

Commercial Equity and Statutes

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Important provisions of the Corporations Act and the Competition and Consumer Act draw freely from equity – notably, the statutory duties imposed on directors, the proscriptions against unconscionable conduct, and statutory remedies – and, in turn, these provisions have influenced equitable principle. By reference to recent decisions, the paper will consider the relationship between statute and equity in a variety of commercial contexts.

“Commercial Equity”

The first thing is to explain what is meant by “Commercial Equity” – a term which would once have been regarded as oxymoronic, or at least eyebrow-raising. Not so long ago, there was a widely held view that equity had little or no role in commercial law. Hence Sir Anthony Mason’s statement that “[e]quitable doctrine and relief have penetrated the citadels of business and commerce, long thought, at least by common lawyers, to be immune from the intrusion of such alien principles”.¹ It seems obvious to anyone who thinks about it today (a) that much commercial life involves relationships of trust, (b) that the modern fiduciary is likely to be remunerated and professional, and (c) that trusts are, particularly in Australia, endemic in areas including investment (superannuation is an

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¹ A Mason, “The place of equity and equitable remedies in the contemporary common law world” (1994) 110 *LQR* 238. See also P Millett, “Equity’s Place in the World of Commerce” (1998) 114 *LQR* 214 (“Even twenty years ago there was still a widely held belief, by no means confined to common lawyers, that equity had no place in the world of commerce”).

obvious example), financing (consider every securitisation and much structured financing) as well as trading trusts including the large publicly listed unit trusts. Consonantly with these developments, Chief Justice Gleeson once observed, insightfully, that one conspicuous difference between Australian and English commercial litigators was that the latter regarded themselves as common lawyers, while the former regarded themselves as equity practitioners.² Times change. The position was quite different when, more than a century ago, specialist commercial courts were being established in Australia.³ They were definitely common law courts.⁴ There are very few barristers today whose practice resembles the traditional chancery fare of conveyancing, wills and settlements, which Herbert Hart found so disillusioning.⁵

Australian statutes affecting commercial law

Another very substantial difference between Australian and English law, central to this paper, was noted almost thirty years ago by Sir Anthony Mason when giving the Wilfred Fullagar Memorial Lecture entitled “Future Directions in Australian Law”:⁶

The general principles of English contract law are set in the large commercial cases decided by the House of Lords. Whether these general principles are entirely suited to Australian contract law which, as we are not an international commercial or maritime centre, is much more consumer oriented, is open to question. No doubt this difference explains why we have been more inclined to grant equitable relief in contract. The new section 52A of the Trade Practices Act 1975 (Cth) and the Contracts Review Act 1980 (NSW), by giving the courts

² When launching the *Journal of Equity* in November 2006.

³ See *Commercial Causes Act 1903* (NSW), whose driving force was the Attorney-General, Bernard Wingrose Wise: see P Bergin, “Commercial Causes Centenary Dinner” [2003] NSWJSchol 9; *Commercial Causes Act 1910* (Qld); these derive from the Commercial Court established in the United Kingdom in 1895, in circumstances described by R Chesterman, “Commercial Causes Jurisdiction” [2004] QldJSchol 33.

⁴ At least in New South Wales, where the distinction was pronounced because of the continuation of common law procedure and pleading: see, for example, A Scotford, “Declaratory Judgments in New South Wales” (1967) 5 *Sydney Law Review* 454.

⁵ Nicola Lacey reproduces his 1944 letter to Isaiah Berlin confessing that he viewed “return to the Bar with disgust not to mention nausea”: N Lacey, *A Life of HLA Hart*, Oxford University Press 2004, 112.

⁶ (1987) 13(3) *Monash University Law Review* 149 at 153.

power to grant relief in contract where the terms are unfair, unjust, unconscionable or the operation of the contract is oppressive, will reinforce, if not stimulate, this tendency.

Some aspects of that passage need updating. The Supreme Court of the United Kingdom has replaced the Judicial Committee of the House of Lords. Section 52A although new in 1987 became s 51AB, was supplemented by s 51AA, and is now found in ss 20 and 21 of the *Australian Consumer Law*, while the *Trade Practices Act* has been renamed and its key sections have been bifurcated between the *Competition and Consumer Act* and the *ASIC Act*.⁷ While there is nowhere near the quantity of international litigation and arbitration as takes place in London,⁸ Australia is far more credibly regarded as an international commercial and maritime centre in 2015 than in 1987.⁹ In 1987, the Australian Commercial Disputes Centre had been in operation for *one* year, the Commercial Arbitration Acts were new (for example, the *Commercial Arbitration Act 1984* (NSW) and *Commercial Arbitration Act 1985* (WA)), and procedural reforms designed to focus attention early on the real issues were only beginning to be implemented.¹⁰

It may readily be acknowledged that Australian contract law in 1987 was more “consumer oriented” than the law of England, but that may fail to capture the most vital

⁷ Sections 12CA, 12CB and 12DA.

