

# *Exploring the Boundaries of Compensation for Misleading Conduct: The Role of Restitution under the Australian Consumer Law*

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## *Abstract*

The *Australian Consumer Law* ('ACL') provides a comprehensive suite of remedial orders available in response to conduct contravening the statutory prohibitions on misleading conduct. However, the potential remedial awards are constrained by the language of the statute, which appears to have an overriding compensatory focus. This limitation presents a significant challenge to courts seeking to make meaningful reparation to victims of significant or intentionally misleading conduct in cases where their 'loss or damage', as commonly conceptualised, is either difficult to assess or wholly absent. This article explores compensatory and other orders for contraventions of the prohibition on misleading conduct in light of these boundaries. In particular, the analysis considers the broader characterisation taken by courts to the concept of 'loss or damage' under s 237 of the *ACL*, which has underpinned the award of orders akin to rescission and restitution. The article also examines the nature of and justifications for remedies awarded on a 'user principle' for misleading conduct.

## **I Introduction**

The variety of orders that may be made under the *Australian Consumer Law* ('ACL')<sup>1</sup> in favour of victims of misleading conduct in contravention of s 18 and its

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<sup>1</sup> *Competition and Consumer Act 2010* (Cth) sch 2 ('ACL'). Section 18 of the *ACL* replaced *Trade Practices Act 1974* (Cth) s 52 ('TPA').

analogues,<sup>2</sup> has seen the regime likened to a remedial ‘smorgasbord’,<sup>3</sup> offering courts a range of options that go well beyond what is commonly on offer at general law.<sup>4</sup> However, a constraining feature is the scope of the permitted orders, which must be designed to ‘compensate’,<sup>5</sup> ‘redress’,<sup>6</sup> or ‘prevent or reduce’<sup>7</sup> the plaintiff’s ‘loss or damage’<sup>8</sup> arising ‘because of’<sup>9</sup> the defendant’s misleading conduct.<sup>10</sup> This requirement to compensate, redress, or prevent or reduce loss presents a significant challenge to courts seeking to make meaningful reparation to victims of significant or intentionally misleading conduct in cases where their ‘loss or damage’, as commonly conceptualised, is either difficult to assess or wholly absent. Nor are these cases purely hypothetical or overwhelmingly rare: to the contrary, looking across the spectrum of doctrines responding to misleading conduct at common law, equity and under statute, the authorities are replete with examples.

For present purposes, two scenarios may suffice to illustrate the gaps exposed by the statutory remedial regime. In Scenario One, a plaintiff purchases a perfectly serviceable and cost-effective washing machine in reliance on the defendant’s false representation that it is made in Australia. The evidence is clear that the plaintiff needed a washing machine and, had he wanted to purchase an alternative that was genuinely made in Australia, it would have been more expensive. Although the plaintiff has not received what he wanted from the transaction, there is no direct pecuniary loss to be made good — the washing machine is worth what the plaintiff paid for it. There is also no opportunity cost — the alternative transactions closed off by the decision to purchase the washing machine in question were in fact more costly. In Scenario Two, a celebrity’s image is used to promote the defendant’s products without her consent, with the deliberate aim of creating the false impression that she has endorsed the goods.<sup>11</sup> The evidence is clear that the celebrity never

<sup>2</sup> For examples of analogous provisions, see *Corporations Act 2001* (Cth) s 1041H; *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA. The ACL remedial orders are also available for contraventions of the more specific prohibitions contained in ACL ss 29–37. For the purposes of the analysis in this article, we focus on the remedial provisions in the ACL ss 236 and 237/243. These provisions replace TPA ss 82 and 87 respectively. For all relevant purposes the provisions are equivalent and hence, unless the context requires otherwise, reference is only made to the ACL.

<sup>3</sup> *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353, 366 (Mason P) (‘Akron’).

<sup>4</sup> These include the options of rewriting the contract, considered heretical at common law: see, eg, *Myddleton v Lord Kenyon* (1794) 30 ER 689, 698–9. But see *Vadasz v Pioneer Concrete (SA) Pty Ltd* for an example of the gravitational influence of the statutory options on the decision to order ‘partial rescission’ in equity of a contract induced by fraudulent misrepresentation: (1995) 184 CLR 102.

<sup>5</sup> ACL ss 237(2)(a), 238(2)(a).

<sup>6</sup> *Ibid* s 239(3)(a).

<sup>7</sup> *Ibid* ss 237(2)(b), 238(2)(b), 239(3)(b).

<sup>8</sup> *Ibid* ss 236–9.

<sup>9</sup> *Ibid* ss 237(2)(a), 237(1)(a), 238(2)(a). Note the different language in s 239(1)(b) (‘caused’) and s 239(3) (‘in relation to’).

<sup>10</sup> Discussed below in Part III.

<sup>11</sup> See, eg, *Wickham v Associated Pool Builders Pty Ltd* (1988) 12 IPR 567 (‘Tracey Wickham Case’); *10th Cantanae Pty Ltd v Shoshana Pty Ltd* (1987) 79 ALR 299, 319–23. See also Jeannie Paterson, Elise Bant and Gavin Rees, ‘They’re Using My Face: What Cosmetic Bloggers and the Cambridge Analytica Saga Tell Us about Protection from Misleading Conduct’ on The University of Melbourne, *Pursuit* (6 May 2018) <<https://pursuit.unimelb.edu.au/articles/they-re-using-my-face>>. Misleading conduct here often runs alongside claims of passing off. For a case of similar ‘false celebrity endorsement’ involving unauthorised use of music in breach of copyright in conjunction with a

would have agreed to license the use of her image to the defendant and she was not in the habit of making money from endorsements, but also that neither her reputation nor marketable ‘brand’ have been tainted by the misleading association. Again, although the celebrity is unhappy, there is no immediately apparent pecuniary loss. Her earning power has not been tarnished by the episode.

In both cases, we will see below that traditional analyses struggle to identify the nature and measure of any loss that may then become the subject of compensatory orders under the *ACL*. As we will also see, the plaintiffs might have success under the general law, but the disjuncture between statutory and general law claims undermines the role of the *ACL* in providing a relatively straightforward and comprehensive basis for relief in response to the prohibited conduct. Yet it seems clear that, unless appropriate orders are made, defendants will be able to employ with impunity patterns of misleading conduct as part of their business model, thereby confounding the twin purposes of the *ACL* to promote ‘fair trading and the provision of consumer protection’.<sup>12</sup> Although the regulator, the Australian Competition and Consumer Commission and the state and territory fair trading agencies, may seek pecuniary penalties against such defendants, its capacity to police and prosecute contravention of the prohibition is necessarily limited by its available resources.<sup>13</sup> An effective enforcement strategy needs to utilise the resources of both the regulator and private litigants.

It is against this background that this article seeks to explore the boundaries of compensatory and other orders for contraventions of the prohibition on misleading conduct under s 18 of the *ACL*. Contraventions of the prohibition may be addressed by private claims for damages under s 236 or wide-ranging ‘compensation orders’ under ss 237–9,<sup>14</sup> all of which respond to loss or damage suffered because of the defendant’s misleading conduct. As we will see, commonly the awards will address pecuniary loss, such as where the plaintiff paid too much for a product, or lost profits as a result of the defendant’s contravention. However, gain-based relief that is restitutionary in nature or effect has also long been available to redress loss or damage suffered because of misleading conduct, in particular pursuant to the suite of remedies listed in s 243 of the *ACL*.<sup>15</sup> This is so despite the apparent compensatory focus of the remedial regime.

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political campaign, see *Eight Mile Style LLC v New Zealand National Party* [2017] NZHC 2603 (25 October 2017) (*‘Eight Mile Style’*).

<sup>12</sup> *Competition and Consumer Act 2010* (Cth) s 2.

<sup>13</sup> See Commonwealth of Australia, *Resources and Guides* (2019), Australian Consumer Law <<http://consumerlaw.gov.au/business-and-the-acl/>>.

<sup>14</sup> Illustrations of the kinds of orders that courts may make under these powers are set out in *ACL* s 243, previously found in the *TPA* s 87(2).

<sup>15</sup> For present purposes, restitutionary orders may be distinguished from disgorgement awards. Restitution denotes an order requiring the defendant to ‘give back’ the objective or market value of some benefit obtained from the plaintiff. Disgorgement awards require a defendant to ‘give up’ a profit obtained as a result of the contravention, but which benefit has not necessarily come from the plaintiff’s assets or labour: see *Anderson v McPherson* (No 2) (2012) 8 ASTLR 321 (Edelman J); Justice James Edelman, James Varuhas and Simon Colton, *McGregor on Damages* (Sweet & Maxwell, 20<sup>th</sup> ed, 2018) ch 14. On whether disgorgement awards can or should be ordered under the *ACL*, see Elise Bant and Jeannie Marie Paterson, ‘Should Specifically Deterrent or Punitive Damages Be Made Available to Victims of Misleading Conduct under the *Australian Consumer Law*’ (2019) 25(2) *Torts Law Journal* 99.

Restitutionary remedies that have been awarded under the *ACL* include orders akin to equitable rescission<sup>16</sup> and orders for the refund of money or return of property. These enable courts to reverse transactions brought about as a result of the defendant's misleading conduct, even in cases (such as Scenario One) where the transaction is not financially disadvantageous to the plaintiff. A more contentious category of case involves the award of damages assessed by reference to the reasonable fee or royalty payable for the defendant's misleading use of the plaintiff's property without her consent. Damages assessed by reference to this so-called 'user principle' are commonly employed at common law, in equity and on occasion under the *ACL* in cases akin to Scenario Two. This article explores the boundaries in theory and in practice of a solely compensatory understanding of the statutory remedies, in light of the range of such orders made by courts in pursuit of the legislative direction to compensate, prevent or reduce loss or damage arising from misleading conduct.

Part II of the article outlines the approach preferred by most courts, and advocated here, to interpreting the ambit of the remedial provisions of the *ACL*. This Part briefly considers the differing conceptions of 'loss or damage' articulated in s 236, providing a right to compensatory damages for contraventions of s 18, in response to misleading conduct, as opposed to that found in s 259 responding to the consumer guarantee provisions. This analysis illustrates the ways in which the interpretive method employed by the courts operates to distinguish and restrict the two different remedial regimes. Ultimately, it favours a relatively confined meaning of loss or damage for the purposes of s 236 awards that focuses on 'actual' (rather than normative or theoretical) loss.

Parts III and IV consider the broader characterisation taken by courts to the concept of 'loss or damage' under s 237, which has underpinned the ready award of orders akin to rescission and restitution granted under the 'remedial smorgasbord'<sup>17</sup> offered by s 243. This sets the scene for the consideration, in Part V of the article, of the nature of and justifications for remedies awarded on a 'user principle' for misleading conduct. The article suggests that these orders are strongly restitutionary in nature, aligning most closely with the orders to rescind and refund. From this perspective, however, they occupy the outer fringes of even the most generous boundaries of compensation or other redress for 'loss or damage' recognised under s 237. In that context, the article concludes by reflecting briefly on the merits of statutory reform for two purposes: first, to provide express authority for courts' efforts to promote the instrumental aims of the *ACL* through restitutionary awards, including, for example, damages assessed by reference to a user principle; and second, to support coherence in the broader treatment of misleading conduct at common law, in equity and under statute.

