Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

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In response to the Interim Report of the Banking Royal Commission dated 28 September 2018, this Submission identifies five key issues for consideration in developing future recommendation to respond to misconduct. The Submission is informed by research undertaken pursuant to Australian Research Council Discovery Project DP140100767– 'Remedies under the Australian Consumer Law and the Common Law: Evolution and Revolution' (2014-2018) and ARCDP 180100932 – 'Developing a rational law of misleading conduct' (2018-2021), conducted by Chief Investigators Professor Elise Bant and Associate Professor Jeannie Paterson (both of Melbourne Law School). The summary of chief findings and publications to date arising from this research is included as **Annexure 1** to the Submission. Published research which is referred to in the Submission are included as **Annexures 2-8**. All project publications and outputs are available to the Commission on request. Please note that some of the annexed published research should not be circulated beyond the Commission without prior permission from the publisher, although it may be cited or referred to by the Commission in any of the Commission's publications or reports. These papers are marked as 'Confidential to the Commission'.

Given the nature of the research projects that support the Submission, the focus of the Submission is on contraventions by banks and other financial service providers (FSPs) of the statutory prohibitions on misleading or deceptive conduct, and to a lesser degree statutory prohibitions on unconscionable conduct, together with the remedial schemes available to regulators and private victims of that misconduct.

1. Simplifying the labyrinth of regulation

This Submission supports Commissioner Hayne's observation that more regulation is not, of itself, the answer to widespread misconduct:

https://financialservices.royalcommission.gov.au/Documents/interim-report/interim-report-volume-1.pdf#page=19&zoom=auto,83,637

However, it further suggests that the current complex, convoluted and excessive regulation of misconduct by FSPs is more damaging than helpful. It requires simplification. In the words of Justice Rares in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in Liq)* [2012] FCA 1028:

> For many years all one had to know was that the elegantly simple s 52(1) of the *Trade Practices Act 1974* (Cth) prohibited a corporation from engaging in conduct, in trade or commerce, that was … likely to mislead or deceive. For some purpose that is not evident the Parliament decided to remove elegant simplicity in its statutory drafting some years ago.

Research carried out pursuant to the ARC grant projects listed above has identified literally dozens of overlapping state and federal statutes that prohibit misleading or deceptive conduct in trade or commerce, ranging over areas as diverse as financial services to food products,

overseas education and emergency services, sporting events and insignia to public health. These acts often use subtly but significantly different language and yield different remedies and penalties. Further, the trend of legislative drafting has been away from 'principle-based' design, in favour of enumerating the detailed operation of the general prohibition in a wide variety of different commercial contexts. This has resulted in an explosion of complexity and volume of relevant legislation, making it impenetrable for many lawyers, let alone non-lawyers, and significantly reducing the expressive power and deterrence effect of the original scheme: see E Bant and J M Paterson, 'Statutory interpretation and the critical role of soft law guidelines in developing a coherent law of remedies in Australia' in R Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law* (ANU Epress 2017) 301-309 (**Annexure 2** to this Submission); E Bant and J M Paterson, 'Misleading Conduct before the Federal Court of Australia: Achievements and Challenges' in P Ridge (ed) *The Federal Court's Contribution to Australian Law: Past, Present and Future* (Federation Press 2018) pp12-17 (**Annexure 3** to this Submission).

One notable result of this 'legislative porridge' is that the regulation of financial services and products is split between statutes in ways that defy rational justification: eg *ABN Amro Bank NV v Bathurst Regional Council* [2014] FCAFC 65 [620] – [700]; *Wingecarribee* [1186] – [1205]). The result is protracted and cripplingly expensive litigation to determine who is covered by what prohibition. This plays perfectly into the hands of well-funded corporations who know that delaying tactics and the limited resources of regulators and commercial and consumer are likely to produce soft settlements, 'agreed penalties' and no real pressure to change behaviour - all while profits continue to flow in.

