the second tier remedies are subject to considerations about the defendant's fault. This conclusion is further supported by the presence of a remoteness rule of reasonable foreseeability that operates to cap defendant liability. These and other limitations serve to restrict defendant traders' scope of liability for losses arising from their prohibited practices.

A consumer will not have a right to damages if the trader proves that:

- (a) the occurrence of the prohibited practice in question was due to-
 - (i) a mistake,
 - (ii) reliance on information supplied to the trader by another person,
 - (iii) the act or default of a person other than the trader,

¹³⁶ CPUTR 27L(2)(a).

¹³⁷ *Chitty on Contracts* (32nd ed) [38-184].

¹³⁸ *Rookes v Barnard* [1964] AC 1129, 1221 (Lord Devlin).

¹³⁹ CPUTR reg 27J.

(iv) an accident, or

(v) another cause beyond the trader's control, and

(b) the trader took all reasonable precautions and exercised all due diligence to avoid the occurrence of the prohibited practice.¹⁴⁰

Subsection (a) seems to raise a further causal enquiry, directing attention to whether the prohibited practice was 'due' to a range of specified factors. Factors (ii) – (v), for example, suggest that intervening acts beyond the control of the trader are sufficient to break the necessary 'chain of causation' linking the trader's conduct and the prohibited practice. However, these factors do not and cannot deny the earlier satisfaction of the test for prohibited conduct in which the trader was necessarily, factually, involved. At this subsequent point the enquiry is into the normative issue of responsibility for the prohibited conduct. This is most clearly evidenced by factors (i) and (ii), which clearly relate to the degree of culpability of the trader in engaging in the prohibited practice.

At this stage of second tier damages then, redress under the CPUTR is fault based. This is confirmed by subsection (b), which provides that a trader who has exercised reasonable care will not be liable for the prohibited conduct where a contributing cause to that prohibited conduct was one of the factors specified in the section.

(b) Right to damages

The second tier of redress provides consumers with a right to compensatory damages for certain defined and restricted loss. Under section 27J of the CPUTR, a consumer has a right to damages if the consumer:

(a) has incurred financial loss which the consumer would not have incurred if the prohibited practice in question had not taken place, or

(b) has suffered alarm, distress or physical inconvenience or discomfort which the consumer would not have suffered if the prohibited practice in question had not taken place.¹⁴¹

Paragraph (a) is a statutory equivalent of the general law right found in cases such as deceit to consequential losses.¹⁴² Paragraph (b) affirms the right to non-pecuniary losses, again available in tort.¹⁴³

Both of these elements of the 'right to damages' contain what at first sight seems like another causation requirement, effectively providing that damages are only available for losses that would not otherwise have been suffered *but for* the unfair practice occurring. However, this approach runs the risk of contradicting the earlier 'significant factor' test, and would re-introduce the significant forensic difficulties and speculation of the 'but for' test without obvious reason or justification. A more likely interpretation of the provisions, consistent with the broader approach to redress under the CUPTR, is that they reflect a concern to ensure that a consumer claimant is left 'no better off' by reason of the award than the consumer would have been had the prohibited practice not taken place.

¹⁴⁰ CPUTR reg 27J(5). Chitty states that the provision was intended to reflect the position under s 2(1) of the *Misrepresentation Act 1967*: *Chitty on Contracts* (32nd ed) [38-185].

¹⁴¹ CPUTR reg 27J(1).

¹⁴² *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [8.145] and also [8.152].

¹⁴³ *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [8.145] and also [8.152].

Stapleton has recently emphasised the role of the ‘no better off’ principle in tort law, which demands that the injury must represent ‘damage’ relative to the benchmark of where the victim *would have been* absent tortious conduct.¹⁴⁴ An equivalent principle seems to be reflected in this statutory right to compensation (a view supported by the presence of the ‘no double compensation’ limitation addressed further below). On Stapleton’s analysis, even if a defendant’s breach factually contributed to (was ‘a factor’ in) the process resulting in an injury, he is not liable to pay compensatory damages if the same or an equivalent injury would have occurred in the absence of that tortious conduct. In the context of the CPUTR, the redress provisions arguably likewise require a court to consider whether the claimant would have still suffered the claimed loss absent the defendant’s prohibited practice.¹⁴⁵