In addressing these issues, the article draws on insights from cognate general law doctrines to the extent that they operate in a manner consistent with and supportive of the language and purpose of the *ACL*. For this purpose, the article seeks to locate the statutory remedies within their relevant legal context, which extends well beyond the familiar common law analogues of deceit and negligent

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<sup>16</sup> On the restitutionary nature of rescission, see below Part III.

<sup>17</sup> *Akron* (1997) 41 NSWLR 353, 366 (Mason P).

misstatement. As will be shown, equitable doctrines, the torts of passing off, defamation and injurious falsehood, as well as other statutory schemes concerned to, or apt to regulate misleading conduct, all offer useful guidance on the outer limits of compensatory and other relief responding to contraventions of the statutory prohibitions on misleading conduct in the *ACL*.

## II    **The Interpretive Method: Damages for Misleading Conduct and under the Consumer Guarantees Regime Compared**

In examining the conditions and justifications for the award of restitutionary relief under the *ACL*, this article proceeds on two bases. The first is that in interpreting the statutory remedies responding to misleading conduct under the *ACL*, general law '[a]nalogy ... is a servant not a master'.<sup>18</sup> Primacy must be given to the words and purpose of the statute. The second basis also accepts, however, that while general law analogies 'are not controlling ... they represent an accumulation of valuable insight and experience which may be useful in applying the Act'.<sup>19</sup> From these foundations, the starting point in applying the remedial regime must be the words and structure of the statute, interpreted in light of its purpose. Common law and equitable principles and doctrines may then properly be drawn upon where those principles and doctrines reflect and promote the aims of the statutory orders and are consistent with the statutory scheme as a whole. That is, while the Act must not be viewed as a mere codification of the general law, there may be a selective and tailored use of general law concepts, circumscribed to the extent that they reflect and promote the statutory language (including its arrangement or structure) and legislative purpose. The practical import of this approach can be readily illustrated through brief consideration of key remedial provisions of the *ACL* concerned with, respectively, misleading conduct (s 236) and the new consumer guarantee regime (s 259).

### A    ***Damages under ACL s 236 for Contravention of the s 18 Prohibition on Misleading Conduct***

In entitling a plaintiff, as of right,<sup>20</sup> to monetary compensation for loss caused by misleading conduct, s 236 provides a central source of relief for plaintiffs seeking pecuniary orders under the *ACL*:

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<sup>18</sup> *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 529 [103] (Gummow J) ('*Marks*').

<sup>19</sup> *Henville v Walker* (2001) 206 CLR 459, 470 [18] (Gleeson CJ) ('*Henville*').

<sup>20</sup> Remedies (including compensation) that may be available at the discretion of the court under *ACL* ss 237, 243 and the different conceptions of 'loss or damage' (the subject of those sections) are addressed from Part III of this article onwards.

### 236 Actions for damages

- (1) If:
- (a) a person (the *claimant*) suffers loss or damage because of the conduct of another person; and
  - (b) the conduct contravened a provision of Chapter 2 or 3;

the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

The meaning of ‘loss or damage’ under s 236 is undefined in the *ACL*. This has presented courts with an immediate interpretative challenge in determining the scope and application of the phrase. In that context, the common law and equity offer rich sources of insight into the potential meanings of those statutory terms. Further, by utilising such general and familiar terminology, and by failing to provide a particularised definition, it may be presumed that Parliament intended courts to draw on relevant general law concepts for guidance.<sup>21</sup> However, the task is not an open-ended one, in which courts may pick at random from general law conceptions of loss or damage. Rather, ‘[t]he task is to select a measure of damages which conforms to the remedial purpose of the statute and to the justice and equity of the case.’<sup>22</sup> Notwithstanding general acceptance of this starting point, courts have at times vacillated over the relevant analogical source.<sup>23</sup> The following analysis demonstrates the value of adopting an interpretive method that draws on general law concepts only to the extent that that are consistent with and promote the particular statutory language and purpose.<sup>24</sup>

When thinking about potential forms of loss or damage, the laws of contract and tort provide alternative (albeit not exhaustive)<sup>25</sup> paradigms for the law’s response to misleading conduct. Both commonly provide remedies for misleading conduct: in contract where the misrepresentation is incorporated into the agreement, and in tort through a raft of claims including deceit, negligent misstatement, defamation, passing off and injurious falsehood. The task is to determine which of these general law doctrines best aligns with and promotes the statutory language and purpose of the remedial provisions of the *ACL*.

<sup>21</sup> *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525 (Mason CJ, Dawson, Gaudron and McHugh JJ).

<sup>22</sup> *Henville* (2001) 206 CLR 459, 470 [18] (Gleeson CJ).

<sup>23</sup> See *Marks*, where the Court adopted a reliance-based measure, analogous to tort: (1998) 196 CLR 494. Cf *Murphy v Overton Investments Pty Ltd*, where the award for damages was akin to expectation measure, analogous to contract: (2004) 216 CLR 388.

<sup>24</sup> See also Elise Bant and Jeannie Paterson, ‘Statutory Interpretation and the Critical Role of Soft Law Guidelines in Developing a Coherent Law of Remedies in Australia’ in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 301.

<sup>25</sup> As Gummow J has observed, it is an error to think that ‘tort and contract compris[e] the universe of analogues offered by the general law in [TPA] s 52 cases’: *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)* (1987) 16 FCR 410, 420–1. See also *GIO Australia Holdings Ltd v Marks* (1996) 70 FCR 559, 582–3 (Foster J). On the gain-based remedial analogues beyond rescission and restitution for misleading conduct, see Bant and Paterson, ‘Should Specifically Deterrent or Punitive Damages Be Made Available’, above n 15.

It is well understood in the law of contract that expectation damages are a form of normative, not factual, loss.<sup>26</sup> Expectation damages make sense in a context where the legal order demands that contracts must be performed.<sup>27</sup> Where a misleading contractual warranty (for example, as to profit) has been breached, a plaintiff's dashed expectation of gain caused by the proscribed conduct constitutes 'loss' because the plaintiff not only *expected* the profit, but was *entitled* to it.

By contrast, the language of s 18 of the *ACL* does not go so far. Section 18(1) requires that defendants should not engage in misleading or deceptive conduct, not that they should perform their promises or make true their representations. Without loss of profit to which the plaintiff was *entitled*, the only loss suffered in cases of misleading or deceptive conduct relating to profitability is distress or disappointment.<sup>28</sup>

## **B     Damages under ACL s 259 for Failure to Comply with the Consumer Guarantees**

This response to the damages provision in s 236 can be contrasted with the remedial scheme under s 259<sup>29</sup> for failures to comply with the consumer guarantee provisions of the *ACL*.<sup>30</sup> The *ACL* follows the *TPA* in including a regime of minimum, non-excludable standards of quality that must be met by goods and services supplied to consumers. Unlike the *TPA*, however, the standards under the *ACL* apply as statutory rights, or 'consumer guarantees', rather than being embedded as implied terms in consumer contracts.<sup>31</sup> This shift in statutory design means that consumers cannot rely on the law of contract to provide a remedy in the event that goods or services supplied to them failed to comply with the consumer guarantees.<sup>32</sup> Accordingly, the *ACL* contains a remedial regime under s 259 that is specific to the consumer guarantees and different from that found in s 236.

Section 259 provides a primary right for consumers to seek a remedy for goods that fail to comply with the consumer guarantee regime, including

<sup>26</sup> L L Fuller and William R Perdue Jr, 'The Reliance Interest in Contract Damages: 1' (1936) 46(1) *Yale Law Journal* 52, 53.

<sup>27</sup> Justice Hayne discussed the nature of expectation damages in contract in *Clark v Macourt* (2013) 253 CLR 1, 7 [11]. See also *Marks* (1998) 196 CLR 494, 503 [16] (Gaudron J):

[O]nce it is appreciated that, for the purposes of the law of contract 'expectation' loss signifies the loss of a valuable right, namely, the contractual promise, it is irrelevant and quite misleading to ask whether, in the case of misleading and deceptive conduct under s 52 of the [*TPA*], ss 82 and 87 allow for 'expectation' loss or 'consequential' loss. It is irrelevant, because, if the misrepresentation is not contractual, there can be no loss of a contractual promise.

<sup>28</sup> On the limits on damages for personal injury, which has been interpreted to include disappointment and distress, see *ACL* pt 2-1.

<sup>29</sup> See Jeannie Marie Paterson, 'The Consumer Guarantee Remedial Regime: Some Uncertainties and the Role of Common Law Analogy' (2016) 33(3) *Journal of Contract Law* 210.

<sup>30</sup> *ACL* pt 3-2 div 1. See generally Jeannie Paterson and Kate Tokeley, 'Consumer Guarantees' in Justin Malbon and Luke Nottage (eds), *Consumer Law and Policy in Australia and New Zealand* (Federation Press, 2013) 97.

<sup>31</sup> Cf *Cameron v Ozzy Tyres Pty Ltd* [2015] NSWCATCD 68 (30 June 2015) [31], where the consumer guarantees were characterised as statutory implied terms.

<sup>32</sup> Jeannie Marie Paterson, 'The New Consumer Guarantee Law and the Reasons for Replacing the Regime of Statutory Implied Terms in Consumer Transactions' (2011) 35(1) *Melbourne University Law Review* 252.

requirements for the supplier to replace, repair or refund defective goods. Of particular interest for current purposes, however, is s 259(4), which provides for consequential loss arising from a failure to comply with a consumer guarantee:

The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

As for s 236, the language of ‘loss or damage’ is undefined. However, in this context it is clearly more appropriate to draw upon contractual analogy to give content to the protection arising from the statutory guarantees.<sup>33</sup> In contrast to the award of damages under s 236 for misleading conduct, the consumer guarantee provisions establish that the consumer is not merely protected from the consequences of misleading conduct, but, affirmatively, is entitled to goods that meet the mandatory standards of quality set out in the legislation. The primary remedies of replacement and repair are geared to fulfilling the consumer’s legitimate expectation of performance.<sup>34</sup> This echoes the contractual measure of relief. The trigger for the complementary award to damages is where goods *fail* to meet the mandated standard of quality. On this understanding, the remedial regime reflects that the consumer is entitled to the guaranteed quality of goods: the normative loss under the consumer guarantee provisions is the disappointed expectation. Consistently with this analysis, in *Barton v Transmissions and Diesels Ltd*<sup>35</sup> the District Court in Auckland (New Zealand) held that the general principle under remedial provisions of the *Consumer Guarantees Act 1993* (NZ), on which the consumer guarantee regime in the *ACL* was based,<sup>36</sup> is that the plaintiff should be placed, so far as money can do it, in the same position as if there had been compliance with the terms of the guarantee.

On this basis, it should be possible under s 259(4) to claim profits lost due to the deficient goods, provided that the loss was ‘reasonably foreseeable’.<sup>37</sup> Similarly, s 259(4) extends to damages to cover the costs of remedying a failure to comply with the consumer guarantees, a measure reminiscent of rectification damages that may be awarded in contract for the breach of an undertaking to repair or build. In both cases, as in contract, the provision protects consumers’ expectation interest, allowing them to obtain the outcome contracted for, or its closest equivalent in money, rather than merely an amount representing their actual, economic loss.<sup>38</sup>

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<sup>33</sup> Ibid.