⁸ By which I mean with no real connection with the jurisdiction save for the parties’ choice of venue.

⁹ The importance of international commercial arbitration may be seen in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 295 ALR 596 and see P Keane, “The Prospects for International Arbitration in Australia” AMTAC address, 25 September 2012, but it is not confined to arbitration: see for example T Bathurst, “The Importance of Developing Convergent Commercial Law Systems, Procedurally and Substantively” Conference of Chief Justices of Asia and the Pacific, 28-30 October 2013, Singapore and J Allsop, “International commercial law, maritime law and dispute resolution: the place of Australia, New Zealand and the Asia Pacific region in the coming years” (2007) 21(1) *Australian and New Zealand Maritime Law Journal* 1.

¹⁰ Snapshots of the past one legal generation ago may be obtained from A Rogers, “Dispute Resolution in Australia in the Year 2000” (1984) 58 *ALJ* 608, A Rogers, “Commercial Dispute Resolution: Litigation and Arbitration in Australia”, paper delivered to the Australian Bar Association, 14 July 1988 and P Dwight, “Commercial Dispute Resolution in Australia: Some Trends and Misconceptions” (1989) 1 *Bond Law Review* 1. For New South Wales, see Practice Note 39 (1986) 6 *NSWLR* 119 and Supreme Court Act 1970 s 53(3E) and 76A (introduced in 1987).

difference, which may be more clearly seen a generation later. The critical difference for the purposes of commercial law is the re-branded “Australian Consumer Law”. I think that that legislation is mis-named. Others agree.¹¹ It is apt to give a misleading impression to an international audience. The point is persuasively made by Professor Finn.¹² Most of the litigation involving the Australian Consumer Law involves small, medium sized and large business entities doing what has been done for decades, relying on the generally worded proscriptions against conduct in trade or commerce which is misleading or deceptive or likely to mislead or deceive, or, to a lesser extent, which is unconscionable. That is not “consumer law”, at least as the term is conventionally apt to be understood, or as it is defined in the Fair Trading legislation.

Putting nomenclature to one side, the crucial difference is captured by Finn:¹³

Such legislation is without any substantial counterpart in the United Kingdom. In consequence, and given the state of English equity jurisprudence, it is essentially contract law and tort that are to be called on to provide relief, if at all, against a perceived wrong or injury suffered in commercial and other relationships and dealings.

Throughout the Australian legal system, there are found generally worded laws, which are squarely addressed to the commercial world and give rise to commercial disputes and on occasion commercial litigation. Often the laws are federal laws, but there are also State and Territory laws forming important parts of a seamless co-operative scheme. The best example, and probably the most influential, was s 52 of the *Trade Practices Act* and the counterpart State *Fair Trading Act* provisions, and now s 18 of the Australian Consumer Law and s 12DA of the *ASIC Act*, and the statutory remedies which are engaged by its contravention. Others may be seen in the obligations imposed by the *Corporations Act 2001* (Cth), notably ss 181 (*good faith* in the best interests of the

¹¹ See for example S Rares, “Introductory Remarks for the 2012 Competition Law Conference”, 5 May 2012.

¹² “Common Law Divergences” (2013) 38 *Melbourne University Law Review* 509 at 520 and 534.

¹³ Above, at 534.

corporation and for a *proper* purpose) and 182 and 183 (*improper* use of a position or of information to gain an advantage or cause detriment) and remedies, and in the general proscriptions against conduct which is unconscionable, in s 20 of the *Australian Consumer Law* and in a suite of other statutes.¹⁴ Speaking generally, contravention of all of those open-textured norms of conduct gives rise to (a) a right to statutory damages, and (b) a discretionary¹⁵ power to award other remedies, including other pecuniary remedies.