However, again, even assuming this is so, caution must be exercised before embracing wholesale a ‘no better off’ principle under the CPUTR. The principle appears to be founded at common law in conceptions of corrective justice. It is, however, subject to exceptions, themselves dependent on normative choices made by the law. So, for example, courts might determine for reasons of policy that where there has been more than one wrongful contribution to a loss, each of which were independently sufficient to cause the loss, each wrongdoer should be held jointly liable for the whole of that loss and left to sort out contributions and indemnity issues between themselves.¹⁴⁶ In the context of the CPUTR, a significant normative choice is the extent to which uncertainties inherent in the ‘but for’ test in the context of cases involving complex decision causation should be allowed to undermine the consumer protection policy of the statute. Enquiries into what the consumer would have done, or what loss the consumer would have suffered (potentially by reference to the decision-making of third parties not before the court) without the prohibited conduct, run the risk of becoming highly speculative. This is not a good basis on which to deny a consumer the right to redress to which she is otherwise entitled. For these reasons, it is arguable that where a court cannot be reasonably certain that the consumer’s loss would have been suffered in any event, then the consumer should be permitted to recover in full. Otherwise, the protective purpose of the provisions as a whole is likely to be repeatedly stultified.

(c) *Other limitations on the right to damages*

We have seen that the consumer will have no right to compensation where the trader has exercised due diligence in relation to the prohibited practice and that the consumer is only entitled to compensation for certain kinds of loss. There are two further specified limitations on the consumer’s right to damages, relating to double compensation and ‘topping up’, and foreseeability.

(i) *No double compensation or topping up*

First, the right to be paid damages for financial loss does not include the right to be paid damages ‘in respect of the difference between the market price of a product and the amount payable for it under a contract’.¹⁴⁷ This amount represents the usual measure of damages under the tort of deceit. As we have seen the CPUTR provide a right to unwind the impugned transaction within a limited time or a right to a discount.

¹⁴⁴ J Stapleton, ‘Unnecessary Causes’ (2013) 129 *LQR* 39, 54-62

¹⁴⁵ *Ibid*, 55.

¹⁴⁶ *Ibid*, 58-59.

¹⁴⁷ CPUTR reg 27(3).

Unwinding a contract entails that the consumer receives back the benefit she transferred to the trader. If that route is taken, however, allowing her to claim the market difference in addition would likely lead to some measure of double recovery. Again, in this cheap and cheerful system, the precise degree of potential double recovery is not the point: the aim is to ensure that adequate and prompt justice is done without undue complication and delay. The double recovery provision promotes this aim.

Likewise, the right to a discount provides an approximation of reliance-based damages in tort but, as we have seen earlier, does not replicate the tort-based enquiry. It would therefore be theoretically possible for a consumer to claim the right to a discount and then effectively seek a top-up relying on the tort-based measure to cover the direct loss sustained by reason of a misleading practice. The purpose of the provision in precluding this type of claim again might be seen as preserving the clarity and simplicity of the regime. Consumers are effectively asked to make a choice as to the type of redress they seek.

Notably, the provisions do not prevent the consumer from seeking damages for consequential loss in addition to unwinding the transaction. This largely replicates the position at general law.¹⁴⁸ On the other hand, amendments to the *Misrepresentation Act 1967* introduced with the 2014 amendments to the CPUTR appear to be squarely aimed at precluding entirely a consumer who has a claim under the CPUTR from seeking redress under the *Misrepresentation Act*.¹⁴⁹ This is likely because the CPUTR regime is designed to be a more simple and accessible route to consumer redress than the *Misrepresentation Act*.¹⁵⁰ In that context, the double compensation and no top up provisions may be seen as part of a coordinated attempt within and across related statutes to balance the interests of traders by channeling consumers into one type of claim, as well as ensuring a coherent if blunt relationship between the remedies is preserved.¹⁵¹

(ii) Foreseeability

Secondly, the right to damages ‘is a right to be paid only damages in respect of loss that was reasonably foreseeable at the time of the prohibited practice’.¹⁵² This provision replicates the enquiry into remoteness for negligence.¹⁵³ A consumer who has suffered

¹⁴⁸ *Newbigging v Adam* (1886) 34 Ch D 582 (CA) 592 (Bowen LJ), affirmed in (1888) 13 App Cas 308; *McAllister v Richmond Brewing Co (NSW) Pty Ltd* (1942) 42 SR (NSW) 187, 192 (Jordan CJ) (NSWSC); *Yorke v Ross Lucas Pty Ltd* (1982) 69 FLR 116; *Archer v Brown* [1985] QB 401; D O’Sullivan, S Elliott and R Zakrewski, *The Law of Rescission* (2nd edn, Oxford, Oxford University Press, 2015) [2.03]–[2.04].