<sup>34</sup> *ACL* ss 259(2), 261.

<sup>35</sup> [2001] DCR 412, 415 [7].

<sup>36</sup> See Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) [7.09].

<sup>37</sup> On this point, and notwithstanding the close analogy that the law of contract otherwise presents to the consumer guarantee remedial regime, the law of tort provides surer guidance on the statutory test: see Paterson, ‘The Consumer Guarantee Remedial Regime’, above n 29.

<sup>38</sup> *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 289 [18].



### C     Conclusion on Measuring ACL s 236 Damages

Consistent with the foregoing analysis, for the measure of loss or damage for misleading conduct under s 236, courts have generally refused to apply an expectation measure of damage by analogy with contract. Rather, the statutory measure is the extent to which a plaintiff is left ‘worse off’ by reference to the ‘actual’ loss suffered as a result of misleading conduct.<sup>39</sup> This sum is usually calculated in terms of ‘reliance loss’, by analogy with the tort of deceit<sup>40</sup> and negligent misstatement.<sup>41</sup> This tort-like measure is further supported by the language and structure of s 236, which directs courts to consider loss suffered *because of* (caused by) misleading or deceptive conduct.<sup>42</sup> This generally, but not always,<sup>43</sup> requires the examination of changes to the plaintiff’s position made *in reliance on* that conduct.<sup>44</sup> Reliance signifies causation in most contexts. Identifying loss flowing from, or caused by, acts of reliance is therefore a logical starting point for the statutory enquiry and generally will make the law of deceit and negligent misstatements more apt analogical sources than the law of contract.

This is not to say that a measure of damages equivalent to what would have been awarded for breach of contract cannot be awarded for contravention of the prohibition on misleading conduct. As Gaudron J explained in *Marks*, it may be that but for the misleading or deceptive conduct, a plaintiff would have entered into a contract that would have yielded the very benefit that was represented.<sup>45</sup> In this case, damages will be the same as if the representation had been contractual.<sup>46</sup>

If we return to the plaintiff in our opening Scenario One, who has purchased goods that do not meet the represented standard (in this case being made in Australia), under the Australian consumer protection regime he will have a choice of claim pathways. If the representation proves false, then the purchaser may pursue damages for misleading conduct. The normal measure of compensating reliance loss would suggest no loss, as there is no suggestion that the washing machine was overpriced. Alternatively, the consumer guarantee regime in the *ACL* renders a

<sup>39</sup> See *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 12 (Mason, Wilson and Dawson JJ); *Marks* (1998) 196 CLR 494, [54]–[56] 515–6 (McHugh, Hayne and Callinan JJ).

<sup>40</sup> See *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281, 291 (Brennan, Deane, Dawson, Gaudron and McHugh JJ); *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413, 460–1 [129] (Kirby and Callinan JJ).

<sup>41</sup> *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 11 (Mason, Wilson and Dawson JJ). The law of negligent misstatement has perhaps been under-utilised by courts to date: see 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.

<sup>42</sup> *Brown v Jam Factory Pty Ltd* (1981) 35 ALR 79; *Henville* (2001) 206 CLR 459.

<sup>43</sup> On the issue of non-reliance damages, see *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526; *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322, 352 [155]; 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.

<sup>44</sup> *Caffey v Leatt-Hayter (No 3)* [2013] WASC 348 (20 September 2013) [466]–[476] (Beech J).  
<sup>45</sup> (1998) 196 CLR 494, 504.

<sup>46</sup> *Collings Construction Co Pty Ltd v Australian Competition and Consumer Commission* (1998) 43 NSWLR 13.

supplier liable for ‘express warranties’,<sup>47</sup> which include representations made to induce a plaintiff to purchase the goods. Here, the purchaser might claim damages for a failure to comply with the consumer guarantees under s 259(4), which we have seen includes a forward-looking expectation measure. This may lead to a claim for the additional cost of purchasing a washing machine that does meet the represented standard (in this case being made in Australia).

### III Rescission and the Remedial Smorgasbord: *ACL* ss 237–9

Turning to ss 237–9 of the *ACL*, these provisions arm courts with the discretion to make a wide range of creative orders to remedy misleading conduct.<sup>48</sup> Section 243 of the *ACL*, which replicates the earlier provision under s 87 of the *TPA*, provides a non-exhaustive list of the kinds of orders that may be made:

#### 243 Kinds of orders that may be made

Without limiting section 237(1), 238(1) or 239(1), the orders that a court may make under any of those sections against a person (the respondent) include all or any of the following:

- (a) an order declaring the whole or any part of a contract made between the respondent and a person (the injured person) who suffered, or is likely to suffer, the loss or damage referred to in that section, or of a collateral arrangement relating to such a contract:
  - (i) to be void; and
  - (ii) if the court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (b) an order:
  - (i) varying such a contract or arrangement in such manner as is specified in the order; and
  - (ii) if the court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;
- (d) an order directing the respondent to refund money or return property to the injured person;
- (e) except if the order is to be made under section 239(1)—an order directing the respondent to pay the injured person the amount of the loss or damage;
- (f) an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that had been supplied by the respondent to the injured person;

<sup>47</sup> *ACL* s 59.

<sup>48</sup> *ACL* s 237 allows for claims by injured persons and the regulator on behalf of such persons. Section 238 allows for compensation orders arising out of other proceedings. Section 239 covers orders for non-party consumers.

- (g) an order directing the respondent, at his or her own expense, to supply specified services to the injured person;
- (h) an order, in relation to an instrument creating or transferring an interest in land, directing the respondent to execute an instrument that:
  - (i) varies, or has the effect of varying, the first mentioned instrument; or
  - (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first mentioned instrument.

Section 237(2) of the *ACL* ('Compensation orders etc on application by an injured person or the regulator') provides that any order made under s 243 'must be an order that the court considers will: (a) compensate the injured person, or any such injured persons, in whole or in part for the loss or damage; or (b) prevent or reduce the loss or damage suffered, or likely to be suffered'.<sup>49</sup> The repetition of 'loss or damage' in both subsections might be taken to mean that the primary aim of the orders is compensatory, responding to pecuniary loss arising from misleading conduct. But this may be an unduly narrow understanding of loss or damage in the context of the legislation and hence the potential remedial compass of the provision. Indeed, on its face, and in light of the section heading, the very juxtaposition (through 'or') under s 237(2) of orders that '(a) compensate ... or (b) prevent or reduce' loss or damage, taken together with the extension of preventative remedies under s 237(2)(b) to loss or damage 'likely' to be suffered, suggests that the section as a whole is not restricted to orders with a solely compensatory effect. This reading of s 237(2) is further supported by the range of illustrative orders listed in s 243. Finally, if those orders are intended to ensure that meaningful redress is afforded to victims of misleading conduct, it is highly unlikely that the remedial purpose of s 237 can be restricted solely to compensatory awards.<sup>50</sup>

It is striking that from early days, the statute has been employed to grant rescission-like remedies, in particular pursuant to a combination of *ACL* ss 243(a), (c) and (d). This is so notwithstanding that equitable rescission operates to effect restitution and counter-restitution of benefits conferred pursuant to the impugned transaction. That is, the aim is to require the parties to give back (make restitution of)<sup>51</sup> benefits received from the other, rather than provide compensation as that concept is understood in the law of torts. The equitable orders consequent on rescission commonly include orders for restitution of the use-value of all benefits

<sup>49</sup> *ACL* ss 238–9 are to similar effect.

<sup>50</sup> See, eg, *Tenji v Henneberry & Associates Pty Ltd* (2000) 98 FCR 324, 333–4 [20] (French J) ('*Tenji*'): Rescission in equity transcends compensation. Avoidance under [*TPA*] s 87 must serve a compensatory purpose but may serve other purposes in doing justice between the parties. There are cases in which a party who enters a contract as a result of misleading or deceptive conduct may be compensated in a pecuniary sense by an award of monetary damages but is left nonetheless with a continuing burden of unforeseen risk, a transaction soured by the events that surrounded it and a property, once the repository of hope for the future that is now an albatross around its neck.

<sup>51</sup> Restitution in this sense is distinguished from disgorgement damages or the order following an account of profits, which require a defendant to give up defined benefits to the plaintiff, whether or not they were transferred from the plaintiff: see Edelman, Varuhas and Colton, above n 15. See also further discussion below in Part VA.

received by the parties under the impugned transaction, usually in the form of interest on the purchase price and a rate of reasonable market hire or rent for any transferred asset.<sup>52</sup> These orders cannot be regarded as compensatory in nature. This is demonstrated by the fact that, at general law, compensation cannot be sought cumulative upon rescission unless the plaintiff pleads and proves the independent tort that supports compensation as a remedy.<sup>53</sup> Further, it will be noted that none of the orders listed in s 243 adopt the language of rescission. Nor do they refer to other related concepts such as election, affirmation, counter-restitution or the requirement of *restitutio in integrum*.

Notwithstanding, the equitable remedy of rescission has long been considered to constitute a powerful, albeit not binding, guide to the relevant considerations that should inform the making of analogous orders under the provision. Thus in the seminal decision of *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)*, Lockhart J noted that '[i]n granting a remedy under [ACL ss 237/243], the court is not restricted by the limitations under the general law of a party's right to rescind for breach of contract or misrepresentation'.<sup>54</sup> Nonetheless, it was appropriate and indeed necessary to consider in that case whether *restitutio in integrum* was possible in exercising the statutory discretion, as required for rescission at general law, given the plaintiff's long delay in pursuing relief and the irretrievably altered circumstances surrounding the transaction.<sup>55</sup> That same year, the Full Court of the Federal Court in *Munchies Management Pty Ltd v Belperio* drew on the leading High Court authority on equitable rescission, *Alati v Kruger*,<sup>56</sup> to explain why, on the facts of that case, considerations of *restitutio in integrum* constituted no bar to equivalent statutory relief stating 'equitable principles concerning rescission give safe, if not necessarily exclusive, guidance'.<sup>57</sup> To similar effect is Gummow J's observation in *Marks* that the provisions created 'new remedies which have an affinity to the equitable remedies of rescission and rectification',<sup>58</sup> however '[t]he principles regulating the administration of equitable remedies afford guidance for, but do not dictate, the exercise of the statutory discretion conferred by s 87 [ss 237/243]'.<sup>59</sup>

Courts have reconciled the restitutionary nature of orders of rescission made under ACL ss 237/243 with the statutory scheme through close analysis of the terms of those provisions, the structure of the remedial scheme and the protective purpose of the statute.<sup>60</sup> Courts have recognised that it would be possible to embrace an

<sup>52</sup> See, eg, *Brown v Smitt* (1924) 34 CLR 160; *Alati v Kruger* (1955) 94 CLR 216.

<sup>53</sup> *Sibley v Grosvenor* (1916) 21 CLR 469, 475 (Griffith CJ); *Redgrave v Hurd* (1881) 20 Ch D 1, 12 (Jessel MR), 26 (Lush LJ), discussed in Elise Bant, 'Rescission, Restitution and Compensation' in Simone Degeling and Jason N E Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, 2017) 277.

<sup>54</sup> *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546, 564.

