Should specifically deterrent or punitive remedies be made available to victims of misleading conduct under the Australian Consumer Law?

Elise Bant[*] *and Jeannie Marie Paterson*[**]

The 'smorgasbord of remedies' available to victims of misleading conduct under the Australian Consumer Law ('ACL') and parallel legislation is usually regarded as comprehensive, outstripping the remedies offered at common law for equivalent misconduct. Although the primary aim of the damages and 'compensation orders' is to 'compensate', or 'prevent or reduce' 'loss or damage' suffered because of misleading conduct, orders of this kind may have a strong deterrent effect, promoting the protective purposes of the statute. These provisions sit alongside an extensive suite of enforcement provisions designed to deter misleading conduct, including allowing the regulator to seek criminal and civil pecuniary penalties for contraventions of the specific prohibitions on 'false or misleading representations'. While this combination might appear to offer complete and effective deterrent measures apt to change commercial misbehaviours, this article argues that the remedial armoury available to achieve the deterrent purpose of the ACL could be made stronger and more effective. In this sphere, the analogous common law torts and equitable doctrines that respond to misleading conduct provide extensive and invaluable remedial templates for regulators and those concerned with law reform, including disgorgement and punitive damages. Drawing on these insights, we argue that such additional remedial options may prove valuable in promoting the consumer protection purposes of the statute. Additionally, they may serve to provide significant redress to victims in cases where damages and compensatory orders are inadequate.

I Introduction

The stated aim of the *Competition and Consumer Act 2010* (Cth), to which the Australian Consumer Law ('*ACL*') is annexed,[1] is the promotion of 'fair trading and the provision of consumer protection'.[2] Unlike private law rules and doctrines found at common law, for which a primary objective is the vindication of private rights between individuals,[3] the *ACL* seeks both to provide redress to individual plaintiffs injured by

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[*] Professor, Melbourne Law School.

[**] Professor, Melbourne Law School. This article forms part of an Australian Research Council Discovery Grant project DP140100767 on 'Remedies under the Australian Consumer Law and the Common Law: Evolution and Revolution'. The authors thank Joseph Huntley, Gavin Rees and Jake Herd for their valuable research assistance in preparing this paper. Sincere thanks also extend to Professor Kit Barker and the participants at seminars held with the Queensland and Victorian Bar Associations for their feedback on earlier drafts of the paper. The authors have responsibility for all remaining errors.

1 *Competition and Consumer Act 2010* (Cth) sch 2 ('*ACL*').

2 Ibid s 2.

3 Here we use vindication in a broad sense to include all positive judicial responses to support or respond to plaintiff rights. For a particularly valuable discussion of the term, see Kit Barker, 'Private and Public: The Mixed Concept of Vindication in Torts and Private Law' in Stephen GA

contraventions of the regime and to influence the conduct of traders in the market to protect consumer interests generally. Thus, the purposes of the legislation include an instrumental aim of changing commercial behaviours for the benefit of consumers and broader Australian society. To these ends the *ACL* contains what might appear to be a comprehensive suite of enforcement provisions designed to deter misleading conduct, with equivalent provisions in the *Australian Securities and Investments Commission Act 2001* (Cth) applying to financial services and products.[4] As a response to the most egregious instances of wrongdoing, the *ACL* creates offences for specific instances of misleading conduct, to which criminal penalties apply.[5] However, to date, these have been very infrequently used by the regulator, probably due to the difficulty and cost in satisfying the criminal burden of proof, and hence play little part, in practice, in effecting the deterrent purposes of the regime.[6] Regulators have placed more emphasis is put on civil and administrative responses. A prime example is the power under s 224(1)(a)(ii), which enables the regulator to seek civil pecuniary penalties for specified contraventions of the *ACL*, including contraventions of the prohibitions on 'false or misleading representations' in specific contexts relating to goods, services and land under ss 29 and 30, and for conduct that is 'liable to mislead' in relation to employment under s 31.[7] The public enforcement of these provisions by the regulator in seeking civil pecuniary penalties has a well-recognised objective of both specific and general deterrence.[8]

In addition to these options available to the regulator, the private rights of action provided to plaintiffs for contraventions of the *ACL*, including for the purposes of this article, contraventions of the various general and more specific prohibitions on misleading conduct, also attract a wide range of remedies that bear consideration in this context.[9] While the primary aim of the damages[10] and 'compensation orders'[11]

Pitel, Jason W Neyers and Erika Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013) 59.

