MISLEADING CONDUCT, RELIANCE AND MARKET-BASED CAUSATION

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Recent Australian decisions have opened the door to the possibility of liability premised on a ‘market-based’ theory of causation. This article is concerned to explore this emerging category of claims, particularly when founded upon an allegation of misleading or deceptive conduct. Specifically, this article is concerned to examine the nature of market-based causation and to consider the role that ‘reliance’ has in a case based on a market-based theory of causation. This article’s core contention is that the enquiry into factual causation has been unhelpfully merged with the scope of liability enquiry in cases involving misleading or deceptive conduct. This unfortunate mix-up has led to a misunderstanding of the role of reliance in cases of market-based causation. This article argues that, in a case of market-based causation, the concept of ‘reliance’ is not always relevant to the factual causation enquiry. Instead, reliance (or the absence of reliance) is best viewed as a normative issue going to a defendant’s scope of liability.

I INTRODUCTION

Questions of causation pervade the law. When liability is imposed throughout the private law, the first consideration is usually an assessment of whether the relevant wrong caused the relevant harm. This is obvious in tort, where a defendant’s role in bringing about the harm is central to the process of attributing liability.¹ This is also true in contract, where a defendant’s breach will

* This article is the first in a series on Market-Based Causation. The second article in the series is Henry Cooney, ‘Factual Causation in Cases of Market-Based Causation’ (2021) *Torts Law Journal* (forthcoming). This article would not have been possible without the encouragement, feedback, and piercing intellect of Elise Bant, to whom I am indebted. Any errors are my own. Feedback at henry.cooney@uwa.edu.au is appreciated.

¹ See, eg, *Barnett v Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428, 433-4 (Neild J). In Australia, most cases of liability in tort are governed by the various Civil Liability Acts. See, eg, *Civil Liability Act 2002* (WA) s 5C.

only enliven liability in respect of loss that was caused by the breach.² Similar questions are front and centre in unjust enrichment: an action for restitution pursuant to a vitiating factor, for example, will commonly require proof the vitiating factor caused the relevant transaction.³ While causal questions are more obvious in the private law, they are also prominent in public law: offence provisions in criminal law, for example, frequently contain causal elements.⁴ Indeed, the law is peculiarly concerned with causation. Across large swathes of the law responsibility cannot be attributed unless a requirement of causation is satisfied.

This article considers the pattern of causation referred to as ‘market-based’⁵. Market-based causation is a contested concept that has arisen in cases dealing with statutory requirements of causation, such as those imposed by the *Corporations Act 2001* (Cth) (‘*Corporations Act*’) or by schedule 2 of the *Competition and Consumer Act 2010* (Cth) (‘*ACL*’).⁶ The phrase refers to a scenario in which a plaintiff argues that a defendant’s misleading or deceptive conduct caused a market to react in a way which itself led to that plaintiff suffering loss. This article aims to explore and clarify the nature of market-based causation as it arises in cases involving misleading or deceptive conduct. At the heart of debate over market-based causation is confusion surrounding the concept, and role, of ‘reliance’. It is this article’s contention that the concept and role of reliance has been misunderstood, and that this has led to an inaccurate assumption that reliance is always relevant to the causal enquiry in a case of market-based causation. Troublingly, this has also resulted in confusion surrounding the role of reliance outside the causal enquiry. This article argues that in a case of market-based causation, reliance is best conceptualised as a normative issue going to a defendant’s scope of liability.

² *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310, 314 (Glass JA).

³ For example, in an action for restitution owing to a mistaken payment the plaintiff must prove the mistake caused the relevant transaction: James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 189.

⁴ Consider, for example, offences that are committed in aggravating circumstances when grievous bodily harm is caused. See, eg, *Criminal Code Act Compilation Act 1913* (WA) s 284(3)(d).

⁵ *Caason Investments Pty Ltd v CAO* (2015) 328 ALR 396, 412 [93] (Edelman J) (‘*Caason*’).

⁶ *Competition and Consumer Act 2010* (Cth) sch 2 (‘*ACL*’).

In considering reliance and market-based causation, this article is characterised by conceptual analysis and hypothetical legal reasoning. The article's underlying premise is the divide between factual questions of causation and normative questions of scope of liability. The methodological focus of this article lies in determining the nature and structural role of reliance in cases of market-based causation, given the divide between factual causation and scope of liability. While this article calls for reconsideration of the role of reliance in cases involving misleading or deceptive conduct, this article does not consider this topic with any 'top-down'⁷ or reform-oriented approach. This article does not argue that law surrounding market-based causation should be changed. Instead, this article argues that factual scenarios involving misleading or deceptive conduct have been misinterpreted, and that this has led to an incorrect application of legal principle. This argument thus adopts a doctrinal methodology.

This article begins in Part II by discussing the foundational divide between factual causation and scope of liability. Part II also provides the necessary background to causation in cases involving misleading and deceptive conduct. In Part III, this article explores the concept of market-based and 'indirect' causation and traces the emerging debate over market-based causation and reliance in Australia. Parts IV and V consider the role of reliance in a case involving misleading or deceptive conduct. Part IV considers the role of reliance at the factual causation stage of analysis, while Part V considers the role of reliance at the scope of liability stage. While market-based causation is the focus of this article, both Part IV and Part V will have relevance to all cases of misleading or deceptive conduct, regardless of whether the case is one of market-based causation.

⁷ 'Top-down' reasoning is generally taken to refer to legal reasoning in which judicial decisions are interpreted in order to fit within existing legal theory. This contrasts with 'bottom-up' legal reasoning, in which legal theory is derived from, and moulded by, judicial decisions. The distinction is controversial. See generally Keith Mason, 'Do Top-down and Bottom-up Reasoning Ever Meet?' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010). See also *Roxborough v Rothmans of Pall Mall (Australia) Ltd* (2001) 208 CLR 516, 544 [72]–[73] (Gummow J); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 158 [154] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

II CAUSATION

A ‘Factual Causation’ and ‘Scope of Liability’

Core to this article is the divide between ‘factual causation’ and ‘scope of liability’. This article aims to reconsider the role of reliance at these two stages of analysis in a case involving misleading or deceptive conduct. To do this, it is first necessary to understand the difference between the two concepts.

Throughout the private law, liability is usually assessed by reference to an analytical divide between enquiries into factual causation and enquiries into scope of liability.⁸ The factual causation enquiry asks whether a defendant’s conduct (usually a wrong) was historically involved in the occurrence of the relevant thing (usually a plaintiff’s loss).⁹ This is sometimes termed a question of ‘cause-in-fact’. The scope of liability enquiry asks whether and to what extent, as a matter of normative assessment, the defendant should be liable to the plaintiff.¹⁰ Confusingly, this is sometimes referred to as ‘legal causation’. Unlike the factual causation enquiry, however, the enquiry into scope of liability is not concerned with the causal relationship between a defendant’s conduct and a plaintiff’s loss. It is for this reason the two enquiries are considered analytically separate.

⁸ Caason (n 5) 427 [162]–[163] (Edelman J). The separation between factual causation and scope of liability is usually attributed to the work of the legal realist Leon Green. See, eg, Leon Green, *The Rationale of Proximate Cause* (Vernon Law Book Company, 1927). This can fairly be described as the dominant view in the private law. However, the view is not without criticism. See, eg, David Hamer, ‘Factual causation’ and ‘scope of liability’: What’s the difference? (2014) 77(2) *Modern Law Review* 155.

⁹ Jane Stapleton, ‘Cause-in-Fact and the Scope of Liability for Consequences’ (2003) 119 *Law Quarterly Review* 388, 388. There is debate as to whether the causation enquiry can be properly termed ‘factual’. Edelman J, for example, takes the view that the enquiry is best termed *counterfactual*, because the essence of causation is an abstract metaphysical relationship concerned with the necessity of an event for an outcome. I discuss this argument in detail in Henry Cooney, ‘Factual Causation in Cases of Market-Based Causation’ (2021) *Torts Law Journal* (forthcoming). For the purposes of this article, I adopt the position taken by Professors Bant and Paterson in Elise Bant and Jeannie Marie Paterson, ‘Statutory causation in cases of misleading conduct: Lessons from and for the common law’ (2017) 24(1) *Torts Law Journal* 1, 16–17.

¹⁰ Jane Stapleton, ‘Choosing What We Mean by Causation in the Law’ (2008) 73(2) *Missouri Law Review* 433, 448–9.

The need to distinguish between the two enquiries stems from the different questions each enquiry asks. The enquiry into factual causation asks whether, when we look backwards through time, the defendant's conduct explains the occurrence of the plaintiff's loss. Thus, the enquiry is 'normatively neutral'.¹¹ It is a non-legal enquiry that concerns our objective reality. The scope of liability enquiry, on the other hand, is not normatively neutral. The enquiry asks whether the defendant *should be liable* for the plaintiff's loss, regardless of any prior conclusion about causation. The enquiry involves legal concepts like *novus actus interveniens*, reasonableness, and purposive-based limits on liability—concepts that cannot be applied in a conceptual vacuum or without resort to normative reasoning and human experience. Accordingly, even if both parties to a dispute agree upon the facts there is always the possibility of disagreement over a defendant's scope of liability.

The law's need for coherent and principled application dictates these two enquiries be considered separately when ascertaining the liability of a defendant. To fail to separate the factual causation question from enquiries involving normative concepts suggests the normative concepts are scientific or factual in nature.¹² This, in turn, allows the assertion of normative conclusions as if those conclusions are unchallengeable matters of fact. The law is made considerably clearer when the values and principles that inform normative conclusions are openly stated, not collapsed within the factual causation enquiry. In doing so, the assumptions and opinions relating to blameworthiness that motivate these normative choices can be critiqued, challenged and adapted. This process is crippled when normative decisions are obfuscated by analysis couched in causal terms.

The distinction between factual causation and scope of liability is not a distinction specific to cases involving misleading or deceptive conduct. While the distinction was, for some time, blurred by concepts of 'common sense'

¹¹ Stapleton, 'Cause-in-Fact and the Scope of Liability for Consequences' (n 9) 392.

¹² Elise Bant and Jeannie Paterson, 'Limitations on Defendant Liability for Misleading or Deceptive Conduct Under Statute: Some Insights from Negligent Misstatement' in Kit Barker, Ross Grantham and Warren Swain (eds), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Hart Publishing, 2015) 159, 184.

causation,¹³ the distinction is now generally accepted as structuring legal analysis throughout the private law.¹⁴ The scope of this article, however, is limited to cases involving misleading or deceptive conduct. For this reason, it is worth briefly explaining the requirement of causation present in cases involving misleading or deceptive conduct.

