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Published in:
Australian Bar Review

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Recommended citation(APA):
Dietrich, J., & Middleton, T. (2006). Statutory remedies and equitable remedies. *Australian Bar Review*, 28(2), 136-170.

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Statutory remedies and equitable remedies

*Joachim Dietrich and Thomas Middleton**

Most spheres of life are now regulated by statute. Many such statutes give courts both specific and wide-ranging general remedial powers in contexts where, potentially, general law, mainly equitable, remedies also apply. This article seeks to explore the relationship between statutory remedial schemes contained in such Acts as the Trade Practices Act, Corporations Act and ASIC Act, and remedies at general law. A number of possibilities may arise. Statutory remedies may abrogate general law remedies entirely or in part, or may be alternative to general law remedies. In many cases, the relationship between the general law and statutory remedies is not clear. Whichever is the case, many important questions arise: Are the statutory remedies broader or narrower in scope than similar equitable remedies? What are the practical advantages and disadvantages of the different remedies? Do the statutory remedies help our understanding of, or influence the development of, equitable remedies? Do equitable concepts continue to play a role in shaping the statutory remedies (eg, are broad injunctive powers subject to equitable limits?) Where statutes are silent as to the meaning of key concepts, are equitable or common law approaches to remedy more relevantly applicable? Alternatively, should those concepts be interpreted in light of the regulatory objectives being pursued by the regulator, and general law approaches be disregarded where the technical rules inherent under those approaches frustrate the achievement of the regulatory objectives? Given the predominance of statute, these are important questions that will shed light on the ongoing relevance and importance of equitable remedies, and on the ongoing debates about fusion, remedial discretion and taxonomy. Conversely, the uncertain operation of equitable remedies suggests the importance of legislation expressly spelling out the relationship of equitable remedies to a particular statutory remedy.

Introduction

Most spheres of life are now regulated by statute.¹ Particularly in the context of corporate and commercial activity, many statutes give courts both specific and wide-ranging general remedial powers in circumstances in which, potentially, general law doctrines and remedies also apply. This article explores the relationship between statutory remedial schemes contained in legislation such as the Trade Practices Act 1974 (Cth) (TPA), Corporations Act 2001 (Cth) (Corporations Act) and Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act), and remedies at general law. Importantly, it is not just in the sphere of corporate regulation that statute now

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¹ Cf, eg, K Mason, 'Fusion: Fallacy, Future or Finished?' in S Degeling and J Edelman (Eds), *Equity in Commercial Law*, Lawbook Co, Sydney, 2005, p 62; and Honourable Justice W M C Gummow, 'Statutes: Sir Maurice Byers annual address' (2005) 26 *Aust Bar Rev* 1.

predominates. The law of contract (broadly speaking) has been the subject of major statutory modifications and has seen the introduction of wide statutory remedial powers. Similarly, much of the conduct traditionally within the purview of equity is now the subject of statutory regulation and remedial powers (for example, ‘unconscionable’ conduct in its broadest sense, including within it a range of equitable doctrines; fiduciary and agency obligations in many contexts and particularly in corporate contexts). Even the law of torts is not immune: the economic torts, fraud, negligent misrepresentation, and passing off, are torts that may now largely be supplanted (in practice) by statutory remedies (for example, as a result of the statutory remedies available under the TPA).

Our focus is on equitable remedies (that is, of a type having their origins in the Courts of Chancery) given that it is the expanded remedial armoury of equity that is usually the conceptual basis for statutory remedies. A number of possibilities may arise. Statutory remedies may abrogate general law remedies entirely or in part, or may be alternative to general law remedies. In many cases, the relationship between the general law and statutory remedies is not clear. Whichever is the case, many important questions arise: Are the statutory remedies broader or narrower in scope than similar equitable remedies? What are the practical advantages and disadvantages of the different remedies? Do the statutory remedies help our understanding of, or influence the development of, equitable remedies? Do equitable concepts continue to play a role in shaping the statutory remedies (for example, are broad injunctive powers subject to equitable limits?) Where statutes are silent as to the meaning of key concepts, are equitable or common law approaches to remedy more relevantly applicable?² Alternatively, should those concepts be interpreted in light of the regulatory objectives being pursued by the regulator, and general law approaches be disregarded where the technical rules inherent under those approaches frustrate the achievement of the regulatory objectives?

Given the predominance of statute,³ these are important questions that will shed light on the ongoing relevance and importance of equitable remedies, and on the ongoing debate about remedial discretion, taxonomy and fusion (specifically, for our purposes, the interrelationship between equitable and common law remedies).⁴

2 For example, do statutory compensation orders for losses *caused* by conduct import equitable or common law concepts of causation? Contrast *ASIC v Adler* (2002) 41 ACSR 72; 168 FLR 253 at [752] with *Adler v ASIC* (2003) 46 ACSR 504; 179 FLR 1 at [707], discussed below.

3 This is so even if ‘common law principle is the “default” rule in common law jurisdictions’. See J Beatson, ‘The Role of Statute in the Development of Common Law Doctrine’ (2001) 117 *LQR* 247 at 247. As Beatson goes on to demonstrate, however, the view that statute law has no role ‘in the development of the common law’ and that there ‘appears therefore to be a fundamental difference between the role of statutes and the role of codes’ (in civil law systems) is overstated; the ‘difference may not be as fundamental as it appears’ (at 247).

4 Indeed, we favour the conclusion that the very labels of ‘common law’, ‘equitable’ and ‘statutory’ remedies may be ‘unhelpful’ and of limited utility, given that the historical jurisdictional limits that arose from such classification are of little relevance today. Compare Mason, above n 1, p 71:

Properly advised, plaintiffs will still choose to press an equitable/common law/statutory right or remedy if it is in their interests and to seek to blend the best of all worlds if that

There are a number of different ways in which one can approach the topic of the interrelationship between statutory remedies and remedies at general law.

One possible point of emphasis is to consider the scope of statutory causes of action that trigger particular remedies, to determine whether they expand, narrow, or displace altogether, existing general law causes of action, or whether they merely exist alongside such causes of action as alternative avenues for legal redress (the last is often the case). Such a focus is of lesser interest for our purposes, since it is a focus on liability rules themselves, rather than on the remedies that potentially flow from such liability. Nonetheless it is necessary to keep the operation of statutory liability rules in mind in order to get an accurate picture of what gaps remain for the operation of the general law. One must turn to the general law either of necessity (because the statutory liability rules, and hence remedies triggered as a result, simply do not apply to a fact situation) or because as a practical matter, the general law offers advantages, either in terms of establishing causes of action or in terms of remedial advantages not available under statute.

The main focus, then, is on the interrelationship between remedies under statute and the general law and specifically, (1) issues arising as to the availability of particular remedies (including, what prerequisites need to be fulfilled to trigger such remedies, what limitations apply to their application, and the role of (judicial) discretion in the determination of such matters) and, (2) assessment, quantification and related issues, relevant to establishing the precise value or form of relief or the terms on which it is granted.

In studying this interrelationship, one can proceed either by considering the different interactions that may occur between statute and general law remedies or, alternatively, by considering different remedies and seeing how they operate under different statutes and under the general law. These perspectives intersect or cut across each other.

Taking each perspective in turn, commencing with the types of relationships that may arise between statutory remedies and the general law. These include:⁵

- 1 Statute may make direct changes to existing remedies and their operation in a given sphere, modifying, expanding or narrowing (or even both at the same time), or (perhaps less usually) abolishing particular remedies.

helps too. But courts are not always obliged to go along with such a trisected view of the law. Parallel universes are not to be fostered for their own sakes. Defendants have rights too. And it is sometimes necessary or appropriate for the values inherent in one legal concept to mean that it takes primacy, or even occupies a field to the exclusion of others.

...

These various enquiries are assisted by reference to the policies found in the precedents for triggering legal recognition of the right or remedy. But they are hindered by glib and unhelpful labelling based upon categories such as 'common law', 'equity', 'statutory'.

5 Compare the questions posed by B McDonald, 'Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia' (2005) 27 *Syd LR* 443 at 444, in the context of the relationship between statute and the common law of torts. Given the importance of statutes, principles of statutory interpretation become crucial. See, eg. generally, Honourable J J Spigelman, 'The poet's rich resource: Issues in statutory interpretation' (2001) 21 *Aust Bar Rev* 224

- 2 Statutory remedies may be silent on certain critical points, such that rules derived from the general law may be necessary to give sensible operation to such remedies, or may be applied by analogy to limit or restrict statutory remedies, as discussed below at 'Compensation'. More generally, many statutory remedies require the exercise of judicial discretion. How are discretions to be exercised and what equitable restraints (if any) apply?⁶ This issue will be discussed under 'Injunctions' below.
- 3 Statutory remedies may operate alongside the general law, making no direct change to it and allowing general law remedies to operate. Statutory remedies in the sphere of corporate and commercial regulation are usually of this type, and examples are provided below. In such cases, there may be competition between the remedial regimes as to which have more practical and other advantages. Consequently, one remedial regime may become redundant. Importantly, the fact that a statute merely assumes the existence and operation of a general law principle does not mean that, should that assumption prove false, that the statute thereby has entrenched that principle.⁷
- 4 Statutory developments may *indirectly* influence the development and application of general law remedies themselves, arguably as occurred in relation to the remedy of rescission in *Vadasz v Pioneer Concrete (SA) Pty Ltd*,⁸ discussed under the heading of 'Rescission' below.
- 5 The existence of statutory remedies may be a significant factor in how we organise and structure our law. For examples, a taxonomy of the law of obligation generally, and remedies more particularly,⁹ may need to reflect the importance of statutory remedial regimes in order to prove useful as a tool for understanding our law. Until now, our legal education and scholarship has tended to relegate statute to a

6 It has been suggested by Justice Gummow, writing extra-judicially, that '[t]o the exercise of such jurisdiction the "equity mind" will more readily adapt'. See W M C Gummow, *Change and Continuity: Statute, Equity and Federalism*, OUP, Oxford, 1999, p 55.

7 See *CSR Ltd v Eddy* (2005) 222 ALR 1 at [50]–[54] per Gleeson CJ, Gummow and Heydon JJ, relating to the existence at common law of damages for gratuitous services replacing services an injured person would have provided to others ('*Sullivan v Gordon* damages' (1999) 47 NSWLR 319). Statutory *limitations* on such damages that therefore, of necessity, assume that such damages are available were considered by the High Court not to support the existence of a right to such damages after the court found that at common law, they were not warranted. Only if the relevant legislation is 'unworkable unless an assumption as to the common law is correct' will the legislation entrench the common law rule. Their Honours went on to state that to overrule *Sullivan v Gordon* damages would not make the legislation 'which simply limited the common law rule, unworkable. By itself that legislative decision is not a conclusive or even persuasive guide to the content of the common law; it merely reflects a legislative policy choice.' These obiter comments seem unnecessarily wide in their conclusions. A limiting provision restricting certain types of damages, though not unworkable, obviously has no field of operation should such damages not be available. The High Court's interpretation has recently been adopted in *Kriz v King* (2006) Aust Torts Reps 81-859.

8 (1995) 184 CLR 102; 130 ALR 570.

9 See, eg, R Zakrzewski, *Remedies Reclassified*, OUP, Oxford, 2005.

lesser role to that of a general law given primacy of place 'in the face of reality'.¹⁰ This observation follows from the overall impact of statute evidenced throughout this article, and we will return to this point in the conclusion.

An alternative perspective is to consider different types of remedies and some of the issues that arise in relation thereto. Such an approach will form the structure of the rest of this article, though in discussing individual remedies, we will illustrate the different interrelationships (noted above) between statutory and general law remedies that may arise.

Account of profits

Account of profits under statute generally

Some Australian statutes, particularly in the sphere of corporate and commercial regulation, discussed below, empower regulators to recover profits under their statutory power to obtain a compensation order because the relevant legislation provides that 'damage' includes profits. Some of the Australian regulators could also recover an account of profits for impecunious private litigants under their statutory power to commence public interest proceedings. Generally, such laws expressly preserve the rights of private litigants to commence proceedings under general law for an appropriate remedy, including an account of profits, in relation to the same conduct that constitutes a contravention of the regulatory laws. Thus, a contravention of the directors' statutory duties under ss 180–183 of the Corporations Act may concurrently involve a breach of the directors' common law or equitable (fiduciary) duties to the extent that those general law duties are co-extensive with the statutory duties. Section 179 of the Corporations Act preserves private litigation for breach of the directors' general law duties. In such a case, private litigation for an account of profits will be governed by the relevant general law principles.

Regulators' statutory powers to seek account of profits

Where the Australian Securities and Investments Commission (ASIC) is acting under the Corporations Act, s 1317H provides that, in the context of a contravention of a civil penalty provision (which includes the directors' duties provisions described above),¹¹ ASIC may recover compensation on behalf of the corporation, or registered scheme, for damage suffered by those persons as a result of the contravention. Section 1317HA provides that, in the context of a contravention of a financial services civil penalty provision, ASIC may recover compensation for a person who has suffered damage as a result of the contravention. Both sections provide that the compensation order may include an order that the defendant pay an account of profits (see s 1317H(2) and

¹⁰ See P D Finn, 'Statutes and the Common Law: The Continuing Story' in S Corcoran and S Bottomley (Eds), *Interpreting Statutes*, Federation Press, Sydney, 2005, p 52, at p 52. See also Gummow, above n 1.