4 See *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA, 12DB, 12DC, 12DF. For ease of reference we refer throughout to the *ACL*, although our discussion will at times also encompass decisions under the *Australian Securities and Investments Commission Act*. Note that provisions modelled on the *ACL* prohibitions on misleading conduct are also found in a wide range of other statutes including the *Corporations Act 2001* (Cth) and more specific federal and state counterparts such as under the various food and retail tenancies acts.

5 See *ACL* pt 4-1: '[o]ffences relating to unfair practices'.

6 See Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report No 45 (2008) vol 1, 45.

7 See also *ACL* ss 32–7, instancing other examples of misleading conduct that also attract penalties.

8 See *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, 659 [65] (French CJ, Crennan, Bell and Keane JJ). See also *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25, 39 [58] ('*Reckitt*').

9 See Jeannie Marie Paterson and Elise Bant, 'Intuitive Synthesis and Fidelity to Purpose? Judicial Interpretation of the Discretionary Power to Award Civil Penalties under the *Australian Consumer Law*' in P Vines and S Donald (eds), *Statutory Interpretation in Private Law* (Federation Press, forthcoming).

10 *ACL* s 236.

11 Ibid ss 237–9. Illustrations of the types of orders available are listed in s 243.

available under the *ACL* is to 'compensate',[12] 'redress',[13] or 'prevent or reduce'[14] 'loss or damage' suffered because of misleading conduct, there is no doubt that orders of this kind may have a strong, albeit incidental, deterrent effect. Such orders lead to adverse publicity that tarnishes the reputation of a corporate entity. They may also require a defendant to dig deep into its pockets in circumstances where it has made little or no profit from the contravening conduct.[15] This cannot but serve to effect both specific and general deterrence, sending a clear message both to the wrongdoer and the commercial community as to the financial implications of misleading conduct. Australian courts' application of principles informed by the common law tort of deceit in determining the measure of statutory compensation reinforce this deterrent tendency.[16] Similarly, the suite of other possible orders listed in s 243 — which may reverse and disable transactions brought about by misleading conduct — can be pressed into service to ensure that the particular defendant does not retain benefits taken from the plaintiff as a result of contravening conduct[17] and, exceptionally, may even hold the defendant to the representation in the future.[18] The availability of these options not only enables courts better to ensure appropriate protection for plaintiff consumers but also, again, sends a strong message that misleading conduct does not pay.

Notwithstanding the overall potency of the statutory regime, this article contends that the remedial armoury available to achieve the deterrent purpose of the *ACL* could be usefully strengthened by extending the remedies available to individual plaintiffs, acting in addition to the regulator. The existing suite of statutory remedies does not include the profit-stripping or punitive relief for victims of misleading conduct which is available for analogous torts and equitable wrongs. Nor can the existing statutory orders be pressed into service to achieve the functional equivalent of those remedies. Given the level of concern currently evidenced over widespread and ongoing misleading practices within the financial services sector,[19] it is appropriate and timely to consider whether victims of misleading conduct should be given additional private rights of redress, specifically aimed at deterrence, against those who engage in contravening behaviour. The issues and considerations favouring additional relief that are raised in this article apply with equal force in those related contexts.

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12 Ibid ss 237(2)(a), 238(2)(a).

13 Ibid ss 239(3)(a).

14 Ibid ss 237(2)(b), 238(2)(b), 239(3)(b).

15 A prime example is *Henville v Walker* (2001) 206 CLR 459 ('*Henville*').

16 See, eg, *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 6–7 (Gibbs CJ), 12 (Mason, Wilson and Dawson JJ) ('*Gates*'); *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413, 460–1 [129] (Kirby and Callinan JJ) ('*Kenny & Good*'); *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281, 291 ('*Kizbeau*'); *Henville* (2001) 206 CLR 459, 470 (Gleeson CJ), 502 (McHugh J); *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, 656 [35].

17 *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274, 287–8 ('*Munchies*'); *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 45 (Gummow J), 48 (Cooper J).

18 *Haydon v Jackson* [1988] ATPR ¶40-845.

19 See Financial Services Royal Commission, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*: *Interim Report* (2018) <https://financialservices.royalcommission.gov.au/Pages/interim-report.aspx>.