B Causation in Cases of Misleading or Deceptive Conduct

1 Statutory Causation

This article's focus is private law claims founded upon an allegation of misleading or deceptive conduct. Misleading or deceptive conduct is proscribed, most relevantly, by section 18 of the *ACL* (formerly section 52 of the *Trade Practices Act 1974* (Cth) ('*TPA*')) and by section 1041H of the *Corporations Act*.¹⁵ However, the contravention of these statutory norms does not alone enliven a private right of redress. In the context of damages, private redress is made available by section 236 of the *ACL* (formerly section 82 of the *TPA*) and by section 1041I of the *Corporations Act*. Section 236 of the *ACL* reads as follows:

236 Actions for damages

(1) If:

(a) a person ... suffers loss or damage **because of** the conduct of another person; and

¹³ The common sense test of causation is now increasingly recognised as a test of causation that unhelpfully merges the factual causation enquiry with the scope of liability enquiry when considering the responsibility of a defendant for a plaintiff's loss. For a detailed discussion of the 'empty slogan' that is common sense causation, see Jane Stapleton, 'Reflections on Common Sense Causation in Australia' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) ch 14. See also *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 48 WAR 1, 74–5 [392]–[393] (Edelman J).

¹⁴ In particular, the divide between factual causation and scope of liability is recognised by statutory law concerned with wrongs throughout Australia. See, eg, *Wrongs Act 1958* (Vic) s 51(1); *Civil Law (Wrongs) Act 2002* (ACT) s 45(1); *Civil Liability Act 2002* (NSW) s 5D(1); *Civil Liability Act 2003* (Qld) s 11(1); *Civil Liability Act 1936* (SA) s 34(1); *Civil Liability Act 2002* (Tas) s 13(1); *Civil Liability Act 2002* (WA) s 5C(1).

¹⁵ The *Corporations Act* also proscribes misleading or deceptive conduct in specific contexts. See, eg, s 995 in the context of securities or s 728 in the context of disclosure documents.

- (b) the conduct contravened a provision of Chapter 2 or 3; the claimant may recover the amount of the loss or damage ...

Section 1041I of the *Corporations Act* is similar, though the phrase ‘because of the conduct of another person’ is replaced by the phrase ‘by the conduct of another person’. The difference is not one of substance.¹⁶

For our purposes, the relevance of these provisions stems from their requirements of causation.¹⁷ A victim of misleading or deceptive conduct does not have a freestanding right to compensation; only loss or damage that stands in a causal relationship with the alleged misleading or deceptive conduct is compensable. In this sense, the provisions identify two causal relata: first, the loss or damage, and second, the contravention of the respective statutory norm. In causal terms, the latter is the ‘event’ while the former is the ‘outcome’.¹⁸ Once the event and outcome are causally linked, a private right of redress exists.

2 Causal Tests

Despite expressing a requirement of causation, neither section 236 of the *ACL* nor section 1041I of the *Corporations Act* specify the nature of the causal enquiry the provisions require. Courts have thus turned to the general law in search of a causal theory to apply when dealing with these provisions. Two tests of causation are commonly employed in cases of misleading or deceptive conduct: the ‘but for’ test of necessity and the ‘a factor’ test of contribution. To understand the role of reliance in a case of market-based causation, it is necessary to understand the operation of these tests of causation.

¹⁶ *Norcast Srl v Bradken Ltd [No 2]* (2013) 219 FCR 14, 95 [326] (Gordon J). The language in the *Corporations Act* mirrors the language used in s 52 of the *TPA*, the predecessor to s 236 of the *ACL*.

¹⁷ The language within these provisions is often described as expressing the notion of causation ‘without defining or elucidating it’: *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514, 525 (Mason CJ, Dawson, Gaudron and McHugh JJ).

¹⁸ As Edelman J said in *Caason* at [153]:

the relevant event is the contravention of [the statutory norm proscribing misleading or deceptive conduct]. The relevant outcome is the suffering of loss or damage.

(a) *The ‘But For’ Test*

The first test that has been applied¹⁹ in cases of misleading or deceptive conduct is the ‘but for’ test. The ‘but for’ test is a metaphysical, counterfactual test of necessity.²⁰ The test involves identifying an event and an outcome and then testing that event against a hypothetical world, identical to the real world except missing the specified event. As Stapleton says:

If ... we are confident that in this hypothetical world the particular [outcome] would not have occurred, we can [say] that the specified [event] was ... “necessary” for [the outcome’s occurrence].²¹

By comparing the real world to the hypothetical world, an observer can determine whether the relevant outcome would have occurred ‘but for’ the relevant event. If the outcome would not have, the event was a cause of the outcome.

The modern approach to the ‘but for’ test mirrors the application of David Lewis’ second limb of counterfactual dependence. Lewis stated that an outcome ‘counterfactually depends’ upon an event when two conditions are satisfied. First, the event must have been followed by the outcome in the real world. Second, if the event had not occurred, then the outcome would not have followed in the hypothetical similar world.²² The first limb is generally ignored by the private law because whether an accepted outcome followed an accepted event is seldom controversial.²³ Thus, when courts apply the ‘but for’ test in the

¹⁹ See, eg, *Henville v Walker* (2001) 206 CLR 459, 508 [156] (Hayne J); *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 128–9 [58] (Gaudron, Gummow and Hayne JJ) (*‘I & L Securities’*); *Stone v Chappel* (2017) 128 SASR 165, 236 [353] (Doyle J).

²⁰ James Edelman, ‘Unnecessary Causation’ (2015) 89(1) *Australian Law Journal* 20, 20–1. It has been suggested that, strictly speaking, the ‘but-for’ test is not a test of necessity: Matthew Braham and Martin van Hees, ‘Degrees of Causation’ (2009) 71(3) *Erkenntnis* 323, 327.

²¹ Stapleton, ‘Choosing What We Mean by Causation in the Law’ (n 10). See also Edelman J’s recent discussion of the ‘but for’ test in *Lewis v Australian Capital Territory* [2020] HCA 26, 71 [178].

²² This is a simplified version of Lewis’ notion of counterfactual dependence, found in David Lewis, ‘Causation’ (1973) 70(17) *The Journal of Philosophy* 556. Note that Lewis speaks in terms of ‘cause’ and ‘effect’, not ‘event’ and ‘outcome’.

²³ While rare, issues of this nature have arisen—though interestingly, courts have often ignored this issue. For example, in *Dextra Bank & Trust Company Limited v Bank of Jamaica* [2001] UKPC 50, the plaintiff made a payment to the defendant based upon an (alleged) mistake of fact. The defendant argued that they had changed their position in reliance upon their receipt of the payment, however,

context of misleading or deceptive conduct, they inquire into whether a plaintiff's loss would not have occurred in the absence of the misleading or deceptive conduct.

(b) *The 'A Factor' Test*

Despite a resurgence in causal tests of necessity,²⁴ the dominant approach to causation in the misleading or deceptive conduct context is not the 'but for' test. Instead, courts commonly enquire into whether misleading or deceptive conduct *contributed to*, in the sense that it was 'a factor' in, the loss suffered by a plaintiff.²⁵ This test specifies contribution, not necessity, as the requisite causal relation under the statutory provisions.

In Australia, the factual causation enquiry in a case founded upon an allegation of misleading or deceptive conduct usually²⁶ involves an enquiry into whether the misleading or deceptive conduct 'materially contributed' to the loss

the defendant's change of position occurred prior to the defendant's receipt of the payment. Thus, the plaintiff argued that the defendant had not changed their position as a result of the receipt of the payment because the defendant changed their position before receiving the payment. The Privy Council refused to draw the distinction. At [38], their Lordships said:

It is surely no abuse of language to say, in the second case [where the defendant changes their position prior to receipt of the payment] as in the first [where the defendant changes their position after receipt of the payment], that the defendant has incurred the expenditure in reliance on the plaintiff's payment or, as is sometimes said, on the faith of the payment.

Their Lordships appear to have reasoned on policy grounds, noting that there is nothing in the policy of the defence of change of position that should prevent the use of the defence in such circumstances. Of course, if it is the payment itself, and not the *receipt* of the payment that is relied upon in making out the defence, the issue would not arise. See Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) 155–6.

²⁴ For a discussion of a return to 'but for' causation in Australia, see Edelman (n 20) 24–5. In the United States, the Supreme Court has recently unanimously held, in *Comcast Corp v National Association of African American-Owned Media*, 140 S. Ct. 1009 at page 1013, that:

Few legal principles are better established than the rule requiring a plaintiff to establish causation. In the law of torts, this usually means a plaintiff must first plead and then prove that its injury would not have occurred "but for" the defendant's unlawful conduct.

²⁵ *Henville v Walker* (n 19) 450 [61] (Gaudron J), 493 [106] (McHugh J). For a recent application of this enquiry in the misleading or deceptive conduct context, see *Mistrina Pty Ltd v Australian Consulting Engineers Pty Ltd* [2020] NSWCA 223, [88]–[94] (Ward JA).

²⁶ As mentioned above, the 'but for' test has been employed in cases of misleading or deceptive conduct.

suffered.²⁷ Suppose that Andrew purchases a house from Bella at an inflated price after Bella makes three statements about the house, only one of which is misleading. Andrew admits he would have purchased the house on any two of the statements. In this example, the misleading conduct was not necessary for Andrew's decision to buy the house. However, interested not in necessity, the court asks whether the misleading statement contributed 'to some extent'²⁸ to Andrew's decision—whether the misleading conduct was 'a factor' in Andrew's decision. If the misleading conduct did contribute to Andrew's decision, the conduct caused the loss despite being unnecessary for it.

III MARKET-BASED CAUSATION

Having explained the necessary background to causation in cases of misleading or deceptive conduct, it is now worth turning to the concept of 'market-based' causation. It is important to note at the outset that, while this article's focus is cases involving misleading or deceptive conduct, patterns of market-based causation can arise throughout the law in contexts unrelated to misleading or deceptive conduct. For this reason, the relevance of the analysis throughout the remainder of this article is not confined only to cases involving misleading or deceptive conduct.