<sup>55</sup> *Ibid.*

<sup>56</sup> (1955) 94 CLR 216.

<sup>57</sup> *Munchies Management Pty v Ltd v Belperio* (1988) 58 FCR 274, 288 ('*Munchies*').

<sup>58</sup> *Marks* (1998) 196 CLR 494, 535 [116]. See also *Tenji* (2000) 98 FCR 324, 329–30 [12] (French J).

<sup>59</sup> *Marks* (1998) 196 CLR 494, 535 [116] (Gummow J) (citations omitted).

<sup>60</sup> The chain of development is addressed in Elise Bant and Jeannie Marie Paterson, 'Misleading Conduct before the Federal Court: Achievements and Challenges' in Pauline Ridge and James Stellios (eds), *The Federal Court's Contribution to Australian Law: Past, Present and Future* (Federation Press, 2018) 165.

expansive approach to *ACL* s 236, ‘giving “recover” the sense of *regaining through restitution a position lost* by the conduct complained of.’<sup>61</sup> However, given the established approach to s 236 damages, which are awarded as of right, the better solution (and one accommodated by the language and structure of the remedial scheme) is to adopt this more expansive approach under ss 237 and 243. There, the courts’ remedial discretion clearly embraces orders akin to rescission, regaining through restitution a position lost and thereby ‘reducing’ the loss or damage suffered because of misleading conduct.<sup>62</sup>

The leading case on the broad meaning of loss or damage under *ACL* ss 237/243 is *Demagogue*.<sup>63</sup> Chief Justice Black there explained that the language and structure of the statute, taken as a whole, demonstrated that ‘the loss or damage contemplated by [s 237] is not limited to loss or damage in the [*ACL* s 236] sense but was intended to include the detriment suffered by being bound to a contract unconscionably induced’.<sup>64</sup> Justice Gummow separately agreed,<sup>65</sup> adding:

It may well be that in a given case the contract is not financially disadvantageous to the complainant. But, at least in Australia, if a contract is rescinded in equity for some vitiating factor in its formation, it is not sufficient for the defendant to show that the transaction to which the complainant was improperly induced to assent, after all, contained terms which, viewed objectively, were not manifestly disadvantageous so that, the complainant should freely have accepted them. ... It would be an odd result if s 87 and s 4K were to be read in a contrary sense by giving too narrow a meaning to the phrase ‘loss or damage’.<sup>66</sup>

Justice Cooper likewise considered that “‘loss or damage” in *ACL* s 237 means no more than the disadvantage which is suffered by a person as the result of the act or default of another in the circumstances provided for in the section’.<sup>67</sup> Orders designed to prevent or redress loss or damage must be viewed in light of the purpose of the provisions:

That object mirrors the approach of equity in the case of equitable fraud or unconscionability. The granting of equitable relief in those circumstances is not ‘to extend sympathetic benevolence to a victim of undeserved misfortune’ but ‘one which denies to those who have acted unconscientiously the fruits of their wrongdoing’.<sup>68</sup>

The orders made by courts effecting statutory rescission under s 243 of the *ACL* reflect this broad, policy-driven conception of ‘loss or damage’ under s 237 of the *ACL*. This generous characterisation of detriment permits courts to consider, as relevant factors in crafting orders for relief, whether the plaintiff would suffer harm

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<sup>61</sup> *Munchies* (1988) 58 FCR 274, 287 (emphasis added), cited with approval in *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 45 (Gummow J) (*‘Demagogue’*); *Metz Holdings Pty Ltd v Simmac Pty Ltd (No 2)* (2011) 216 IR 116, 257 [865] (Barker J). See also *Karmot Auto Spares Pty Ltd v Dominelli Ford (Hurstville) Pty Ltd* (1992) 35 FCR 560, 573 (Heerey J).

<sup>62</sup> *Ibid.*

<sup>63</sup> (1992) 39 FCR 31.

<sup>64</sup> *Ibid.* 33.

<sup>65</sup> *Ibid.* 43.

<sup>66</sup> *Ibid.* 43–4.

<sup>67</sup> *Ibid.* 47 (citations omitted).

<sup>68</sup> *Ibid.* 48 (citations omitted).

in the absence of, or indeed as a result of, the award.<sup>69</sup> The particular focus of the enquiry, as for equitable rescission, seems to be whether it is possible to return the parties to their former positions, so preventing or reducing loss or damage. To that end, for example, courts routinely apply change of position-style considerations to protect rescinding plaintiffs from being placed without justification (such as plaintiff fault or risk-taking once they become aware that the defendant's conduct was misleading) in a worse position than they occupied prior to the impugned transaction.<sup>70</sup>

This reasoning would suggest that our erstwhile plaintiff in Scenario One, the unhappy recipient of a functional washing machine that was not made in Australia, might be afforded redress by being released from the bargain and left free to pursue another.<sup>71</sup>

#### IV Restitution under *ACL* s 243: Refunds and Orders to Return

The discussion so far has explored how tailored consideration of appropriate general law doctrines regulating misleading conduct can provide useful guidance on the statutory measures of loss or damage under the *ACL*. Part III of this article introduced the award of restitutionary relief by tracing how courts have married the restitutionary nature of statutory orders akin to rescission with the remedial purpose of ss 237 and 243 orders. This section considers further orders found under s 243 that may be regarded as restitutionary in nature, before turning to consider, in Part V, the nature and role of user-damages under the *ACL*.

Consistent with the earlier discussion of rescission, the language of restitution is used in this Part to mark an award that reverses a transfer of benefit from plaintiff to defendant. An order of restitution requires the defendant to 'give back' the objective or market value of a benefit obtained from the plaintiff.<sup>72</sup>

On this definition, s 243 of the *ACL* contemplates what, at face value, appear to be restitutionary awards: thus, s 243(d) cites 'an order directing the respondent to refund money or return property to the injured person'. Further, following the broad characterisation of loss or damage embraced in the cases discussed previously concerning statutory rescission, it is possible to conceptualise such awards as involving compensation as 'recovery ... [in] the sense of regaining through restitution a position lost'.<sup>73</sup> The orders 'prevent or reduce' loss or damage to the plaintiff by returning her or him vis-à-vis the contravener to the position she or he occupied prior to the misleading conduct.

On this analysis, the relevant end-point of orders to refund and return may be different to the tortious and more expansive compensatory measure generally

<sup>69</sup> See, eg, *Munchies* (1988) 58 FCR 274, 287–9; *Akron* (1997) 41 NSWLR 353, in particular the judgment of Mason P.

<sup>70</sup> The same change-of-position considerations are also at work in equitable rescission: see, eg, *Coastal Estates Pty Ltd v Melevende* [1965] VR 433, 440–1 (Sholl J); Bant, 'Rescission, Restitution and Compensation', above n 53, 287–90, 298.

<sup>71</sup> Cf the similar result reached through the consumer guarantees regime, discussed above Part II(B).

<sup>72</sup> See also below n 86 and accompanying text.

<sup>73</sup> *Munchies* (1988) 58 FCR 274, 287–8.

applicable under s 236, which seeks to place the plaintiff in the position she or he would have held had the misleading conduct not occurred at all. That section's tort-like enquiry is hypothetical and wide-ranging, potentially capturing a variety of consequential losses; by contrast, the restitutionary approach underpinning s 243 orders of refund and return may be limited to a more historical and restrictive enquiry, restricted to reversing the impugned transaction to restore the parties to their former position.<sup>74</sup> In some cases, however, it may be possible that orders enabling recovery of the plaintiff's former position and compensation in a more strict, tortious sense will equate. For example, a payment made as a result of a misleading representation may leave a consumer out of pocket in an equivalent amount.<sup>75</sup> In that scenario, any order for refund or return will effect both restitution and compensation.

Two early cases give a flavour of the circumstances that may attract these awards. In *Haydon v Jackson*,<sup>76</sup> the plaintiffs purchased a motel business as a result of the defendants' misleading conduct relating to the takings of the motel and as to its occupancy rate. The complex arrangements agreed by the parties at base resulted in the plaintiff making overpayments for rent and the goodwill of the business. The trial judge made orders relieving the purchasers from the obligation to make further payments relating to goodwill and ordered the defendants to repay the value of the overpayments.<sup>77</sup> On appeal, Fisher J (Lockhart J concurring) considered that TPA s 87(2) (now s 243(4) of the ACL) justified the orders to repay, together with interest on the amount of the repayment. However, the Court varied the trial judge's orders, suggesting that orders should be directed to the particular defendant who had received the overpayments (a party 'involved in' the contravention) rather than the parties who had directly engaged in the misleading conduct.<sup>78</sup> In making the variation, Fisher J observed that '[a]lthough on the face of it there is a discretion in the provision as to who is to be ordered to refund, there is little doubt that that person should be the person who has received the money which is ordered to be refunded'.<sup>79</sup>

This analysis is wholly consistent with a defendant being required to 'give back' a benefit — including the benefit of the use of the money (interest) on the initial amounts of the overpayments — received from the plaintiff. It is also consistent with the monetary adjustments consequent on rescission discussed earlier, which reflect an award for the use-value of money or other primary benefits transferred under the impugned transaction.<sup>80</sup>

<sup>74</sup> Bant, 'Rescission, Restitution and Compensation', above n 53, 282.

<sup>75</sup> *Fenech v Sterling* (1985) 61 ALR 465, 469 (Beaumont J), approved in *Haydon v Jackson* [1988] ATPR ¶40-845, 49, 101 (Fisher J). See also *Sanrod Pty Ltd v Dainford Ltd* (1984) 54 ALR 179, 191 (Fitzgerald J) ('*Sanrod*').

<sup>76</sup> [1988] ATPR ¶40-845.

<sup>77</sup> *Ibid* [49095], [49099].

<sup>78</sup> *Ibid* [49101].

<sup>79</sup> *Ibid*.