In this article, we argue that additional remedial options aimed squarely at deterrence are both consistent with the consumer protection purposes of the statute and are likely to prove valuable in promoting these aims.[20] Additionally, they may serve to provide significant redress to victims in cases where damages and compensatory orders, even when framed generously, are inadequate. In exploring these questions, the article seeks insights from the common law, equitable and broader statutory context in which the *ACL* is embedded. This broader perspective identifies a range of general law doctrines and statutory schemes that operate to prohibit and remedy misleading conduct, and which offer significant insights for bolstering the *ACL*'s remedial scheme. The analysis enables us to identify the factors favouring introduction of specifically deterrent relief for misleading conduct, as well as countervailing considerations that weigh in favour of the status quo. In drawing on this broader context, a chief consideration is the extent to which the solutions adopted by common law, equitable and other statutory regulation of misleading conduct are consistent with and promote the statutory language (including its arrangement or structure) and purpose.[21]

We also take this opportunity to explore the possibility of punitive awards, aimed at retribution. Although measures aimed at deterrence may also have an effective of punishing a defendant and vice versa, the awards are conceptually distinct. Yet in a field of regulation informed at least partly by community expectations of fairness, there may be scope consistent with the informing values of the regime for egregious examples of contravention of the law to be met with retribution in the remedial award.[22]

The article commences in Part II by summarising briefly the existing penalty regime, and its limitations in deterring contraventions of the *ACL*, as well as the boundaries of the compensatory orders currently available under ss 237–9 of the *ACL*, which make it appropriate and timely to consider expansion of private rights of redress to include specifically deterrent remedies. It then moves to consider the range of possible orders — drawn from the surrounding common law, equitable and statutory context — that could operate specifically with the aim of deterring contraventions of the *ACL* or punishing egregious conduct. The aim is to identify the strengths and potential weaknesses or dangers of those options, particularly in view of the existing remedial structures and instrumental aims of the statute. The article concludes in Part III by suggesting that a range of options are, on balance, sufficiently adapted and appropriate to promote the protective, deterrent and normative purposes of the *ACL* to warrant further investigation by both law reform bodies and those charged with its oversight and enforcement.

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20 Cf Ernest J Weinrib, 'Punishment and Disgorgement as Contract Remedies' (2003) 78 *Chicago-Kent Law Review* 55, arguing that exemplary damages are contrary to the demands of corrective justice underpinning general law liability. Cf also Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 *Oxford Journal of Legal Studies* 87, arguing that exemplary damages should be abolished in private law as they are in tension with the nature of civil liability. We address the distinct position of instrumental legislation such as the *Competition and Consumer Act* below.

21 Elise Bant and Jeannie Paterson, 'Exploring the Boundaries of Compensation for Misleading Conduct: The Role of Restitution under the Australian Consumer Law' (2019) *Sydney Law Review* (forthcoming).

22 See, eg, Financial Services Royal Commission, above n 19, vol 1, in which the Executive Summary identifies the need for the regulator, the Australian Securities and Investments Commission, to go to court 'to seek public denunciation of and punishment for misconduct'.

II Deterrence under the *ACL*

A Civil pecuniary penalties sought by the regulator

As explained above, the *ACL* is legislation with an instrumental purpose. It does more than respond to disputes about the infringement of the rights of individual litigants — a form of corrective justice.[23] The objects of the *Competition and Consumer Act*, in which the *ACL* sits, include enhancing 'the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.[24] For these purposes to be achieved, there must be a shared sense among players in the market that behaviour contravening the legislation will be identified and sanctioned in a way that outweighs the benefits of contravention. To this end, the *ACL* authorises the regulator to apply for a variety of orders that seek directly to deter misleading conduct and instead promote good business practices. The regime is designed around a 'pyramid' model of enforcement.[25] The *ACL* allows regulators a number of responses available as administrative mechanisms rather than court orders, through enforceable undertakings in s 218 and substantiation notices under s 219. It also includes strategies designed to encourage compliance include the award of 'non-punitive' orders under s 246, which may require businesses review their internal practices that led to the misleading conduct, or institute compliance and education programs within offending businesses. Overtly deterrent enforcement mechanisms include injunctive relief under s 232, adverse publicity orders under s 247 and orders disqualifying contraveners from managing corporations under s 248.