This Submission accordingly supports a return to simple and overarching prohibitions on misleading or deceptive, and unconscionable conduct, contained in one or two key statutes, and which apply to every actor who engages in trade or commerce without exception, exclusion or distinction. Focused and principles-based drafting such as found in the original s52 Trade Practices Act 1974 that applies to all commercial actors, whatever the context, is a clearer and more powerful way to convey the essential nature and consequences of misconduct to those engaging in trade and commerce. These can be usefully supported through non-statutory soft law guidelines, that do not add to the complexity and volume of statutory regulation, and that provide targeted examples of the statutory scheme for the guidance of particular industries. Further, rather than relying solely on 'front of shop' guidance such as those currently provided by ASIC, it is suggested that detailed and individualized guidance on the operation of the prohibitions in particular industries and contexts may be better managed through the sorts of soft law practice notes discussed in E Bant and J Paterson, 'Statutory Interpretation' (**Annexure 2** to the Submission) and E Bant and J M Paterson, 'Misleading Conduct before the Federal Court' pp 17-22 (**Annexure 3**).

2. Refocus on Deceptive *Systems and Patterns of Conduct* by Corporations

As a response to the most egregious instances of wrongdoing, the *ASIC Act* creates offences for specific instances of misleading conduct, to which criminal penalties or fines apply: ss12GB and s12GC *ASIC Act*. However, to date, these have been very infrequently used by the regulator, probably due to the difficulty and cost in satisfying the criminal burden of proof, and hence play little part, in practice, in effecting the deterrent purposes of the regime: Productivity Commission, Review of Australia's Consumer Policy Framework, Inquiry Report

No 45 (2008) vol 1, p 45. As a result, more emphasis is put on civil and administrative responses: see further E Bant and JM Paterson, 'Should specifically deterrent or punitive remedies be made available to victims of misleading conduct under the Australian Consumer Law?' (**Annexure 4**) pp 4-7.

To date, ASIC has tended to concentrate its litigation resources on bringing claims of and proving 'misleading' conduct by corporations, rather than seeking to show that the corporation's conduct was 'deceptive'. One factor supporting this decision is that it is notoriously difficult to prove the personal dishonesty traditionally required to prove fraud. As is well known, corporations are artificial persons and so operate through a complex web of directors, managers, employees, agents, sub-contractors, related entities and so on. Identifying instances of individual personal dishonesty, intention and responsibility in this diffuse structure can be difficult and in some cases impossible. In turn, this serves as an invitation for corporations actively to put in place structures, policies and procedures that prevent them from 'connecting the dots' on corporate misbehaviour. Misleading conduct, by contract, is relatively easy to prove, because it focuses on the objective meaning of conduct, does not require proof of fault – and does not require ASIC to identify the personal intentions or states of mind of individuals behind the conduct. But, this comes at a cost to effective regulation. It seems that the reputational risks associated with findings of misleading conduct are perceived by banks and other large corporate players as very low – as Commissioner Hayne has noted, corporations are quick to characterise this sort of conduct as involving 'mistakes', to apologise and to promise reform.

https://financialservices.royalcommission.gov.au/Documents/interim-report/interim-report-volume-1.pdf#page=296&zoom=auto,40,364

Further, research demonstrates that courts are loath to award stinging penalties for simple misleading conduct (which can be accidental or even reasonable in some circumstances), as opposed to findings of dishonest and deceptive behaviour: see J M Paterson and E Bant, 'Intuitive Synthesis and Fidelity to Purpose?: Judicial Interpretation of the Discretionary Power to award Civil Penalties under the Australian Consumer Law' P Vines and S Donald (eds), *Statutory Interpretation in Private Law* (Federation Press, 2019) (**Annexure 5**).

It is submitted that it is necessary for our law to evolve to meet the reality of corporations: E Bant, 'Unravelling Fraud in the Wake of *Hayward v Zurich Insurance*' pp17-19 (**Annexure 6**). We need to broaden our focus on 'deceptive' conduct from the often doomed search for the 'directing mind and will' of corporations, to identify the failure of corporate practices, policies and courses of conduct to meet the objective standards of honest conduct demanded by Australians. As Commissioner Hayne has said:

https://financialservices.royalcommission.gov.au/Documents/interim-report/interim-report-volume-1.pdf#page=149&zoom=auto,83,341

you don't need legal advice to know that 'charging for doing what you do not do is dishonest'. Much of the reported conduct by FSPs 'ignores basic standards of honesty.' A change in focus from the personal intention or knowledge of individuals to the manifested conduct, policies, procedures and structures of corporate FSPs, judged against objective standards of honest conduct, is necessary to address what Commissioner Hayne identifies as

'the root causes of conduct, which often lie with the systems, processes and culture cultivated by an entity.'

https://financialservices.royalcommission.gov.au/Documents/interim-report/interim-report-volume-1.pdf#page=114&zoom=auto,40,598.