<sup>80</sup> Given this longstanding practice, the United Kingdom ('UK') Supreme Court's recent re-characterisation of interest awards on principal sums that are the subject of orders of restitution as compensatory in nature must be open to serious doubt: see *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] 3 WLR 652. For the former and, it is submitted, correct position, see *Sempre Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561; *Littlewoods Retail Ltd v HM Revenue & Customs* [2014] EWHC 868 (Ch) (28 March 2014) [372] (Henderson J). The restitutionary nature of interest in this context is the subject of detailed consideration in *Heydon v NRMA Ltd (No 2)* (2001) 53 NSWLR 600, 603–10 [12]–[36] (Mason P); *Lahoud v Lahoud* [2010]

In determining that interest should also be included in the award, Fisher J approved the 1984 case of *Sanrod*, where Fitzgerald J had stated:

I can myself perceive no difficulty in accepting that, when money is paid in consequence of misleading conduct, the loss suffered by that conduct includes not only the money paid but also the cost of borrowing that money or the loss from its investment, as the case may be ... Interest awarded as a component of damages in such circumstances is not for loss of the use of the money awarded as damages, but for loss of the use of the money paid over in consequence of the misleading conduct and is directly related to the misleading conduct.<sup>81</sup>

While the discussion is framed in terms of compensation and loss, in the following paragraph, Fitzgerald J had further observed:

The absurdity of any other conclusion is well indicated by the present case. The guilty respondent in fact had the use of the deposit monies and received interest on them to the date of termination of the contract totalling \$6320.38. It will scarcely advance the object of the Act to provide a corporation which engages in misleading conduct with a narrow construction of ss. 82 and 87 upon which it can rely to retain the fruit of any monies which it acquires by its contravention while denying an innocent party who has done no more than make payments the right to recover anything more than has actually been paid over.<sup>82</sup>

Thus, although framed in terms of compensation for loss, both cases also sought to ensure the return of the benefit (the ‘fruit’) received by the defendant from the plaintiff. Recognition of the awards as restitutionary in nature would help to explain why courts have not generally been concerned to enquire whether the transfer of benefit was matched with a corresponding financial loss — an enquiry that we have seen earlier would normally be required for compensatory awards. It is enough to satisfy the broad conceptualisation of ‘loss’ under s 237 that the award is required to reverse the impugned transaction, preventing loss to the plaintiff (and thus providing redress to the plaintiff) by taking steps to restore the parties, vis-à-vis each other, to their former positions. The ultimate award granted by Fitzgerald J is also consistent with this generous and not overly technical approach.<sup>83</sup> The amount of the deposits that had been received by the defendant in the case was some \$42 000. The interest actually earned by the defendant recipient was (as stated above) some \$6 300. The final order was in the sum of \$50 000. No evidence was brought by the plaintiff as to the actual value of the ‘loss of the use of the money to the plaintiff paid over in consequence of the misleading conduct’.<sup>84</sup> In that light, it appears that the ultimate award reflected neither the defendant’s subjective gain, nor the plaintiff’s subjective loss. Rather, the Court ordered restitution of a sum that reflected the fair or objective value of the use of the plaintiff’s money by the defendant.

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NSWSC 1297 (10 November 2010) [117]–[149] (Ward J), followed in *Copuss Pty Ltd v Nix* [2012] NSWSC 671 (20 June 2012). See also *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSC 76 (6 March 2015) [220]–[246] (Sloss J).

<sup>81</sup> (1984) 54 ALR 179, 191 (Fitzgerald J).

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*



## V     Damages Calculated by Reference to a ‘User Principle’: Compensation, Restitution or Both?

Parts III–IV of this article mapped the award of restitutionary remedies under the *ACL*. The remaining Parts press that analysis further, to explore the boundaries and nature of user damages and their award under the *ACL*. In Part V, we return to the type of conundrum raised by the Scenario Two in our introduction, the case in which the defendant has wrongfully benefited from her conduct in using the plaintiff’s image without permission, but without causing any pecuniary loss to the plaintiff.<sup>85</sup>

In examining the nature and forms of these orders, the article again seeks guidance from the surrounding law regulating misleading conduct, but casts its net beyond solely rescission, deceit and negligent misstatement to encompass torts such as injurious falsehood, defamation and passing off, as well as other statutory schemes that address misleading conduct. Throughout, the aim is to determine the extent to which these forms of relief are consistent with and support the statutory language and purpose of the *ACL*.

### A     *User Damages: A Brief Overview*

In Part IV of this article, we saw that orders to refund made under s 243(d) in response to misleading conduct appear restitutionary in nature, in that they require the defendant to ‘give back’ the objective value of benefits received by the defendant. An implication of this measure of restitutionary orders is that they are to be distinguished from orders for disgorgement of the *actual or subjective* benefit obtained by a defendant from using the received benefit. Disgorgement orders may be more than market value and so the subject of an account of profits that may, in turn, be subject to allowances with respect to defendant’s particular time, skill and effort expended in generating the profit.<sup>86</sup> The defendant’s subjective gain may also be less than market value. Nonetheless, in this case, if restitution is sought by way of remedy, the measure of gain remains objective<sup>87</sup> and the question becomes whether the defendant is entitled to any defence such as change of position.<sup>88</sup> Restitution operates to return or restore the parties to their former position by unwinding the transfer of benefit to the defendant. Understood in this way,

<sup>85</sup> See also the discussion of Gummow J in *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)* identifying analogous forms of equitable relief by way of restitution in comparable circumstances of misleading conduct: (1987) 16 FCR 410, 420–1.

<sup>86</sup> *Anderson v McPherson (No 2)* (2012) 8 ASTLR 321, 353 [226] (Edelman J); *Warman International Ltd v Dwyer* (1995) 182 CLR 544. The possibility of disgorgement damages under the statute is the subject of Bant and Paterson, ‘Should Specifically Deterrent or Punitive Damages be Made Available’, above n 15.

<sup>87</sup> For this reason, the ‘user principle’ authorities discussed below have often emphasised that the market value may well exceed the benefit actually received by a defendant from wrongful use of the plaintiff’s property: see, eg, the cases and principles discussed in *Winnebago Industries Inc v Knott Investments Pty Ltd (No 4)* (2015) 241 FCR 271, 285–92 [38]–[63] (‘*Winnebago (No 4)*’). In the context of the tort of trespass, see, eg, *Inverugie Investments Ltd v Hackett* [1995] 3 All ER 841.

<sup>88</sup> Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) 171, 210. For an example of a scenario where change-of-position considerations affected the usual user award in a case of equitable rescission, see *Coastal Estates Pty Ltd v Melevende* [1965] VR 433, 440–1 (Sholl J); Bant, ‘Rescission, Restitution and Compensation’, above n 53, 287–90, 298.

restitutionary orders may be seen as consistent with the aim of orders under s 237 to ‘prevent or reduce’ loss suffered because of misleading conduct, by restoring the plaintiff in substance to her position prior to the misleading conduct.

This Part considers cases where the defendant is ordered to pay the plaintiff a reasonable fee, licence or royalty for the wrongful use of the plaintiff’s assets in association with misleading conduct.<sup>89</sup> This kind of award is very common at general law. It is found in a range of variously-named common law awards such as ‘wayleave’ damages, mesne profits, reasonable royalties, reasonable licence fees and damages on a ‘user principle’, all of which appear to respond equally to wrongful use of land, goods or intellectual property.<sup>90</sup> From a certain perspective, this class of order shares the same sort of restitutionary pattern as found in cases of statutory rescission and refund discussed earlier in Part IV: the defendant is required to give back to the plaintiff the market value of the benefit received from wrongful use of the plaintiff’s property.<sup>91</sup> As with orders of restitution for unjust enrichment, the measure does not focus on the defendant’s actual profit obtained from the use:<sup>92</sup> however spectacularly successful, or indeed inept or marginal the use has been, the defendant must pay the reasonable (usually market) price or rate of hire for the privilege of using the plaintiff’s property. This is consistent with the established practice in cases of equitable rescission, discussed earlier. Any plea by the defendant that this award should be discounted to reflect detriment she or he has suffered as a result of her or his actual use of the benefit, for example by placing the money under her or his bed or donating it to charity, raises difficult change-of-position considerations that must be assessed in light of the nature of the wrong, the culpability of the defendant and overriding issues of stultification and coherence in the law.<sup>93</sup> The otherwise strict and objective primary measure of restitution closely matches the form of award commonly made in cases of ‘user damages’.

That having been said, it is important to note from the outset that, at least in some cases, user damages will be squarely compensatory. This will be so where the plaintiff can demonstrate a lost opportunity arising from the wrong, for example that it would have licensed the use of the property to the defendant, or gave up the opportunity to license the property to a third party, as a result of the defendant’s misleading conduct.<sup>94</sup> By contrast, in other scenarios where these awards traditionally have been routinely ordered, it is not easy to accommodate a compensatory analysis. The evidence may be clear that the defendant never would

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<sup>89</sup> The factual circumstances in which these awards may be relevant vary widely, from misleading ‘celebrity endorsement’ cases, such as the *Tracey Wickham Case* (1988) 12 IPR 567, to: cases involving counterfeit goods or trade mark infringement, as in the *Winnebago* litigation discussed below; misleading representations of business association cases, as in *Harcourts WA Pty Ltd v Roy Weston Nominees Pty Ltd (No 5)* (2016) 119 IPR 449 (*‘Harcourts (No 5)’*); and the more removed scenario found in the *Larrikin Music* litigation, discussed below in Part V(A).

<sup>90</sup> For a detailed examination, see Edelman, Varuhas and Colton, above n 15, chs 14, 47.

<sup>91</sup> See above Part III.

<sup>92</sup> This measure would be the focus of an account of profits or ‘disgorgement damages’.

<sup>93</sup> The main authorities and analyses are considered in *Cavenagh Investment Pte Ltd v Kaushik Rajiv*, which ultimately adopted the analysis in Bant, *The Change of Position Defence*, above n 88: [2013] 2 SLR 543, 568–71 [60]–[64] (Chan Seng Onn J) (High Court).

<sup>94</sup> The second category of damages identified in *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd* [1975] 1 WLR 819, 824–6 (Lord Wilberforce) (*‘General Tire’*).

have paid to use the property,<sup>95</sup> or the plaintiff never would have agreed to license its use by the defendant, as in Scenario Two regarding celebrity product endorsement. This latter scenario arose in *Aristocrat Technologies Australia Pty Ltd v DAP Services (Kempsey) Pty Ltd (in liq)*.<sup>96</sup> The plaintiff had elected ‘damages’ over an account of profits as its remedy for breach of copyright under s 115(2) of the *Copyright Act 1968* (Cth). Emphasising the compensatory aims of damages under the statutory provision, but without further discussion of the point, the Full Federal Court of Australia held that ‘a royalty does not provide the appropriate measure of damages where the copyright owner would not have granted a licence’.<sup>97</sup>

As we will see, this restrictive approach to compensatory relief taken under the *Copyright Act 1968* (Cth) in cases where the plaintiff would not have licensed the use of its intellectual property has not been adopted in the context of the *ACL*. The aim of Part VB of this article is to explore the nature and propriety of user damages awarded for misleading conduct where actual financial loss on the part of the plaintiff cannot be established,<sup>98</sup> to determine whether such damages are appropriate and justified in light of the overarching compensatory and protective purposes of the *ACL* remedies. To this end, the analysis will take guidance from the operation of user damages in the surrounding and relevant general law and statutory context. A good example of a case in which user damages were awarded for breach of s 52 of the *TPA* (*ACL* s 18) arose from the *Larrikin Music* litigation.<sup>99</sup> The litigation over issues of copyright infringement was prolonged and contentious.<sup>100</sup> However, the ultimate award of user damages under s 82 of the *TPA* was neither contested nor challenged on appeal. The decision on damages has since been cited with approval by courts in Australia<sup>101</sup> and overseas<sup>102</sup> that have awarded user damages in cognate fields, in the absence of proof of financial loss on the part of the plaintiff.

<sup>95</sup> See, eg, *Irvine v Talksport Ltd* [2003] 2 All ER 881, a case of passing off where the Court of Appeal overturned the trial judge’s award measured by reference to what the defendant would have been prepared to pay and substituted a reasonable fee calculated by reference to the value of earlier endorsements agreed by the plaintiff.

<sup>96</sup> (2007) 157 FCR 564 (*‘Aristocrat’*).

<sup>97</sup> *Ibid* 569 [27].