A 'Market-Based' and 'Indirect' Causation

To understand market-based causation it is necessary to understand the difference between what has been termed 'direct' and 'indirect' causation.²⁹ The majority of misleading or deceptive conduct cases are straightforward cases in which a plaintiff was induced by a defendant into a course of action that resulted in loss. Suppose Charlotte (a real estate agent) tells David the house Charlotte is

²⁷ *Henville v Walker* (n 19) 450 [61] (Gaudron J), 493 [106] (McHugh J).

²⁸ Elise Bant and Jeannie Marie Paterson, 'Consumer Redress Legislation: Simplifying or Subverting the Law of Contract' (2017) 80(5) *The Modern Law Review* 895, 908.

²⁹ The reference to 'indirect causation' in this context can be traced to the decision in *Digi-Tech (Australia) Ltd v Brand* (2004) 62 IPR 184 ('*Digi-Tech*'), in which the appellants argued an 'indirect causation theory'.

selling is structurally sound. Reassured, David buys the house, but subsequently finds the house is dangerously unstable. David, realising his investment is worthless, sues Charlotte under section 236 of the *ACL*. In a case like this, the causal relationship necessary to link the misleading conduct and the loss is commonly proven by showing that Charlotte's misleading conduct was *relied upon*³⁰ by David in deciding to enter the transaction. These cases—in which the misleading or deceptive conduct is relied upon by the plaintiff—are termed 'direct causation' cases.

This can be contrasted with examples of 'indirect causation', in which the plaintiff does not rely upon the misleading or deceptive conduct. It is necessary here to introduce two examples of indirect causation, the first being an example common to the tort of injurious falsehood.³¹ Suppose a shopkeeper tells prospective customers that a competitor stocks poor quality wares. Despite being misleading, the shopkeeper's comments result in the customers choosing to avoid shopping at the competitor's store. The competitor thus sues the shopkeeper under section 236 of the *ACL*. Here, despite suffering loss, the competitor has not relied upon the misleading or deceptive conduct—instead, the prospective customers are the ones who have relied upon the misleading conduct, and this has resulted in the loss of their custom to the competitor. This is one example of indirect causation. Furthermore, in this case the competitors' own conduct (apparently) played no role in the loss suffered. For this reason, Beach J terms this type of indirect causation 'passive indirect causation'.³²

The second example of indirect causation illustrates causation that is 'market-based'.³³ Suppose Edward buys shares in ABC Ltd for \$4.00 a share. After buying the shares, misrepresentations in ABC's historical financial reporting is revealed to the market and Edward's shares in ABC Ltd fall to a

³⁰ The meaning of phrases relating to 'reliance' is considered below.

³¹ The tort of injurious falsehood involves the publication of a false statement about a plaintiff's goods, business or property, to a third party, with malice, which results in damage to the plaintiff: *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388, 404 [52] (Gummow J). The example given here is loosely based on the facts in *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526.

³² *TPT Patrol Pty Ltd as trustees for Amies Superannuation Fund v Myer Holdings Ltd* [2019] FCA 1747, 367 [1660] (*TPT Patrol*). As will be discussed shortly, the 'passive' vs 'active' indirect causation distinction is misleading and should be abandoned.

³³ The following example is based on the facts in *Re HIH Insurance Ltd (in liq)* (2016) 335 ALR 320 (*Re HIH*).

value of \$2.00 each. This is a case of market-based causation. The reference to ‘market-based’ indicates that it is the market, not the plaintiff, who relied upon the misleading or deceptive conduct. Often, cases of market-based causation will involve a share market, and the plea will be that:

a misleading statement ... [caused] the [share] market price for the securities to be inflated so that the investor [purchased] securities at an [inflated] price ...³⁴

Of course, market-based causation is not limited to share markets. Another example might involve the purchase of a vehicle at an inflated price due to misleading manufacturer statements about eco-efficiency.³⁵ Regardless of the nature of the market, however, all cases of market-based causation involving misleading or deceptive conduct can be characterised similarly. They involve a plaintiff alleging they suffered loss because of the effect of the defendant’s misleading or deceptive conduct upon a market.

The example of Edward and ABC Ltd, and the example involving the shopkeeper, both involve loss suffered because of misleading or deceptive conduct. Neither example, however, involve the respective plaintiffs relying upon the misleading conduct—neither involve ‘plaintiff-reliance’. Indeed, despite a ‘widespread assumption’³⁶ that plaintiff-reliance is an element in the cause of action brought for relief in cases of misleading or deceptive conduct, fact patterns akin to the injurious falsehood example have been accepted as enlivening a cause of action for decades.³⁷ On the other hand, it was thought until recently that cases based on market-based causation failed for a lack of causation (owing to a lack of reliance). The origins of this misapprehension can be traced to appellate court decisions of the early 21st century.

³⁴ *Caason* (n 5) 425–6 [154] (Edelman J). See also *Re HIH* (n 24) 349 [75] (Brereton J); *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469, 494 [117] (Beach J); *Grant-Taylor v Babcock & Brown Limited (in liq)* [2014] FCA 437, 7 [7] (Perram J).

³⁵ I borrow this example from Bant and Paterson, ‘Statutory causation in cases of misleading conduct: Lessons from and for the common law’ (n 9) 12.

³⁶ *Ibid* 11.

³⁷ See, eg, *Janssen-Cilag* (n 31) 537 (Lockhart J).

B Market-Based Causation in the Courts

The view that cases based upon a market-based theory of causation fail for lack of plaintiff-reliance begins with *Digi-Tech (Australia) Ltd v Brand* ('*Digi-Tech*').³⁸ The facts in *Digi-Tech* can be briefly stated. The appellants in *Digi-Tech* participated in an investment scheme based upon Digi-Tech's products but valued and produced by Deloitte. Deloitte's valuation was based on misleading representations made to Deloitte by Digi-Tech. The appellants argued that had Digi-Tech not misled Deloitte, the subsequent valuation would have been too low for the scheme to go forward. Thus, had Deloitte not relied upon the misleading conduct of Digi-Tech, the appellants could not have invested in the scheme and suffered loss. This was therefore a case of indirect causation.

The Court of Appeal in *Digi-Tech* rejected the indirect causation argument. The court distinguished between passive indirect causation scenarios (such as the injurious falsehood example given above) and cases in which 'conduct on the part of the plaintiff forms a link in the causation chain.'³⁹ In the latter, 'to complete the chain of causation, there must be something linking the appellants' loss to their entry into the investment scheme.'⁴⁰ That link is, according to *Digi-Tech*, plaintiff-reliance.⁴¹ This reasoning was endorsed in *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* ('*Ingot*'),⁴² in which Ipp JA said:

... such plaintiffs can only succeed ... if, in fact, they are misled ... by 'such plaintiffs' I mean plaintiffs who ... suffered loss brought about by their own actions or omissions coupled with misleading conduct by the defendants.⁴³

Giles JA made similar comments, saying that:

³⁸ *Digi-Tech* (n 29).

³⁹ Ibid 212 [156] (Sheller, Ipp and McColl JJA).

⁴⁰ Ibid 212 [158].

⁴¹ Ibid 212 [158]–[159].

⁴² *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2008) 73 NSWLR 653 ('*Ingot*').

⁴³ Ibid 732 [618].

the distinction drawn in *Digi-Tech*... is between cases where conduct on the part of the plaintiff “forms a link in the causation chain” and where it does not.⁴⁴

According to Giles JA, in the former case plaintiff-reliance must be shown while in the latter, consistent with longstanding authority,⁴⁵ plaintiff-reliance need not be shown.

The confusion that arose in the wake of these cases related to the class of cases in which reliance must apparently be shown.⁴⁶ Based on the quotes extracted above, one plausible interpretation of the reasoning in *Digi-Tech* and *Ingot* is that loss suffered by a plaintiff after their own action (for example, entering a transaction) is only recoverable if the plaintiff relied upon the misleading or deceptive conduct. This appears to be consistent with the statement of Ipp JA in *Ingot* that, were it otherwise, ‘plaintiffs could succeed ... even though the plaintiffs well knew the truth of the representations or were indifferent to them’.⁴⁷ As will be shown, however, as a matter of factual causation it is simply wrong to conclude that a plaintiff who suffers loss resulting from their own action or omission must always prove they relied upon the misleading or deceptive conduct. This conclusion is only tenable if the phrase ‘by’ (or ‘because of’) imports reliance as a *normative*, and not causal, restriction.⁴⁸

In any event, more recent decisions have rejected the notion that theories of market-based causation fail for a lack of plaintiff-reliance.⁴⁹ In *Caason Investments Pty Ltd v CAO* (‘*Caason*’), both Gilmour and Foster JJ, and

⁴⁴ Ibid 659–60 [12].

⁴⁵ See, eg, *Janssen-Cilag* (n 31); *Flamingo Park Pty Ltd v Dolly Dolly Creations Pty Ltd* (1986) 65 ALR 500.

⁴⁶ For a more detailed analysis of judicial treatment of *Digi-Tech* and *Ingot*, see Margaret Doyle, ‘Market-Based Indirect Causation After *HIH*’ (2017) 35(3) *Australian Resources and Energy Law Journal* 205; Michael Duffy, ‘Causation in Australian Securities Class Actions: Searching for an Efficient but Balanced Approach’ (2019) 93(10) *Australian Law Journal* 833.

⁴⁷ *Ingot* (n 42) 732 [618].

⁴⁸ Edelman J has noted that if any requirement of reliance exists, it does not exist as a matter of factual causation: *Caason* (n 5) 426.

⁴⁹ See, eg, *Re HIH* (n 24) 332–3 [39] (Brereton J); *TPT Patrol* (n 32) 363 [1635] (Beach J); *Caason* (n 5) 405 [57] (Gilmour and Foster JJ); *Melbourne City Investments Pty Ltd v UGL* [2015] VSC 540, 34 [145] (Robson J); *Bolitho v Banksia Securities Ltd* [2014] VSC 8, 14 [41] (Ferguson J); *ABN AMRO BANK NV v Bathurst Regional Council* (2014) 224 FCR 1, 271–2 [1374] (Jacobson, Gilmour and Gordon JJ).