¹¹ Corporations Act s 1317E lists the civil penalty provisions.

s 1317HA(2)). The decision in *Adler v ASIC*¹² indicates that the equitable test of causation does not apply to proceedings for a compensation order under s 1317H. Presumably, this may mean that equitable principles¹³ do not apply to proceedings where an account of profits is sought in relation to the statutory compensation order. However the position is not clear as this matter was not addressed by the court and such a conclusion could lead to incongruous results: with the *statutory* order for an account of profits not being governed by equitable principles while a private litigant could commence proceedings and seek an account of profits (on equitable principles) in respect of the same conduct that constituted a breach of the civil penalty provision. Of course, even if the statutory account of profits power were held not to be governed by equitable principles, it remains an open question on what principles precisely such a remedy would be assessed.

In related contexts, however, the statutory schemes have not expressly included accounts of profits within the power to make compensation order for contraventions of civil penalty provisions.¹⁴

Interestingly, the US courts have recognised the right of the regulators, like the Securities Exchange Commission (SEC) or the Antitrust Division of the Department of Justice (ATD), to bring a non-statutory, equitable action called 'disgorgement'. The purpose of this remedy is to compel the defendant to give back, or disgorge, the profits made from the unlawful conduct.¹⁵ This action is governed by general law principles.¹⁶

It is not clear whether the Australian regulators could commence any equitable proceedings on behalf of victims or whether they could seek some equivalent remedy to the disgorgement remedy available in the United States. However, as noted below in the context of injunctions, it has been held that

12 (2003) 46 ACSR 504; 179 FLR 1 at [707]–[709], discussed below under 'Compensation'.

13 The general equitable approach to the account of profits remedy was set out by the High Court of Australia in *Warman International Ltd v Dwyer* (1995) 182 CLR 544; 128 ALR 201.

14 Where ASIC, the Australian Prudential Regulation Authority (APRA) or the Australian Taxation Office (ATO) are acting under the Superannuation Industry (Supervision) Act 1993 (Cth), s 215 does not mention accounts of profits.

15 The regulator will deposit the monies retrieved from such an action into a fund which is used to compensate the victims of the fraud. See further T Newkirk and I Brandriss, 'Speech by SEC Staff: The Advantages of a Dual System: Parallel Streams of Civil and Criminal Enforcement of the US Securities Laws', nn 30–33, at <<http://www.sec.gov/news/speech/speecharchive/1998/spch222.htm>> (accessed 15 March 2005). The remedy of disgorgement, is not restricted, however, to the purpose of compensating victims and, in some cases, there may be no identifiable victims of the contravention.

16 The case law in the United States indicates that the disgorgement remedy is designed to maintain market integrity and to deter unlawful actions by making such actions unprofitable. See *SEC v Certain Unknown Purchasers* 817 F 2d 1018 (2d Cir 1987); *SEC v Levine* 881 F 2d 1165 (2d Cir 1989); *SEC v Courtois* [1984-1985 Transfer Binder] Fed Sec L Rep CCH [95,000] (SDNY), 11 April 1985; *SEC v Commonwealth Chemical* 574 F 2d 90 (2d Cir 1978); *SEC v Blatt* 583 F 2d 1325 (5th Cir 1978); *SEC v First City Fin Corp Ltd* 688 F Supp 705 (DDC 1988) at 728, aff'd 890 F 2d 1215 (DC Cir 1989); s 21B.e of the Securities Exchange Act 1934 (US). Recent amendments to the legislation in the United States now allow the SEC to obtain the disgorgement remedy by way of an administrative proceeding before the SEC, rather than by way of a court order: Securities and Exchange Act 1934 (US) s 21C(e); 15 USC s 78u-3(e); and Newkirk and Brandriss, above n 15, at nn 76 and 77.

some Australian regulators do have standing to seek a *mareva* injunction.¹⁷

Public interest action

ASIC has the statutory power to commence civil actions, in the public interest, in the name of a corporation (with or without the corporation's consent) or natural person (with that person's consent).¹⁸ Such public interest actions potentially are available for breaches of the legislation other than civil penalty provisions or for breaches of general law duties. ASIC funds the litigation and provides its own lawyers. Where ASIC, APRA and the ATO are acting under the Superannuation Industry (Supervision) Act 1993 (Cth),¹⁹ or where ASIC and APRA are acting under the Retirement Savings Accounts Act 1997 (Cth),²⁰ they also have a power to commence a public interest action.

The public interest action is commenced in relation to private rights of the impecunious plaintiff. The private litigant, in whose name the action was commenced, recovers the proceeds of any judgment. The legislation broadly provides that the public interest action is commenced to recover 'damages' for fraud, negligence, default breach of duty, or other misconduct, committed in connection with a matter to which the regulator's investigation or oral examination related.²¹

It is not clear whether the regulators' power to commence a public interest action for 'damages' would permit the regulator to seek an order for the recovery of any profits made by the wrongdoers. Given the remedial purpose of the legislation, and the broad objectives of the regulators,²² it is suggested that the public interest action would empower the regulator to recover profits for the impecunious plaintiff. Since the public interest action involves enforcement of the private rights of the impecunious plaintiff, any action to recover profits would be governed by general law principles despite the fact that the action is commenced under a statutory power by a public regulator.

Public interest proceedings have rarely been commenced by the Australian regulators with only two reported decisions to date.²³ The public interest proceedings enforcement option has been described by some commentators as

17 See, eg, *ASIC v Maxwell* [2003] NSWSC 1264 (unreported, 19 December 2003, BC200308485) at [5], [8] and [9].

18 ASIC Act s 50. ASIC would commence public interest proceedings without the corporation's consent where the corporation is incapable of giving consent because it is controlled by the wrongdoers. ASIC would commence public interest proceedings in the name of the private plaintiff (a corporation or a natural person) where the contraventions of the corporations legislation have left that plaintiff without sufficient resources to commence and maintain expensive and complicated litigation or, in addition, in the case of a corporation, where the perpetrators are in control of the wronged corporation.

19 See Superannuation Industry (Supervision) Act 1993 (Cth) s 298.

20 See Retirement Savings Accounts Act 1997 (Cth) s 128.

21 See ASIC Act s 50; Superannuation Industry (Supervision) Act 1993 (Cth) s 298; and Retirement Savings Accounts Act 1997 (Cth) s 128.

22 See, eg, ASIC's objectives in s 1(2) of the ASIC Act. Note also the application of the purposive approach to statutory construction required by the ASIC Act s 1(3) and Acts Interpretation Act 1901 (Cth) s 15AA.

23 See *Deloitte Touche Tohmatsu v ASC* (1995) 54 FCR 562; 128 ALR 318; 13 ACLC 161; and *Somerville v ASC* (1995) 60 FCR 319; 131 ALR 517; 13 ACLC 1527.

a 'white elephant'.²⁴ Given recent high profile collapses where many thousands of victims suffered losses, it is difficult to see why this power has not been utilised more. It may be that the precondition of acting in the 'public interest' is perceived by the Australian regulators as too difficult to satisfy and as a consequence, they have elected to commence other proceedings such as proceedings for a compensation order, an injunction, a pecuniary penalty order or a disqualification order which do not have a 'public interest' precondition to such litigation. The mere recovery of damages or property by the individual does not, of itself, satisfy the requirement of public interest.²⁵ A clear statutory definition of 'public interest' may provide a greater incentive for the regulators to commence such actions.

As can be seen from the above discussion, there are a number of outstanding issues that have not been addressed by the courts as to the interrelationship between the statutory powers to award accounts of profits and the equitable remedy, and the extent to which regulators are able to utilise the general law when not given express powers to seek an account of profits.

Injunctions

Many statutes give courts wide-ranging powers to grant injunctions,²⁶ often at the instigation of regulatory authorities enforcing the regulatory regimes. For example, ASIC has a wide statutory power to obtain an injunction²⁷ 'if in the

24 D Richardson, 'Section 50 of the Australian Securities Commission Act 1989: White Knight or White Elephant?' (1994) 12 *C & SLJ* 418.

25 The literature suggests that the public interest should include a consideration of the regulatory purpose behind the action, whether the action would send a message of compliance in relation to offending conduct that is widespread throughout the community, and whether the action is a test case which would resolve an ambiguity in the law. In deciding whether to commence an action, the public interest would also require a consideration of the prospects of success and the costs of the action including the likelihood of recovering the litigation costs. See P Thomson, 'Section 50 of the ASC Law — the Power and its Application' (1993) 3 *ASC Digest SPCH* 75; and Richardson, *ibid*, at 430.

26 The formula for very broad injunctive powers used in the Corporations Act is used in related legislation, such as the ASIC Act, but also in very different contexts, eg, the protection of aboriginal heritage (Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) s 26, but powers under 'any other law' are preserved (s 29)); and for certain breaches of the Banking Act 1959 (Cth) s 65A: although these are more in the realm of 'public' law, they may cut across some private obligations.

From a law of obligations perspective, also of interest are the extremely wide powers in the New South Wales Contracts Review Act s 10 and Industrial Relations Act s 107 to prescribe or otherwise restrict terms of future contracts that may be unjust and to prohibit (absolutely or conditionally) entry into specified types of contracts to perform work in any industry, respectively, including preventing the doing of acts that might be construed as *intended to advise or persuade someone* to enter such a contract (which would be harsh or oppressive). Such a power goes well beyond the power in equity to grant *quia timet* injunctions, but we are not aware of cases where the powers have been exercised to such an extent.

The Bankruptcy Act 1966 (Cth) contains broad and generally framed injunctive powers (see, eg, s 139ZJ; s 139ZIK re interim injunctions; and s 139ZIM), doing away with the need for undertakings as to damages. Importantly, these exist while equitable powers are preserved: s 139ZIN.

27 See Corporations Act s 1324; and ASIC Act s 12GD. Similarly, where APRA, ASIC or the ATO are acting under the Superannuation Industry (Supervision) Act 1993 (Cth), they have the power to obtain an injunction under s 315, and where ASIC and APRA are acting under

opinion of the court it is desirable to do so', where it is acting under the Corporations Act and ASIC Act. The Australian Competition and Consumer Commission (ACCC) has power to obtain an injunction under s 80 of the TPA. The regulatory authorities have also been given powers to make 'asset preservation orders' in similar broad terms,²⁸ and much of the discussion below applies equally to such orders. Such orders will also be discussed further under the heading of 'Proprietary remedies'.

Where proceedings are conducted in the Federal Court, that court is vested with a statutory jurisdiction to grant an injunction under s 15C of the Acts Interpretation Act 1901 (Cth). However, that Act does not apply to proceedings in the State courts.²⁹ As discussed below, there are inconsistent State court decisions on whether State courts are exercising a wide statutory jurisdiction or one limited in the same way as the inherent equitable jurisdiction when granting an injunction sought by private litigants.

Presumably, parliament gave the Australian regulators the statutory powers to obtain an injunction (or an asset preservation order) so that those regulators could quickly, in the pursuit of their public interest regulatory objectives,³⁰ obtain such order without having to satisfy the usual equitable requirements that are associated with the general law remedy of injunction, as discussed below. Some regulators, however, such as the ATO, have not been given such statutory powers. The ATO has a statutory power to prevent the taxpayer from leaving jurisdiction³¹ but has no statutory injunction power to prevent the taxpayer's assets from being removed from jurisdiction or from being dissipated within jurisdiction.³²

Arguably, where a regulator has not been given an express power, such regulator could, in appropriate cases, obtain general law remedies, that are similar to the statutory injunctions or the statutory asset preservation orders that are available to some regulators, (for example, *mareva* injunctions). However, the case law does not give any clear guidance on the *regulators'* (as opposed to private litigants') ability to seek general law remedies. In some cases, the ATO and ASIC have obtained an order under the general law by way of a *mareva* injunction.³³ But a clear statutory power may overcome some of the impediments to obtaining a *mareva* injunction under the court's inherent

the Retirement Savings Accounts Act 1997 (Cth), they have the power to obtain an injunction under s 163. See T Middleton, *ASIC Corporate Investigations and Hearings*, Lawbook Co, subscription service, at [8.980]–[8.1240].

28 See n 75 below.

29 Where ASIC is acting under the Corporations Act (see ss 1337B and 1337E) or the ASIC Act; ASIC, APRA, or the ATO are acting under the Superannuation Industry (Supervision) Act 1993 (Cth) (see ss 10(1), 196, 215 and 313); or ASIC and APRA are acting under the Retirement Savings Accounts Act 1997 (Cth) (see ss 16, 161 and 163), that legislation provides that civil proceedings may be commenced in the Federal Court or the States' courts (exercising vested federal jurisdiction). In the case of the ACCC, the TPA provides that civil proceedings in relation to contraventions of the Act may be commenced in the Federal Court and in the relevant States' courts (see s 86).

30 See, eg, ASIC's objectives in ASIC Act s 1(2) and the ACCC's objectives in TPA s 2.

31 Taxation Administration Act 1953 (Cth) s 14S.

32 Similarly, the ACCC has no statutory power to obtain an asset preservation order.

33 See, eg, *Deputy Commissioner of Taxation v Advanced Communications Technologies (Australia) Pty Ltd* [2003] VSC 67 (unreported, 5 March 2003, BC200303720); and *ASIC v Maxwell* [2003] NSWSC 1264 (unreported, 19 December 2003, BC200308485).

equitable jurisdiction. For example, in some cases, the ATO has been concerned that taxpayers are dissipating their assets, but the court has held that the ATO was unable to satisfy the equitable requirements for the grant of a *mareva* injunction.³⁴ In *ACCC v Chaste Corporation*,³⁵ Spender J of the Federal Court held that the ACCC's claim for a pecuniary penalty order that might be made under s 76 of the TPA and the potential legal costs associated with those proceedings, did not vest any present legal or equitable interest in the ACCC. Accordingly, the court had no jurisdiction to grant a *mareva* injunction in equity in relation to assets that might be applied to meet any future pecuniary penalty order or costs order. Spender J indicated that the imposition of a pecuniary penalty by a court against a defendant cannot be described as a judgment in favour of the ACCC. Accordingly, the ACCC did not stand in the same position as a creditor who is owed an existing debt. By contrast, in *ASIC v Maxwell*,³⁶ Austin J of the NSW Supreme Court held that the interests of investors that ASIC sought to protect justified the continuation of *mareva* injunctions restraining the disposal of real estate.