This approach would be consistent with the objective approach taken to dishonesty in *Peters v R* (1998) 192 CLR 493 and the proposed amendments to the *Corporations Act* contained in the draft Treasury Laws Amendment (ASIC Enforcement) Bill 2018: Exposure Draft Explanatory Materials 26 September 2018 [1.121]-[1.127]. The need to address the challenges of corporate attribution and shift to objective markers of intention and honesty also plays in at the point of defences, such as honest and reasonable mistake.

3. Profit and Punishment

A further piece of the puzzle (missing from the otherwise incisive discussion in the interim report) is to bring courts on board with the program.

To date, Australian courts have been very cautious in awarding penalties for misleading conduct. The Courts have said repeatedly that the focus of the civil penalties provisions is on deterrence, not punishment. In *Trade Practices Commission v CSR Ltd Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076, 52,152 (approved in *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482, 507–8 [59] (French CJ, Kiefel, Bell, Nettle and Gordon JJ)) French J identified the purpose of the penalty regime available in response to contraventions of the competition provisions of the *TPA* as deterrence. His Honour explained that:

> The principal, and I think probably the only object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.

In *CCC v TPG* [2013] HCA 54; 250 CLR 640, 659 [65], French CJ, Crennan, Bell and Keane JJ confirmed that 'specific and general' deterrence should play a 'primary' role in assessing the appropriate penalty for contraventions of the ACL. See also *ACCC v Reckitt Benckiser* [2016] FCAFC 181; 340 ALR 25, 39 [58] (Jagot, Yates and Bromwich JJ).

This cautious approach has found expression in the range of factors used by courts in setting levels of civil penalties, which emphasise proportionality between the level of misconduct and penalty and give due weight to mitigating factors such as expressions of remorse and cooperation with regulators: J M Paterson and E Bant, 'Intuitive Synthesis' (**Annexure 5**).

The existing, cautious approach adopted by courts to the role and legitimacy of imposing punitive levels of award may be entirely appropriate in cases where courts are dealing with human defendants facing personal ruin. But when applied to corporations, it can undermine the legitimate role of punishment in changing repeated and longstanding corporate misbehaviour. As has become apparent from the Commission hearings, modest penalties encourage companies to discount the consequences of contravention and to manage this risk ex post by offering apologies, showing cooperation with the regulator and expressing remorse for the misconduct. It is moreover only recently that gains-based considerations have been contemplated by courts as relevant in setting the level of penalty orders under the ACL*: Australian Competition and Consumer Commission v Woolworths Limited* [2016] ATPR ¶42-521, [126] (Edelman J). See also applying this measure *Director of Consumer Affairs*

Victoria v Gibson [No 3] [2017] FCA 1148. This more refined approach has the benefit of ensuring that defendants do not benefit from incorporating predicted and modest levels of penalty into their business model, but has yet to be broadly adopted.

There are some relatively simple changes to our existing legislative schemes that might be considered to address this problem. The first is to clarify that punishment is an important aim of the civil penalties regime, required for 'public denunciation' of bad behaviour https://www.documentcloud.org/documents/4951274-Banking-royal-commission-interim-report.html#document/p1 and to provide effective deterrence.