Edelman J, agreed that market-based causation theories are at least arguable⁵⁰ and that plaintiff-reliance is not a substitute for the requirement of causation imposed by, in that case, the *Corporations Act*.⁵¹ In *Re HIH Insurance Ltd (in liq)* ('*Re HIH*'), Brereton J held that market-based causation theories were available at law.⁵² In doing so, Brereton J concluded that *Digi-Tech* and *Ingot* do not stand for the proposition that a plaintiff who suffers loss following a transaction must show reliance on the misleading or deceptive conduct. Instead, Brereton J read *Digi-Tech* and *Ingot* as saying that a plaintiff who enters into a transaction in knowledge of the true position (in other words, without being misled or deceived by the misleading or deceptive conduct) does not suffer loss 'by' the conduct for reasons of a *novus actus interveniens*.⁵³

In concluding this section, it is worth noting the availability of market-based theories of causation has not received direct High Court attention. Despite this, on Federal Court authority it now appears likely that market-based causation arguments are arguable at law. This is so notwithstanding any lack of plaintiff-reliance upon misleading or deceptive conduct in a market-based scenario.⁵⁴

C Terminology

To understand how confusion surrounding reliance and market-based causation has developed, the key phrases used in this context require attention. As will be shown, terminological confusion is likely to both reflect and generate conceptual confusion, and thus the lack of clarity in analysis surrounding market-based causation may be partly responsible for the troubled state of the topic in Australian law.

The first point of clarification relates to the meaning of the phrase 'reliance'. Regrettably, references to 'reliance' are made in two different ways throughout analysis on this topic. The first way that 'reliance' is used is in the context of a

⁵⁰ *Caason* (n 5) 410 [85] (Gilmour and Foster JJ), 431 [187] (Edelman J).

⁵¹ *Ibid* 406 [59]–[64] (Gilmour and Foster JJ), 425 [153] (Edelman J).

⁵² *Re HIH* (n 24) 349–50 [75]–[78].

⁵³ *Ibid* 348 [72].

⁵⁴ In addition to *Re HIH* as discussed above, see, eg, *TPT Patrol* (n 32) 368 [1663] (Beach J). Cf *Masters v Lombe* [2019] FCA 1720, in which Foster J appeared to express doubt regarding the market-based theory of causation at 130–1, [388]–[394].

plaintiff changing their position ‘as a result of the defendant’s misleading conduct’.⁵⁵ When used in this manner, the phrase ‘reliance’ references a relationship of causation between the defendant’s misleading or deceptive conduct and the plaintiff’s change of position. The phrase is used to express a situation of ‘decision causation’⁵⁶—the plaintiff’s decision to change their position was caused by the misleading or deceptive conduct. Indeed, ‘reliance’ is being used in this way when reference is made to the concept of ‘reliance damages’—damages intended to undo a plaintiff’s decision to change their position.⁵⁷ Importantly, when ‘reliance’ is used to express a situation of decision causation it is not being used to describe the misleading or deceptive conduct or to denote a plaintiff being misled or deceived.

Unfortunately, in addition to referencing cases of decision causation, ‘reliance’ is also used throughout the case law to describe a plaintiff being positively misled or deceived by misleading or deceptive conduct.⁵⁸ The problem here is that, as will be seen, a plaintiff can change their position because of misleading or deceptive conduct *even though they were not misled or deceived by the conduct*. A case like this would be one of reliance in the first meaning of that term, but also a case without reliance as that term is used in the second sense. For this reason, it is important to distinguish between a plaintiff changing their position *in reliance* upon misleading conduct (where they were actually misled), and a plaintiff changing their position *because of* misleading conduct (regardless of whether they were misled). In this article ‘plaintiff-reliance’ is taken to refer to a situation in which a plaintiff is positively misled or deceived by the relevant conduct.

⁵⁵ Bant and Paterson, ‘Statutory causation in cases of misleading conduct: Lessons from and for the common law’ (n 9) 10.

⁵⁶ Ibid 11. As Professors Bant and Paterson point out, the phrase ‘decision causation’ is preferable as it avoids any normative implications (such as those relating to trust and confidence) that ‘reliance’ may contain.

⁵⁷ While not explicitly referring to ‘reliance’ damages, see *Henville v Walker* (n 19) 502–4 [132]–[135] (McHugh J).

⁵⁸ See, eg, *Re HIH* (n 24) 340–1 [55]–[56] (Brereton J); *Digi-Tech* (n 29) 212 [159]; *Ingot* (n 42) 671 [79] (Hodgson JA); *Australian Breeders Co-operative Society Ltd v Jones* (1997) 150 ALR 488, 529 (Wilcox and Lindgren JJ).

Another source of confusion arises from distinguishing between ‘passive’ and ‘active’ indirect causation cases.⁵⁹ This distinction is unhelpful and potentially misleading. As the distinction is made by reference to a plaintiff’s decision to enter a transaction, the distinction may shift attention away from the correct causal relata (misleading conduct (event) and loss (outcome)) and toward relata not specified by the statute: namely, misleading conduct (event) and a plaintiff’s decision to enter a transaction (outcome). As we have seen in the injurious falsehood example, it is not always the case that a plaintiff’s loss is the result of a decision to change their position. A plaintiff’s loss may be factually attributable to the defendant’s misconduct through the agency of third parties. This risk of a misdirected causal enquiry was illustrated in *TPT Patrol*, where Beach J identified one of the causal questions to be answered as whether the applicant:

would not have acquired those securities, at that price, but for the market’s reaction to Myer’s misleading or deceptive conduct and disclosure failures.⁶⁰

It is unclear whether Beach J’s reference to this question was in the context of enquiring into factual causation, or instead for the purposes of measuring the loss that was caused ‘by’⁶¹ the misleading conduct.⁶² If it was the former, the question involved considering an outcome not specified as causally relevant by the statute.

Finally, the lack of plaintiff-reliance in a case of market-based causation should not be used to differentiate market-based causation as a ‘new’ or ‘separate’ form of causation. As Edelman J has noted, cases involving market-based causation fall under the umbrella of ‘indirect causation’ cases.⁶³ But even distinguishing between cases of ‘direct’ and ‘indirect’ causation, as if they involve different metaphysical relationships, is misleading. An outcome is either

⁵⁹ See *TPT Patrol* (n 32) 367–8 [1659]–[1660].

⁶⁰ *Ibid* 368 [1662].

⁶¹ Note that these proceedings arose under the *Corporations Act* and not the *ACL*, and that *TPT Patrol* involved alleged contraventions of statutory disclosure requirements in addition to alleged misleading or deceptive conduct.

⁶² There are indications that Beach J’s reference to this question was in the context of enquiring into factual causation: *TPT Patrol* (n 32) 370–1 [1671].

⁶³ *Caason* (n 5) 412 [93]. Within this umbrella falls injurious falsehood cases like *Janssen-Cilag*, market-based cases like *Re HIH*, and cases like *Digi-Tech* and *Ingot*.

caused by an event or it is not. Causation is a binary relation.⁶⁴ Labels such as ‘market-based’, ‘passive,’ ‘active’ and ‘indirect’ are labels used to distinguish between factual patterns of causal chains; they should not be understood as denoting different causal relationships. Thus, while market-based causation involves indirect causation, there will be cases of indirect causation that do not involve a market. The labels are simply ways to group causal patterns, all of which may be subject to the observations made in the remainder of this article.

IV RELIANCE AND FACTUAL CAUSATION

As mentioned in Part II, the enquiry into factual causation in a case of misleading or deceptive conduct is a normatively neutral, historical enquiry into whether a defendant’s misleading or deceptive conduct *caused* a plaintiff’s loss. This is true regardless of whether the circumstance is one of direct, indirect or market-based causation. But what role does reliance have when considering this question? Is reliance relevant to the factual causation enquiry regardless of the pattern of causation? Can a plaintiff satisfy the factual causation enquiry in a case of market-based causation without showing reliance of any kind? As we will see, properly distinguishing between factual causation and scope of liability enables straightforward answers to be given to these questions.

A Reliance and Factual Causation in Cases of Misleading or Deceptive Conduct

While this article’s focus is market-based causation, it is worth beginning discussion of reliance and misleading or deceptive conduct by considering the role of reliance in cases of direct causation. As will be seen, the varying relevance of plaintiff-reliance to the factual causation enquiry in cases of misleading or

⁶⁴ Kit Barker and Jenny Steele, ‘Drifting Towards Proportionality Liability: Ethics and Pragmatics’ (2015) 74(1) *The Cambridge Law Journal* 49, 67; Richard Pearson, ‘Apportionment of Losses Under Comparative Fault Laws – An Analysis of the Alternatives’ (1980) 40(2) *Louisiana Law Review* 323, 346. This is the dominant position in the law. However, in philosophy the contrary is often argued: see, eg, Michael Moore, *Causation and Responsibility: An Essay in Law, Morals and Metaphysics* (Oxford University Press, 2009) 275.

deceptive conduct can be illustrated by hypothetical examples involving direct causation.

Any discussion of reliance and misleading or deceptive conduct must begin with the comments of Gummow, Hayne, Heydon and Kiefel JJ in *Campbell v Backoffice Investments*,⁶⁵ where their Honours pointed out that ‘reliance is *not* a substitute ... for the essential question of causation’,⁶⁶ and that:

references to ... reliance must not be permitted to obscure the need to identify ... a causal connection [between the misleading or deceptive conduct and the alleged loss].⁶⁷

The truth of this is clear when considering the injurious falsehood-type example discussed in Part III. In that example, on either the ‘but for’ or ‘a factor’ test the plaintiff’s loss is caused by the defendant’s misleading conduct. This is the case even though the misleading conduct was not directed toward the plaintiff, and thus could not have been relied upon by the plaintiff. These cases, however, appear to be treated as exceptions or anomalies. The dominant view is that in typical, direct causation cases—take the example in Part II of *Charlotte and David*—the plaintiff must prove they relied upon the misleading or deceptive conduct in order to make out factual causation.⁶⁸ In other words, the plaintiff must show they were positively misled or deceived by the conduct if they are to establish that the conduct caused their loss.

If such a plaintiff must always prove they were misled or deceived by the defendant’s misleading or deceptive conduct, it is because the law has made a normative decision to impose that requirement as a matter of scope of liability.

⁶⁵ *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304. Note that *Campbell v Backoffice Investments* involved contraventions of proscriptions of misleading or deceptive conduct in the *Fair Trading Act 1987* (NSW).

⁶⁶ *Ibid* 351 [143].

⁶⁷ *Ibid* 341 [102].