Equitable considerations

There has been some doubt expressed as to whether the Australian regulators' statutory powers to obtain an injunction³⁷ under the regulatory legislation are subject to equitable considerations. Some recent decisions in the NSW Supreme Court have indicated that, in the context of the regulators' application for an injunction under the regulatory legislation, the court is exercising a statutory jurisdiction, rather than its traditional equitable jurisdiction, in granting the injunction.³⁸ This approach is supported by Gummow J (speaking extra-judicially), who has indicated that the term 'injunction', when used in a statutory setting, must take its meaning from the provisions of the relevant statute and that meaning may differ from the injunction remedy available in equity.³⁹ Nonetheless, Gummow J has suggested that the broad language adopted by the regulatory statutes does not confer on the court an unlimited power to grant injunctive relief.⁴⁰

The Australian regulatory legislation broadly provides that the court may grant an injunction 'if in the opinion of the court it is desirable to do so'.⁴¹ In *ASIC v Triton Underwriting Insurance Agency*,⁴² Barrett J of the NSW Supreme Court held that this wide language means that the court's statutory power to grant injunctive relief is not restricted by equitable considerations.

34 See, eg, *Deputy Commissioner of Taxation v Cumins* (2003) 51 ATR 620 at [14].

35 (2003) 127 FCR 418; 44 ACSR 668 at [22], [28], [29], [61], [62] and [63].

36 [2003] NSWSC 1264 (unreported, 19 December 2003, BC200308485) at [9].

37 Presumably, the same issue would also arise in the context of asset preservation orders.

38 See, eg, *ASIC v Mauer-Swiss Securities Ltd* (2002) 42 ACSR 605 at [18], [19], [20] and [36], where Palmer J indicated that this conclusion was based on the effect of Corporations Act ss 1324(6) and 1324(7).

39 Justice W M C Gummow AC, 'Equity: too successful?' (2003) 77 ALJ 30 at 35 referring to *Bristol City Council v Lovell* [1998] 1 WLR 446 at 453-4; [1998] 1 All ER 775.

40 *Ibid*, at 35, referring to *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; 185 ALR 1.

41 Corporations Act s 1324(1); Superannuation Industry (Supervision) Act 1993 (Cth) s 315(5); Retirement Savings Accounts Act 1997 (Cth) s 163(2) and (5); and TPA s 80(2).

42 (2003) 48 ACSR 249 at [25] per Barrett J.

Barrett J indicated that even though the court is not constrained by equitable principles, those principles represented a sound basis upon which the court could make a preliminary assessment of the application for an injunction. Barrett J indicated that once those matters were taken into account, the court could consider the statutory role of ASIC and the wider question of what is 'desirable' in terms of s 1324 of the Corporations Act.⁴³ Barrett J also indicated that the meaning of the word 'desirable' in s 1324 was a broad and unexplained concept.⁴⁴

The court's power to grant an injunction restraining a person from engaging in conduct may be exercised whether or not the defendant intends to engage in again, or continue to engage, in conduct of that kind; whether or not the defendant has previously engaged in conduct of that kind; or whether or not there is imminent danger of substantial damage to any person if the defendant engages in conduct of that kind.⁴⁵ The regulatory legislation also provides that these same matters apply to the court's power to grant a mandatory injunction under that legislation.⁴⁶ In *ASIC v Mauer-Swiss Securities Ltd*,⁴⁷ Palmer J of the NSW Supreme Court held the matters outlined above indicate that the court is not exercising its traditional equitable jurisdiction, but a statutory jurisdiction, when granting an interim or permanent injunction under the legislation.

The fact that the legislation expressly provides that the regulator, when applying for an injunction,⁴⁸ cannot be required to give an undertaking as to damages also suggests that parliament intended that equitable considerations (relating to the balance of convenience) do not apply to the courts' decision as to whether to make such orders.

From the perspective of the public interests that are promoted by the regulators' investigation and enforcement activities, there are a number of advantages of categorising the courts' jurisdiction to grant an injunction under the regulatory legislation as involving a special statutory jurisdiction, rather than the traditional equitable jurisdiction. For example, it has been held that the court is not restricted by equitable considerations such as whether there is a serious question to be tried or where the balance of convenience lies⁴⁹ or by discretionary considerations which would otherwise be applicable if the court

43 Ibid, at [9], [25], [26], [28] and [29].

44 Ibid, at [22].

45 Corporations Act s 1324(6); Superannuation Industry (Supervision) Act 1993 (Cth) s 315(7); Retirement Savings Accounts Act 1997 (Cth) s 163(7); and TPA s 80(4).

46 Corporations Act s 1324(7); Superannuation Industry (Supervision) Act 1993 (Cth) s 315(8); Retirement Savings Accounts Act 1997 (Cth) s 163(8); and TPA s 80(5).

47 (2002) 42 ACSR 605 at [18], [19], [20] and [36] per Palmer J

48 Corporations Act s 1324(8); Superannuation Industry (Supervision) Act 1993 (Cth) s 315(9); Retirement Savings Accounts Act 1997 (Cth) s 163(9); and TPA s 80(6).

49 However, the interests of justice will always require that those considerations be examined carefully even where an interim injunction is sought to protect the public: see *ASIC v Mauer-Swiss Securities Ltd* (2002) 42 ACSR 605 at [36] per Palmer J. The approach in this case is in contrast to that in *ASIC v Marshall-Bell Hawkins* (2002) 43 ACSR 340 at [17]–[18] where Merkel J indicated that equitable considerations such as whether there is a serious question to be tried or where the balance of convenience lies *must* be considered in deciding whether or not to appoint a receiver and manager under s 1323 of the Corporations Act.

were exercising its traditional equitable jurisdiction.⁵⁰ Additionally, according to the case law, the courts' statutory jurisdiction is not restricted by equity's traditional reluctance to grant injunctive relief in relation to the repetition of crime. This equitable principle is overridden by the public interest in preventing contraventions of the regulatory legislation that involve matters of economic and social importance. Accordingly, the regulators may obtain an injunction under the legislation in relation to a contravention for which there is a criminal sanction.⁵¹ Similar principles operate in the United Kingdom.⁵²

However, it should also be noted that the view that the court is not restricted by equitable considerations when exercising statutory jurisdiction is the subject of some judicial debate and awaits a final judicial determination.⁵³ The issue is complicated by the fact that private litigants also have standing to apply for injunctions (or asset preservation orders) under the regulatory legislation described above. It has been held that where a private litigant applies for an interim injunction under s 1324(4) of the Corporations Act, the court should adopt the same approach as that taken in respect of the grant of interim injunctions in Equity. Accordingly, the court will consider the usual discretionary considerations.⁵⁴ This means that the private litigant must satisfy the court that the claim is not vexatious or frivolous, that there is a serious question to be tried, and that the balance of convenience favours the grant of an injunction.⁵⁵ Such additional requirements under the general law may be a practical impediment to obtaining timely relief.⁵⁶

50 *ASIC v Mauer-Swiss Securities Ltd* (2002) 42 ACSR 605 at [18], [19], [20] and [36] per Palmer J; and *ASIC v Triton Underwriting Insurance Agency* (2003) 48 ACSR 249 at [24] and [25].

51 *ASIC v Sweeney* [2001] NSWSC 114 (unreported, 6 March 2001, BC200101059) at [57] per Austin J; *ASIC v Parkes* (2001) 38 ACSR 355 at [9] per Austin J; *ASIC v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561 at [38]; *ASIC v Mauer-Swiss Securities Ltd* (2002) 42 ACSR 605 at [36] per Palmer J; and *ASIC v Loiterton* [2004] NSWSC 172 (unreported, 1 April 2004, BC200401865) at [32].

52 *Financial Services Authority, Enforcement Manual 6*, cited in J Fisher, J Bewsey, M Waters and E Ovey, *The Law of Investor Protection*, 2nd ed, Sweet & Maxwell & Thomson, London, 2003, p 333.

53 *Liquorland (Australia) Pty Ltd v Anghie* (2001) 20 ACLC 58 per Warren J; *ASIC v Cooke* (1996) 22 ACSR 580 per Nicolson J; and *ASIC v Marshall Bell Hawkins Ltd* (2002) 43 ACSR 340 per Merkel J cited in *ASIC v Triton Underwriting Insurance Agency* (2003) 48 ACSR 249 at [22] and [23] by Barrett J. In *Liwszyc v Smolarek* (2005) 55 ACSR 38 at [35]–[42] Hasluck J indicated that equitable considerations apply where a private litigant applies for an interlocutory injunction under the Corporations Act s 1324(4) (citing *ASC v Cooke* (1997) 22 ACSR 580; 15 ACLC 435).

54 *Tekinvest Pty Ltd v Lazarom* (2005) NSW Conv R 56-119 at [21]. This case makes it clear that although a statutory jurisdiction is being exercised, it is subject to equitable considerations. From a point of view of interpreting the statutory powers, it is not clear why such a limitation needs to be attached. In other cases it is not even clearly spelt out whether a statutory, as opposed to inherent equitable, jurisdiction is being exercised.

55 *Liwszyc v Smolarek* (2005) 55 ACSR 38 at [35]–[37], citing *ASC v Cooke* (1997) 22 ACSR 580; 15 ACLC 435; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153; 67 ALR 553; and *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 408; [1975] 1 All ER 504.

56 For example, in the context of asset preservation orders, under Corporations Act s 1323, it has been said that orders can be made 'before liability is established and before evidence necessary to establish liability has been collected. The application for orders under s 1323 is not an interlocutory application in relation to existing civil or criminal proceedings but is

It is suggested that the regulator's application for a (statutory) injunction should be distinguished from a private litigant's application for such orders (under the regulatory legislation) because the regulator, unlike the private litigant, is seeking to perform public interest functions and to promote public interest objectives. The preferable view is that, in the context of the regulators' application for an injunction, parliament gave the court the special statutory jurisdiction to grant those orders so that the court is not restricted by the constraints associated with the court's traditional equitable jurisdiction. Indeed, we would argue that this should be so, irrespective of whether the claim is brought by a regulator or private litigant. In the context of statutory injunctions under other legislation, such as s 114(1) of the Family Law Act 1975 (Cth), the courts have indicated that the statute confers on the court a much wider power to grant injunctions than ever existed at common law or in equity.⁵⁷

The preferred view is that, where the regulator applies for an injunction under the regulatory laws, the central issues for the court to consider when deciding whether to make such orders are not the traditional equitable considerations. Instead, the court should consider whether there has been a contravention, or whether there is a continuing or proposed contravention, of the legislation and whether the injunction would serve some regulatory purpose or promote the regulators' objectives.⁵⁸ To remove any doubt, the regulatory legislation should be amended by expressly providing that, in the context of the regulator's application for an injunction (or an asset preservation order) the courts' statutory jurisdiction to grant those orders is not restricted by equitable considerations.

Range of persons subject to a statutory injunction

The Australian regulators can only obtain the statutory remedies of an injunction (and a statutory compensation order (including an account of profits) or a statutory damages order, in addition to, or in substitution for, an injunction)⁵⁹ against the principal contravener of the regulatory legislation (usually the corporation or its directors and officers) and against a *narrow* range of third parties (in comparison to the broad range of third parties that may be liable to equivalent remedies under general law). Where ASIC is

interlocutory in a wider sense because it can be made where an investigation is being conducted which may or may not result in civil or criminal proceedings': *ASIC v Carey (No 3)* (2006) 57 ACSR 307 at [25]. Similarly, it has been said that: 'A suspicion that a person has contravened the corporations legislation or a general law obligation, that is unsupported by any evidence at all, is insufficient for the grant of a *mareva* injunction under the general law but may be sufficient to obtain an asset preservation order under s 1323': *ASIC v Burnard* [2006] NSWSC 611 (unreported, 13 June 2006, BC200604482) at [22].

57 R Meagher, D Heydon and M Leeming, *Meagher Gummow and Lehane's Equity Doctrines and Remedies*, 4th ed, Butterworths, Sydney, 2002, at [21-530]–[21-560].

58 *ASIC v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561, cited in *ASIC v Triton Underwriting Insurance Agency* (2003) 48 ACSR 249 at [23] per Barrett J.