The second is for courts to frame penalties with a strong eye to the profits engendered by the breach. Often the profit earned will be larger than the damage to consumers: https://financialservices.royalcommission.gov.au/Documents/interim-report/interim-report-volume-1.pdf#page=324&zoom=auto,40,463 Misconduct cannot be allowed to make good financial sense. The proposed amendments to the *ASIC Act* contained in the Treasury Laws Amendment (ASIC Enforcement) Bill 2018 (26 September 2018), discussed [1.66-1.74] Explanatory Materials, contain revised formulas for civil penalty provisions that capture profit from misconduct, together with other penalty markers (eg percentage of turnover). If this step is taken, it will be important to consider in framing the provisions, the issues that commonly render disgorgement awards complex, time-consuming and costly in terms of litigation and court resources. These include the causation questions raised by Edelman J in *ACCC v Reckitt Benckiser (Australia) Pty Ltd (no 7)* [2016] FCA 424, [59]-[65], which may favour adopting an 'a factor' test over the usual 'but for' test of causation, and the value of using revenue as the baseline for determining profit (or 'benefit') derived 'because of the contravening conduct: discussed in E Bant and J Paterson, 'Should specifically deterrent or punitive remedies' (**Annexure 4**) pp21-22.

The third (again, not yet the subject of published consideration by the Commission) is to seriously consider expanding private rights of redress to include additional or exemplary damages in cases of serious misconduct: E Bant, and J M Paterson, 'Should specifically deterrent or punitive remedies' (**Annexure 4**) Part III. Not only would this make private claims more feasible for commercial victims. The recent launch of group proceedings by Slater & Gordon

https://www.smh.com.au/business/companies/banks-set-to-face-massive-class-action-over-rip-offs-20180911-p502yo.html

shows that, when brought together, private litigants are capable of sharing the regulatory burden of keeping banks on the straight and narrow: it need not all be borne by ASIC. There are significant issues with group litigation, currently the subject of review by the Australian Law Reform Commission https://www.alrc.gov.au/inquiry-categories/class-action-proceedings-and-third-party-litigation-funders

However, the deep pockets of banks in litigation might well meet their match in well-organised teams of lawyers and litigation funders, aggressively seeking justice in the interests of their clients and for their own financial reward.

4. Rescission, restitution and the boundaries of existing relief

In Section 4 Small and medium enterprises (page 159 Interim Report) Commissioner Hayne raises the question whether AFCA should adopt FOS' approach of putting the borrower back in the position they would be in if the loan had not been made, but not award compensation for losses or harm caused. The Interim Report also asks whether there are circumstances in which AFCA should waive a customer's debts.

In many cases, the statutory relief being made available to customers is in the nature of, or akin to, equitable rescission. The relationship between rescission, restitution and compensation is complex and requires close attention, in order accurately to address the questions posed by the Commissioner: see E Bant, 'Rescission, Restitution and Compensation' in S Degeling and J Varuhas (eds), *Equitable Compensation and Disgorgement* (Hart Publishing, 2017) 277-309 (**Annexure 7**). Rescission usually entails 'setting aside' the impugned contract and requiring the parties to make mutual restitution and counter-restitution of any benefits received to date under the contract: a 'giving and a taking back on both sides' (*Erlanger v The new Sombrero Phosphate Company* (1878) 3 App Cas 1218, 1278-79 (Lord Blackburn). In most cases, rescission is conditional on the customer paying back benefits (eg the principal under a loan with the bank plus interest at the market rate) conferred by the bank: *Maguire v Makaronis* (1997) 188 CLR 449. If those benefits are not returned, the transaction stands. Equally, any sum repaid by the defendant to the plaintiff should usually be accompanied by an order for payment of a further sum by way of interest. This general position is, however, subject to the following comments.

In Equity, rescission for misrepresentation does not give rise to an independent right to compensation for losses suffered as a result of the transaction now being set aside. However, it is possible to seek compensation in addition to rescission where an independent tort (such as deceit) is claimed and proven: discussed E Bant, 'Rescission (**Annexure 7**) pp 278-283. There seems little reason why the protective purposes of the *ASIC Act* should not be promoted through similar, cumulative awards made by AFCA. The existing suite of remedies under *ASIC Act* s12GM contemplate a combination of compensatory and restitutionary orders that can be applied to effect more complete relief in a way that operates to 'compensate', 'prevent or reduce' the loss or damage caused by misconduct: see also E Bant and J M Paterson, 'Exploring the boundaries of compensation for misleading conduct: the role of restitution under the ACL' (**Annexure 8**).