⁶⁸ See, eg, Beach J’s comments in *TPT Patrol* (n 32) 367 [1657] that:

The first category is direct causation. This is the scenario where absent a power in the respondent to direct or compel the applicant to take a course of action, the mechanism by which misleading acts or omissions by the respondent might directly cause loss to the applicant is almost invariably by inducing the applicant to some course of action. This inducing requires proof that the applicant relied upon some impression created by the respondent’s misleading act or omission.

It is not because the plaintiff cannot prove factual causation without showing reliance. Suppose that a salesman (the defendant) directs misleading representations about his products to a customer (the plaintiff). The customer is not misled by the misleading conduct, however, given the absurd nature of the misleading representations the customer finds the attempted misrepresentations amusing. Suppose further that the customer decides to purchase the products because of the amusing nature of the salesman's attempted misrepresentation. If one assumes the customer would not have changed their position unless they were amused, then that customer's decision to change their position was caused by the misleading conduct on both the 'but for' and 'a factor' test. 'But for' the misleading or deceptive conduct, the customer would not have been amused and thus would not have changed their position. Similarly, on the 'a factor' test, the customer's amusement positively contributed to their decision to change their position.

Our conclusion that both the 'but for' and 'a factor' tests are satisfied in this example means that, as a matter of fact, the plaintiff's loss was caused by the defendant's misleading conduct. In this example, however, the satisfaction of either causal test does not depend upon showing the plaintiff was misled by the misleading conduct. Indeed, as we noted, in this example the plaintiff was *not* misled by the conduct. This does not mean the plaintiff's lack of reliance is irrelevant to the enquiry into *liability*—the lack of reliance might reasonably be viewed as preventing the plaintiff from recovering at the scope of liability stage, for example. But this is not a matter of factual causation. If the plaintiff's lack of reliance in this example is viewed as preventing the plaintiff's recovery, the values and reasoning motivating that normative decision should not be concealed within a conclusion about causation.

The preceding analysis does not mean that reliance is never relevant to the factual causation enquiry in cases of misleading or deceptive conduct. The causal relevance of reliance depends upon the pleaded causal link between the plaintiff's loss and the defendant's misconduct. Proof of reliance will be necessary if a plaintiff alleges that their reliance upon the misleading conduct is the causal link connecting their decision to change their position to the defendant's misleading conduct. Take the example given above of Charlotte and

David. In that example, David would be required to argue he was misled by Charlotte's conduct. David's decision to purchase the house was motivated by his positive belief the house was structurally sound, and thus David cannot establish causation without proving he relied upon Charlotte's misleading conduct. The point is that reliance is not the *only* possible causal link between a plaintiff's decision to change their position and a defendant's misleading or deceptive conduct.

B *Reliance and Factual Causation in Cases of Market-Based Causation*

The above analysis has identified that the role of reliance in the factual causation enquiry depends upon the pleaded causal link between the plaintiff's loss and the defendant's misleading or deceptive conduct. In light of this analysis, it is now possible to consider the role of reliance in cases of market-based causation.

It has been suggested the difference between direct and indirect causation cases is that, in the latter, *someone* must have relied upon the misleading or deceptive conduct if the plaintiff is to satisfy the factual causation enquiry. As Brereton J said in *Re HIH*:

... the applicant must establish that *somewhere* in the chain of causation, *someone* relied on the contravening conduct—in other words, that someone was misled or deceived ... unless *someone* in the chain of causation is deceived, it cannot be said that the ultimate loss to the applicant is “by conduct of” the respondent ...⁶⁹

In the typical market-based case discussed in this article, it would be the market (or a member of the market) who (according to Brereton J) must be misled or deceived. This view appears widespread in the context of indirect causation.⁷⁰ Once again, this notion is not relevant to factual causation and is best viewed as going to a defendant's scope of liability. The strict delineation of the factual

⁶⁹ *Re HIH* (n 24) 341 [56].

⁷⁰ See, eg, *TPT Patrol* (n 32) 367–8 [1660]; *Redmond Family Holdings v GC Access Pty Ltd* [2016] NSWSC 796, [128] (Black J). See also Michael Duffy's brief analysis of this issue in *Duffy* (n 46) 848–9.

causation enquiry and the scope of liability enquiry helps situate this consideration in its correct, normative position.

Suppose a company makes a misleading statement during the company's initial listing, and 50 industry insiders (and nobody else) buy the company shares. Due to their industry expertise each of the investors suspects the statement could be misleading, but each is happy to invest on the (false) assumption that other non-insider investors will drive up the share price. Unbeknown to the industry insiders, it is only themselves who drive up the share price (as no non-insiders invested). The misleading conduct is later revealed to the market and the 50 insiders hurry to sell their shares. Fiona, one of the insiders, attempts to sell her shares but cannot find a buyer as the shares are now worthless. If Fiona were to bring an action under the *ACL*, one question might be whether Fiona's failure to be misled by the conduct should preclude her from recovering against the company. A different question is the question of factual causation: was the company's misleading statement a cause of Fiona's loss?

In this example, the misleading statement is a cause of the inflation of the share price (and thus a cause of Fiona's loss) on the 'but for' test. But for the misleading statement, the 50 insiders would not have bid up the price of the shares. The same answer is reached when applying the 'a factor' test: the misleading statement played a positive role in the occurrence of the price inflation—in this case, by being necessary for it. This is despite no individual being misled or deceived by the misleading or deceptive conduct. If it is essential that *someone* be misled or deceived to make out factual causation, we should conclude the misleading statement was not a cause of Fiona's loss. As we have just seen, however, as a matter of fact Fiona's loss was caused by the misleading statement. While we may intuitively feel that the 'real' or 'fair' cause of Fiona's loss was her own gamble, this is an intuition about responsibility, not causation. If the fact that no individual relied upon the misleading or deceptive conduct is to prevent Fiona from recovering against the company, this should not be viewed as a matter of causation. Instead, this is properly viewed as a possible normative restriction upon the defendant's scope of liability.

Once again, this analysis does not mean reliance can have no relevance to the factual causation enquiry. As will be seen below, whether the *plaintiff* relied

upon the misleading or deceptive conduct will never be relevant to the factual causation enquiry in a case of market-based causation. However, whether the *constituent members of the market* relied upon the misleading or deceptive conduct in a case of market-based causation may well be relevant to the factual causation enquiry. Recall that the causal relevance of reliance depends upon the pleaded causal link between the misleading or deceptive conduct and the plaintiff's loss. If, in a case of market-based causation, a plaintiff alleges their loss was caused by the market's positive belief in the misleading or deceptive conduct (which in turn caused the price inflation that resulted in the plaintiff's loss), the plaintiff will be required to demonstrate the market was positively misled or deceived by the misleading or deceptive conduct.⁷¹ However, as the example involving Fiona demonstrates, this will not always be the pleaded causal link. Reliance is not *necessarily* a requirement of the factual causation enquiry—it is possible to make out factual causation in a market-based case without demonstrating anyone relied upon the misleading or deceptive conduct.

C *Factual Causation & An 'Informed Plaintiff'*

The above analysis turns attention to the possibility of a plaintiff satisfying the factual causation enquiry despite having *positively known* of the misleading or deceptive nature of the relevant conduct. Suppose a plaintiff suffers loss after investing in a company despite knowing of misrepresentations in the company's financial reporting. Can such an 'informed plaintiff', whose knowledge gave them every opportunity to avoid suffering loss, prove their loss was factually caused by the defendant's conduct?

The possibility of a plaintiff attempting to game or abuse the consumer protections afforded by statutory proscriptions of misleading or deceptive conduct has been a source of much judicial concern.⁷² It has been repeatedly suggested a plaintiff will not be able to prove their loss was caused by misleading

⁷¹ This would be done by way of expert evidence. See *Caason* (n 5) 412 [96] (Edelman J).

⁷² See, eg, *Re HIH* (n 24) 348 [72], 349 [74]; *TPT Patrol* (n 32) 338 [1529]; *Ingot* (n 42) 665 [38] (Giles JA), 732 [618] (Ipp JA); *Digi-Tech* (n 29) 212 [159]; *Caason* (n 5) 427 [164]–[165]. These concerns are also present in non-disclosure contexts: see, eg, *Masters v Lombe* (n 54) [390]–[392]; *Grant-Taylor v Babcock & Brown Ltd (in liq)* (n 34) 766 [220] (Perram J).

or deceptive conduct if the plaintiff knew the truth of the relevant matter.⁷³ However, as we have seen above, plaintiff-reliance is not always relevant to the factual causation enquiry in a case of misleading or deceptive conduct. Indeed, in a case of market-based causation, plaintiff-reliance is *never* relevant to the factual causation enquiry. The causal link between the plaintiff's loss and the defendant's misleading or deceptive conduct in a market-based case will never depend upon the plaintiff having relied upon the misleading or deceptive conduct. This is because whether the plaintiff was misled or deceived by the misleading or deceptive conduct does not bear on whether the misleading or deceptive conduct caused the market to inflate the price of the relevant asset.

This point is illustrated by the earlier example of Edward and ABC Ltd. Recall that Edward's shares in ABC Ltd fell from \$4.00 each to \$2.00 each after misrepresentations in ABC's financial reporting was revealed to the market. In this example, the occurrence of Edward's loss does not depend upon the relationship between Edward and the misleading conduct. The result of applying either the 'but for' test or the 'a factor' test is unchanged by varying the facts to note that Edward knew of the inaccuracies in ABC's financial reports. Either way, ABC's misleading conduct factually caused Edward's loss. This is because, regardless of what *Edward* knew about the misleading conduct, ABC's misleading conduct caused *the market* to inflate the price of ABC Ltd shares. While it may be appropriate to deny Edward recovery in circumstances where Edward can be characterised as an informed plaintiff, this idea is founded in a judgment about policy and fairness. It is not a conclusion about causation.

This analysis helps identify the inherent difficulty with the concept of a plaintiff's knowledge constituting a *novus actus interveniens*. In *Re HIH*, Brereton J said that an investor in a market-based case who acquired shares despite knowledge of the misleading conduct 'could not be said to have incurred the loss "by" the misleading conduct, as the decision to knowingly acquire the

⁷³ *Re HIH* (n 24) 348 [72], 349 [74]; *TPT Patrol* (n 32) 338 [1529]; *Digi-Tech* (n 29) 212 [159]; Andrew Watson and Jacob Varghese, 'The Case for Market-Based Causation' (2009) 32(3) *University of New South Wales Law Journal* 948, 959–60. Note that Edelman J in *Caason* at [165] correctly observed that while an informed plaintiff might be denied recovery, this would not be because the plaintiff was unable to prove factual causation.