<sup>98</sup> Cf the position where actual loss has occurred but cannot be measured, where restitutionary relief has also been found to be appropriate under *ACL* ss 237, 243 and equivalent provisions: *Donald Financial Enterprises Pty Ltd v APIR Systems Ltd* (2008) 67 ACSR 219, 289–93 [177]–[192] (Edmonds J), upheld on appeal in *APIR Systems Ltd v Donald Financial Enterprises Pty Ltd* [2009] FCAFC 45 (9 April 2009) [54]–[57]; *Clifford v Vegas Enterprises Pty Ltd (No 5)* (2010) 272 ALR 198, 273–9 [423]–[455] (Barker J); *Rapid Roofing Pty Ltd v Natalise Pty Ltd* (2007) 2 Qd R 335, 360–1 [80]–[83] (Keane JA); *Stumer Investments Pty Ltd v Azzura Holdings Pty Ltd* [2010] QSC 352 (20 September 2010) [40] (McMurdo J); *Grande Enterprises Ltd v Pramoko* [2014] WASC 294 (22 August 2014) [89]–[91] (Le Miere J).

<sup>99</sup> *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd* (2009) 179 FCR 169; *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd* (2010) 263 ALR 155; *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd (No 2)* (2010) 188 FCR 321 (*‘Larrikin Music (No 2)’*).

<sup>100</sup> See, eg, Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013); Matthew Rimmer, ‘An Elegy for Greg Ham: Copyright Law, the Kookaburra Case, and Remix Culture’ (2012) 17(2) *Deakin Law Review* 385.

<sup>101</sup> *Winnebago (No 4)* (2015) 241 FCR 271 (passing off).

<sup>102</sup> *Eight Mile Style* [2017] NZHC 2603 (25 October 2017) (breach of copyright).

Relevantly for present purposes, the plaintiff alleged that the misleading conduct of the defendant composers and recording companies caused third parties not to pay certain royalties to the plaintiff, to which the plaintiff claimed it was otherwise entitled.<sup>103</sup> The foundation of the plaintiff's claim of misleading conduct lay in earlier copyright infringement. The trial judge controversially found that the defendants had infringed the plaintiff's copyright in the iconic song 'Kookaburra Sits in the Old Gum Tree' through incorporating a brief flute riff inspired by Kookaburra into the equally iconic Men at Work song entitled 'Down Under'.<sup>104</sup> The misleading conduct, by contrast, arose from later statements made to third party associations, which collected performance royalties on behalf of association members and distributed back payments to the relevant association members. As a condition of entering into such an arrangement for 'Down Under', the defendants had warranted to the third party associations that the defendants had 100% copyright in the material and that the material did not infringe copyright held by any other person.<sup>105</sup> Although the defendants fiercely denied the allegations of breach of copyright and misrepresentation, they conceded that if established, the plaintiffs had suffered loss or damage because of the misrepresentations.<sup>106</sup> By consensus between the parties, Jacobson J assessed damages under s 82 of the *TPA* (s 236 of the *ACL*) based on a hypothetical bargain that would have been struck between a willing licensor and licensee of the copyright in Kookaburra.<sup>107</sup> In so doing, his Honour noted that this was 'in accordance with the principles commonly applied in assessing damages for the infringement of the rights of the owner of an item of intellectual property'.<sup>108</sup> Given the very modest amount of infringing material, his Honour assessed the fee at five per cent of the total royalty income.<sup>109</sup>

As Jacobson J noted,<sup>110</sup> this approach to the measure of damages for wrongful use of intellectual property is well-established. However, notwithstanding this longstanding acceptance and widespread application across the full spectrum of property and property-like interests, the nature and bounds of user damages remain disputed. This inevitably affects the extent to which they can be understood to be consistent with the language and purpose of s 236 and/or ss 237 and 243 awards. It is not possible to answer these issues definitively in this article, but, fortunately for our purposes, it is only necessary to sketch the spectrum of the debate. It will then be possible to determine the extent to which the awards, as characterised and ordered by courts, conform with and promote the remedial purposes of ss 236 and 237 awards.

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<sup>103</sup> *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd* (2010) 263 ALR 155, 183 [263] (Jacobson J).

<sup>104</sup> *Ibid* 159 [27]–[28], 191 [337] (Jacobson J).

<sup>105</sup> *Ibid* 184 [274] (Jacobson J).

<sup>106</sup> *Larrikin Music (No 2)* (2010) 188 FCR 321, 323 [7] (Jacobson J).

<sup>107</sup> *Ibid* 323 [8].

<sup>108</sup> *Ibid*.

<sup>109</sup> *Ibid* 343 [220]–[222].

<sup>110</sup> *Ibid* 325 [24].

## B     *User Damages as Compensation?*

Some have argued that user damages compensate the loss of an opportunity to bargain to licence the use of the property.<sup>111</sup> As discussed earlier, where it is shown that the plaintiff was deprived of an opportunity that the plaintiff would have taken to licence use of the property to the defendant or a third party, then this analysis is entirely plausible. The problem is that there is difficulty accommodating all such awards in this manner. In many cases, it is clear that the defendant would never have agreed a price for the user: this was, for example, the clear tenor of evidence in the *Larrikin Music* litigation.<sup>112</sup> Further, many courts have awarded user damages while explicitly rejecting that the plaintiff suffered any actual loss through the wrongful use, because the plaintiff never would or could have licensed the use of the property. Whether the property concerns a chair,<sup>113</sup> horse,<sup>114</sup> accommodation,<sup>115</sup> underground passageways,<sup>116</sup> patent,<sup>117</sup> ‘goodwill’,<sup>118</sup> or trademark,<sup>119</sup> the principle appears to be the same: notwithstanding that there is no financial loss nor injury to the property concerned, the plaintiff is entitled to recover the reasonable value of the benefit enjoyed by the defendant as a result of the breach. Given the lack of actual financial loss in such cases, it is difficult to see how user damages in such cases align with compensation for ‘loss or damage’ in the sense required by s 236 of the *ACL*, in particular.

An alternative, broader compensatory analysis, is that the plaintiff loses his ‘right of dominium’ over the asset, in the sense of his right to control access to and use of the property and that it is this loss that is the subject of compensation by reference to user damages.<sup>120</sup> A related approach is to view the award as addressing a correlative, but *normative* (rather than material or ‘actual’), loss and gain: by breaching the plaintiff’s right to exclusive use of the subject matter of the property right, the defendant has violated and gained from the (corresponding) loss of the plaintiff’s right.<sup>121</sup> As we will see, these rights-based analyses find some support in the case law.<sup>122</sup> A recent example is the UK Supreme Court case of *One Step*

<sup>111</sup> Robert J Sharpe and S M Waddams, ‘Damages for Lost Opportunity to Bargain’ (1982) 2(2) *Oxford Journal of Legal Studies* 290.

<sup>112</sup> *Larrikin Music (No 2)* (2010) 188 FCR 321, 333 [98].

<sup>113</sup> *The Owners of the Steamship ‘Mediana’ v The Owners, Master and Crew of the Lightship ‘Comet’* [1900] AC 113, 117 (Lord Halsbury) (*‘The Mediana’*).

<sup>114</sup> *Watson, Laidlaw & Co Ltd v Pott, Cassels, and Williamson* (1914) 31 RPC 104, 119 (Lord Shaw).

<sup>115</sup> *Inverugie Investments Ltd v Hackett* [1995] 3 All ER 841; *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285.

<sup>116</sup> *Martin v Porter* (1839) 5 M & W 351; 151 ER 149.

<sup>117</sup> *General Tire* [1975] 1 WLR 819, 826; *Watson, Laidlaw & Co Ltd v Pott, Cassels, and Williamson* (1914) 31 RPC 104, 120 (Lord Shaw).

<sup>118</sup> *Winnebago (No 4)* (2015) 241 FCR 271.

<sup>119</sup> *32Red Plc v WHG (International) Ltd* [2013] EWHC 815 (Ch) (12 April 2013) [22]–[42] (Newey J). See also the discussion in *Winnebago (No 4)* (2015) 241 FCR 271, 289–92 [50]–[62].

<sup>120</sup> Mitchell McInnes, ‘Gain, Loss and the User Principle’ (2006) 14 *Restitution Law Review* 76, 85.

<sup>121</sup> David J Brennan, ‘The Beautiful Restitutory Heresy of a Larrikin’ (2011) 33(2) *Sydney Law Review* 209, 219–25.

<sup>122</sup> See, eg, *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420 (*‘Bunnings v CHEP’*); *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District (No 10)* [2016] NSWSC 1587 (10 November 2016) [124] (*‘Macquarie Health (No 10)’*).

(Support) *Ltd v Morris-Garner* in which Lord Reed (with whom Lady Hale, Lord Wilson and Lord Carnwath agreed) characterised user damages as

providing compensation for loss, albeit not loss of a conventional kind. Where property is damaged, the loss suffered can be measured in terms of the cost of repair or the diminution in value, and damages can be assessed accordingly. Where on the other hand an unlawful use is made of property, and the *right to control such use is a valuable asset*, the owner suffers a loss of a different kind, which calls for a different method of assessing damages. In such circumstances, the person who makes wrongful use of the property *prevents the owner from exercising his right to obtain the economic value of the use in question, and should therefore compensate him for the consequent loss*. Put shortly, he takes something for nothing, for which the owner was entitled to require payment.<sup>123</sup>

Lord Reed subsequently concluded that

[t]he claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the asset in question. The defendant has taken something for nothing, for which the claimant was entitled to payment.<sup>124</sup>

However, there are problems with these right-based analyses. It is difficult to see how a plaintiff's right to possession, or right to control the use of the property, for example, can be regarded as having been harmed or lost through its infringement: its past breach yields a remedy (even if only nominal) and future breaches may be the subject of an injunction. The right itself sails on unharmed. If, by contrast, all that is required is a corresponding normative loss and gain through the infringement of the plaintiff's rights, it is unclear why gain-based relief is not available in every case where a plaintiff's right is infringed, no matter of what kind. Yet, as *Morris-Garner* itself makes clear, it is clear that not all rights infractions attract this kind of relief.<sup>125</sup>

Barker has presented a more nuanced approach connecting rights theory with a compensatory approach to user damages.<sup>126</sup> He argues that, in the most problematic cases, what is lost by the defendant's infringement may be the plaintiff's *legal power* to seek an injunction *ex ante* to prevent that breach:

Either A loses his own power to stop the infringement, or a power to see that someone else (the court) stops it. A reasonable permission fee for the use of A's property then provides an approximation of the factual value of A's lost legal power to stop the infringement occurring. Indeed, such a permission fee provides a natural index of A's lost entitlement to 'insist' on his permission

<sup>123</sup> [2018] 2 WLR 1353, 1365 [30] (emphasis added) (*Morris-Garner*). Cf *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*, in which the Singapore Court of Appeal adopted a related but distinct analysis, characterising user damages as compensatory in nature, albeit calculated by reference to a restitutionary measure, and directed to the loss of rights, rather than actual loss: [2018] SGCA 44 (2 August 2018) [210]–[215] (*Turf Club*).

<sup>124</sup> *Morris-Garner* [2018] 2 WLR 1353, 1381 [92]. See also 1382–3 [94]–[95], particularly points (1) and (10).

<sup>125</sup> See also *Turf Club*, denying that the award of compensation for infringement of rights leads to a quantum shift in the nature of compensation, because it is only permitted in a '*specific and limited category of cases*': [2018] SGCA 44 (2 August 2018) [208] (emphasis in original).