59 Section 1324 of the Corporations Act; s 315(11) of the Superannuation Industry (Supervision) Act 1993 (Cth); and s 163(11) of the Retirement Savings Accounts Act 1997 (Cth).

acting under the Corporations Act and ASIC Act,⁶⁰ ASIC, APRA or the ATO are acting under the Superannuation Industry (Supervision) Act 1993 (Cth),⁶¹ ASIC and APRA are acting under the Retirement Savings Accounts Act 1997 (Cth),⁶² or the ACCC is acting under the TPA,⁶³ the legislation provides that an injunction may be obtained against third parties including those who aid and abet or counsel or procure the contravention, those who induce the contravention and those who are knowingly concerned in, or conspire with others to effect, the contravention. These terms are also found in the definitions of ‘involved in the contravention’,⁶⁴ a phrase used in other sections of the regulatory legislation to extend civil liability for statutory compensation orders to third parties.⁶⁵ The use of these terms is unusual in the sense that they are based on criminal law concepts and were derived from former s 5 of the Crimes Act 1914 (Cth) (now s 11 of the Criminal Code 1995 (Cth)). In accordance with criminal law concepts, the only third parties captured by these terms, and who may be the subject of the statutory orders, are those who acted in relation to the contravention with actual knowledge (or mens rea) of the essential matters that constitute the contravention.⁶⁶ Such persons may also be liable *in equity* as constructive trustees under the ‘knowing assistance’ rule where, by virtue of the same conduct, they have knowingly assisted a trustee or fiduciary to breach their duties.⁶⁷

The remedies contained in the legislation, however, will not apply to a broad range of third parties who are liable in equity as ‘constructive trustees’ outside of cases of ‘knowing assistance’ with actual knowledge. For example, liability in equity may extend to knowing assistance with constructive knowledge;⁶⁸ or third parties may be liable as constructive trustees in equity (outside the ‘knowing assistance’ rule) where they receive property with actual or constructive knowledge (or perhaps even constructive notice) that

60 Corporations Act s 1324(1)(c)–(f); and ASIC Act s 12GD. See Middleton, above n 27, at [8.4200].

61 Section 315(1).

62 Section 163(1).

63 Section 80(1)(a)–(f).

64 See Corporations Act s 79; former s 17 and current s 194 of the Superannuation Industry (Supervision) Act 1993 (Cth); Retirement Savings Accounts Act 1997 (Cth) s 21; and TPA s 87B.

65 See, eg, ss 181(2), 182(2), 183(2), 1317E and 1317H of the Corporations Act.

66 *Yorke v Lucas* (1985) 158 CLR 661 at 666–7; 61 ALR 307; *R v Le Broc* [2000] VR 43 at 61–2; and *ACCC and ASIC v NRMA Health Pty Ltd and NRMA Insurance Ltd and Saatchi & Saatchi Australia Pty Ltd* (2002) ATPR 41–891 at [73]. See also T Middleton, ‘Australian Securities Commission Investigations of Fiduciaries and Proceedings Against Constructive Trustees’ (1998) 16 *C & SLJ* 16. For a third party to be the subject of an injunction that person must have had actual knowledge of the essential facts prior to, or contemporaneously with, the commission of the contravention. Where third parties become aware of the essential facts constituting the contravention only after it has occurred and is complete, they cannot be the subject of an injunction: see, generally, *ASIC v Australian Investors Forum Pty Ltd (No 2)* (2005) 53 ACSR 305 at [114]–[118].

67 *Barnes v Addy* (1874) 9 Ch App 244 at 251–2; *Consul Developments v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 398 per Gibbs J, 409–10 per Stephen J; 5 ALR 231; *ASC v AS Nominees Ltd* (1995) 62 FCR 504 at 523; 133 ALR 1 at 9 per Finn J; and *Forkserve Pty Ltd v Jack* (2001) 19 ACLC 299 at [122]–[123] per Santow J.

68 There is considerable debate about the precise limits of the ‘knowing assistance’ rule; however, this debate is beyond the scope of this article.

such receipt involved a breach of a fiduciary's or trustee's duty under the 'knowing receipt' rule;⁶⁹ or where they unconscionably retain or assert title to property;⁷⁰ or where they have voluntarily and wrongfully assumed control of a trust corporation's property ('trustees de son tort').⁷¹ In all of these examples, the third parties may be held to be constructive trustees in equity but they cannot be required to transfer the property back to the victim by way of an injunction or be the subject of a compensation or damages order under the regulatory legislation because their liability as constructive trustees in equity, unlike third party liability under the legislation, does not depend on actual knowledge of breach of duty or dishonest intent.

It is incongruous that the remedies under the regulatory legislation are only available against third parties who are accessories as defined by criminal law concepts but are not available against a wide range of third parties who are constructive trustees in equity outside such cases. This is so even accepting that the terminology of 'constructive trustee' is itself problematic: it has an uncertain scope and meaning and is apt to mislead. Nonetheless, if the statutory civil remedies are available against a narrower range of third parties than the equivalent general law remedies, then a corporation or victim may be 'better off' if they pursue general law remedies.

However, in some cases the victim of the civil or criminal contraventions of the regulatory legislation may have insufficient resources to maintain expensive and complicated private litigation and is thus left without a private law remedy. In such a case the victim should be able to rely on the assistance of the regulator. In such circumstances, some regulators could commence a public interest action, in the name of the impecunious victim against a broad range of third parties or 'constructive trustees'. As discussed previously, however, there are difficulties in pursuing such actions in that regulators must satisfy the 'public interest' requirement.

As noted previously, there are also doubts as to the regulators' capacity to seek general law remedies such as *mareva* injunctions or to obtain, say, a declaration of constructive trust, in relation to conduct that constitutes a breach of the regulatory laws. It is evident that some of the regulatory laws do not constitute an exhaustive code so as to exclude general law principles or general law claims.⁷² The problem is that the ability of the regulator to seek general law remedies would have to be determined on a case by case basis. Such an approach may not necessarily promote effective regulation⁷³ and the

69 See, eg, *Lurgi Australia Pty Ltd v Gratz* [2000] VSC 278 (unreported, 4 August 2000, BC2000004628) at [75], [79] and [85] per Byrne J; cf *Koorootang Nominees Pty Ltd v ANZ Banking Group Ltd* [1998] 3 VR 16, denying pure constructive notice suffices. For a useful summary of the case law concerning requisite notice for recipient liability, see J D Heydon and M J Leeming, *Jacob's Law of Trusts in Australia*, 7th ed, LexisNexis Butterworths, Australia, 2006, [1335] at n 213.

70 *Muschinski v Dodds* (1985) 160 CLR 583 at 613–14; 62 ALR 429; *Baumgartner v Baumgartner* (1987) 164 CLR 137; 76 ALR 75; and *Carson v Wood* (1994) 34 NSWLR 9.

71 *Barnes v Addy* (1874) LR 9 Ch App 244; and *Re Barney* [1892] 2 Ch 276. See also R P Austin, 'Constructive Trusts' in P D Finn (Ed), *Essays in Equity*, Lawbook Company, Sydney, 1985, pp 210–11.

72 See, eg, Corporations Act ss 179 and 230.

73 Effective regulation involves encouraging a culture of compliance by the target population with the regulatory rules and the achievement of the regulatory objectives (whether investor

achievement of the regulators' statutory objectives.

Given the uncertainties surrounding the regulators' ability to obtain general law remedies, it is suggested that the legislation should be amended to expressly authorise the court to grant injunctions or make compensation orders or damages orders against 'constructive trustees'. This broader approach would also be consistent with the Australian regulators' current statutory power to obtain asset preservation orders which are expressed to apply to a wide range of persons, including those who hold property in a 'fiduciary capacity' or as a 'trustee', as discussed below.

Proprietary remedies

Although many statutes grant the courts powers to make 'asset preservation orders', apart from such limited orders, remedies that attach to specific property, with the consequent advantages that such remedies bring, are not commonly available under statute, (though, in some contexts, injunctions requiring the delivery of property could achieve similar results).⁷⁴

Powers to make 'asset preservation orders' are generally available in the same broad terms (and in the same regulatory contexts) as are injunctive powers discussed above, and much of that discussion thus has equal application to 'asset preservation orders'. For example, ASIC has a statutory power to obtain an asset preservation order⁷⁵ where it is acting under the Corporations Act and the ASIC Act. The object of the order is to prevent a person from dealing with property while the Australian regulators are conducting their investigation or conducting civil or criminal proceedings. The asset preservation order preserves the status quo and protects the relevant assets from dissipation or removal from jurisdiction until the outcome of the investigation or legal proceedings is known.⁷⁶

The court may make a statutory asset preservation order against a wider range of persons than that contemplated by the statutory injunction power described above.⁷⁷ This is partly because, unlike the statutory injunction power, the asset preservation power expressly borrows from equity and provides that the court may make protective orders over property held by a 'trustee'⁷⁸ or a 'fiduciary'.⁷⁹ However, the word 'trustee' is not defined in the

or consumer protection, a competitive market or efficient revenue collection) in a timely and cost effective manner: see Australian Law Reform Commission, Background Paper 7 — Review of Civil and Administrative Penalties in Federal Jurisdiction, Item 2, 'What is Effective Regulation?', at <<http://www.austlii.edu.au>> (accessed 17 June 2006).

74 M Gething, 'Do We Really Need Criminal and Civil Penalties for Contraventions of Directors' Duties?' (1996) 24 *ABLR* 375 at 380.

75 See Corporations Act s 1323. Similarly, where APRA, ASIC or the ATO are acting under the Superannuation Industry (Supervision) Act 1993 (Cth), they have the power to obtain an asset preservation order under s 313 of that Act. Where ASIC and APRA are acting under the Retirement Savings Accounts Act 1997 (Cth), they have the power to obtain an asset preservation order under s 161 of that Act.

76 See, generally, *ASIC v Adler* (2001) 38 ACSR 266 at [7] per Santow J; and *ASIC v Rich* (2001) 51 NSWLR 643; 38 ACSR 251 at [35] and [58] per Austin J.

77 *ASIC v Sea-Land Insurance Brokers Pty Ltd* [1999] NSWSC 788 (unreported, 26 July 1999, BC9904346).

78 Corporations Act s 1323(1)(g) and (h); Superannuation Industry (Supervision) Act 1993 (Cth) s 313(2)(e) and (3)(a); and Retirement Savings Accounts Act 1997 (Cth) s 161(5)(b).

legislation and it is not clear whether that word is restricted to trustees of express trusts or whether it would include constructive trustees. It could be argued that the protective purpose underlying the asset preservation order dictates that the word 'trustee' should be broadly interpreted to include constructive trustees. And, of course, 'fiduciaries' may, in appropriate cases, be constructive trustees so that to this extent at least, the legislation would apply to 'constructive trustees'. It is suggested that the regulatory legislation be amended by defining the word 'trustee' to include 'express and constructive trustees' so that the court has clear power to make protective orders over property held by such persons. Further, putting to one side the doubts as to the precise parties against whom such orders can be made, it seems incongruous that, under the current law, asset preservation orders can be made (on an interim basis during the investigation or during legal proceedings) against a wider range of persons than those who can be subject to a statutory interim or final injunction.⁸⁰

Asset preservation orders and similar remedies, such as the *mareva* injunction, do not necessarily lead to the transfer of (beneficial) ownership of property to victims of breaches of the relevant statutes. Some limited statutory remedies, however, have permanent proprietary consequences. For example, the regulators' statutory injunction power theoretically can be used to facilitate the payment of compensation by way of mandatory injunction in which the court orders the wrongdoer or third party to transfer property to assist in

79 Corporations Act s 1323(2A)(b); Superannuation Industry (Supervision) Act 1993 (Cth) s 313(3)(b); and Retirement Savings Accounts Act 1997 (Cth) s 161(5)(a).

80 Similar to 'asset preservation orders' are statutory restraining orders. All of the Australian regulators may, in appropriate cases, with the assistance of the Commonwealth DPP, obtain a restraining order under the Proceeds of Crime Act 2002 (Cth). This allows them to prevent the disposal of property that may be the subject of future forfeiture or confiscation orders made in relation to certain offences allegedly committed by the suspect (ss 16, 17 and 338). The restraining order may apply to the suspect's property, or to specified property of another person that is subject to the 'effective control' of the suspect (ss 17(2)(a) and (c) and s 337). The wide statutory definition of 'effective control' borrows from Equity and extends to suspects who have a legal or equitable interest in another's property, including an interest through a trust. 'Effective control' has also been interpreted to include 'de facto control' or 'control in fact' or 'control that is practically effective' or control that enables a person to treat the property as their own. See *Loo v DPP (Vic)* (2005) 12 VR 665 at [9] n 11, in the context of s 9 of the Confiscation Act 1997 (Vic). The concept of 'effective control' means that, in the context of indictable offences under the regulatory legislation, an order restraining the disposal of property can be made under the Proceeds of Crime Act 2002 (Cth) against a wider range of third parties than the range of third parties, who in the context of civil contraventions of the regulatory laws, can be made the subjects of a statutory injunction or a statutory asset preservation order. The Proceeds of Crime Act 2002 (Cth) is restricted to proceeds of *crime*, and has no application to the recovery of property or profits made as the result of civil contraventions of the regulatory laws. This is a lesser problem for those regulators (described above) who have the statutory power to obtain an asset preservation order. However, in the cases of the ATO and the ACCC, it appears unusual that they have powers to restrain the disposal of property in the context of the criminal matters contemplated by the Proceeds of Crime Act 2002 (Cth) but they do not have the same statutory power as the other regulators to obtain a court order to restrain the disposal or dissipation of assets in the context of civil matters. In such circumstances, they must rely on the general law remedies, including the *mareva* injunction, as discussed previously.

paying the statutory compensation order;⁸¹ such options, however, have not in practice been explored.