Three links between statutes affecting commercial law and equity

Some may think it trite, but it is perhaps nevertheless also worth saying three things about those laws and why they are linked with equity. The first is that often (although not invariably) there is an equitable counterpart or analogy to the statutory norm of conduct. See for example (a) the obligations imposed on fiduciaries not to place themselves in a position of conflict or to derive a benefit, (b) the protection of confidential information, (c) in the equitable response to misrepresentation (whether innocent or fraudulent), undue influence and unconscientious behaviour. Returning to s 52, a recurring class of litigation is a claim for damages (sometimes equitable relief is also sought) based on a commercial contract, to which the response is a claim that there has been misleading or deceptive conduct contrary to s 52 of the *Trade Practices Act* and now s 18 of the *Australian Consumer Law*. One sees this familiar pattern in loans, in building and IT contracts, in joint ventures, in voidable settlements and other uncommercial transactions and broadly in most commercial relationships which have soured. There was much controversy over whether the defendant's allegation of misleading or deceptive conduct could be pleaded as a defence or required a cross-claim,¹⁶ but no dispute that the situation

¹⁴ See (in New South Wales), s 88F of the *Industrial Arbitration Act 1940* (NSW) and its successors, the "unjust" contract provisions in the *Contracts Review Act 1980* (NSW) (which is "An Act with respect to the judicial review of certain contracts and the grant of relief in respect of harsh, oppressive, unconscionable or unjust contracts") and legislation based on it (such as the *Retail Leases Act 1994* (NSW)). The list is far from exhaustive.

¹⁵ See for example *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [629]-[631], and J Dietrich and T Middleton, "Statutory remedies and equitable remedies" (2006) 28 *Aust Bar Rev* 136 at 145-148 and 168-169.

¹⁶ See now *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9 and *Midcoast County Council trading as Midcoast Water v Reed Constructions Australia Pty Ltd* [2011] NSWCA 268 at [8].

was, and is, commonly recurring, and overlaps with what may be fairly regarded as equitable principle.

Finn wrote:¹⁷

It has for some decades now been acknowledged that many of Australia's major developments in equity from the 1980s involved conduct which would have been actionable under legislation such as the Trade Practices Act in any event. *Amadio* and *Waltons Stores* are conspicuous examples.

The converse is likewise true. In ways which I hope will shortly become apparent, it is reasonable to regard much of the litigation as reflecting and applying the central approach of equity.

Secondly, all litigants ultimately seek remedies, and it is to be recalled that remedies – save for the most important: damages – are equitable. As David Wright puts it:¹⁸

Most remedies are equitable in their nature. Much of the law of remedies is a subset of equity. However, the most important remedy, damages, is a common law remedy.

There is an obvious overlap with equitable jurisdiction to rescind for misrepresentation, and “the principles which govern equitable remedies may provide guidance as to the appropriate order in a particular case”.¹⁹ There are many other examples. As others have said, outside the context of the large volume of litigation for personal injury damages, “the primary importance of equitable remedies” ought to be recognised.²⁰ This is, emphatically, *not* to say that the statutory provisions are to be construed as though they are merely enactments of the equitable principle. Very often statute is wider. For

¹⁷ Above at 535.

¹⁸ D Wright, *Remedies*, Federation Press, 2nd ed, 2014, 2.

¹⁹ *Marks v GIO Australia Holdings* (1998) 196 CLR 494 at [24] and [116].

²⁰ J Dietrich and T Middleton, “Statutory remedies and equitable remedies” (2006) 28 *Aust Bar Rev* 136 at 167.

example, the *Corporations Act* provisions apply to any officer or employee, even relatively junior employees whose fiduciary obligations would be limited. Ancillary liability extends to all persons “involved”, which is considerably broader than the position at general law (a topic addressed by Patricia Cahill SC) and the remedies are broader (for example, s 1317H may include profits made by third parties).²¹ The High Court has observed that statutory injunctions “empower courts to give a remedy in many cases where none would have been available in a court of equity in exercise of its jurisdiction”.²² By way of example, currently there is controversy as to the scope of s 1324(10).²³

Thirdly, there is an important distinction between broad and narrow rules. The regulatory complexity which envelops much commercial activity (capital raisings, takeovers, tender processes, investment advice, regulation of superannuation trustees are ready examples) has consequences for reasoning which, I wish to persuade you, may fairly be described as “equitable”. The nature of much commerce today is that it will be relatively heavily regulated. Parliaments and regulators need to choose between precise, “hard-edged” black-letter laws, which are apt to be voluminous yet relatively simple to comply with, and higher level principles. It is of course open to have both, and the *Trade Practices Act*, with its specific (and criminal) prohibitions in Part V (pyramid selling, bait advertising, etc) coupled with the general (non-criminal) prohibition on misleading and deceptive in s 52 is a paradigm example. Obviously, there are arguments for and against both modes of regulation – one person’s enhanced protection is another’s unnecessary red tape. A generally worded provision may be concise and easily read, but may involve uncertainty in its application in a particular case. On the other hand, a suite of precise

²¹ See s 1317H(2) and *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [622]-[626]. There are some respects in which statute is narrower: for example, the purpose requirement under ss 182 and 183 appears to be narrower than the position in equity.

²² *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [28].