⁷⁴ *Re HIH* (n 24) 349 [74].

shares would ‘break the causal chain’.⁷⁵ As we have just seen, in a market-based case the ‘causal chain’ is not dependent upon the plaintiff’s relationship with the misleading or deceptive conduct. Instead, reference to ‘breaking the causal chain’ is best understood as a decision to deny a plaintiff recovery on normative grounds. Normative judgments are not themselves problematic, because as is discussed shortly courts engage in normative reasoning when considering a defendant’s liability for loss caused by misleading or deceptive conduct. However, it should not be merely asserted that a plaintiff’s knowledge ‘breaks the causal chain’ as if this is an obvious, scientific, or incontestable conclusion. As will be seen now, the normative role of a plaintiff’s reliance (or lack of reliance) is an issue that requires detailed and transparent examination.

V RELIANCE AND SCOPE OF LIABILITY

As this article has explained, normative issues surrounding plaintiff-reliance in actions founded upon an allegation of misleading or deceptive conduct have been unhelpfully concealed by analysis couched in the language of causation. This is despite an established willingness of courts to reduce or expand a defendant’s liability for misleading or deceptive conduct by reference to normative, scope of liability considerations.⁷⁶ This part of the article seeks to openly explore the possible normative role of plaintiff-reliance at the scope of liability stage of analysis. Accordingly, this article focuses on two key questions that arise out of the discussion of reliance and factual causation in Part IV.

First, in Part V this article examines whether a plaintiff seeking damages for loss caused by misleading or deceptive conduct *should* be required to show their loss was caused by being positively misled or deceived by a defendant’s

⁷⁵ Ibid. See also *TPT Patrol* (n 32) 338 [1529].

⁷⁶ In relation to *novus actus interveniens* see, eg, *Henville v Walker* (n 19) 468 [13] (Gleeson CJ), 493 [106] (McHugh J), 508 [156] (Hayne J); *I & L Securities* (n 19) 136 [85] (McHugh J). In relation to normative limits on liability based on considerations relating to the purpose of the *ACL*, see, eg, *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568, 597 [99] (Gummow, Hayne and Heydon JJ). Considerations relating to whether a defendant acted reasonably also arise, mainly in the context of assessing whether conduct is misleading or deceptive: Bant and Paterson, ‘Limitations on Defendant Liability for Misleading or Deceptive Conduct’ (n 12) 174.

misleading or deceptive conduct. While this question goes to the judicial debate over the availability of market-based causation in Australia, this question correctly frames the issue as a *normative* one. If, as a matter of scope of liability, a plaintiff cannot recover loss caused by misleading or deceptive conduct without showing plaintiff-reliance, then theories of market-based causation are legally unavailable. Second, in Part V this article considers whether a plaintiff's positive knowledge of the misleading or deceptive nature of a defendant's conduct should operate to prevent the plaintiff's recovery. In doing so, the article acknowledges this issue is also one of scope of liability, and thus one that requires principled, normative reasoning.

In examining these issues, the limited space available necessitates engagement with only the *ACL*, and not section 1041I of the *Corporations Act* nor any other statutory proscriptions of misleading or deceptive conduct. However, the reasoning proposed in the next sections will no doubt have relevance to cases of market-based causation generally.

A *Plaintiff-Reliance as an Element of the Cause of Action*

We have seen in Part IV that a plaintiff's loss can be factually caused by a defendant's misleading or deceptive conduct even when the plaintiff was not misled or deceived by the conduct. Indeed, this will often occur in cases of indirect and market-based causation. However, this does not itself mean it would be inappropriate for the law to require a plaintiff to demonstrate reliance in actions brought for compensation in cases involving misleading or deceptive conduct. Regardless of any conclusion about causation, a normative decision could be made that plaintiff-reliance is an element of the relevant cause of action. This would, of course, rule out arguments based on an indirect or market-based theory of causation.

As the normative character of this issue has been given little attention in Australia,⁷⁷ this section proposes a model of reasoning that engages with the

⁷⁷ While the normative issues surrounding reliance have been ignored by courts, they have also been given little academic attention. One notable exception is Professor Bant and Paterson's powerful analysis in Bant and Paterson, 'Statutory causation in cases of misleading conduct: Lessons from and for the common law' (n 9).

ACL and draws upon insights from the treatment of this issue in the United States. The reasoning in this section will hopefully provide a plausible guide to the examination of this issue, both as it arises under the *ACL* and under other statutory provisions proscribing misleading or deceptive conduct.

1 *Interpreting the Provisions*

The starting position of any enquiry into whether plaintiff-reliance is an element of the section 236 cause of action is the words of the section itself. As a matter of bare semantics, there is nothing in the section to indicate such a requirement exists. The section does not refer to reliance, nor indicate a focus upon a plaintiff's decision-making or state of mind. It should be uncontroversial that, if a requirement of plaintiff-reliance exists, it is not found within the literal meaning of the words of section 236.⁷⁸ However, despite the lack of any open requirement of plaintiff-reliance in section 236, courts are occasionally prepared to imply additional terms or requirements into a statutory provision.⁷⁹ In Australia, this process arises independently of any process of statutory construction,⁸⁰ and is thus best considered alone, before any question of construction arises. For the following reasons, there are difficulties associated with the implication of a requirement of plaintiff-reliance in actions brought under section 236.

The first challenge to the implication of a requirement of plaintiff-reliance is the significance of such an implication. The implication of additional words into a statutory provision 'involves a judgment of matters of degree'.⁸¹ While courts will readily correct obvious drafting errors, courts are reluctant to give effect to changes that are 'too big, or too much at variance with the language ... used by the legislature'.⁸² The implication of a requirement of plaintiff-reliance would fall squarely into this latter category. Such an implication would not only rule

⁷⁸ See also *Cahill v Kenna* [2014] NSWSC 1763, where McDougall J noted at [266] that consideration of reliance may involve a 'diversion from the statutory test' in cases of misleading or deceptive conduct.

⁷⁹ *Wentworth Securities Ltd v Jones* [1980] AC 74, 105–6 (Lord Diplock).

⁸⁰ *Caason* (n 5) 426 [160] (Edelman J).

⁸¹ *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531, 548 (French CJ, Crennan and Bell JJ).

⁸² *Ibid.*

out cases of market-based causation, but would also deny a plaintiff recovery in a *Janssen-Cilag*-style case of indirect causation. The implication would thus involve rewriting section 236 to target a narrower mischief than the section is aimed at on its face. Indeed, as the *ACL* refers to reliance in other sections,⁸³ the omission of a requirement of reliance in section 236 is arguably intentional.

The implication of a requirement of plaintiff-reliance is further challenged by the lack of a fitting location for such an implication. Section 236 does not relate only to misleading or deceptive conduct; compensation can be sought for loss suffered because of any contravention of Chapter 2 or 3 of the *ACL*. Chapters 2 and 3 contain proscriptions of practices including unconscionable conduct,⁸⁴ unfair contract terms,⁸⁵ and harassment and coercion.⁸⁶ Would the implication of a requirement of plaintiff-reliance into section 236 affect actions founded upon an allegation of any of these practices? The notion of a requirement of plaintiff-reliance in cases of unconscionable conduct or harassment, for example, borders on the irrational. Plaintiff-reliance is not a useful focus of attention in these cases. Restricting compensation for loss caused by these practices to situations involving plaintiff-reliance would drastically curtail the operation of section 236.

The foregoing analysis militates against an implication of a requirement of plaintiff-reliance into the words of section 236. However, the absence of any literal or implied requirement of reliance does not prevent a construction of section 236 that requires a plaintiff to have relied upon a defendant's misleading or deceptive conduct in order to satisfy the requirements of the cause of action. Accordingly, we turn now to a consideration of how section 236 should be construed.

2 *Construing the Provisions*

If section 236 is to be construed as containing a requirement of plaintiff-reliance, it is necessary to link this requirement to the purpose of the overall

⁸³ See, eg, reference to 'reasonable reliance' in s 207.

⁸⁴ *ACL* (n 6) ch2 pt 2–2.

⁸⁵ *Ibid* ch 2 pt 2–3.

⁸⁶ *Ibid* ch 3 pt 3–1 div 5.

statutory scheme. The High Court is alive to the importance of construing the *ACL* consistently with its purpose, and has explicitly considered the *ACL*'s purpose when considering the liability of a defendant under section 236.⁸⁷ The following analysis considers what the purpose of section 236, and the purpose of the *ACL* more broadly, has to say about plaintiff-reliance.

Section 2 of the *CCA* (which contains the *ACL*) reads as follows:

2 Object of this Act

The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

This purpose can be considered against the effect of a requirement of plaintiff-reliance in misleading or deceptive conduct cases. First, and foremost, if the burden for loss caused by misleading or deceptive conduct is to be allocated between either a person who contravened section 18, or an innocent market participant, the *CCA*'s consumer protection and fair trading objectives favour a construction that makes the contravener responsible. There is no obvious reason this is not the case even if the market participant did not rely upon the misleading or deceptive conduct.⁸⁸ To allow those who mislead market participants to escape liability by arguing it was merely *the market*, and not the *individual plaintiff* that relied upon the misleading conduct, would be inconsistent with the *CCA*'s focus on fair trading. Indeed, this would significantly limit the deterrent effect of section 236.

Alternatively, it could be argued that a construction of section 236 which allows a plaintiff to recover despite not having relied upon the relevant misleading or deceptive conduct in a market-based case would discourage active and informed participation in Australian markets. These concerns have been raised in work on indirect causation in disclosure obligation contexts.⁸⁹ The

⁸⁷ Unfortunately, this has been framed as a matter of causation. See, eg, *Travel Compensation Fund v Tambree* (2005) 224 CLR 627, 639 [30] (Gleeson CJ). When a defendant's scope of liability is denied or expanded based on a desire to give effect to the purpose of the *ACL*, this is best viewed as a matter of purposive construction, not a question of causation.

⁸⁸ Watson and Varghese (n 73) 964.