This Submission also suggests that there are circumstances where it may be open to AFCA, consistently with equitable principles and the language and protective purposes of the statute, to reduce or waive a customer's debt, or reduce or waive interest payable on debt. Rescission in equity and orders equivalent to rescission under statutory provisions such as *ASIC Act* s12 GM take into account relevant changes in the parties' positions through a principle of 'restitutio in integrum'. We have seen that this principle normally requires customers to make restitution of outstanding principal, with interest, to the lender as a condition of obtaining rescission of loan agreements. However, this obligation is not strict: courts in equity and applying analogous statutory jurisdictions have made subtle adjustments and allowances to take into account changes in the parties' positions after entering into the contracts and the requirements of overriding statutory and general law principles. These have frequently reduced the amount that must be repaid as a condition of rescission and bear further investigation for guidance for AFCA's future approach: see E Bant, 'Rescission' (**Annexure 7**) pp 283-309. Where, for example, (cf questions put by Commissioner Hayne to Suncorp on

25 May 2018) a lender has entered into a loan agreement with the customer that was objectively irresponsible, providing funds for a business that was clearly failing, and that money has been irretrievably applied to that failed business, it is arguable that repayment of the principal should be waived in whole or in part. The customer has irreversibly changed his position by applying the funds for the approved purpose, in circumstances where the lender should not have entered into the transaction at all. To require the customer to make full counter-restitution of the principal to the lender will place the customer in an unjustifiably worse position than the customer occupied prior to the loan (cf *AFSL v Hills Industries* (2014) 253 CLR 560, addressing similar issues for the general law defence of change of position). The protective purpose of the statute and general law principles align to require that the risk of loss here should fall on the lender: for analogous cases, see *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274, 289 and *Akron Securities Ltd v Iliffe* (1997) 42 NSWLR 252, 367, discussed in E Bant, 'Rescission' (**Annexure 7**) at 298-300.

5. Banking Code of Practice

These submissions support Commissioner Hayne's concern to clarify the status and influence of industry codes such as the current and proposed Banking Codes of Practice:

https://financialservices.royalcommission.gov.au/Documents/interim-report/interim-report-volume-1.pdf#page=319&zoom=auto,83,315

These are often the first source of information seen by banking customers who approach their bank for assistance or with a complaint. The author has real concerns that, in some cases, the Banking Code of Practice does not articulate the legal obligations of the banks pursuant to the law, but rather expresses a different and often lower base-line of conduct that can be expected to be prioritised by banks' internal processes and procedures.

An example is the protection of domestic sureties, identified in the interim report as an example of potential divergence between the Code and requirements of the law. The proposed 2019 Code frames the obligations of banks under Chapters 25-28 as reactionary, requiring little more of banks than the provision of certain basic information to guarantors, that banks recommend that guarantors seek independent legal advice, and purporting to restrict their obligations by reference to information disclosed by the guarantor. This summary does not reflect and accord with the more subtle and expansive obligations imposed by equity under the principles stated in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 and *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395. The Banking Code of Practice moreover only really addresses the risk of mistake or misinformation. The new 'cooling off' period offered under s107 reflects this focus. No attention is paid to the danger of undue influence – a chief concern of the general law. Nor does it address risks of pressure exerted on the guarantor by the primary debtor.

In these respects, the summary of obligations disclosed under the Code may be 'likely to mislead' customers and guarantors into thinking that the Code exhaustively states the obligations of the bank and corresponding rights of the complainant, when that is not the case. It has to be remembered that customers and complainants to banking disputes will likely be referred by their bank, at the outset of the dispute, to the provisions of the Code. The current and proposed set of provisions are likely in that context to have a strong influence on complainant's perceptions of their likely rights and options for relief.

Accordingly, this submission strongly cautions against any adoption of the current or proposed provisions of the Code into the law, as being exhaustive of FSPs' obligations. Further, it strongly recommends that the 2019 Code be amended to make clear that it does not constitute a full and accurate reflection of the rights and obligations of banks under the law. Finally, for all the above reasons, the author agrees with the position adopted in the interim report that the regulator (I would suggest with input from specialist bodies such as the AFCA/FOS, appropriately qualified academics and other experts in the field) should have strong input into how the relevant provisions of the Code should be framed.