Given such very limited statutory powers to award remedies in the nature of 'proprietary' relief, the equitable remedies of constructive trust and lien may continue to be particularly useful in many contexts. The case law indicates that a *discretionary* proprietary remedy, such as the remedial constructive trust, may be available for breaches of equitable duties that are coextensive with the duties imposed by the Corporations Act.⁸²

However, the law on the availability of proprietary remedies in equity is not easy to state and is subject to ongoing debate. Clarification of the scope and availability of general law 'proprietary' remedies is thus of importance even in the context of conduct that is the subject of statutory regulation and for which, in most cases, statutory remedies are normally the most appropriate mechanism for relief. The law in this context faces a real dilemma, as to the solution to which we express no firm views: should the imposition of remedies having proprietary consequences and thus depriving parties of 'their' property be clearly spelt out in statute and only be available on those limited, expressly spelt out, terms; or are the possible fact scenarios that may arise so diverse that a flexible, open-ended approach so favoured by equity is the only realistic mechanism by which proprietary remedies can be determined, on a case by case basis? If the latter is the case, should such power be found in a wide ranging, discretionary statutory power to impose proprietary remedies or does the residual equitable jurisdiction provide an adequate repository of proprietary remedial options? An argument against a continuing role for equitable remedies might be made on the basis of the objectives of regulation itself. Some regulatory objectives state that 'efficiency, cost effectiveness, timeliness in enforcement etc' are paramount: see ASIC Act s 1(2). The Australian Law Reform Commission has also highlighted the need for 'effective regulation' which is maximum compliance levels by target population at least cost.⁸³ This would be best achieved if there are clear statutory provisions and general law approaches should be disregarded where the technical rules inherent under those approaches frustrate the achievement of the regulatory objectives.

Compensation/damages remedies

Many statutes contain compensatory remedies providing for the award of monetary sums for losses incurred.⁸⁴ For example, under the Corporations

81 Gething, above n 74, at 380. The existing limitations (as to which 'third' parties can be subject to such power, discussed above) on the statutory injunction power apply, thus restricting the ability of the victims to receive full compensation for their losses (by way of such transfer of property).

82 See, eg, *Robins v Incentive Dynamics Pty Ltd* (2003) 45 ACSR 244 at [53], [71] (9 April 2003). Importantly, the Court of Appeal (Mason P, Stein and Giles JJA agreeing) thought that it is 'unnecessary to consider the exact scope of the non-statutory fiduciary duty that corresponds with [the statutory duty: s 232(6) of the Corporations Law, now s 182 of the Corporations Act]' (at [53]).

83 See above n 73.

84 Apart from those discussed below, see, eg, Superannuation Industry (Supervision) Act 1993

Act, a court may compensate for losses of a corporation⁸⁵ ‘that *resulted from* the contravention’ of the civil penalty provisions of the Act (s 1317H(1) and s 1317HA) (which compensation order may be sought by the corporation or ASIC (s 1317J(1)).⁸⁶ Such power is extended to the award of damages to any person who has suffered loss as a result of a breach of a financial services civil penalty provision (s 1317HA; see also s 1317J(3A)).⁸⁷ A similar power exists in relation to ‘misleading or deceptive’ conduct in the provision of financial services though, interestingly, this is to be awarded to a ‘person who suffers loss or damage *by* conduct of another person’ (in breach of the relevant provisions or involved in such breach (s 1041I)). Although this is the same wording as adopted in the TPA s 82⁸⁸ (and equivalent sections of state Fair Trading Acts) in relation to breach of parts of the Act, including s 52 (misleading or deceptive conduct), it is odd that different language should be used to delineate what is the same remedy in the one Act.⁸⁹ In any case, the use of such a seemingly simple, but Delphic, word as ‘by’ leaves much for the interpretation by the courts: the considerable litigation in the context of the TPA as to the meaning of the term is evidence enough of this. In the context of the TPA the courts have held that the meaning of ‘by’ is a question of statutory interpretation, though considerable assistance can be gained from general law concepts of causation.⁹⁰

The same difficulties arise from the use of the words ‘resulted from’ the contravention. Just precisely what causal link does this require between the conduct of the defendant and the losses sustained by the plaintiff? One of the consequences of the use of such uninformative terms is that courts need to

(Cth) s 215 (compensation order for loss or damage to a superannuation entity arising as a result of contravention of civil penalty provisions).

85 This includes ‘registered schemes’; for convenience, we will use the term ‘corporation’ as including ‘registered schemes’ where they are relevantly included in the Act.

86 As the blurring of the distinction between civil and criminal law that has occurred in the context of such powers, see below n 129.

87 ASIC’s power to obtain a compensation order extends to allow ASIC to recover compensation on behalf of ‘other persons’ such as creditors or shareholders who have suffered loss (for breach of financial services civil penalty provisions) (see s 1317J(1)).

88 Section 82 (1) provides:

A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVA, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

89 It should be noted that although the remedies are classified as compensatory, such damages under the Corporations Act ‘include profits made by any person resulting from the contravention’ (s 1317H(2), s 1317HA(2)) (this is not, however, contained in s 1041I, damages for loss as a result of false or misleading statements (s 1041E) or misleading or deceptive conduct (s 1041H) in relation to financial products and services). These subsections provide for the possibility of an account of profits remedy, as discussed above; however, the wording of the subsections is problematic and the subsections surely cannot be intended to mean precisely what they appear to say. They are worded in the form of a direction, seemingly *requiring* that all compensation orders include any profits made, rather than allowing such relief where appropriate, either as one measure of loss, or as an alternative remedy even where no loss has been suffered at all. (Cf also Corporations Act s 1041I with ASIC Act s 12GF, compensation for breaches of the financial services consumer protection provisions in subdiv D of that Act.)

90 See, eg, *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; 158 ALR 333 at [38]–[42].

determine whether common law or equitable concepts of causation relevantly apply (or, more accurately, which of the different approaches to causation, within the common law and equity apply). This was one of the issues that arose in *ASIC v Adler*.⁹¹ In that case, involving serious breaches of the Corporations Act by directors of HIH Insurance Ltd, Santow J held that the term ‘resulted from’ the contravention imported the more ‘stringent test’ of causation in equity in part, because if such interpretation were not adopted, duplication in litigation would follow. This was because many (though not all) breaches of the relevant provisions also activate claims in equity for breach of fiduciary duty to which the more stringent equitable test would apply⁹² (though see below as to the doubts about this proposition in relation to some types of breaches of fiduciary duty). The principal effect of applying the stringent equitable test of causation is that once the court has determined that a breach of the relevant provision has occurred, then there is no need for the court to consider whether the loss might have occurred even without the contravention or whether the loss may have been avoided under certain contingencies.⁹³

Some support for Santow J’s view could also be derived from the fact that compensation orders under the Corporations Act (unlike the position at common law) are not available as of right: a residual discretion exists to refuse to award damages, even where the breach has caused the loss (on whichever tests of causation are applicable).⁹⁴

The NSW Court of Appeal rejected Santow J’s view. In the view of Giles JA, (Mason P and Beazley JA agreeing), the provision could not be distinguished from s 82 of the TPA, in relation to which the High Court has held ‘that the ordinary meaning of the words of the statute had primacy’, though general law principles could be useful guides.⁹⁵ The issue was essentially, therefore, a question of statutory interpretation. The court also noted that the ‘analogy with equitable claims against fiduciaries is all the more difficult because some civil penalty provisions in the Act do not involve contravention by a person standing in a fiduciary capacity’.⁹⁶ The court went on to conclude:

In my opinion, the words ‘resulted from’ in s 1317H are words by which, in their natural meaning, only the damage which as a matter of fact was caused by the contravention can be the subject of an order for compensation. Like the word ‘by’ in s 82 of the Trade Practices Act 1974 (Cth) (see *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; 158 ALR 333 at [38]–[42]), they should be given their

91 (2002) 41 ACSR 72; 168 FLR 253. See Middleton, above n 27, at [8.1800].

92 See *ibid*, at [746]; see also at [769]–[774] for a discussion of the calculation of such loss by analogy to a defaulting trustee.

93 See *ibid*, at [749]–[750].

94 See *ASIC v Adler* (2002) 42 ACSR 80 at [175]–[177].

95 See *Adler v ASIC* (2003) 46 ACSR 504; 179 FLR 1 at [710]. See also *ASIC v Vines* (2006) 58 ACSR 298 at [245]–[246] per Austin J.

96 *Ibid*, at [708]. In response to this, however, it could be argued that non-fiduciaries are not necessarily exempt from equity’s reach: for example, accessory, recipient and other liability may attach to a range of third parties not in a fiduciary relationship with a corporation.

ordinary meaning of requiring a causal connection between the damage and the contravening conduct, free from the strictures of analogy with equitable claims against fiduciaries.⁹⁷

The caution of the Court of Appeal is justifiable, in part because the actual position in equity as to causation in relation to breaches of trust and fiduciary duties is itself uncertain. There is no single approach to causation in equity⁹⁸ and, apart from the conclusion that the equitable causation principles are in some circumstances 'more stringent' ('meaning that causation is more readily found')⁹⁹ than those at common law, there is little agreement on the issues. There is uncertainty as to what precisely, is the law (and there are wide-ranging opinions as to what the law ought to be), in relation to two matters: (1) the nature of the 'more stringent' causation inquiry relevantly to be engaged in and, (2) as to whether such more stringent approach is applicable to all breaches of trust and fiduciary duties or only some. Indeed, one could be led to believe that there are as many views as there are commentators and judges addressing the issue. Further, the issues are complex and engender considerable confusion. As Joshua Getzler has said, the 'causal approach in equity ... can seem ... inscrutable'.¹⁰⁰ (We confess not necessarily to have a complete understanding of all the complexities, nor of the nuances of the variety of opinions expressed. This could be either because we are obtuse, or because the law is in a disreputable state, or both.)

We can point to numerous distinctions that have been drawn in the cases or by commentators as to when different causation criteria in equity apply, or

97 Ibid, at [709]. Interestingly, however, the conclusion of the Court of Appeal is undermined by the fact that under s 82 of the TPA, the courts have not applied a 'but-for' test of causation, but a more pro-plaintiff approach. Misleading or deceptive conduct need only be 'a' cause of the detrimental conduct, such that the plaintiff might still have entered the transaction in the absence of such conduct. (This appears to be a similar approach to that adopted by Santow J.) See, eg, *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546 at 558–9; 79 ALR 83 at 96 and *Dominelli Ford (Hurstville) Pty Ltd Karmot Auto Spares Pty Ltd* (1992) 38 FCR 471 at 483; 110 ALR 535. Losses flowing from the entry into the contract in such circumstances thus may not satisfy the 'but for' test. This is similar to the common law in cases of fraud (see, eg, *Gould v Vaggelas* (1985) 157 CLR 215; 179 ALR 89) and, perhaps, in equity, on the application of the principle in *Brickenden v London Loan and Savings Co* [1934] 3 DLR 465 at 469: when a fiduciary fails to disclose material facts, 'he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction. ... [S]peculation as to what course the [beneficiary], on disclosure, would have taken is not relevant.' For a discussion as to the operation of this principle, see Kirby J's judgment in *Maguire v Makaronis* (1997) 188 CLR 449 at 488–95; 144 ALR 729. The joint judgment of Brennan CJ, Gaudron, McHugh and Gummow JJ left the status of *Brickenden* open (at 474). See also *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, specifically Spigelman CJ and Priestley JA.

Further, the courts have also rejected the relevance of contributory negligence concepts to losses under the TPA, inappropriately so, in our view (see J Dietrich, 'The Decline of Contributory Negligence' (2003) 11 *TLJ* 51–67), though this error has been rectified by legislation. See now TPA s 82(1B). Such denial of contributory negligence concepts perhaps also suggests a closer analogy to equitable compensation.

98 *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 274–5.

99 *ASIC v Adler* (2002) 41 ACSR 72; 168 FLR 253 at [706].

100 See J Getzler, 'Am I My Beneficiary's Keeper? Fusion and Loss-Based Fiduciary Remedies' in Degeling and Edelman, above n 1, p 239, at p 259. See also S B Elliott, 'Remoteness Criteria in Equity' (2002) 65 *MLR* 588 at 595: 'It is impossible to pretend that the decided cases give clear answers.'

ought to apply (issue (2) above); we do not propose to consider issue (1) above.¹⁰¹

- 1 A distinction is drawn between the liability of a trustee to account for the misapplication of trust property (the beneficiary falsifying the account)¹⁰² requiring the restoration of the trust property or, relevantly here, monetary compensation to the equivalent value (custodial duties), and other breaches of trust or fiduciary duty (non-custodial duties). In the former case, issues of causation are not relevant, whereas in the latter, at least some causative connection between the breach and loss needs to be established. According to Getzler, custodial obligations arise to restore trust property and therefore are ‘in the manner of specific performance of a primary duty . . . and hence no issues of controlling the extent of remediable loss flowing from breach enter into the exercise’.¹⁰³
- 2 The House of Lords has modified this distinction by suggesting that the account obligation only applies to ‘traditional’ trusts and does not apply to ‘bare’ trusts in the context of wider commercial transactions. Here, only equitable compensation is available as a remedy (with its requirement of some causative link, whatever such requirement may be: see below).¹⁰⁴ This approach has been criticised, however, and the case taking this approach has instead been explained as turning on the fact that restoration of property was no longer possible or necessary where the commercial purpose of the transaction had, in fact, been achieved after the initial breach of trust. This explanation has received the approval of the High Court.¹⁰⁵ Such account obligations have been extended to fiduciaries who are not trustees, namely, company directors who have power to dispose of company assets.¹⁰⁶
- 3 Outside of the context of custodial duties to restore misapplied trust funds (1 above),¹⁰⁷ equitable compensation for loss is subject to

101 In summarising these positions, we have found Getzler’s article, *ibid*, and M O’Meara’s article, ‘Causation, remoteness and equitable compensation’ (2005) 26 *Aust Bar Rev* 51, particularly helpful.