¹⁴⁹ The *Misrepresentation Act 1967* s 2(d)(4) states: ‘This section does not entitle a person to be paid damages in respect of a misrepresentation if the person has a right to redress under Part 4A of the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) in respect of the conduct constituting the misrepresentation.’

¹⁵⁰ The Law Commissions noted the complexity of the *Misrepresentation Act* as a reason favouring introduction of the consumer redress provisions: see *Consumer Redress for Misleading and Aggressive Practices* (Law Com No.332; Scot Law Com No.226, 2012) [S14], [3.20], [3.21], [3.22], [4.6], [4.15].

¹⁵¹ Cf the Australian position where the overlap between statutes in the context of statutory prohibitions on misleading conduct is relatively uncoordinated and accordingly complex: see, for example, the overlapping claims in *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94.

¹⁵² CPUTR reg 27J(4).

¹⁵³ Including negligent misstatement, eg, *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 248–9 [186] (Gummow J). The source of the test is *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (Wagon Mound (No1))* [1961] AC 388.

consequential losses as a result of fraud or deceit may find that a more generous measure of damages is available under the general law in an action for fraudulent misrepresentation, where remoteness rules based on foreseeability will not apply to limit the damages available.¹⁵⁴ In that context, a consumer will be able to recover all intended losses and losses directly arising from the impugned conduct, even if those losses are not reasonably foreseeable.¹⁵⁵

The damages awarded in response to negligent misrepresentation at common law may also be limited by considerations of mitigation and contributory negligence. It is possible that these types of limitations could also be encompassed by the statutory enquiry into foreseeability. For example, a failure on the part of a claimant to take steps to mitigate her loss may not be reasonably foreseeable. However, again, caution must be exercised before informing the statutory enquiry with common law conceptions that are complex and difficult to apply. We have seen that a major aim of the statute is to provide an adequate (not perfect) remedial regime for consumers that is simple and easy to apply. There is a real danger that this aim will be seriously undermined or stultified by introducing wholesale common law scope of liability concepts such as mitigation through the reasonable foreseeability requirement. The common law experience shows that such concepts can be extremely difficult to apply.¹⁵⁶ Such an approach would have the effect of reading limiting concepts drawn from a working knowledge of the law of contract and tort into the rights to redress provided under the CPUTR. This was not the aim of the regime.

A better interpretation of the reasonable foreseeability requirement that is more consistent with the statutory purposes is that scope of liability limitations only come into play in clear-cut cases of gross carelessness on the part of the claimant. This is further supported by the failure of the legislation expressly to incorporate apportionment provisions or mitigation requirement when it could easily have done so. In that context, the decision to include a remoteness rule, but not to introduce contributory negligence or mitigation restrictions, appears to reflect a conscious decision to favour simplicity and certainty over a more nuanced but uncertain and complex enquiry.

VI. EVOLUTION OF THE GENERAL LAW?

Hugh Collins has identified a ‘deep and systematic challenge to the integrity of the private law system posed by the advent of extensive economic and social regulation’.¹⁵⁷ He argues that the ‘presence of this public or welfare regulation in the field of contractual practices compels a dialogue between it and the traditional private law’.¹⁵⁸ We have seen that the CPUTR does not actively undermine traditional private law approaches to consumer-trader disputes. Rather it presents a simplified approximation of general law liability, offered in parallel to common law relief, tailored to the consumer context. In many cases, however, this will lead to different outcomes than would be reached under the application of general law principles. Considerations of coherence therefore demand a dialogue that is reciprocal between these parallel regimes.

¹⁵⁴ *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, 167 (Lord Denning MR).

¹⁵⁵ *Ibid.*

¹⁵⁶ *Eg Burns v MAN Automotive (Aust) Pty Ltd* [1986] HCA 81; (1986) 161 CLR 653.

¹⁵⁷ H Collins, *Regulating Contracts* (Oxford University Press, 1999) p 46.

¹⁵⁸ *Ibid.*

Without this engagement there risks being ongoing friction between the similar but different principles applied in overlapping contexts that has the potential to undermine the coherence and cohesion of both regimes.

The revision of traditional remedial principles wrought by the CPUTR in consumer transactions therefore requires us to consider how the regime might impact on the private law doctrines that operate in close proximity with it. From one perspective the effect may be next to negligible. At least in contract law, courts have usually used the existence of consumer protection statutes as a reason for confining the scope of doctrines that might otherwise have been used to address concerns about procedural fairness in consumer transactions.¹⁵⁹ Such a response is not entirely surprising. As we have seen, at one level, the method and objectives of consumer protection legislation and the private law of contract are very different. Consumer protection legislation is overtly instrumental in its objectives and interventionist in its approach. By contrast, classical or rights-based theories of contract law conceive contractual obligations as created by the parties themselves and contract law as primarily concerned with enforcing the voluntary choices of contracting parties.¹⁶⁰ On this view the initiatives of consumer law pose a considerable challenge to private law reasoning and, accordingly, to preserve the sanctity of the law of contract should not be allowed to intrude on its domain.