'Annexure 1'

List of Findings and Research to Date for
ARC DP140100767 Remedies for Misleading Conduct under the Australian Consumer Law and the Common Law
and
ARCDP 180100932 Developing a rational law of misleading conduct

Professor Elise Bant and Associate Professor Jeannie M Paterson
Melbourne Law School

1. The Statutory Scheme in Outline:

Section 18 (1) ACL: A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 236(1): If:

(a) a person (the claimant) suffers **loss or damage** because of the [misleading] conduct of another person;

…the claimant may recover **the amount of the loss or damage** (some emphasis added)

Section 237 Compensation etc orders

(1) A court may:

(a) on application of a person …who has suffered, or is likely to suffer, loss or damage because of the [misleading] conduct of another… make such order or orders **as the court thinks appropriate** against [the contravenor]

(2) The order must be an order that the court considers will:

(a) **compensate** … **in whole or in part** for the loss or damage; or

(b) **prevent or reduce** the loss or damage suffered, or likely to be suffered, by the injured person … (some emphasis added)

Section 243 Kinds of orders

(a) Orders declaring that the impugned contract is void ab initio or from a certain date;
(b) Orders varying the impugned contract;
(c) Orders refusing to enforce part or all of a contract;
(d) Orders to refund money or return property to the injured person; and
(e) Orders directing the respondent to pay the injured person the amount of the loss or damage;

2. Main findings:

1) Courts have developed a finely-tuned approach to the prohibition on misleading conduct and its remedies, whereby they start with the statute, but then draw on general law analogues to the extent that they are consistent with and promote the statutory language, structure and purpose.
2) Although the prohibition is strict, the language and structural separation of remedies, introduction of s137B of the CCA, the availability of penalties and other considerations of proportionality and coherence, have seen courts take into account the culpability of the defendant in fashioning private redress.
3) Concepts of causation and responsibility under the statute track, reflect and may influence general law conceptions and developments: in particular, recognition of the 'a factor' test of factual causation in cases of decision-making and the separate, normative nature of scope of liability considerations that embrace issues of fault.

4) Generally s236 damages are measured similarly to reliance loss drawing on deceit/negligent misstatement (note nature of the prohibition – one must not mislead, rather than make good one's representations) but relief is not restricted to that – eg cases akin to passing off and injurious falsehood claims.
5) By contrast s237/243 embraces a much broader conception of loss or damage and thus remedies. It extends to the loss of the plaintiff's original position and orders made to reduce or avoid that loss or damage commonly include orders equivalent to equitable rescission and restitution. Occasionally, courts have awarded 'reasonable fee', as found in passing off and property torts.
6) There is a balance to be considered between the benefits (eg change of position re restitutionary remedies) and dangers of ever-pressing the boundaries of 'loss or damage' and the interrelation (gravitational force) between statute and general law doctrines.
7) Equitable doctrines such as estoppel and breach of fiduciary duty etc that also respond to misleading conduct support further investigation into whether the statute does or should extend to an account of profits or exemplary/additional damages.
8) There is an important interplay between enforcement actions and remedies on the part of the Regulator (eg penalties) and private law rights of redress that requires further investigation. Research to date suggests that the current interpretive approach to the penalties regime places undue emphasis on compensatory concepts, to the detriment of legitimate deterrent and punitive considerations. Moreover, restrictions on regulator resources means that private rights of redress can and should share the regulatory burden in deterring egregious misleading conduct.
9) Principles-based drafting is to be preferred over rules-based regulation, in promoting a more effective and coherent law of misleading conduct. This approach to legislation can be employed in conjunction with soft law case examples directed at consumer and business audiences.
10) The prohibition on misleading conduct and accompanying remedial scheme has now been repeated and reframed a huge number of times, with concomitant dangers of excessive complexity and, ultimately, incoherence.