102 See O’Meara, *ibid*, at 57–8.

103 Getzler, above n 100, p 253. Other types of losses, such as result from a failure to invest for a reasonable return, and losses from breaches of non-custodial duties, require that some causative connection be established.

104 *Target Holdings Ltd v Redfern* [1996] 1 AC 421; [1995] 3 All ER 785; see also *Swindle v Harrison* [1997] 4 All ER 705 and, eg, note by R Nolan, ‘A Targeted Degree of Liability’ (1996) *LMCLQ* 161 at 162: in relation to ‘bare’ trusts, the breach by the trustee must not only satisfy a ‘but for’ test of causation but also a ‘sufficiently material cause of loss to justify fixing the trustee with liability’. In the view of P U Ali and T Russell, ‘Investor Remedies against Fiduciaries in Rising and Falling Markets’ (2000) 18 *C & SLJ* 326 at 344–5, this approach preserves the equity/common law divide in most, but not all, fiduciary contexts.

105 See O’Meara, above n 101, at 59, and *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484; 196 ALR 482 at [50].

106 *O’Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262.

107 We are assuming this; see, eg, Elliott, above n 100, at 589–91. It is not entirely clear to us, however, whether all of the case law or commentators who consider that breaches of duty involving carelessness (which is said to be subject to less stringent causation tests akin to

differing causation requirements, according to the nature of the breach of equitable duty, at least on most views.¹⁰⁸ A distinction between duties of care and skill as opposed to the ‘core’ fiduciary duty of loyalty is drawn.¹⁰⁹ For breaches of the former (that is, negligent conduct) stringent causation principles will not apply, but will continue to do so for breaches of the latter type (that is, involving disloyalty).¹¹⁰ Common law rules of causation, remoteness and measure of damages apply by analogy to breaches of duties of care.¹¹¹

- 4 A variation of the above view is to draw a distinction (within the context of breaches of ‘core’ fiduciary duties of loyalty), between ‘subjectively dishonest’ breaches (that is, intentional wrongdoing where the fiduciary has intentionally preferred self-interest ahead of the beneficiaries) and less serious breaches.¹¹² Again, stringent causation principles (akin to those for fraud at common law) are to apply in the former types of breach but not to the latter.

Much of the support for the distinctions in (3) and (4) above is motivated in part by a desire to attain consistency between common law and equitable doctrine. On this ‘fusionist’ view, there ought to be a similarity of approach (to causation and remoteness) according to the type of conduct generating a loss. Such determination ought not to be dictated by the jurisdictional basis of the liability rule (for example, fraud is dealt with by strict causation rules, irrespective of whether common law or equitable remedies are sought for such

those in the tort of negligence) exclude custodial duties from this (ie, where a trustee breaches a custodial duty in the misapplication of property carelessly).

108 See J D Heydon, ‘Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?’ in Degeling and Edelman, above n 1, p 185, at p 188, who goes so far as to claim that there is ‘[a]lmost unanimous support’ for a differentiation between various kinds of breach of trustee (and fiduciary) duties. Heydon does not support such majority opinion, however. Getzler, above n 100, is also critical.

109 See, eg, *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187 at 237–9; 14 ACSR 109, approving statements by P Finn, ‘The Fiduciary Principle’ in T G Youdan (Ed), *Equity, Fiduciaries and Trusts*, Carswell, Canada, 1989, pp 27–8. In *Wheeler*’s case, the court held that the director’s duty of due care and diligence are not an equitable fiduciary duty. This question was left open by Austin J in *ASIC v Vines* (2005) 55 ACSR 617 at [1070].

110 See, eg, *Bristol and West Building Society v Mothew* [1998] Ch 1 at 16–17; [1996] 4 All ER 698. Numerous articles and cases could be cited in support: see, eg, the extensive list in Heydon, above n 108, at nn 77–79, and also D Hayton, ‘Unique Rules for the Unique Institution, the Trust’ in Degeling and Edelman, above n 1, p 279, at pp 290–2.

111 This was doubted, however, in *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484; 196 ALR 482 at [38]–[40], and criticised by Heydon, above n 108, pp 187–8, who also notes some of the variations on this position.

112 See Elliott, above n 100, particularly at 597, summarising the position. See also *Armitage v Nurse* [1998] Ch 241 at 251–6 per Millett J; [1997] 2 All ER 705, criticised by Hayton, above n 110, p 272. Although Getzler, above n 100, seems to see these as further refinements within one overall scheme, these appear to us to be subtly different approaches with different points of emphasis.

fraudulent conduct. Non-fraudulent breaches are dealt with according to causation and remoteness principles applicable to negligence).¹¹³

- 5 In contrast to the views above, there is still support for a strict ‘anti-fusion’ approach that equitable causation principles should apply to all breaches of equitable duty, irrespective of the type of conduct involved. In *Youyang Pty Ltd v Minter Ellison Morris Fletcher*, the High Court doubted the distinctions drawn in (3) and (4) above,¹¹⁴ due to the ‘unique foundations and goals of equity’.¹¹⁵ However, even in those cases that have adopted a strict ‘anti-fusion’ approach, there has been some amelioration of the potential harshness of the principle where the real cause of the loss is from some outside source and is no longer connected to the breach.¹¹⁶ The difficulty with such cases, as Getzler notes, is that although they re-affirm the strict and distinct approach of equity, the decisions in those cases themselves are not clearly compatible with a causation approach based on ‘but-for’ causation alone.¹¹⁷ Getzler states:

‘This whole area of law is not helped by the difficult reasoning of the leading appellate decisions of *Target* in England and *Canson* in Canada, where judges used the classical equitable language of but-for causation to justify results that clearly departed from the but-for model.’¹¹⁸

Even if we could with certainty outline the current Australian legal position (and we can only guess at that since many of the issues have been left open by the High Court),¹¹⁹ we could not ignore the range of views here and in other jurisdiction as to how these issues should be resolved, whether those

113 See, eg, *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) and *Hodgkinson v Simms* [1994] 3 SCR 377 at 444.

114 The doubts cast on modern reformulation of equity’s approach, by the High Court, has led one commentator to draw a further distinction in relation to careless conduct, between breaches of duties of care and skill *within* the administration of trusts, and outside of that context. In the latter case, it is argued that common law concepts of remoteness and foreseeability and such like are relevant, even if not so in the former context. See O’Meara, above n 101, at 65ff, who also seems to suggest that this is consistent with *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484; 196 ALR 482. Even this very limited restriction on the operation of stringent equitable causation would not appear to find favour with some commentators, eg, Heydon, above n 108, we would suggest.

115 (2003) 212 CLR 484; 196 ALR 482 at [39].

116 *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at 543 in which McLachlin J (in the minority) affirmed equity’s strict approach; and cf O’Meara, above n 101, at 64.

117 Getzler, above n 100, p 258.

118 *Ibid.*

119 The High Court: (1) has left open the scope and meaning of the ‘Brickenden’ principle of causation, and its status in Australia (see *Maguire v McKaronis* (1997) 188 CLR 449; 144 ALR 729, although one senses clear support for the principle in that statement); (2) has cast doubt on, but not rejected outright, distinctions 3 and 4 above (see above n 114); (3) has cast doubt on, but not rejected outright, the relevance of contributory negligence for breaches of fiduciary duty (see *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165; 180 ALR 249 at [86]); (4) has endorsed in *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484; 196 ALR 482 statements by McLachlin J in *Canson* ([1991] 3 SCR 534 at 543) and, therefore, seemingly the results of that case, but not explained how such results are in fact consistent with the strict equitable approach (see above n 117).

views are in part justified on the basis of 'fusion' or calls for 'sound taxonomy', or simply on the view that the present regime as too harsh, at least in relation to merely negligent fiduciaries.

Finally, there are two quite contradictory approaches one could take to resolving these difficulties and particularly in explaining the interrelationship between statute and general law, as part of an attempt to determine the operation of statutory compensatory remedies in different contexts. On the one hand, one could say that the general law needs to be clarified and that such clarification will provide a framework for distinctions that can be translated into statutory contexts. On the other hand, one could say that the resolution of the unanswered issues in the general law is really of little relevance to the task of interpreting statutes; that they must be treated on their own terms and offer an opportunity for a return to first principles that *spell out the objectives sought to be achieved* (which might differ from statute to statute). We have no firm views on which approach is the better way to proceed, though we lean towards the latter, in part because the baggage of jurisdictional history and competing ideologies make it difficult to approach the issues, under the general law, from first principles.

Exemplary damages

There are considerable differences of opinion as to the circumstances in which exemplary or punitive damages (the labels are used interchangeably) ought to be available at general law. There is debate as to whether such damages as a matter of principle ought ever to be available as a remedy for civil wrongs (even for torts, the one area of accepted operation of such damages),¹²⁰ and whether such damages ought to be available potentially for other wrongs, such as breach of contract,¹²¹ or breaches of equitable duties. In relation to breaches of equitable duties, the debate turns not only on arguments for and against exemplary damages in principle, but also has a fusionist aspect to it: that is, some commentators oppose such a remedy in part because its acceptance involves an unacceptable 'fusion'¹²² of a common law remedy being utilised to remedy an equitable wrong.¹²³ The contrary view not only involves an acceptance of the merits of exemplary damages, but acceptance of some

120 See, eg, A Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 *OJLS* 87, opposing such damages for torts, even though they have been accepted as available in most common law jurisdictions. For a contrary view as to the merits of exemplary damages see, eg, J Birch, 'Exemplary damages for breach of fiduciary duty' (2005) 33 *ABLR* 429.

121 Most jurisdictions have held not, but in Canada such damages were recently awarded, quite justifiably on the facts of the case: see A Burrows, 'Remedial Coherence and Punitive Damages in Equity' in Degeling and Edelman, above n 1, p 381, at p 401. Burrows favours the possibility of exemplary damages for breach of contract (despite earlier views disfavouring exemplary damages as an anomaly: see A Burrows 'Reforming Exemplary Damages' in P Birks (Ed), *Wrongs and Remedies in the Twenty-first Century*, Clarendon Press, Oxford, 1996). Sir Anthony Mason, 'Fusion' in Degeling and Edelman, above n 1, p 13, opposes the extension of exemplary damages into new contexts because of a general distaste for punitive remedies.

122 As to the meaning of this term, and the background to the debate, see Mason, *ibid*, and K Mason, above n 1.

123 See, eg, Meagher, Heydon and Leeming, above n 57, p 839 and, to a lesser extent, Heydon JA in *Harris v Digital Pulse* (2003) 56 *NSWLR* 298; 197 *ALR* 626, though

fusion¹²⁴ (at the very least, by analogy, or more liberally, on the basis of a wholesale fusion of common law, statutory and equitable remedies, as in *Aquaculture Corpn v New Zealand Green Mussel Co Ltd*).¹²⁵

Turning to statute, in some cases, statutes have expressly extended the award of exemplary damages to private litigants for breaches of statutory rights: see, for example, s 115(4) of the Copyright Act 1968 (Cth) and *Milpurrurru v Indofurn Pty Ltd*.¹²⁶ Leaving such express statutory developments aside, more usually, when one turns to statutory remedies, one of the more important changes of recent times has been the move towards ‘civil penalty’¹²⁷ regimes, whereby serious misconduct that may also be criminal is dealt with via the imposition of pecuniary penalties. Civil penalty proceedings are governed by the civil rules of evidence and procedure and are subject to the civil standard of proof.¹²⁸ One of the consequences of this development, as Keith Mason has pointed out, is as follows:

In *Rich v Australian Securities Investment Commission*, the High Court was at pains to scotch the notion that there is any meaningful distinction between ‘punitive’ and ‘protective’ functions with respect to a statutory power to impose a range of civil sanctions on delinquent company officers. The distinction was described as ‘elusive’ at best and suffering the same difficulties as attempts to classify all proceedings as either civil or criminal.¹²⁹

Burrows does not interpret Heydon JA’s views as being inconsistent with fusion by analogy, that is, the use of analogical reasoning across jurisdictional barriers: see Burrows, above n 121, particularly pp 394–9.

124 See, eg, I C F Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions and Equitable Damages*, 6th ed, Lawbook Co, Sydney, 2001, pp 636–7, favouring such remedy for equitable wrongs.

125 [1990] 3 NZLR 299 at 301–2; (1990) 19 IPR 527.

126 (1994) 54 FCR 240; 130 ALR 659.

127 Oddly, under the Corporations Act s 1317H proceedings for a compensation order are included within the definition of a ‘civil penalty order’. See, generally, the definition of civil penalty orders in Corporations Act s 9; and Superannuation Industry (Supervision) Act 1993 (Cth) ss 10 and 196. The inclusion of compensation orders within the definition of civil penalty orders is undesirable as it does not reflect the civil or non-punitive nature of such orders. See also *Rich v ASIC* (2004) 220 CLR 129; 209 ALR 271 at [28], supporting the view that such orders are not penal in nature.

128 See, eg, Corporations Act ss 1317L and 1332; and Superannuation Industry (Supervision) Act 1993 (Cth) s 322.

129 See Mason, above n 1, pp 62–3; the citation for *Rich* is (2004) 220 CLR 129; 209 ALR 271 at 280–1. It should be noted, however, that this was a disqualification order case involving s 206C of the Corporations Act and not a pecuniary penalty under s 1317G of that Act. In his article favouring exemplary damages, Birch, above n 120, at 433, argues that ‘It is submitted that [the] “strict divide” between criminal and private law does not exist nor is such a divide necessary.’ Cf also *Gray v Motor Accidents Commission* (1998) 196 CLR 1 at 7; 158 ALR 485.