²³ See R Baxt, “Why do Courts cut back on statutory remedies provided by the Parliament under Corporate Law: The Enigma of section 1324 of the Corporations Act?” (2014) 88 *ALJ* 625, by reference to *McCracken v Phoenix Constructions (Qld) Pty Ltd* [2013] 2 Qd R 27, *Re Colorado Products Pty Ltd (in prov liq)* [2013] NSWSC 1613 and *Built NSW Pty Ltd v Evolve Built Contracting Pty Ltd* [2014] NSWSC 255.

rules may provide certainty, but be voluminous and regularly require updating; it may indeed also fail to apply to all of the conduct of concern. One familiar example is whether a generally worded best interests test should be incorporated into the regulation of various industries,²⁴ or should there merely be a finite rule-based set of obligations to be complied with.²⁵ I should not be taken to be expressing any view as to the merits or otherwise of such proposals, save that there are arguments on both sides.

Plevin v Paragon Personal Finance

To illustrate some of the foregoing in an actual case – and one about which I can safely talk at a level of detail – it is convenient to refer to the decision of the United Kingdom Supreme Court last November in *Plevin v Paragon Personal Finance Ltd.*²⁶

Plevin concerned “payment protection insurance” (**PPI**), insurance sold to borrowers to cover their obligations to repay against the possibility of their becoming sick or unemployed. Ms Plevin was a widow, aged 59. She was employed by an employer with generous sickness and redundancy benefits, and she already held life assurance. She had a small mortgage and two unsecured personal debts. In 2006, she responded to an unsolicited invitation from a broker to consolidate her indebtedness against a fresh mortgage over her home. She agreed to borrow £34,000 from Paragon Personal Finance repayable over five years. She also agreed to take out PPI with an insurer for the first five years. The premium for the policy was a single payment of £5,780, payable at the outset and conveniently added to the principal. In accordance with the disclosure obligations, the fact that commissions were to be paid was disclosed, but not their amount. There had been (so far as appears from the reasons) complete compliance by the lender and insurer with a suite of regulatory obligations, notably the “Insurance Conduct

²⁴ See for example s 52(2)(c) of the *Superannuation Industry (Supervision) Act 1993* (Cth), as amended by the *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* (Cth), and s 601FC(1)(c) of the *Corporations Act*.

²⁵ See s 961B(2) of the *Corporations Act* and the (now disallowed) Streamlining of Future of Financial Advice Regulations 2014. The entire area is considered by A Black, “Trusts, Financial Services and Conflicts”, paper delivered 19 February 2015, Sydney, pp 18-20.

²⁶ [2014] UKSC 61.

of Business” (ICOB) rules. Those regulations did not include an obligation on the broker to act in the best interests of the client; in any event, the broker did not survive the Global Financial Crisis.

In fact, of the £5,780 premium, **71.8%** was taken in commissions before it was remitted by Paragon to the insurer. The broker received £1,870 and the lender Paragon retained £2,280. A large proportion of the broker’s profits on the whole transaction was derived from procuring the sale of PPI – much more than from the refinancing itself. The fact that the insurer which was taking on the PPI obligation was actually receiving only 28.2% of the “premium” paid by Ms Plevin was not disclosed. A report from the Competition Commission in 2009 (following the onset of the Global Financial Crisis) found that high levels of commission were endemic in a market which was far from competitive, and recommended a ban upon the simultaneous sale of PPI in a package with a loan and a prohibition on single premium policies (which could simply be absorbed into the principal). Those recommendations have since been adopted, but that did not assist Ms Plevin.

Ms Plevin relied on the broad power conferred by s 140A of the Consumer Credit Act 1974 (UK) to make orders if a relationship between debtor and creditor is found to be “unfair”. The provision had been inserted with effect from April 2007, and replaced a test which required the court to find that the debtor’s payments were “grossly exorbitant” or otherwise “grossly contravene ordinary principles of fair dealing”, which had been the subject of repeated judicial concern.²⁷ Lord Sumption JSC wrote for a unanimous court:²⁸

Section 140A is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application, such as is to be found in other provisions of the Act conferring discretionary powers on the courts.

²⁷ See *Broadwick Financial Services Ltd v Spencer* [2002] EWCA Civ 35 at [85] (Walker LJ); *McGinn v Grangewood Securities Ltd* [2002] EWCA 522 at [89] (Clark LJ) and *Nash v Paragon Finance Plc* [2002] 1 WLR 685 at 708-709 (Dyson LJ).

²⁸ [2014] UKSC 61 at [10].