<sup>126</sup> Kit Barker, "Damages Without Loss": Can Hohfeld Help? (2014) 34(4) *Oxford Journal of Legal Studies* 631.

being obtained. The fee should then reflect the amount that P himself would reasonably have been able to ask for giving his permission.<sup>127</sup>

On Barker's analysis, the loss of this legal power is analogous to the loss of other valuable legal powers such as options, or indeed physical powers, such as the use of an arm or leg, both of which must be compensated through substantial damages.<sup>128</sup> This subtle analysis avoids many of the problems inherent in the other compensatory analyses. It seems to find some support from the UK Supreme Court's characterisation of user damages awarded under *Lord Cairns' Act* in *Morris-Garner* as being

the amount which the claimant could fairly and reasonably have charged for the voluntary relinquishment of a valuable right of which he had effectively been deprived by the refusal of an injunction ... The claimant does not literally lose the right in question, but, as Lord Nicholls stated [in *Attorney-General v Blake*], 'the court's refusal to grant an injunction means that in practice the defendant is thereby permitted to perpetuate the wrongful state of affairs he has brought about'.<sup>129</sup>

Notwithstanding the strength of the analysis, it appears to be no more possible for a wrongdoing defendant to strip a plaintiff of his legal powers to obtain an injunction than it lies in his hands to strip the plaintiff of his primary legal rights. As we saw earlier with the 'rights-based' analyses, it is therefore arguable that the legal power to protect the plaintiff's rights is never lost — only the practical capacity to exercise it.<sup>130</sup> Moreover if, as the Supreme Court states (here departing from Barker),<sup>131</sup> the question becomes one of practical loss of 'a valuable opportunity to exercise [the] right to control the asset'<sup>132</sup> via an injunction, the value of the plaintiff's power in practice to obtain injunctive relief (or see that the Court stops the infringement) must be more or less valuable depending on the particular facts of the case. This would mean that in some cases, the plaintiff's power may be virtually certain to lead to injunctive relief and in others, not at all. Further, a plaintiff's right to quia timet relief will be subject to consideration of a wide range of factors going to the 'balance of convenience'. Yet, as a matter of practice, courts seem to take none of these factors into account when assessing the plaintiff's right to user damages, which is measured by the objective value of the opportunity to use the benefit obtained by the defendant.

On balance, it must be accepted that user damages assessed by reference to the plaintiff's rights, powers or 'normative loss' represent a departure from the usual approach to compensation adopted elsewhere in the general law. As Lord Nicholls observed in *Attorney-General v Blake*, '[t]he reality is that the injured person's rights

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<sup>127</sup> Ibid 655.

<sup>128</sup> Ibid 654.

<sup>129</sup> [2018] 2 WLR 1353, 1375–6 [69] (citations omitted).

<sup>130</sup> Our sincere thanks to Professor Barker for his generosity in discussing his ideas and helping us to frame our reservations regarding his thesis. A further issue with the analysis is that if we see the loss in terms of the plaintiff losing the power at the point of breach to sell or relax the primary right to the defendant prior to the infringement, then (as with the broader rights-based analyses discussed earlier) reasonable fee damages should be available in all cases of rights violation, which does not yet seem to be the case.

<sup>131</sup> Barker's analysis expressly rejects the 'lost opportunity' analysis: Barker, above n 126, 638, 654–6.

<sup>132</sup> *Morris-Garner* [2018] 2 WLR 1353, 1379 [84].

were invaded but, in financial terms, he suffered no loss'.<sup>133</sup> Certainly, any normative analysis diverges from the factual approach generally adopted by courts to s 236 damages, by which courts look to see the extent to which the plaintiff is left worse off by reference to actual loss or damage.<sup>134</sup> Indeed, arguably it risks introducing fundamental conceptual incoherence into the statutory scheme. Descheemaeker has argued that the law of torts contains two different and mutually incompatible conceptions of harm.<sup>135</sup> On the one hand, the 'bipolar' model of harm wrongfully caused focuses on the extent to which a person is left financially or emotionally worse off because of the defendant's wrongdoing. On the other hand, there is a 'unipolar' model in which the very infringement of the plaintiff's right is itself considered the harm to be compensated. Using Descheemaeker's analysis, the language and structure of the *ACL*'s remedial scheme indicate a definitive choice by Parliament in favour of the bipolar model. This is particularly evident in the separation of the contravention question in s18 from identification of the causally-connected 'actual' harm question under ss 236 and 237. It follows that re-characterising 'loss or damage' as capturing purely normative harm arguably is inconsistent with the *ACL*.

Further, in the context of the *ACL*, characterising the infringement of a plaintiff's property right as the relevant damage for the purposes of a claim of misleading conduct is inherently problematic. In these cases, as *Larrikin Music (No 2)* itself demonstrates, the claim is at best parasitic upon the infringement of a property right. The immediate source of the claim for statutory relief is the defendant's misleading conduct, not breach of a property right — although, of course, the two events may coincide. Barker's 'loss of power to obtain an injunction' thesis is a more likely line of enquiry in the context of the *ACL*, which expressly permits, at the discretion of the court, injunctive relief to prevent misleading conduct under s 232 and compensation under s 243. However, as discussed above, it remains unclear how the power is ever 'lost' through the actions of the defendant, except to the extent that the plaintiff no longer has the practical opportunity to obtain injunctive relief. Further, when assessing user damages, courts do not appear to be interested in, or engaged in determining, the real or subjective value of that opportunity.

### C *Janus Damages?*

Recognising difficulties with a purely compensatory analysis of the user principle as applied at common law, some courts and commentators have preferred a dual characterisation in which damages awarded on a 'user principle' are recognised as having both compensatory and restitutionary characteristics. Indeed, the recognition of the relevance of a defendant's gain in the analysis comes through even in the most trenchant compensatory analysis. Thus the UK Supreme Court in *Morris-Garner* in the extracts set out above repeatedly emphasised that the defendant had 'taken something for nothing'<sup>136</sup> — in other words, had been enriched by its wrongful user.

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<sup>133</sup> [2001] 1 AC 268, 279.

<sup>134</sup> See, eg, *Marks* (1998) 196 CLR 494.

<sup>135</sup> Eric Descheemaeker, 'Unravelling Harms in Tort Law' (2016) 132(4) *Law Quarterly Review* 595.

<sup>136</sup> See above nn 127–9 and accompanying text.



Further, while rejecting the gain-based characterisation of user damages as a matter of authority, the Supreme Court acknowledged that

there is a sense in which it can be said that the damages [in the property cases] ‘may be measured by reference to the benefit gained by the wrongdoer from the breach’, provided that the ‘benefit’ is taken to be the objective value of the wrongful use.<sup>137</sup>

The leading authority in Australia reflecting the dual characterisation of user damages comes from the field of conversion of goods. In *Bunnings v CHEP*,<sup>138</sup> Bunnings had converted the plaintiff’s pallets by refusing to return them following the plaintiff’s demand and actively using them in its business. The plaintiff had difficulty establishing that it had suffered any loss as a result of Bunnings’ conversion. It had received compensation for the loss of the pallets from third parties and there was no evidence that it had lost concrete opportunities to hire the pallets out elsewhere while they were in Bunnings’ wrongful possession. Nonetheless, the New South Wales Court of Appeal awarded substantial damages measured on a user principle.

President Allsop (with whom Macfarlan JA agreed) discussed the leading English and Australian authorities on point and accepted that such awards have a distinctly restitutionary aspect. However, his Honour considered that the notion of loss or damage for the purposes of a damages award in tort was sufficiently broad to

includ[e] the denial and infringement of [the plaintiff’s] rights ... It is entirely logical and in accordance with justice and common-sense that a wrongdoer should pay a price for using the goods of another as a matter of compensation for the denial of the right concerned. I do not see this as contrary to, or undermining of, the principle of compensation.<sup>139</sup>

In a separate judgment, Giles JA expressly noted that the ‘jurisprudential basis for the award of damages’ in such cases is ‘open to debate’.<sup>140</sup> His Honour preferred a restitutionary analysis that saw damages representing ‘the expense saved by Bunnings through having the use of the pallets without paying for their hire’.<sup>141</sup> We return to consider whether it is better to eschew the dual characterisation of user damages in favour of a purely restitutionary analysis further in Part VD below.

A similar dualist approach to user damages was adopted by Yates J in the Federal Court of Australia in *Winnebago (No 4)*.<sup>142</sup> That decision was concerned solely with the assessment of damages for passing off, but there had also been earlier findings of misleading conduct under the *TPA*. In earlier proceedings, the Full Federal Court remitted the case to a single judge to consider whether the plaintiff was entitled to a reasonable royalty, notwithstanding that it was clear that the

<sup>137</sup> See *Morris-Garner* [2018] 2 WLR 1353, 1378 [79]. Both Yates J and Allsop CJ considered the earlier English authorities on this point during the *Winnebago* litigation discussed below.

<sup>138</sup> (2011) 82 NSWLR 420, followed and interpreted in *Macquarie Health (No 10)* [2016] NSWSC 1587 (10 November 2016) [152] as establishing that user damages are compensatory in nature.

<sup>139</sup> *Bunnings v CHEP* (2011) 82 NSWLR 420, 467 [175]. See also *Knott Investments Pty Ltd v Winnebago Industries Inc (No 2)* (2013) 305 ALR 387, 392 [26] (*‘Winnebago (No 2)’*).

<sup>140</sup> *Bunnings v CHEP* (2011) 82 NSWLR 420, 471 [194]. See also 472 [197]–[198].

<sup>141</sup> *Ibid* 473 [205].

<sup>142</sup> (2015) 241 FCR 271, followed by *Harcourts (No 5)* (2016) 119 IPR 449, 460–1 [54] (McKerracher J). See also *Bayer Pharma Aktiengesellschaft v Generic Health Pty Ltd* (2017) 124 IPR 23, 94–5 [319]–[325].

plaintiff never would have licensed its name to the defendant.<sup>143</sup> In the course of granting the remitter, Allsop CJ noted that although the authority of *Aristocrat* (discussed in Part VA) stood in the path of this relief, other cases

recognise that the use of property (here the reputation of the respondent) may be compensated for by reference to notions (perhaps restitutionary in essence) that unauthorised use of property has to be paid for: see generally the discussion of issues in the context of conversion in *Bunnings* ...<sup>144</sup>

In the subsequent hearing, Yates J held that user damages should indeed be awarded, considered that the reasoning of *Aristocrat* was at odds with long-established principle, restricted it as a binding authority to its context in copyright law and applied *Bunnings* by analogy. In taking these steps, his Honour engaged in a detailed and comprehensive examination of the general law authorities in England and Australia, demonstrating that user damages are not dependent on proof that the plaintiff would have agreed to licence the defendant's use, nor that the defendant had to be shown to have been willing to pay. His Honour identified that wrongful interference with the plaintiff's property right could itself constitute the 'damage' to be compensated for by the award of user damages. A similar analysis, in which *Winnebago (No 4)* and *Larrikin Music (No 2)* were both cited, was subsequently adopted in the High Court in New Zealand in *Eight Mile Style*.<sup>145</sup> That case involved copyright infringement by the New Zealand National Party of a song by rap artist Eminem. Following an extensive review of the authorities, Cull J concluded:

The user principle is not strictly compensatory in nature as it is not remedying the plaintiff's financial loss. Rather, the user principle recognises the infringement that has invaded the monopoly a plaintiff has on their intellectual property rights and the defendant's gain in this infringement. It is therefore *both compensatory and restitutionary in nature*.<sup>146</sup>

The dual characterisation adopted in these cases would potentially legitimise similar measures of user damages under s 236 of the *ACL*, if we accept that a plaintiff is left worse off by loss of dominion of rights, loss of powers to obtain *ex ante* injunctive relief, or by way of normative loss suffered through misleading conduct.<sup>147</sup> We have seen earlier that there are difficulties, however, with these analyses.