There are numerous examples that can be given of such a blurring of the ‘divide’ between criminal and civil law. The Superannuation Industry (Supervision) Act 1993 (Cth) s 216 provides that where the regulator (or the Commonwealth DPP) has commenced criminal proceedings, the criminal court may make a compensation order. The Taxation Administration Act 1953 (Cth) s 8ZG provides that where the taxpayer is convicted of an offence, the court may also make a civil order requiring that person to pay an amount to the Commissioner of Taxation. However, under recent amendments to the Corporations Act, where a defendant is found not guilty of a criminal offence, ASIC will have to pursue fresh civil proceedings under Corporations Act s 1317H seeking a compensation order against that person: Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998,

It has been suggested that the availability of pecuniary penalties for breaches of statutory duties (albeit for the benefit of government)¹³⁰ supports the award of exemplary damages (to private plaintiffs) for egregious breaches of (the equivalent) equitable duties.¹³¹ In short, the presence of pecuniary penalty regimes supports a conclusion, by analogy, favouring the extension of the availability of exemplary damages under the general law. And from a defendant's perspective it matters little whether a penalty is payable to a private individual who has suffered harm, or to the government as the result of the regulator 'policing' breaches of the law¹³² (though, admittedly, the prospect of *both* penalties and exemplary damages being available might be of concern).¹³³ Indeed, the widespread introduction of civil penalty regimes, albeit authorised by parliament through statute, means that the debate about the desirability or otherwise of exemplary damages in private law is really of little moment from a defendant's perspective in the range of contexts in which pecuniary penalties may be imposed. Indeed, arguably, public policy may be further enhanced by such damages being available at the behest of a particularly aggrieved individual. Hence, in our view, these statutory developments are important factors to take into account in extending the potential availability of punitive damages to breaches of equitable duties.¹³⁴

The statutory developments also illustrate that there is no clear divide between public and private law and hence, arguments against exemplary damages on the basis that goals of punishment are best achieved in the public law sphere¹³⁵ are of little relevance in this context.

Interestingly, reasoning from the analogy of statute means that statutory developments ought, in our view, to be the main driving force behind changes to the general law. Consequently, arguments in support of the award of exemplary damages in new contexts for reasons of consistency *within the general law* (overriding the historical jurisdictional differences between equity and common law) are of less weight than arguments of policy for or against such awards. Such policy, importantly, ought to be informed by *statutory*

at [6.128]. The blurring of such criminal proceedings and civil proceedings for the payment of money or for compensation creates difficulties for all parties including confusion as to the applicable rules of evidence and procedure: see T Middleton, 'The difficulties of applying civil evidence and procedure rules in ASIC's civil penalty proceedings' (2003) 21 *C & SLJ* 505. Such provisions impose on accused persons not only the burden of preparing a defence to the criminal charge but they may also be required to concurrently defend a civil claim.

130 By contrast, pecuniary penalties in the United States are paid into a 'fair fund' created by s 308 of the Sarbanes-Oxley Act 2002 (US). This fund is then used to compensate the victims of the contraventions.

131 This was a view favoured by Palmer J in *Digital Pulse v Harris* (2002) 40 ACSR 487; 166 FLR 421 at [27]–[32], [172], overturned on appeal, *Harris v Digital Pulse* (2003) 56 NSWLR; 197 ALR 626.

132 The prospect of a well-resourced and vigilant public-policy driven regulator seeking such penalties may be far more undesirable than the infrequent award of exemplary damages under the general law for, say, breach of contract or breach of equitable duties.

133 Perhaps the solution would be for judges to take into account whether other punitive remedies have been or are likely to be obtained against a defendant before deciding to award exemplary damages to a private plaintiff.

134 We thus agree with Justice Palmer in his view in *Digital Pulse v Harris* (2002) 40 ACSR 487; 166 FLR 421.

135 See A Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 *OJLS* 87.

developments. (Of course, arguments *against* the extension of such damages based on historical and jurisdictional patterns equally have little merit).¹³⁶

Rescission

In recent times there has been considerable legislative use of broad generic concepts to give courts a wide discretion to affect parties' contractual rights. Some examples include the review of 'unjust' contracts under the Contracts Review Act 1980 (NSW) and the Industrial Relations Commission's discretion to reopen contracts that are 'unfair, harsh or unconscionable' under s 106 of the Industrial Relations Act 1996 (NSW) (in relation to contracts for the performance of work). Perhaps most importantly, the TPA and equivalent state Fair Trading Acts prohibit a wide variety of conduct in both the consumer contract and other contexts. Such Acts contain powers allowing courts to rescind contracts and (in some cases) other transactions.¹³⁷ These are usually cast in extremely wide terms; hence, these sections have considerable potential to impact upon a range of commercial and consumer arrangements.¹³⁸ For example, under the Contracts Review Act, courts may vary, 'declare void' (in whole or in part) or 'refuse to enforce' any or all of a contract declared to be 'unjust' (s 7). As will be evident from the discussion below, these powers are more widely cast than equity's historic capacity to set aside¹³⁹ contracts, notwithstanding that such setting aside can be conditional (that is, on terms, the performance of which terms is a pre-requisite for relief).

Other examples of wide statutory powers of rescission are provided by the capacity of courts to vary or set aside contracts of more specific types, such as 'harsh' or 'unfair' contracts to carry out 'building work' under the Building and Construction Industry Improvement Act 2005 (Cth) (s 47 and s 5) (BACII Act) and contracts entered with 'independent contractors' under the Workplace Relations Act 1996 (Cth) (s 127B). Obviously, such provisions impinge upon the law of obligations in a significant way, albeit with a focus beyond the private rights of the parties concerned; that is, they 'straddle' the divide between public and private law. (The title of the former Act, as well as its focus, is evidence of that.) As an aside, the BACII Act also illustrates the

¹³⁶ Compare Mason, above n 1, p 71.

¹³⁷ See, eg, TPA s 87(2), which allows for orders to be made in relation to 'collateral arrangements'.

¹³⁸ The impact of the Contracts Review Act 1980 (NSW) on commercial transactions is limited however, because the Act excludes from its scope claims for review by persons having entered contracts in the course of or for the purposes of trade, business or profession (s 6(2)). For an overview of cases decided under that Act, see T M Carlin, 'The Contract Review Act 1980 (NSW) — 20 Years On' (2001) 23 *Syd LR* 125 and B Zipser, 'Unjust Contracts and the Contracts Review Act 1980 (NSW)' (2001) 17 *JCL* 76.

¹³⁹ Note that a distinction has been drawn between rescission in equity's concurrent jurisdiction for fraudulent misrepresentation, where the right to rescind is vested in the innocent party, and equity's role in its exclusive or auxiliary jurisdiction, where there is no 'right to rescind' since such relief is always subject to equity's discretion. The term 'rescission' is sometimes applied to the former process (as of right) and not to the latter (setting aside) but we propose to use the terms interchangeably, especially since the jurisdictional distinctions no longer seem to hold in light of the decision of the High Court of Australia in *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102; 130 ALR 570. See, generally, D O'Sullivan 'Partial Rescission for Misrepresentation in Australia' (1997) 113 *LQR* 16 and A Robertson, 'Partial Rescission, Causation and Benefit' (2001) 17 *JCL* 163.

impact of statute on areas of obligations and remedies other than contract law. Courts can, under that Act, order both ‘civil penalties’ (s 49(1)(a)) for breach of some of the provisions of that Act (for example, for coercion in the entry into, or variation of, contracts (ss 43 and 44), and for ‘unlawful industrial action’ (s 38)), compensation for damages suffered by any persons as a result of such breaches (s 49(1)(b)) and ‘any other orders that the court considers appropriate’ (s 49(1)(c)). The last power includes wide-ranging injunctive powers (s 49(4)) as well as orders for the sequestration of property (s 49(3)(b)). This means that, *potentially* at least, both awards of damages and *proprietary* orders may be made as a consequence of conduct otherwise within the traditional purview of the common law of duress. This is a wide remedial power at first blush: if we were to debate the question as an issue under the general law of obligations, no doubt taxonomical outrage would flow from any such proposition. It is not at odds with modern trends in terms of statutory remedies, however. (Importantly, such wide remedial powers also mean that debate about whether ‘duress’ is about vitiated consent and a ‘not-wrong’, or else a wrong based on the defendant’s illegitimate use of pressure,¹⁴⁰ is by the way in the factual sphere of operation of the BACII Act, at least: clearly, damages awards for coercive conduct are one possible consequence of the breach of the Act.)

Interestingly, despite the otherwise widely framed remedies contained within the Corporations Act, it does not contain powers to rescind transactions entered in breach of the provisions of that Act.¹⁴¹ Admittedly, the injunction power in that Act (see above) could, with some artificiality, be used to achieve a like outcome,¹⁴² but generally, parties seeking rescission may find it easier to seek the aid of equity, rather than rely on statutory remedies. Equity’s power to rescind contracts can prove useful even in the corporate context (the Corporations Act expressly preserves the general law in a range of contexts).¹⁴³ For example, in *Kinsela v Russel Kinsela Pty Ltd*,¹⁴⁴ the liquidator of a company successfully sought rescission of a lease entered (at a considerable undervalue) by the company and its directors in breach of their fiduciary duty. The liquidator was thus able to sell company property unencumbered by the lease. Such relief does not require any compensation

140 For example, P Birks perceives the law of duress as falling within the ‘not-wrong’ category of unjust enrichment, based on a plaintiff’s vitiated consent (see, eg, *Unjust Enrichment*, 2nd ed, OUP, Oxford, 2005, p 138). For an alternative view, see the shorthand statement of the relevant doctrinal underpinnings of duress (and the relevance of normative assessments of a defendant’s conduct within such doctrine) in R Bigwood, ‘When Exegesis Becomes Excess: The Newborn Problematics of Contractual Duress Law in New Zealand’ (2005) 21 *JCL* 208. See also R Bigwood, *Exploitative Contracts*, OUP, Oxford, 2003, pp 480–1. For more recent development of Bigwood’s views, suggesting an explanation based on a defendant’s transactional neglect (ie, negligent conduct) justifying (what is still, however) defendant-sided liability, see R Bigwood, ‘Contracts by Unfair Advantage: From Exploitation to Transactional Neglect’ (2005) 25 *OJLS* 65.

141 See, however, s 1040O(f). The ASIC Act s 12GM contains provisions equivalent to those in s 87 of the TPA, applicable to breaches of the Act in relation to financial services.

142 See, eg, Corporations Act s 1324(1), authorising the grant of injunctions requiring ‘any person to do any act or thing’. See Gething, above n 74.

143 For example, see s 179 and s 185 (duties of directors and officers of corporations) and s 230 (directors’ fiduciary duties re authorised transactions).

144 (1986) 4 NSWLR 722.

from, or penalty to be imposed upon, the directors, and hence may prove useful even where the defendants have no assets or are insolvent.

Under such statutes as the TPA and Contracts Review Act, the broad powers to vary, set aside or enforce in part only, contracts, means that, in effect, very different contracts to those actually entered into by the parties may be enforced (indeed, theoretically even wholly new terms in contemplation of neither party to a contract could be added to an existing agreement). This remedial flexibility may well have been a factor that indirectly influenced the High Court in *Vadasz v Pioneer Concrete (SA) Pty Ltd*¹⁴⁵ to uphold a flexible approach to equity's rescission remedy.

Despite suggestions that there is no jurisdiction in equity to award partial rescission,¹⁴⁶ in *Vadasz*, the High Court upheld the trial judge's decision to grant the defendant partial rescission in equity in relation to the plaintiff's misrepresentation that a guarantee was for future indebtedness only when in fact the guarantee was for all outstanding debts. It was held that the defendant was entitled to avoid liability for debts before the contract was entered into, but *not* debts arising after the date of the contract. The High Court concluded: 'To enforce the guarantee to the extent of future indebtedness is to do no more than hold the appellant to what he was prepared to undertake independently of any misrepresentation.'¹⁴⁷ Importantly, although the point was made more as an aside, the High Court noted that such an approach had been taken under the Contracts Review Act 1980 (NSW) and in relation to misleading or deceptive conduct under the TPA.¹⁴⁸ The High Court stressed that the focus of rescission is on restoring the status quo ante as much as is possible and that, to achieve this, equity could frame its orders to achieve what was 'practically just'.¹⁴⁹

The decision has proved to be controversial and the subject to both criticism and support. It has been said that the court invented such relief and that this 'might well have some interesting consequences in the hands of a more erratic judge'.¹⁵⁰ Critics have noted that the focus on 'causation' (that is, a finding that the defendant would still have entered a limited contract of guarantee for future debts) at the remedy stage is misconceived and inconsistent with other

145 (1995) 184 CLR 102; 130 ALR 570.

146 See O'Sullivan, above n 139, who argues that no equitable *discretion* exists in that context. However, since restitution must be possible, a plaintiff who seeks the assistance of equity's more flexible aid to give effect to *restitutio in integrum* must do equity, that is, must make counter restitution, and some terms can surely be imposed in order to achieve 'practical justice'.

147 *Ibid*, at 115.

148 *Ibid*, at 116. Further, the wide remedial discretion under TPA s 87 means that questions of negligence, innocence or fraud become irrelevant in accessing the full range of remedies. In relation to the Contracts Review Act, there has been a marked increase in the grant of 'partial' relief in recent years: see Carlin, above n 138, pp 134–5.