⁸⁹ Damian Grave, Leah Watterson and Helen Mould, 'Causation, loss and damage: Challenges for the new shareholder class action' (2009) 27(8) *Company and Securities Law Journal* 483, 487.

apparent danger is that a failure to recognise a requirement of plaintiff-reliance would discourage beneficial investor and consumer behaviour, such as carefully reading financial reports. The relevance of this concern, however, depends upon the statutory context in focus. In the corporation disclosure scheme context, for example, the promotion of an informed and active market may be one of the main aims of the regulatory scheme. The same cannot be assumed in the context of the *ACL*. Arguably, the *ACL*'s focus upon consumer protection and fair trading supports the ability of a plaintiff to recover without demonstrating reliance, even if this may (to some extent) encourage 'passive' market behaviour.

In light of the *CCA*'s purpose, it is notable the Australian Competition and Consumer Commission ('ACCC') can seek orders against a person who contravenes section 18 regardless of any individual reliance upon the misleading or deceptive conduct.⁹⁰ The range of permitted orders includes orders directing a person to establish procedures aimed at preventing future contraventions,⁹¹ community service orders,⁹² and disclosure orders.⁹³ While these orders are not punitive, they form part of the regulatory scheme designed to prevent misleading or deceptive conduct. It is legitimate to wonder whether these orders would be available in the absence of plaintiff-reliance if plaintiff-reliance was core to the regulatory scheme. The ability of the ACCC to seek the orders regardless of any plaintiff-reliance appears to count against a construction of section 236 that would emphasise the importance of a plaintiff relying upon a defendant's misleading or deceptive conduct.

The context of section 236 should also be considered against a requirement of plaintiff-reliance. Section 236 allows those who suffer loss because of a defendant's misleading or deceptive conduct to recover compensation from that defendant. Section 236 is thus a core part of the *ACL*'s regulation of misleading or deceptive conduct. Given this role, any construction of section 236 that would limit the circumstances in which the section applies should be treated with caution. Indeed, there is much to say for the notion that, given section 236 forms

⁹⁰ *ACL* (n 6) s 246.

⁹¹ *Ibid* s 246(2)(b)(i).

⁹² *Ibid* s 246(2)(a)–(b).

⁹³ *Ibid* s 246(2)(c).

a key part of a legislative scheme giving effect to matters of ‘high public policy’,⁹⁴ section 236 should be construed as widely as fairly possible.⁹⁵ The imposition of a requirement that would limit the efficacy of section 236 is perhaps, therefore, best viewed as a matter only for Parliament.

3 *Insights from the United States*

A useful source of insight into the operation of plaintiff-reliance requirements in cases of misleading or deceptive conduct is United States securities law. Both Congress and the US judiciary have grappled with requirements of plaintiff-reliance in securities actions founded upon an allegation of misleading conduct. The following analysis highlights how inherently ill-suited a requirement of plaintiff-reliance would be in cases brought under the *ACL*.

There are several US legislative provisions that relate to misleading conduct in the securities context. For our purposes, two are notable. The first is the express cause of action created by section 18(a) of the *Securities Exchange Act 1934* (*‘Exchange Act’*):

SEC. 18. (a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this title ... which statement was ... false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, *in reliance upon such statement* shall have purchased or sold a security at a price which was affected by such statement, for damages *caused by such reliance* ... (emphasis added)

As can be seen, this section requires the misleading statement to have factually caused the loss suffered by requiring the security price to have been ‘affected’ by the misleading statement.⁹⁶ However, the section also imposes a strict requirement of plaintiff-reliance: the plaintiff’s decision to purchase or sell

⁹⁴ *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 528 (Gummow J).

⁹⁵ *Ibid.*

⁹⁶ In the United States, this is usually referred to as ‘loss causation’. See, eg, Roberta Karmel, ‘When Should Investor Reliance Be Presumed in Securities Class Actions’ (2007) 63(1) *The Business Lawyer* 25, 33. On the causal requirements of section 18(a), see Theresa Gabaldon, ‘Causation, Courts and Congress: A Study of Contradiction in the Federal Securities Law’ (1990) 31(5) *Boston College Law Review* 1027, 1060–4.

the security (which resulted in loss) must have been caused by the plaintiff's *reliance*. In other words, Congress decided that cases of indirect causation—in which a plaintiff suffers loss without having relied upon the misleading statement—do not fall within section 18(a).

The second notable provision is Rule 10b-5, a subsidiary rule made by the Securities and Exchange Commission ('SEC') under section 10(b) of the *Exchange Act*.⁹⁷ Rule 10b-5 makes a variety of 'manipulative and deceptive practices' unlawful when done in connection with the 'purchase or sale of any security', including the making of untrue statements or the omission of material facts.⁹⁸ While the rule does not refer to a private cause of action, the rule has been interpreted as containing an 'implied' right of action.⁹⁹ In establishing this implied right of action, courts concluded the 'tort actions of deceit and misrepresentation provided the elements of proof'¹⁰⁰ in a claim brought under Rule 10b-5. As these tortious causes of action require plaintiff-reliance,¹⁰¹ plaintiff-reliance was made a requirement of the Rule 10b-5 action. At least initially, therefore, cases based on a market-based theory of causation could not succeed.

The requirement to demonstrate plaintiff-reliance has impeded the investor-protection purpose of these provisions. Unlike typical person-to-person transactions, securities trade in a 'highly impersonal market'.¹⁰² An investor could, for example, decide to purchase a security on a recommendation from a

⁹⁷ Rule 10b-5 is found in Part 40 of Title 17 of the United States *Code of Federal Regulations*.

⁹⁸ 17 C.F.R § 240.10b-5.

⁹⁹ The implied right of action under Rule 10b-5 was first found in *Kardon v National Gypsum Co.*, 69 F. Supp. 512 (Kirkpatrick J) (E.D. Pa. 1946). The implied action was endorsed by the Supreme Court in *Superintendent of Ins. v Bankers Life & Cas. Co.*, 404 U.S. 6 (1971). Douglas J delivered the opinion of a unanimous bench.

¹⁰⁰ Daniel Willey, 'Misplaced Reliance: Rethinking Rule 10B-5 and the Causal Connection' (2015) 95(2) *Boston University Law Review* 651, 654.

¹⁰¹ See, eg, *Dura Pharm. v Broudo*, 544 U.S. 336 (2005) at 341, where Breyer J (delivering the opinion for a unanimous bench) said:

The courts have implied from these statutes and Rule a private damages action, which resembles, but is not identical to, common-law tort actions for deceit and misrepresentation ... the action's basic elements include:

...
(4) *reliance* ...

¹⁰² Willey (n 100) 652.

broker, or after watching the trading activity of an institutional investor. The recommendation or trading activity could, in turn, have been the result of the third party's reliance upon an issuer's misleading conduct. This impersonal nature combined with the difficulties associated with proving plaintiff-reliance to render section 18(a) and Rule 10b-5 incapable of protecting investors from loss caused by misleading company statements. Roberta Karmel, a former Commissioner of the SEC, wrote in 2007 that:

Because of this reliance requirement, section 18 has proved to be a completely ineffective remedy for recovering losses caused by issuer misstatements or misleading omissions ...¹⁰³

Indeed, there was not a single recorded recovery under section 18(a) of the *Exchange Act* in the first 50 years of the provision's operation.¹⁰⁴ The same difficulties initially faced plaintiffs relying upon Rule 10b-5. As Daniel Willey has recently pointed out, the strict requirement of plaintiff-reliance 'detracted from the deterrent effect that the private 10b-5 action was supposed to create'.¹⁰⁵

These difficulties provide further support for the ability of Australian consumers to recover under section 236 of the *ACL* without being required to prove they personally relied upon the misleading or deceptive conduct in question. We have seen above that the *ACL* is concerned to promote fair trading and protect market participants from the effects of misleading or deceptive conduct. Yet, as has occurred in the United States, this purpose would be curtailed by a limitation preventing plaintiffs from arguing cases based on a market-based theory of causation. Quite simply, plaintiff-reliance is not a suitable focus of enquiry in cases where large consumer markets are misled or deceived. The serious (and sometimes devastating) effect misleading or deceptive conduct can have upon market participants is not limited to circumstances in which a market participant relied upon the misleading or deceptive conduct. When combined with the *CCA*'s focus upon fair trading and consumer protection, the experience of the United States tells against the

¹⁰³ Karmel (n 96) 34.

¹⁰⁴ Gabaldon (n 96) 1061.

¹⁰⁵ Willey (n 100) 654.

adoption of a requirement of plaintiff-reliance in actions founded upon an allegation of misleading or deceptive conduct.

Unlike a plaintiff under section 18(a) of the *Exchange Act*, a Rule 10b-5 plaintiff is no longer required to demonstrate they personally relied upon the defendant's 'manipulative or deceptive' practice. In *Basic Inc. v. Levinson* ('*Basic*'),¹⁰⁶ the United States Supreme Court adopted the 'fraud-on-the-market' theory, allowing a 10b-5 plaintiff to benefit from a presumption the plaintiff invested 'in reliance on the integrity of [the market] price'.¹⁰⁷ As, according to the Supreme Court, securities markets efficiently incorporate publicly available information into a security's pricing,¹⁰⁸ a plaintiff is presumed to have relied upon any misstatement (so long as the misstatement can be shown to have affected the price¹⁰⁹). While the Supreme Court in *Basic* was keen to note the presumption is rebuttable, as a matter of practice the presumption has removed the reliance requirement in cases brought under Rule 10b-5.¹¹⁰

The concept of market-based causation does not depend upon accepting a fraud-on-the-market theory or the efficient markets hypothesis.¹¹¹ As *TPT Patrol* demonstrates, a plaintiff under section 236 of the *ACL* will not be successful unless they positively demonstrate causation; they must show the misleading or deceptive conduct resulted in their loss by showing the conduct inflated the price of the relevant asset. However, *Basic* remains a useful decision, if only for the reasoning of White J in his dissent. White J argued that, normatively, a plaintiff should be required to rely upon the relevant misstatement if they are to be compensated for loss suffered by a misstatement.¹¹² According to White J, this is because to allow a plaintiff to recover loss caused by a misstatement regardless of whether the plaintiff relied upon (or even knew of) the misrepresentation would operate to create a 'scheme

¹⁰⁶ 485 U.S. 224 (1987).

¹⁰⁷ *Ibid* 247.

¹⁰⁸ This theory is commonly referred to as the 'efficient markets hypothesis'.