From another perspective however there is much to be said for a more symbiotic relationship between statutory and general law regimes. At its most abstract it would not seem desirable for the effect of the new remedial regime in the CPUTR to be that the impact of the law of contract is confined to disputes other than those involving consumers. Conversely there seem numerous points where the reasoning from the statute may be valuable in informing the development of the general law of contract. For example, it seems possible that the values informing statutes such as the CPUTR, which require rigorous scrutiny of the circumstances of consumer consent and impose demanding and generalized normative standards of commercial behaviour, may have an impact on the private law, at least in comparable contracts where there are significant discrepancies of bargaining power between the parties concerned. The integrity of the law of contract relies on having a plausible model of consent accompanied by a range of sanctions for those who seek to exploit a more vulnerable contracting partner to the point of denying that person's individual rights to autonomy and agency.¹⁶¹

Moreover, the experience of Australian judges in exercising significant remedial discretion in the statutory context has strongly influenced their approach to general law relief, reflected in acceptance of the possibility of partial rescission¹⁶² and the

¹⁵⁹ See *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 843 (Lord Wilberforce) and 851 (Lord Diplock); *Toll (FGCT) Pty v Alphapharm Pty Limited* [2004] HCA 52; (2004) 219 CLR 165, 182-3 (Gleeson CJ, Gummow, Hayne Callinan and Heydon JJ);

¹⁶⁰ D Cabrelli, 'The Role of Consent in Contract Law: Principles ad Practice' (2010) *University of Edinburgh School of Law Working Paper Series* 1; H Collins, *The Law of Contract* (4th edn LexisNexis, London 2003) 7; A Robertson, 'The Limits of Voluntariness in Contract' (2005) 29 *Melb U L Rev* 179-217.

¹⁶¹ See R Bigwood, 'Still Curbing Unconscionability: *Kakavas* in the High Court of Australia' (2013) 37 *MULR* 463, 495-6.

¹⁶² *Vadasz v Pioneer Concrete (SA) Pty Ltd* [1995] HCA 14; (1995) 185 CLR 102, 115-116 (the Court).

widespread use of the remedial constructive trust.¹⁶³ It remains to be seen whether the CPUTR will exert similar influence on judicial modes of reasoning in parallel, general law contexts. On one view, the remedial scheme under the CPUTR is by comparison heavily constrained, articulating in detail a series of remedies in a fashion that appears to leave much less room for judicial discretion than exists even with respect to their general law counterparts. This may seem to offer very few opportunities for the sort of gravitational influence of the scheme on the evolution of its surrounding general law that its Australian comparator has enjoyed. However, the very hierarchy of remedies (commencing with rescission, some form of primary measure of compensation and then consequential loss) adopted under the scheme, its structural separation of the factual causation and scope of liability enquiries and the explicit connection between the defendant's degree of culpability and the level of discount or damages awarded, all reflect important informing principles that underpin the legislative scheme and that are potentially highly instructive when considering the role and continuing operation of analogous general law concepts.

In particular, the CPUTR prompt scrutiny of core concepts such as causation that might well provide greater insight into their operation in comparable common law scenarios. It is unclear, for example, why the clear preference for the 'a factor' test in determining issues of factual causation in cases of decision causation in the statutory context (and as we have seen many general law fields) is not carried through consistently in the private law. Decision causation, for example, is central to the many 'failure to advise' cases in negligence where the 'but for' test is routinely applied.¹⁶⁴ The preceding analysis suggests that here, adoption of the 'but for' test may be masking scope of liability limitations. For example, it may be that where a failure to advise of a medical risk has contributed to a claimant's decision to undertake a medical procedure, and thus played a factual causative role, relief nonetheless should be denied where it can be shown that in deciding to proceed, the claimant has also accepted that there were likely to be undisclosed risks associated with the procedure.¹⁶⁵ A parallel concern with risk-taking is evidenced elsewhere in the law.¹⁶⁶

Certainly, it is suggested that the principle of coherence¹⁶⁷ requires the interplay between statute and common law to be taken seriously in legal reasoning when addressing private law disputes.¹⁶⁸ We have seen that where common law doctrines reflect and promote the statutory language and purpose, or at least are consistent with the statutory scheme, they provide a rich source of insights that should be exploited in applying the statute. Conversely, statutory principles may exert a gravitational influence on cognate common law concepts. This need for integrated evolution and

¹⁶³ *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296, [503]-[512] (the Court).