3. Law reform recommendations to date

1) Review proliferation and reiteration of the prohibition and accompanying remedies. Currently there are dozens of prohibitions, often worded slightly differently from the original s52 template and which come with slightly differing remedial regimes. Outside the relatively straightforward application of the prohibition to consumer goods, and in particular in the area of financial services, this proliferation undermines the expressive power of the simple prohibition, leads to unhelpful debates over the scope and operation of the various prohibitions and plenty of litigation to determine which applies to what.
2) Err on the side of simplification and principles-based drafting, rather than seeking to spell out the application of the prohibition for each industry and trade. Illustrations of its detailed operation are better given through use of common scenarios, set out in plain English and published at the regulators' websites.
3) Consider expanding the suite of remedies available for private litigants to include, expressly, restitutionary remedies and remedies aimed specifically at disgorgement/punishment.
4) Clarify the purposes of the penalties regime as including both punishment and deterrence, to address the current overly-cautious approach that emphasises proportionality and individual fairness to the individual over broader aims of deterrence and punishment.

4. Ramifications

It is time to reconsider the way in which misleading conduct is regulated at common law, in equity and under statute as part of a coherent law of misleading conduct. Deceit, negligent misstatement, injurious falsehood, passing off, defamation, estoppel, equitable rescission for misrepresentation, and a plethora of statutory schemes (including the Misrepresentation Acts) all have misleading conduct at their core. Other areas such as unjust enrichment routinely abut and overlay these fields (eg restitution for mistake).

The next steps accordingly are to (1) map and (2) comprehensively articulate the existing suite of common law, equitable and statutory rules and principles with a view to (3) making recommendations for judicial and statutory reform to promote a more coherent and effective treatment of misleading conduct.

5. Project Publications ARC DP140100767

Refereed Articles and Book Chapters

1. E Bant, 'Common Law and Statute: Interaction and Influence in Light of the Principle of Coherence' (2015) 38 *UNSWLJ* 362-386
2. J M Paterson, Unconscionable bargains in equity and under statute' (2015) 9 *J Eq* 188-213
3. E Bant and J M Paterson, 'Limitations On Defendant Liability For Misleading Or Deceptive Conduct Under Statute: Some Insights From Negligent Misstatement' in K Barker, W Swain and R Grantham (eds), The Law of Misstatements: 50 Years on from Hedley Byrne v Heller (Hart Publishing, 2015) 159-190.
4. J M Paterson, 'Consumer Protection in Singapore: Statute and the Ongoing Influence of the General Law' (2016) 28 SAcLJ 1079-1110
5. E Bant, 'Rescission, Restitution and Compensation' in S Degeling and J Varuhas (eds), 'Equitable Compensation and Disgorgement' (Hart Publishing, 2017) 277-309
6. E Bant and J M Paterson, 'Statutory interpretation and the critical role of soft law guidelines in developing a coherent law of remedies in Australia' in R Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law* (ANU Epress 2017) 301-309
7. J M Paterson and E Bant, 'In the Age of Statutes, Why Do We Still Turn to the Common Law Torts?: Lessons from the Statutory Prohibitions on Misleading Conduct in Australia' (2016) 23 *Torts LJ* 139-162
8. J M Paterson, 'The Consumer Guarantee Remedial Regime: Some Uncertainties and the Role of Common Law Analogy'(2016) *JCL* 210-233
9. E Bant and J M Paterson, 'Consumer Redress Legislation: Simplifying or Subverting the Law of Contract' (2017) 80 *Modern Law Review* 895-926
10. E Bant and J M Paterson, 'Statutory Causation in Cases of Misleading Conduct: Lessons from and for the Common Law' (2017) 24 *Torts Law Journal* 1-31
11. E Bant and J M Paterson, 'Misleading Conduct before the Federal Court of Australia: Achievements and Challenges', accepted for publication 14 September 2017 in P Ridge (ed) *The Federal Court's Contribution to Australian Law: Past, Present and Future (*Federation Press 2018) *in press*
12. J M Paterson and E Bant, 'Intuitive Synthesis and Fidelity to Purpose?: Judicial Interpretation of the Discretionary Power to award Civil Penalties under the Australian Consumer Law' , accepted for publication in P Vines and S Donald (eds), Statutory Interpretation in Private Law (Federation Press, 2019).
13. J M Paterson, 'From Disclosure to Design and Back Again: The Australian Regulatory Response to Mis-selling by Financial Services Providers in the Retail Market', accepted for publication in A Booysen (ed), *Bank Mis-selling* (forthcoming)
14. J M Paterson and E Bant, 'Misleading conduct through the Lens of Form and Substance (Presented at the Obligations IX Conference, Melbourne Law School, July 2018 – currently under consideration for publication)
15. E Bant and J M Paterson, 'Exploring the boundaries of compensation for misleading conduct: the role of restitution under the ACL' (presented to the Qld and Vic Bar Associations and currently under consideration for publication)