His Lordship found that the nondisclosure of the fact that the commission was so high made the relationship relevantly “unfair”. Earlier decisions had expressed dismay at such level of commission, but rejected submissions that the relationship was thereby rendered unfair. The leading decision prior to *Plevin* had relied on what was said to be “an anomalous result if a lender was obliged to disclose receipt of a commission in order to escape a finding of unfairness under section 140A of the Act but yet not obliged to disclose it pursuant to the statutorily imposed regulatory framework under which it operates”.²⁹ This approach was overturned by the Supreme Court.

The main point I wish to make emerges from the following, admittedly lengthy, passage in the reasons of Lord Sumption JSC at [17]:

The view which a court takes of the fairness or unfairness of a debtor-creditor relationship may legitimately be influenced by the standard of commercial conduct reasonably to be expected of the creditor. The ICOB rules are some evidence of what that standard is. But they cannot be determinative of the question posed by section 140A, because they are doing different things. The fundamental difference is that the ICOB rules impose obligations on insurers and insurance intermediaries. Section 140A, by comparison, does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with the question whether the creditor's relationship with the debtor was unfair. ...

Most of the ICOB rules, including those relating to the disclosure of commission, impose hard-edged requirements, whereas the question of fairness involves a large element of forensic judgment. It follows that the question whether the debtor-creditor relationship is fair cannot be the same as the question whether the creditor has complied with the ICOB rules, and the facts which may be relevant to answer it are manifestly different. An altogether wider range of considerations may be relevant to the fairness of the relationship, most of which would not be relevant to the application of the rules. They include the characteristics of the borrower, her sophistication or vulnerability, the facts which she could reasonably be expected to know or assume, the range of choices available to her, and the degree to which the creditor was or should have been aware of these matters.

For present purposes, the point I wish to make is that the English statute applied a classically “equitable” approach, eschewing an assessment based simply on a binary

²⁹ *Harrison v Black Horse Ltd* [2011] EWCA Civ 1128; [2012] Lloyd's Rep IR 521 at [58].

assessment of compliance with a series of rules for a qualitative analysis. You will have noted the references to a “broader test of fairness”, the “large element of forensic judgment” contrasted to “hard-edged rules”, the “altogether wider range of considerations [that] may be relevant to the fairness of the relationship, most of which would not be relevant to the application of the rules”, and the references to judicial discretion. The contrast Lord Sumption drew between the ICOB rules, breach of which gave rise to a right to damages but which were complied with, and “unfairness” under s 140A, resonates with familiar comparisons between common law and equity on a number of levels. One is the distinction between common law *rules* and equitable *principles*.³⁰ Another is to the approach, reflected in the statement in *Kakavas v Crown Melbourne Ltd*:³¹

The invocation of the conscience of equity requires ‘a scrutiny of the exact relations established between the parties’ to determine ‘the real justice of the case’.

The High Court was quoting from the earlier unanimous judgment of Dixon CJ, McTiernan and Kitto JJ in *Jenyns v Public Curator (Q)*, which continued as follows:³²

Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition. Indeed no better illustration could be found of Lord Stowell’s generalisation concerning the administration of equity: “A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case”: *The Juliana*.³³

³⁰ See for example *Bankstown City Council v Alamo Holdings Pty Ltd* (2005) 223 CLR 660 at [28].

³¹ [2013] HCA 25; 298 ALR 35 at [18].

³² (1953) 90 CLR 113 at 118-119.

³³ (1822) 2 Dods 504 at 522; 165 ER 1560 at 1567.

The same may be seen in Fullagar J's statement in *Blomley v Ryan* that the circumstances "are of great variety and can hardly be satisfactorily classified".³⁴ In short, the application of equitable principle often requires a broad evaluative judgment, and the fact that the decision-maker has invariably been a judge (as opposed to a common law jury) capable of granting relief which is discretionary and which may be on terms, is something quite different from a common law rule. Some of the statutes referred to above have followed the same pattern.

In applying those principles to the facts of the case, Lord Sumption concluded that it did not matter that, had Ms Plevin shopped around, she may not have found a better price. She had sought rescission, not compensation for loss. It was sufficient that:³⁵

Any reasonable person in her position who was told that more than two thirds of the premium was going to intermediaries, would be bound to question whether the insurance represented value for money, and whether it was a sensible transaction to enter into. The fact that she was left in ignorance in my opinion made the relationship unfair.

Other examples of "equitable statutes" in commercial law

The approach of equitable principle informing the construction, and approach, to other open-textured statutory provisions of general application may be seen across federal and state law. It is a phenomenon readily seen in the generally worded provisions in the *Corporations Act* and the *Competition and Consumer Act* referred to above. It may be seen in the construction of "best interests" statutory covenants imposed on trustees.³⁶ As Sir Anthony Mason indicated in 1987, statutory "unconscionability" is another obvious example. There is no need to resort to the principle of construction that when a statute picks up as a criterion for its operation a general law notion such as unconscionability,

³⁴ (1956) 99 CLR 362 at 405.