¹⁶⁴ *Rosenberg v Percival* (2001) 205 CLR 434 [24]-[25] (McHugh J); [2001] HCA 18; *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC 128 [98], citing *Tabet v Gett* (2010) 240 CLR 537, [111]-[113] (Kiefel J, with whom Hayne, Crennan and Bell JJ agreed), see also [104].

¹⁶⁵ See eg discussion in *Rosenberg v Percival* (2001) 205 CLR 434 [17] (Gleeson CJ);

¹⁶⁶ Edelman and Bant, *Unjust Enrichment* (Hart Publishing, Oxford 2016) 176-179; E Bant and M Bryan, 'Fact, Future and Fiction: Risk and Reliance in Estoppel' (2015) *OJLS* 1.

¹⁶⁷ Emphasised by the High Court of Australia in recent times: *Miller v Miller* (2011) 242 CLR 446; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498.

¹⁶⁸ Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38(1) *UNSW Law Journal* 362.

analysis is not confined to the consumer law context. It has been observed, for example, that the principle of coherence underpins and provides doctrinal clarity to the deeply contested defence of illegality.¹⁶⁹ Here, again, comparison of both Australian and English developments is instructive.¹⁷⁰ However, it must not be forgotten that the search for coherence in private law also demands that we take seriously the different normative foundations and objectives that can underpin statutory and common law regimes. The CPUTR provide an excellent example of a statutory regime that must be assessed and applied on its own terms and for its particular purposes, as a source of law that is consciously designed to fit within, but not replicate, its broader common law and statutory context.

VII. CONCLUSION

The statutory scheme in the CPUTR was enacted to simplify and clarify the remedies available to consumers in response to unfair practices prohibited by the Act. The goal of protecting consumers, including the vulnerable and disadvantaged, places peculiar stresses on this type of regime. This is a body of law that will not commonly be argued in court and buttressed by a body of judicial interpretation. Rather consumer claims are typically resolved through mediation, through ombudsman services and in small claims courts. The law therefore needs to be capable of being applied by people affected, rather than by lawyers. The CPUTR have responded to this challenge by providing a simplified, and for that reason revolutionary, scheme of rights of redress in response to unfair practices. Instrumentalist considerations such as access to justice and promotion of fair business practices may therefore have trumped the elegance of corrective justice. Nonetheless, we have suggested that the statutory and general law regimes operate in such close proximity that there may quite plausibly be some degree of coordinated evolution in both. The result may be the gradual development of a more coherent and integrated law of consumer protection arising under common law and under statute alike.

¹⁶⁹ The most recent in the convoluted series of UK cases endorsing the centrality of coherence to the defence is *Patel v Mirza* [2016] UKSC 42: see eg at [101], [115], [120] (Lord Toulson, with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge agreed) [174] (Lord Neuberger) [192] (Lord Mance) [213]-[215] (Lord Clarke) [230], [232], [243]-[244] (Lord Sumption). See also *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] QB 549; *Langsam v Beachcroft LLP* [2011] EWHC 1451, [253] (Roth J); *Patel v Mirza* [2014] E WCA Civ 1047, [2015] Ch 271 [65] (Gloster LJ); *Hounga v Allen* [2014] UKSC 47, [2014] WLR 2889 [42] – [52] (Lord Wilson JSC), discussed at length by Lords Toulson and Hodge JJSC in *Bilta (UK) Ltd (in liq) v Nazir (No 2)* [2015] UKSC 23, [2015] 2 WLR 1168 [171] – [174], see also at [129] and adopted by Sales LJ, with whom McCombe LJ agreed, in *R (on the application of Best) v Chief Land Registrar* [2015] EWCA Civ 17 [70].

¹⁷⁰ Eg *Nelson v Nelson* [1995] HCA 25, (1995) 184 CLR 538; *Miller v Miller* [2011] HCA 9, (2011) 242 CLR 446; *Equuscorp Pty Ltd v Haxton*; *Equuscorp Pty Ltd v Bassat*; *Equuscorp Pty Ltd v Cunningham's Warehouse Sales Pty Ltd* [2012] HCA 7, (2012) 246 CLR 498, applied in *Redwood Anti-Ageing Pty Ltd v Knowles* [2013] NSWSC 508, (2013) 101 IPR 358 [119] (White J); *Gnych v Polish Club Ltd* [2015] HCA 23, (2015) 89 ALJR 658.