¹⁰⁹ *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 US ___, 18 (Roberts CJ, delivering the opinion of the Court) (2014).

¹¹⁰ Joseph Grundfest, 'Damages and Reliance Under Section 10(b) of the Exchange Act' (Working Paper No 150, Rock Center for Corporate Governance, Stanford University, August 2013) 47.

¹¹¹ Watson and Varghese (n 73) 960–2.

¹¹² *Basic Inc. v. Levinson* (n 106) 251.

of investors insurance'.¹¹³ Similarly, the explicit reliance requirement in section 18(a) of the *Exchange Act* was inserted after Richard Whitney, President of the New York Stock Exchange, testified to a congressional committee that the possibility of a plaintiff recovering compensation despite not having personally relied upon the relevant misstatement was a 'really objectionable feature' of the proposed bill.¹¹⁴

Whatever may be said of the development of securities law in the US, these criticisms have little force when considering section 236 of the *ACL*. It is true that without a requirement of plaintiff-reliance, a plaintiff who purchased or sold their securities for reasons unrelated to the alleged misleading conduct may be able to recover against a defendant. This does not, however, represent a 'scheme of investors insurance', and a plaintiff in that situation would not receive an undeserved windfall if successful. The absence of a requirement of plaintiff-reliance does not affect the requirement of causation. Only loss caused by the misleading conduct is compensable. In this sense, section 236 would insure a consumer against loss suffered because of a defendant's misleading or deceptive conduct—though this is arguably consistent with the purpose of section 236. So long as a plaintiff is required to prove their loss was caused by the alleged misleading or deceptive conduct, there is little danger in allowing a plaintiff to recover compensation for loss suffered regardless of whether the plaintiff personally relied upon the misleading or deceptive conduct.¹¹⁵

B *An Informed Plaintiff*

The analysis above concluded that plaintiff-reliance should not constitute a necessary element of the cause of action under section 236 of the *ACL*. A

¹¹³ Ibid 252.

¹¹⁴ Stock Exchange Practices, Hearings on S. Res. 84, 56, and 97 before the Senate Committee on Banking and Currency, 73d Cong., 2d Sess., part 15, 6638 (1934) (statement of Richard Whitney).

¹¹⁵ Indeed, it is at least arguable that section 236 does not contain any second-order, scope of liability restrictions upon defendant liability. Instead, section 236 may be concerned only with the question of factual causation—all loss caused by misleading or deceptive conduct in trade or commerce might thus be compensable. This would be consistent with the *CCA*'s focus on consumer protection. As mentioned above, this is not the position that has been taken in Australian law. However, for a discussion of this possibility, see Bant and Paterson, 'Statutory causation in cases of misleading conduct: Lessons from and for the common law' (n 9) 8.

different issue, however, is whether a plaintiff's positive knowledge of the misleading or deceptive nature of the relevant misleading or deceptive conduct operates as a restriction upon a defendant's scope of liability. We have seen that this is best viewed as an issue of scope of liability, not causation. We turn now to the question of whether an informed plaintiff should, at the scope of liability stage, be denied recovery under section 236 of the *ACL*.

A notable feature of the judicial treatment of indirect causation has been overwhelming acceptance that an informed plaintiff cannot recover damages for loss caused by misleading or deceptive conduct under section 236.¹¹⁶ Indeed, the notion that an informed plaintiff may recover under section 236 does not appear to have been seriously argued before an Australian court.¹¹⁷ As mentioned in Part IV, the issue of an informed plaintiff has usually been considered using the language of causation—a plaintiff's positive knowledge may 'break the chain of causation', for example.¹¹⁸ While this language is unhelpful, the underlying conclusion appears to be one founded upon a consideration of the purpose of statutory proscriptions of misleading or deceptive conduct.

The starting point in consideration of this issue is acknowledgement of judicial reluctance to impose restrictions on defendant liability that go beyond the requirement of causation present in section 236. As both McHugh J and Kirby J made clear in *I & L Securities*, it would not be usual for a plaintiff's own conduct to operate to reduce a defendant's liability.¹¹⁹ However, liability under section 236 is not imposed blindly; in rare cases the conduct of a plaintiff might be sufficient to take the plaintiff beyond the scope of protection afforded by the *ACL*. Just as an egregiously careless plaintiff will be denied recovery under section 236,¹²⁰ a plaintiff whose positive knowledge afforded them every opportunity to avoid suffering loss should be denied recovery under the *ACL*.

¹¹⁶ See, eg, *Caason* (n 5) 427 [164] (Edelman J); *TPT Patrol* (n 32) 338 [1529]; *Masters v Lombe* (n 54) 130 [390]; *ABN AMRO BANK NV v Bathurst Regional Council* (n 49) 358–9 [1375]; *Ingot* (n 42) 662 [22] (Giles JA), 732 [618] (Ipp JA); *Digi-Tech* (n 29) 212 [159].

¹¹⁷ In *Caason*, for example, it was 'common ground' that an informed plaintiff cannot recover under section 236: *Caason* (n 5) 427 [164] (Edelman J).

¹¹⁸ *TPT Patrol* (n 32) 338 [1529].

¹¹⁹ *I & L Securities* (n 19) 136 [85] (McHugh J), 153–4 [144] (Kirby J).

¹²⁰ *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274, 286–7 (Fisher, Gummow and Lee JJ).

As mentioned earlier, the *CCA* is aimed at the promotion of fair trading, competition, and consumer protection. These objectives should not be understood in any artificial sense. An informed plaintiff is not, for example, participating in trade or commerce in a ‘fair’ manner by opportunistically taking advantage of the ignorance of other market participants as to the misleading nature of, say, a financial report. Indeed, this would be *unfair* trading—the ability of the plaintiff to profit stems from their secret knowledge of the misleading nature of the financial report. Similarly, allowing an informed plaintiff to recover under section 236 cannot easily be described as ‘consumer protection’—from whom is the consumer being protected? While the plaintiff’s loss may be factually caused by the defendant’s misleading or deceptive conduct, the plaintiff made an informed decision to risk suffering loss. The *ACL* does not extend to the protection of consumers from their own risky investment decisions.

The above analysis does not, necessarily, dictate a construction of section 236 that prevents an informed plaintiff from recovering compensation for loss suffered by misleading or deceptive conduct. While the ability of an informed plaintiff to recover under section 236 would run contrary to the objects of the *CCA*, allowing a defendant whose conduct was misleading or deceptive to avoid liability under section 236 might *also* run contrary to the objects of the *CCA*. In this sense, it may be necessary to engage in a balancing exercise. Neither an informed plaintiff recovering damages, nor a guilty defendant avoiding liability for loss caused by their misleading or deceptive conduct, fits harmoniously with the *CCA*’s objects. However, there are at least two reasons to conclude the proper construction of section 236 requires denying an informed plaintiff recovery against a guilty defendant.

First, the *ACL* creates offences relating to misleading representations and conduct when deemed necessary.¹²¹ Accordingly, there is no reason to read section 236 as having a punitive function.¹²² A defendant does not fail to be punished for their misleading or deceptive conduct in circumstances where an informed plaintiff is denied recovery under section 236. Thus, there is no glaring

¹²¹ See *ACL* (n 6) ch 4 div 1.

¹²² *I & L Securities* (n 19) 45 [141].

injustice in allowing a defendant to avoid liability in circumstances involving an informed plaintiff. Secondly, and relatedly, as was mentioned earlier the ACCC can seek a range of non-punitive orders against a person whose conduct is misleading or deceptive, even if no third party was awarded damages under section 236. Once again, this possibility reduces any apparent injustice in allowing a defendant to avoid liability under section 236 when the person seeking damages can be characterised as an informed plaintiff. A restriction upon the ability of an informed plaintiff to recover against a defendant does not involve implicitly condoning the defendant's contravention of the *ACL*.

For the reasons given above, it is at least arguable the *ACL* does not permit the recovery of damages by an informed plaintiff. As this conclusion is one of statutory construction, it cannot be neatly transferred to cases involving different statutory schemes. However, the above analysis has demonstrated one way to address the normative issues surrounding an informed plaintiff seeking an award of damages under, in this case, the *ACL*. The important point to take away from that analysis is that it is not possible to give these normative issues the attention they require when they are obscured by the language of causation. This will hold true regardless of the statutory scheme in focus.

VI CONCLUSION

The award of damages in cases of misleading or deceptive conduct involves asking two principal questions. The first question is whether, as a matter of historical fact, the defendant's misleading or deceptive conduct caused the plaintiff's loss. The second question involves asking whether the defendant's scope of liability extends to cover the award of damages sought by the plaintiff. This question is not a question of historical fact, but a normative question of scope of liability. Clearly delineating these separate enquiries has enabled this article to re-assess the role of reliance at both the factual causation and scope of liability stage in cases of market-based causation.

As this article has demonstrated, it is possible for a plaintiff to prove that a defendant's misleading or deceptive conduct caused the plaintiff's loss without demonstrating any reliance upon the misleading or deceptive conduct. This is

the case in both indirect and direct cases of causation. This article has further explained that the causal of reliance depends upon the pleaded causal link between a defendant's misleading or deceptive conduct and a plaintiff's loss. Consequently, in a case of market-based causation a plaintiff's reliance (or lack of reliance) on the misleading or deceptive conduct has no bearing on the enquiry into factual causation. Indeed, when considering whether misleading or deceptive conduct caused a market to do something that resulted in loss to a plaintiff, it is preferable that reference is not made to the concept of reliance. In rare instances, a plaintiff might make out factual causation in a case of market-based causation without demonstrating *anyone* relied upon the misleading or deceptive conduct. While the recovery of a plaintiff in such a case might be denied on normative grounds, it is important this decision is not framed as a conclusion about causation.

While the role of reliance in the factual causation enquiry has been overstated, the possible normative role of reliance has been given little attention. In considering whether reliance has a normative role as a possible restriction upon defendant liability, this article has proposed a model of reasoning for considering the issue under the *ACL*. The normative issues surrounding reliance are complicated, however, and different statutory schemes may place different degrees of emphasis upon reliance. There may also be genuine disagreement over the proper normative role of reliance. This is to be expected. The important point is that, in the interests of a coherent and transparent private law, the normative role of reliance should not be concealed within the factual causation enquiry. To that end, both the model of reasoning proposed in Part V, and the reasoning throughout the remainder of this article, is potentially relevant to factual causation and scope of liability enquiries throughout the private law generally.