149 *Ibid*, at 113.

150 Meagher, Gummow and Lehane, above n 57, p 862. Interestingly, however, the authors consider that there is 'nothing very novel' about the High Court's exercise of its jurisdiction to rescind on terms in *Maguire v Makaronis* (1997) 188 CLR 449; 144 ALR 729, in which a mortgage was rescinded on terms that the moneys paid under the loan plus interest first be repaid. There is an element of pedantry about delineating starkly between full rescission on terms (such as that certain moneys first be repaid) and rescission of part of an agreement only (such that certain moneys are payable). In any case, such sentiment is odd when one notes the wide-ranging statutory powers given to judges.

authorities denying the relevance of such causative inquiries at the liability stage.¹⁵¹ Further, the High Court in *Maguire v Makaronis*¹⁵² has itself to some extent limited the scope of potential application of *Vadasz* (by limiting its application to misrepresentation and not to breach of fiduciary duties). Other commentators have been broadly supportive, however.¹⁵³

Whatever the merits of some of these criticisms, ultimately, such criticisms as are based on historic jurisdictional distinctions or as to the novelty of such power are, in our opinion, by the way. It would be odd indeed if the capacity to make an order for partial rescission were to be rejected (the desirability of making such an order in a given case is another matter). Indeed, remedial flexibility and the greater ease of establishing misleading or deceptive conduct under the TPA would normally lead plaintiffs to choose statute in preference to 'equity'. It would be ironic if plaintiffs in some circumstances deliberately avoided the use of the TPA because equity was restricted to rescission in full (or at most, merely subject to terms). We would be left with plaintiffs deliberately limiting themselves to equitable relief to seek an all or nothing remedy.

In reaching this conclusion, we recognise that we are supporting the analogical use of statute in developing the common law, a view that has only received a lukewarm reception by the courts. The High Court of Australia has held that in a federal context, there has to be 'a consistent pattern of legislative policy to which the common law in Australia can adapt itself'.¹⁵⁴ Since there is only one common law in Australia, legislative developments in only some States cannot impact upon the common law of those States (since no such creature exists).¹⁵⁵

151 See A Robertson, 'Partial Rescission, Causation and Benefit' (2001) 17 *JCL* 163 at 168–73. Robertson goes on to point out that the decision is justifiable, however, on the basis of the need to make counter-restitution of (objectively measured) benefits received by the representee before rescission is justifiable. See also J W Carter and G Tolhurst, 'Rescission, Equitable Adjustment and Restitution' (1996) 10 *JCL* 167.

152 (1997) 188 CLR 449; 144 ALR 729.

153 See, eg, D J Meikle, 'Partial Rescission — Removing the Restitution from a Contractual Doctrine' (2003) 19 *JCL* and D Wright, 'Fiduciaries, Rescission and the Recent Change to the High Court's Equity Jurisprudence' (1998) 13 *JCL* 1 and see also J Poole and A Keyser, 'Justifying Partial Rescission in English Law' (2005) 121 *LQR* 273.

154 See *Esso Australia Ltd v Commissioner of Taxation* (1999) 201 CLR 49; 168 ALR 123 at [24]–[27] per Gleeson CJ, Gaudron and Gummow JJ, discussing whether the common law can be developed by analogy to statutory developments. It was held that because the Evidence Act 1995 (Cth) ss 118 and 119, and NSW, TAS and ACT equivalents, adopted the 'dominant purpose test' for legal professional privilege, the sole purpose test at common law should be overruled so as to prevent inconsistency between the statutes and common law regarding the operation of this privilege. It could lead to absurd results if the inconsistency remained.

155 Eg, in *CSR v Eddy* (2005) 222 ALR 1 at [54], in relation to the existence of *Sullivan v Gordon* damages (see above n 7), Gleeson CJ, Gummow and Heydon JJ said:

The controversy concerns the existence of a common law doctrine. In Australia there is a single common law. If every legislature had enacted legislation assuming the correctness of the *Sullivan v Gordon* doctrine, that might be a pointer towards its existence as a matter of common law. But there is no consistent pattern of State legislation of that kind.

General observations

Having considered some of the issues arising in the context of statutory remedies and their relationship with general law (mainly equitable) remedies, we wish to conclude by way of five general observations.

- 1 The distinction that is commonly, often with little reflection, drawn between 'public' law and 'private' law is not as clear-cut as is often assumed.¹⁵⁶ Developments in remedies, as well as liability regimes, in many fields, including consumer contracts, many commercial arrangements, and breaches of fiduciary and agency duties in the corporate (and financial) sector, indicate how such a divide is not overly helpful in many contexts. For example, the standing of private individuals to commence actions, including seeking injunctions and damages, for breaches of provisions of the TPA (eg, ss 80 and 82), Corporations Act (eg, ss 1317H and 1324) and ASIC Act (s 50), including provisions with an obvious public policy focus promoting public interests, suggests that public interests and private rights can be simultaneously pursued. Private individuals could well seek injunctions to enjoin conduct that is both criminal (thereby both overcoming the traditional reluctance of equity to grant injunctions to preclude criminal conduct and broadening its standing rules as to who can bring such injunctions).¹⁵⁷
- 2 A widespread perception of equitable remedies as being secondary and supplanting the common law remedial regime, may paint an inaccurate picture of the status of equitable remedies. Certainly, this perception in part may be the product of the large volume of litigation for personal injury damages (where the equitable remedies are of little practical relevance or use). But this is all the more reason why, outside of that context, we ought to recognise the primary importance of equitable remedies. This, in very simplified terms, is the burden of Douglas Laycock's argument in the context of US law.¹⁵⁸ We would suggest that this argument has equal force in Australia. In any case, whatever one's views as to existence or otherwise of a 'hierarchy' of remedies under the general law (what little there is left of it), once one takes statutes into account it becomes clear that the statutory remedies (inspired by similar

For a discussion of the circumstances in which courts ought to reason analogically from statute, see Finn, above n 10, and P Finn, 'Statutes and the Common Law' (1992) 22 *UWALR* 7.

156 For example, ASIC, APRA and the ATO have the discretionary power to release a record of examination and 'any related book' to the lawyer of a private litigant where there is a 'nexus' between the investigation and the private litigation: see ASIC Act s 25(1); Superannuation Industry (Supervision) Act 1993 (Cth) s 281(1); and Retirement Savings Accounts Act 1997 (Cth) s 111. This legislation indicates that the regulatory legislation promotes both public and private purposes: see *Boys v ASC* (1997) 15 ACLC 844 at 860, 868 per Carr J; 24 ACSR 1; and *Boys v ASC* (1998) 16 ACLC 298 at 311 per Heerey J (French J concurring); 152 ALR 219.

157 See above nn 51 and 52.

158 See D Laycock, 'The Triumph of Equity' [1993] *Law and Contemporary Problems* 53 at 54–64, and his book, *The Death of The Irreparable Injury Rule*, OUP, New York, 1991, also in a shorter version at (1990) 103 *Harv L Rev* 687.

equitable forms of relief) are widely available, on an even broader, less restricted and more flexible basis than in equity itself (subject to the doubts about the width of the statutory injunction powers discussed previously), and in a range of public and private law (or public/private law) contexts. As the High Court has pointed out in *Cardile v LED Builders Pty Ltd*, 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’.¹⁵⁹

- 3 The debate about the competing merits of discretion in remedy (and the extent to which such a discretion exists in ‘equity’)¹⁶⁰ is largely meaningless when so much of day to day life is governed by statutes which mandate both broad discretion in the application of individual remedies (for example, the injunctions power under the Corporations Act), and also discretion as to which of a range of remedies to apply in a given factual context (for example, s 87 of the TPA). Of course, this does not mean that traditional learning on remedies does not *largely* influence, and in some cases perhaps even dictate, the choices courts make, but it is in the context of unusual or exceptional cases that the full power and sweep of options potentially to be utilised by a court becomes critical. Perhaps only the conservative leanings of lawyers schooled in a legal education system that gives undue focus to ‘common law’ (and a taxonomy and structure dictated by the ‘common law’)¹⁶¹ precludes the full impact of some of these developments from being felt. For example, Damien O’Brien has noted the lack of use of injunctive powers under the TPA for breaches of the Franchising Code of Conduct, and that this likely reflects ‘a lack of awareness of the ability to use the injunctive powers provided in the Act’.¹⁶² In a similar vein, *outside of the context of remedy*, Kirby J was recently moved to chastise lower courts for ignoring statute in *Joslyn v Berryman*,¹⁶³ in which he said:

In this case, the issue . . . was not therefore to be decided by reference to . . . common law, as modified by the apportionment statute. It was governed by ‘enacted law’. The duty of the Court of Appeal was therefore to apply that enacted law. This is yet another instance in which applicable statute law has been overlooked in favour of judge-made law.¹⁶⁴

159 (1999) 198 CLR 380 at [28] per Gaudron, McHugh, Gummow and Callinan JJ. They went on to add that ‘the term “injunction” takes its content from the provisions of the particular statute in question’.

160 See, eg, P Birks, ‘Equity in The Modern World: An Exercise in Taxonomy’ (1996) 26 *UWALR* 1; ‘Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment’ (1999) 23 *MULR* 1; ‘Rights, Wrongs, and Remedies’ (2000) 20 *OJLS* 1; ‘Three Kinds of Objections to Discretionary Remedialism’ (2000) 29 *UWALR* 1.

161 See, however, contra, Birks, *ibid*, who argues more attention needs to be paid to a general taxonomy of the law in our legal education.

162 D O’Brien, ‘Restraining Wrongful Termination of Franchises’ (2004) 20 *JCL* 247 at 250.

163 (2003) 214 CLR 552; 198 ALR 137 at [137]. See also at [122]–[123], and [135].

164 Kirby J cites these examples in the footnote: *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72; 181 ALR 307 at [46]; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520; 182 ALR 321 at [63];

A restrictive approach to remedy, limiting the capacity for discretion, for example, may well render such of the general law as could still otherwise have importance, redundant.¹⁶⁵

- 4 In some examples we have discussed above, general law remedial limitations may place some constraints on the use of statutory remedies, such as has been suggested by some judges in the context of injunctions. In other cases, the general law may provide an extra, perhaps more expansive, range of remedial options alongside statutory powers that have not been clearly spelt out or drawn as widely as is perhaps desirable. In either case, we take the view that in interpreting the precise scope of, or limits upon, the powers available to *regulatory bodies* performing important public functions, cases based on private litigation ought not necessarily to dictate the interpretation of remedies in the context of public regulation. Ultimately, regulatory legislation must be interpreted in light of the regulatory/public interest objectives being pursued by the regulators, as spelt out in the relevant statutes. Interpretations that do not frustrate the achievement of regulatory and public interest objectives, and the broad purposes of the statutes, are to be preferred.
- 5 From the above, a more general observation, more in the nature of a speculative question rather than as a firm conclusion, can be made. Are the features of the legal landscape with which we are traditionally familiar and which we associate with our 'map' of the law, (which features and map are drawn as a consequence of the biases and emphases of our own legal education and traditions), really as prominent and important as we tend to think? Is our 'map' of the law in fact largely inaccurate, a map as the law was perhaps 100 years ago, after the Judicature Acts, but before the revolution of consumer legislation and the explosion of legislation more generally? Would a map which started with the most important statutes, structured the law around the distinctions drawn in such statutes, and then moved to the remedial regimes created by those statutes, paint a picture of the law in which the general law of contract and tort were merely minor features of the landscape? In such a map, would debate about 'fusion' be irrelevant; would the hierarchy of remedies be more of a historical framework; and would debate about 'remedial discretion' appear puzzling? Perhaps even the private/public law divide, seemingly so stark and important at least from the perspective

Allan v Transurban City Link Ltd (2001) 208 CLR 167; 183 ALR 380 at [54]; *Commonwealth v Yarmirr* (2001) 208 CLR 1; 184 ALR 113 at [249] and *Conway v R* (2002) 209 CLR 203; 186 ALR 328 at [65]; cf Hayne, 'Letting Justice be Done Without the Heavens Falling' (2001) 27 *MonLR* 12 at 16. This may in part be because of a perception by some that statute law is less interesting and of lesser importance than case law: see, generally, Gummow, above n 1.

¹⁶⁵ As one of the authors has said previously, not specifically in the context of remedies: 'the more restrictive the courts are in their application of *equitable and common law* general concepts, the more redundant they become. This point is often forgotten by critics.' See J Dietrich, 'Giving Content to General Concepts' (2005) 29 *MULR* 218 at 225. We would suggest the point has equal relevance in relation to remedy. See also Finn, above n 155, pp 28–30.

of many lawyers, would merely be a convenient shift in focus rather than reflective of an important divide in structuring the very categories of our law? Perhaps, most importantly, the debate about the taxonomy of the law of 'obligations' would be seen to be of little interest or relevance to understanding how the law in fact works.¹⁶⁶ Those of us who are educators might want to reflect on how curricula might be changed to more realistically represent the law as it is, rather than as it (perhaps) used to be.

¹⁶⁶ See, generally, J Dietrich, 'What is "Lawyering"? The Challenge of Taxonomy', forthcoming article, 2006, *Cambridge L Jnl*. Interestingly, R Zakrzewski, *Remedies Reclassified*, OUP, Oxford 2005, tends to downplay the role of 'transformative remedies' as he calls them, but as our survey of Australian statute, at least, suggests, such remedies have an important modern role and would perhaps be even more significant in their impact if the full potential of such remedies were realised in all the contexts in which they are available.