³⁵ [2014] UKSC 61 at [18].

³⁶ See for example *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* (2011) 282 ALR 167.

then, absent contrary indication, the statute speaks continuously to the present, and picks up the case law as it stands from time to time.³⁷ Section 20(1) of the Australian Consumer Law recognises in terms that the legal meaning of “unconscionability” is ambulatory (“from time to time”), and so is apt to rise and fall in light of developments in judge-made law. Whatever the state of equitable doctrine be, it is picked up, federalised, and used to define a federal norm of conduct contravention of which engages a power to award a range of statutory remedies which in terms go (considerably) beyond what is available at general law.

Is a different approach to be taken when the language of equity is transplanted to a statute, where courts regularly identify necessary and sufficient elements? Is the “scrutiny of the exact relations established between the parties” replaced by a more mechanistic approach? It is very hard to generalise, but there was once a distinction drawn between what was unconscionable and what was merely unfair or unjust, and held, for some years quite influentially,³⁸ that “unconscionability is a concept which requires a high level of moral obloquy”.³⁹ But more recently, courts have returned to the text of the statute, as opposed to explanatory glosses upon it:⁴⁰

[T]o treat the word “unconscionable” as having some larger meaning, derived from ordinary language, and then to seek to confine it by such concepts as high moral obloquy is to risk substituting for the statutory term language of no greater precision in an attempt to impose limits without which the Court may wander from well-trodden paths without clear criteria or guidance. That approach should not be adopted unless the statute clearly so requires.

³⁷ Cf *Aid/Watch Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539 at [23] (by reference to charity).

³⁸ See for example *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* (2011) 34 VR 536, at [90]-[91] and [96]; *Violet Homes Loans Pty Ltd v Schmidt* (2013) 300 ALR 770 at [58]; *Canon Australia Pty Ltd v Patton* (2007) 244 ALR 759 at [41]-[43] but cf at [4].

³⁹ *Attorney General of NSW v World Best Holdings Ltd* (2005) 63 NSWLR 557 at [121].

⁴⁰ *Director of Consumer Affairs Victoria v Scully* [2013] VSCA 292; 303 ALR 168 at [45]; *Canon Australia Pty Ltd v Patton* [2007] NSWCA 246; 244 ALR 759 at [4]; *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [41]; see the discussion by Sackville AJA in *PT Ltd v Spuds Surf Chatswood Pty Ltd* [2013] NSWCA 446 at [99]-[106].

This may be contrasted with the position in the United Kingdom, illustrated by the statements of regret made by Sir Peter Millett and Lord Hobhouse.⁴¹

We have substituted an inappropriate bright line rule for a proper investigation of the facts and have failed the vulnerable in the process. The Australians are turning to the jurisdiction to relieve against harsh and unconscionable bargains as an alternative, and there is much merit in this approach.

A related question is the resort to equitable principle where statute uses language whose connotations are less unambiguously “equitable”. Consider the criminal and civil penalty provisions preventing directors and officers from engaging in “improper” conduct. In the leading decision of *R v Byrnes*, the joint judgment of Brennan, Deane, Toohey and Gaudron JJ observed that “improper” in (the *Code* antecedent to s 182) “is an indefinite term” and construed it by reference to a lengthy but uncontroversial analysis of the fiduciary obligations of a director. Their Honours did not go so far as to say that any breach of fiduciary duty was improper, but concluded that the undoubted and deliberate breaches by the directors made their conduct “improper”.⁴² Another example of the same phenomenon appears in the United States law of insider trading, where the legislative language of “device, scheme or artifice to defraud”, “untrue statement of a material fact” and “engage in any act, practice or course of business which operates ... as a fraud or deceit upon any person” have given rise to a body of law based very largely on *equitable* notions of breach of fiduciary and breach of confidence.⁴³

Equitable exceptionalism flows through to statutes

There is another link between *Plevin* and *Kakavas*. In *Kakavas*, it was said that:⁴⁴

equitable intervention does not relieve a plaintiff from the consequences of improvident transactions conducted in the ordinary and undistinguished course of a lawful business. A plaintiff who voluntarily engages in risky business has never

⁴¹ See P Millett, “Equity’s Place in the World of Commerce” (1998) 114 *LQR* 214 at 220, and *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at [115].

⁴² (1995) 183 CLR 501 at 516-518.

⁴³ See Securities Exchange Act 1934, s 10(b) and rule 10b-5, and *US v Chiarella* 445 US 222 (1980), *Dirks v SEC* 463 US 646 (1983), *Carpenter v US* 484 US 19 (1987) and *US v O’Hagan* 521 US 642 (1997).