16. E Bant, and J M Paterson, 'Should specifically deterrent or punitive remedies be made available to victims of misleading conduct under the Australian Consumer Law?' (presented to the Qld and Vic Bar Associations and currently under consideration for publication)

Chapter Sections

17. E Bant, 'Rescission and the Australian Consumer Law' chapter section in N Witzleb, E Bant, S Degeling and K Barker (eds), *Remedies: Commentary and Materials* (6th edn, Thompson Reuters, Sydney 2015) [2.170]-[2.190].
18. E Bant, 'Compensatory awards for breach of Trade Practices legislation and the Australian Consumer Law', chapter section in N Witzleb, E Bant, S Degeling and K Barker (eds), Remedies: Commentary and Materials (6th edn, Thompson Reuters, Sydney 2015) [4.800]-[4.905].

Online Engagement

19. J M Paterson, 'China's consumer protection law a win for Aussie online shoppers', *The Conversation,* March 13, 2014
20. J M Paterson and Arlen Duke, 'Can I get a Refund on my Emissions Cheating Volkswagen', *The Conversation*, 10 October 2015
21. J M Paterson, 'When Uber is Legal the Taxi Industry will have nowhere to Hide', *The Conversation,* October 19, 2015
22. J M Paterson, 'ACCC takes VW to Court – but will it help consumers'. *The Conversation,* September 2, 2016
23. J M Paterson 'ACCC takes VW to Court – but will it help consumers'. *The Conversation*, September 2, 2016
24. J M Paterson, 'Putting the E into E-Consumer Protection' *Pursuit,* 17 May 2017
25. J M Paterson, 'So you bought the new iphone? Here are your rights if it breaks' *The Conversation* 13 Sept 2017
26. J M Paterson, 'Like it or not you are getting the NBN, so what are your rights when buying internet services?' *The Conversation* 23 Oct 2017
27. J M Paterson, 'Misleading private carpark fees', television interview for *ABC News 24,* 2 Februrary 2018
28. J M Paterson, 'Unfair andmisleading terms in Ubereats contracts' print interview for *ABC News Online* 15 April 2018
29. J M Paterson, 'Unfair and misleading terms in Ubereats contracts' television interview for *A Current Affair* (channel 7)
30. E Bant 'How courts and costs are undermining ASIC and the ACCC's efforts to police misbehaving banks and businesses', *The Conversation*, April 26, 2018
31. J M Paterson, E Bant and G Rees, 'They're using my face: What cosmetic bloggers and the Cambridge Analytica saga tell us about protection from misleading conduct' *Pursuit*, 6 May 2018
32. E Bant, 'When families and money don't mix' *Pursuit* 29 May 2018
33. E Bant, 'Fees for no service: how ASIC is trying to make corporate misconduct hurt' *The Conversation* 19 September 2018
34. E Bant, 'Misleading Conduct. So What!: Indifference and disregard for the rule of law in Australia requires a firmer hand and tougher penalties' *The Pursuit* 25 September 2018

35. E Bant, 'Three Key Steps to Addressing Dishonest Conduct in our Banks' *The Conversation* 1 October 2018

Law Reform and Workshop Materials

36. J M Paterson and E Bant, 'Submission to the Australian Consumer Law Review' 3 May 2016 (regarding findings and recommendations arising from the grant project) (www.consumerlaw.gov.au)
37. E Bant and J M Paterson, 'Australian Consumer Law: Comparing Remedial Regimes' (19 page workshop manual containing commentary and worked examples on the interaction between remedies under the ACL and common law).
38. E Bant and J M Paterson, Colloquium Materials entitled 'Remedies under the Australian Consumer Law and the Common Law: Evolution and Revolution' (16 pages, presenting interim conclusions of the ARC grant project)

6. Project Publications ARCDP 180100932

39. E Bant, 'Unravelling Fraud in the Wake of *Hayward v Zurich Insurance*' (2018, 12,000 words) (currently under consideration for publication)