The Gravitational Force of the Australian Consumer Law on Private Law Remedies and Judicial Reasoning

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The Australian High Court has recently and repeatedly emphasised the principle of coherence as an overarching requirement of private law. Although what such a principle entails is a matter of considerable complexity, this paper argues that it certainly requires us to take much more seriously the interplay between statute and common law as part of our everyday mode of legal reasoning when addressing private law disputes. The analysis suggests that it is highly desirable for statutes to be interpreted in the light of their surrounding general law context, because cognate common law principles may well provide guidance on the application of statutory provisions in a way that actively promotes the particular statutory purpose and, more broadly, supports a consistent approach across the private law. Conversely, courts should be cautious of applying common law doctrines without adverting to the impact of neighbouring or applicable legislative schemes. Most controversially perhaps, the analysis also suggests that statutes may properly and sometimes necessarily exert a significant ‘gravitational force’ on the ongoing development of the common law. The paper illustrates the thesis by reference to unique features of the Australian legal system, but also by reference to common law and equitable doctrines and patterns of legislation familiar across the Commonwealth.