⁴⁴ [2013] HCA 25; 298 ALR 35 at [20].

been able to call upon equitable principles to be redeemed from the coming home of risks inherent in the business. The plaintiff must be able to point to conduct on the part of the defendant, beyond the ordinary conduct of the business, which makes it just to require the defendant to restore the plaintiff to his or her previous position.

The same point was made by Lord Sumption:⁴⁵

the great majority of relationships between commercial lenders and private borrowers are probably characterised by large differences of financial knowledge and expertise. It is an inherently unequal relationship. But it cannot have been Parliament's intention that the generality of such relationships should be liable to be reopened for that reason alone.

As Peter Turner has recently put it:⁴⁶

Equitable remedies in aid of legal rights are an important supplement to parties' legal entitlements. However, they are to be applied judiciously.

Coincidentally, the United Kingdom Supreme Court will shortly hear an appeal which resonates with this.⁴⁷ The balance of the judgment likewise shows a restrained approach. Matters not attributable to the lender (for example, the seeming failure by the broker to carry out any meaningful assessment as to whether Ms Plevin needed the insurance it was procuring for her) were not relevant to the unfairness of the debtor/creditor relationship. To return to Lord Millett's remarks at the commencement of this paper, it is essential that there be some restraint before subjecting, say, arms-length commercial relations to a fiduciary obligation: "If this warning it not observed then equity's place in the commercial world will be put at risk: it will be found to do more harm than good."⁴⁸

⁴⁵ [2014] UKSC 61 at [10].

⁴⁶ P Turner, "Inadequacy in Equity of Common Law Relief: The Relevance of Contractual Terms: [2014] *CLJ* 493 at 496.

⁴⁷ *Graves v Capital Home Loans Ltd* (2014) EWCA Civ 1297, (2014) MHLO 113 ("Mr Graves has permission to appeal on the question whether the provisions of ss 140A and 140B apply to the mortgage in this case and, if so, whether the relationship between himself and CHL was unfair because of (a) the inclusion of clause 9.1.6 of the mortgage; and/or because of (b) the way in which CHL exercised or enforced its rights under the agreement in the light of its knowledge of Mr Graves' mental disability.")

⁴⁸ P Millett, "Equity's Place in the World of Commerce" (1998) 114 *LQR* 214 at 215.

The influence of statute upon equity

In the passage from 1987 reproduced at the outset of this paper, Sir Anthony Mason referred to statutory innovations “reinforcing, if not stimulating”, the tendency to grant equitable relief. I have elsewhere written of the central role of statutes as follows:⁴⁹

Most of what is actually occurring in the legal system is the construction and application of statutes. A great deal of what is simplistically described as ‘common law’ is the historical product of, or response to, statutes. And much of the contemporaneous ‘development’ in the day-to-day workings of courts in fact involves a process of harmonisation informed by statutory norms. Even when a court decides *not* to alter the law, the role of statutes can be influential.

In short, statutes are an under-appreciated component in the academic literature on the Australian legal system: their role lies not merely in stating norms of law, but in influencing judge-made law and as a critical driver of change *and* restraint in the Australian legal system.

There is a controversial question as to when and how judge-made law adapts itself to a “consistent pattern of legislative policy”. I am not sure why in point of principle it is so controversial. Long ago, Lord Diplock said, in *Warnink v J Townend & Sons (Hull) Ltd*:⁵⁰

Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course.

The same or similar sentiments were expressed by Gleeson CJ, Gaudron and Gummow JJ in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*.⁵¹ Once again,

⁴⁹ “Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room” (2013) 36(3) *University of New South Wales Law Journal* 1002 at 1002-3.

⁵⁰ [1979] AC 731 at 743.

⁵¹ (1999) 201 CLR 49 at [23]–[28].

Professor Finn has consistently advocated this over many years,⁵² as have many other judges and academics.⁵³ This reflects nothing other than the ordinary processes of seeking coherence in the whole body of law, something which is particularly prominent where there is a legislated protection of rights. Last year, Lord Toulson JSC said pointedly:⁵⁴

The growth of the state has presented the courts with new challenges to which they have responded by a process of gradual adaption and development of the common law to meet current needs. This has always been the way of the common law and it has not ceased on the enactment of the Human Rights Act 1998, although since then there has sometimes been a baleful and unnecessary tendency to overlook the common law. It needs to be emphasised that it was not the purpose of the Human Rights Act that the common law should become an ossuary.