Further, as Barker has observed, on its face the idea that a single award of damages can be both compensatory and restitutionary in nature seems nonsensical: '[w]henver there is any factual disparity between B's gain and A's loss, it is pretty obvious that a single monetary award cannot represent both amounts.'<sup>148</sup> Certainly, in the case of user damages, we have seen that they come primarily into play

<sup>143</sup> *Winnebago (No 2)* (2013) 305 ALR 387.

<sup>144</sup> *Ibid* 392 [26] (citations omitted).

<sup>145</sup> [2017] NZHC 2603 (25 October 2017).

<sup>146</sup> *Ibid* [338] (emphasis in original).

<sup>147</sup> *Henderson v Radio Corporation Pty Ltd* (1960) SR (NSW) 585, 599, where Evatt CJ and Myers J, in an action of passing off involving the unauthorised appropriation of the plaintiffs' images falsely to suggest their endorsement of a product, stated that:

The professional recommendation of the respondents was and still is theirs, to withhold or bestow at will, but the appellant has wrongfully deprived them of their right to do so and of the payment or reward on which, if they had been minded to give their approval to the appellant's record, they could have insisted.

<sup>148</sup> Barker, above n 126, 646.

precisely where compensation measured in the usual way would result in no substantial monetary award. Barker therefore suggests that what must be meant by this hybrid characterisation is that the ‘*effect of an award* can be to eradicate both some loss to A and some gain to B’.<sup>149</sup>

This seems more likely and, coincidentally, is an approach that fits nicely with the requirements of s 237(2) of the *ACL* (being the gateway to the wide range of orders available under s 243) that any order made under s 243 must be one that the court considers will:

- (a)     compensate ... in whole *or in part* for the loss or damage ... or
- (b)     *prevent or reduce the loss or damage suffered, or likely to be suffered,* by the injured person or any such injured persons.<sup>150</sup>

On this approach, the award of user damages need not be purely compensatory in character.<sup>151</sup> Provided that some loss or damage is identified, restitutionary damages will have the *effect* of reducing that loss, even though the inherent or primary aim or purpose of the remedy is to reverse the defendant’s gain.<sup>152</sup> It remains, however, to identify the gateway to restitutionary relief — the ‘loss or damage’ to which restitutionary relief may respond. As we saw earlier, focusing on the infringement of *proprietary* rights (as demonstrated in *Winnebago (No 4)* and *Larrikin Music (No 2)*) distracts from the point that s 18 of the *ACL* addresses misleading conduct, not infringement of proprietary rights. Further, it seems from our earlier discussion under Part II of this article that the aim of s 237(2) is to require more by way of loss or damage than simple proof of contravention of the statutory prohibition on misleading conduct.

It may therefore be more appropriate and realistic to view the awards as potentially falling within the expanded conception of loss or damage the subject of s 237 of the *ACL*, which we have seen adopted in cases of statutory orders akin to rescission. A monetary order based on a user sum can, in this context, be seen as ‘*regaining through restitution a position lost* by the conduct complained of’<sup>153</sup> thereby ‘*reduc[ing] the loss or damage suffered*’<sup>154</sup> by the plaintiff. Particularly where loss in the stricter sense of *ACL* s 236 is very difficult to ascertain or measure, and where there has been a clear and wrongful taking of a benefit by the defendant from the plaintiff’s assets through the misleading conduct, an award that reverses that wrongful transfer to restore the parties to their former position seems appropriate and adapted to achieve the protective purpose of the statute.

Drawing from these authorities, and consistently with the broader approach taken to s 237 in the statutory rescission cases, it is possible to support damages assessed on the user principle where the defendant has obtained the benefit of

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<sup>149</sup> *Ibid* (emphasis in original).

<sup>150</sup> Emphasis added.

<sup>151</sup> *Tenji* (2000) 98 FCR 324, 333–4 [20] (French J).

<sup>152</sup> *Cf Turf Club*, which distinguishes between normative restitution (which seeks to restore some benefit to the plaintiff) and descriptive restitution (which may be compensatory in purpose, but measured by reference to the gain obtained by the defendant): [2018] SGCA 44 (2 August 2018) [210]–[215] (Andrew Phang Boon Leong JA for the Court).

<sup>153</sup> *Munchies* (1988) 58 FCR 274, 287–8 (emphasis added).

<sup>154</sup> *ACL* s 237(2)(b).

unauthorised use of the plaintiff's property as a result of her or his misleading conduct. Restitutionary damages operate to prevent or reduce the loss of the plaintiff's original position. This broader approach to the compensatory effect of ss 237 and 243 orders may be justified in light of the structure and protective purpose of the statutory remedial scheme and the essentially restitutionary nature of the awards made by way of rescission, refund, repayment and, it would be added, reasonable fees and royalties for wrongful user. Indeed, awards of reasonable fees and royalties line up with other restitutionary orders available under s 243. On this analysis, awards of user damages made in the 'celebrity endorsement' cases are restitutionary responses to the misleading use of the celebrity's image. The defendant is required to 'give back' to the plaintiff the benefit received from that unauthorised use, thereby restoring both parties so far as is practicable to their former positions.

### D *Restitution Unchained from Compensation*

Before leaving this discussion, it must be acknowledged that although potentially justified in light of the language, purpose and judicial development of the basis for statutory relief, the use of restitutionary damages in this manner does stretch the usual conception of a response to 'loss or damage' to breaking point.<sup>155</sup> The approach is only plausible in the statutory context because the *ACL* already expressly contemplates what appear to be restitutionary orders, and because courts have interpreted the concept of loss under s 237 sufficiently widely to accommodate the making of orders akin to rescission. Moreover, at the end of the day, these orders are highly effective in promoting the twin purposes of fair business practices and consumer protection under the *ACL*.

However, the work needed to justify these awards within the confines of the statutory regime should give us reason to pause and reconsider the approach. As a regime of consumer protection, the *ACL* needs to cast a wide shadow over the market to prompt compliance with the regime and the efficient settlement of disputes where they arise. An essential requirement for its success and, indeed, the iterative function of legislation that sets aspirational standards of conduct, is that the regime be clear and accessible. If, as appears to be the case, highly technical and nuanced approaches are required in order to give meaningful and necessary redress under the statute, the efficacy of the regime cannot help but be undermined. Moreover, there is a real danger that the courts' current interpretive approach to the boundaries of loss under the *ACL*, although defensible in the particular statutory context, will lead to a confusion of compensatory and restitutionary damages more broadly and so undermine principle and coherence in the law. Considerations of remoteness and

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<sup>155</sup> Cf the warning of McHugh J in *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 113:

Even if extrinsic material convincingly indicates the evil at which a section was aimed, it does not follow that the language of the section will always permit a construction that will remedy that evil. If the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances.

This warning was adopted in *Taylor v The Owners — Strata Plan No 11564* (2014) 253 CLR 531, 548–9 [39] (French CJ, Crennan and Bell JJ).

scope of liability, for example, have no part to play where a court is seeking to restore some benefit to the plaintiff. Relevant defensive considerations will also differ.<sup>156</sup> For this reason, the most recent edition of *McGregor on Damages* eschews extended meanings of loss and, accordingly, compensation.<sup>157</sup> Instead, it advocates recognition of the discrete nature and operation of restitutionary damages (including by way of user damages) for common law, equitable and statutory wrongs.

It would be possible to avoid the identified danger of incoherence arising from an over-inclusive conception of ‘loss or damage’ coupled with the ambiguous directive contained in ss 237 and 243, and moreover, to align the remedial scheme of the *ACL* with other general law and statutory doctrines concerned with misleading conduct. This could be done by reforming the legislation to make express provision for restitutionary awards. This is by no means impossible: a striking feature of the wider Australian statutory landscape is that other legislation prohibiting misleading conduct does precisely that, such as under retail tenancy legislation.<sup>158</sup> Although that option cannot be canvassed in this article, it is clear that courts consider restitutionary remedies to be appropriate and, indeed, required to effect the instrumental purposes of the statute in some cases of misleading conduct. Indeed, as noted in *Demagogue*, the statute was intended to provide remedial options beyond those offered at general law.<sup>159</sup> It appears strange in that context that such difficult, although we would say ultimately principled, interpretive gymnastics are required to find room for restitutionary remedies within the sumptuous ‘remedial smorgasbord’ otherwise on offer.

## VI Conclusion

The task of interpreting and applying legislation such as s 18 of the *ACL* and its associated remedies is perhaps surprisingly complex. The apparently simple instruction not to mislead, combined with the ambition to provide individual plaintiffs with relatively straightforward access to remedies, gives rise to intricate questions about the choice and ambit of language in the relevant sections of the legislation and the interaction with established general law principles. These are important questions because, as we saw at the outset, the vindication of the plaintiff’s right not to be misled turns on the availability of a remedial regime that can traverse even the more difficult cases where the loss is not apparent or is non-existent.

The potential range and measure of damages and other orders under the *ACL* ultimately depends upon the scope of the repeated criterion of ‘loss or damage’, seen in light of the broader language, structure and purpose of the *ACL*. We have seen that courts give a generous interpretation to these words when considering the

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<sup>156</sup> In some cases involving good faith defendants to claims of restitution, change-of-position considerations may be relevant, for example.

<sup>157</sup> Edelman, Varuhas and Colton, above n 15, 452–7 [14-011]–[14-022].

<sup>158</sup> *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA) s 16D(3)(a); *Retail Leases Act 1994* (NSW) s 72(1)(a). See also *Spuds Surf Chatswood Pty Ltd v PT Ltd (No 4)* where the NSW Civil and Administrative Tribunal made what it identified as a restitutionary award responding to unconscionable conduct under s 72AA(1)(a) of the *Retail Leases Act 1994* (NSW): [2015] NSWCATAP 11 (12 February 2015) [213].

<sup>159</sup> (1992) 39 FCR 31, 32–3 (Black CJ), 42–3, 45 (Gummow J), 48 (Cooper J).

possibility of orders under ss 237–9, which has justified the award of restitutionary relief. The award of user damages based on a misuse of a plaintiff's property where there has been no pecuniary loss is consistent with this approach. However, because this is instrumental legislation, operating within a broader legal context, there are other considerations before sanctioning this approach. These include considerations of the integrity of the legislative scheme itself and the gravitational impact of the current generous approach on our broader, general law understandings of concepts of loss and damage. For these reasons, it may be prudent to consider legislative reform to give express authorisation for restitutionary remedies that are so evidently valued in practice.