In Australia, where there have been important statutory intrusions into the heartland of commercial law, it is not surprising that the same process has occurred in relation to equitable doctrine. Let me give two examples. The first is that Australian law admits of a so-called remedial constructive trust – a trust imposed non-retrospectively by a court’s order, something described last year by Lord Neuberger PSC as “equity at its flexible shabby worst”.⁵⁵ There is a large question whether such trusts exists in England, and, as Dyson Heydon QC said in response, it does not seem that the Australian solution, which is only rarely ordered, as an “extreme emergency measure” has caused much harm.⁵⁶ But

⁵² See “Statutes and the Common Law” (1992) 22 *University of Western Australia Law Review* 7 and “Common Law Divergences” (2013) 38 *Melbourne University Law Review* 509 at 535.

⁵³ See M Leeming, “Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room” (2013) 36(3) *University of New South Wales Law Journal* 1002 at 1003 (footnote 3) and 1021-1026.

⁵⁴ *Kennedy v The Charity Commission* [2014] UKSC 20 at [133], Lords Neuberger and Clarke agreeing; see also at [46] per Lord Mance JSC, reiterating what Toulson LJ had said in *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court* [2012] EWCA Civ 420; [2013] QB 618 at [88].

⁵⁵ D Neuberger, “The Remedial Constructive Trust – Fact or Fiction” (paper delivered 10 August 2014, at the Banking Services and Finance Law Association Conference, Queenstown).

⁵⁶ J D Heydon, “Commentary on Lord Neuberger’s ‘The Remedial Constructive Trust – Fact or Fiction’”, (paper delivered 10 August 2014, at the Banking Services and Finance Law Association Conference, Queenstown).

it seems fairly clear that “other orders” which have long been available under the *Trade Practices Act* and the *Corporations Act* have certainly done nothing to prevent the recognition of the remedy.

Secondly, consider the partial rescission ordered in *Vadasz v Pioneer Concrete (SA) Pty Ltd*,⁵⁷ which expressly diverged from the English approach: the joint reasons of all members of the Court stated that “the view [in *TSB Bank Plv v Camfield* [1995] 1 WLR 430] to the effect that setting aside is an ‘all or nothing process’ should not be accepted in this country”.⁵⁸ That conclusion was *expressly* based on cases decided under the *Trade Practices Act* and the *Contracts Review Act*. I do not wish to express a view on the correctness or otherwise of the reasoning,⁵⁹ but there can be no doubt in this respect, at least, of the influence of statute upon equitable principle.

That said, it is very easy to over-estimate the element of incremental curial change in the law. Most courts, most of the time, have no opportunity to change the law. Moreover, in the small minority of areas where the law is uncertain and courts have a genuine leeway of choice, that is most commonly because there is a dispute about the legal meaning of a statute, rather than because of uncertainty as to the content of a rule or principle of judge-made law.

However, in one respect statute has a much more powerful influence which may be less widely appreciated. It is that ultimately the issues presented by litigants for curial determination are chosen by, and reflect the perceived advantages of, the legal environment. To take what seems to be a clear-cut example, if litigants perceive advantages in suing for contravention of s 52, as opposed to innocent or negligent

⁵⁷ (1995) 184 CLR 102.

⁵⁸ (1995) 184 CLR 102 at 116.

⁵⁹ Cf D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission*, Oxford University Press, 2008, chapters 13 and 19, where it is discussed under the heading “Heretical Approaches”. However, it is considered and supported by J Dietrich and T Middleton, “Statutory remedies and equitable remedies” (2006) 28 *Aust Bar Rev* 136 at 163-166, where reference to other views may be found.

misrepresentation (because it is unnecessary to prove anything about the state of mind of the defendant, because of the availability of more advantageous remedies, because of advantages if there be a representation as to a “future matter”) then, rationally, litigation will develop in those areas. Indeed, the perceived advantages of statutory rights and remedies may mean that it takes a relatively unusual case,⁶⁰ for parties consciously to resort to general law rather than statute.

Conclusion

One recurring theme in this paper (expressed at a number of levels), is that labels matter.⁶¹ It is useful to identify an area of the law as “Commercial Equity” and it is helpful to observe the links – which flow in both directions – between the statutes which are central to the practical operation of the Australian legal system and the body of judge-made law which operates in that area. The point of this paper is to draw attention to some of them.

⁶⁰ See for example *Macquarie Generation v Peabody Resources* [2000] NSWCA 361 (equitable rescission sought for innocent misrepresentation, long after the event).

⁶¹ A matter considered in more detail in a paper presented last week, “Equity: Ageless in the Age of Statutes” (Journal of Equity Conference, Melbourne, 20 February 2015). These ideas are developed by S Bray, “The Supreme Court and the New Equity” (2015) 68 *Vanderbilt L Rev* (forthcoming, available on SSRN).