The *ACL* further makes certain contraventions of the legislation, including specific prohibitions on misleading conduct, criminal offences.[26] Criminal prosecutions send a very clear message about conduct that simply will not be tolerated in the market. Nonetheless, the view taken in the Productivity Commission's inquiry report into the *Review of Australia's Consumer Law Policy Framework* — was that the option of seeking criminal sanctions was rarely used by the regulator because the standard of proof in a criminal case was difficult to satisfy.[27] Thus, it is the civil pecuniary penalties regime introduced into the federal legislation in 2010[28] which have been relied on most frequently by the regulator in responding to misleading conduct contrary to the statutory prohibitions. The penalties regime was introduced in order to enable a 'targeted and proportionate regulatory response' that would increase the inherent deterrent effect of

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23 See also Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2016).

24 *Competition and Consumer Act* s 2.

25 Productivity Commission, *Review of Australia's Consumer Policy Framework*, above n 6, vol 2, 228.

26 See *ACL* pt 4-1: '[o]ffences relating to unfair practices'.

27 Productivity Commission, *Review of Australia's Consumer Policy Framework*, above n 6, vol 2, 228–9.

28 Initially these penalties were enacted in the *Trade Practices Act 1974* (Cth) s 76E. They were re-enacted in the *ACL* as s 224 in 2010 following the recommendation of the Productivity Commission, *Review of Australia's Consumer Policy Framework*, above n 6, vol 2, ch 10.

the relevant statutory prohibitions and the private rights of redress under s 236 and ss 237–9.[29]

A particularly cogent factor favouring its introduction was that any effective redress and enforcement scheme 'should aim to ensure that the ultimate cost of engaging in illegal conduct significantly outweighs its perceived benefits and the costs to other parties of taking enforcement action'.[30] In its recent review of the *ACL*, the Productivity Commission recommended that the maximum financial penalty applicable under the *ACL* should be increased.[31] These recommendations were accepted by the Commonwealth and the recommended increases have now come into effect.[32] However, we have argued elsewhere that Australian courts to date have adopted a cautious approach in setting the level of pecuniary penalties ordered under the Act.[33] In imposing civil pecuniary penalties, courts have been concerned to stress that such awards are not punitive, and moreover have been concerned to accommodate factors relating to the culpability of the contravening defendant and the remorse shown for its conduct. The consequence has been a conservative approach to setting the quantum of penalty awards that rarely makes use of the statutory maximum available, even in extreme cases.[34]

In *Australian Competition and Consumer Commission v Apple Pty Ltd (No 4)*,[35] a civil pecuniary penalty of $9 million was imposed on Apple for making misleading representations as to the consumer guarantee rights available to consumers contrary to s 29(1)(m) of the *ACL* following a settlement agreement between the parties. Justice Lee commented that such a penalty might be regarded as trivial or even 'loose change'[36] having regard to the size of the company but considered himself constrained by authority to accept this award.[37] The combination of the earlier cautious approach of

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29 Productivity Commission, *Review of Australia's Consumer Policy Framework*, above n 6, vol 2, 236.

30 Ibid 237, drawing on *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* (2012) 287 ALR 249, 265 [63], cited with approval in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640, 659 [66] (French CJ, Crennan, Bell and Keane JJ).

31 Productivity Commission, *Consumer Law Enforcement and Administration*, Research Report (2017) 87.

32 See *Treasury Laws Amendment (Australian Consumer Law Review) Act 2018* (Cth). The revised penalties are summarised below text at n 117. For the *Australian Securities and Investments Commission Act*, see s 12GBA and for the proposed reforms to the penalty regime, see Treasury, Australian Government, *Reforms to Strengthen Penalties for Corporate and Financial Sector Misconduct — Draft Legislation* (2018) <https://treasury.gov.au/consultation/c2018-t328482/>.

33 Paterson and Bant, 'Judicial Interpretation of the Discretionary Power to Award Civil Penalties under the *Australian Consumer Law*', above n 9.

34 See, eg, *Reckitt* (2016) 340 ALR 25 ($6 million); *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2018] FCA 571 (26 April 2018) ($10 million); *Australian Competition and Consumer Commission v Ford Motor Co of Australia Ltd* (2018) 360 ALR 124 ($10 million); *Australian Competition and Consumer Commission v Apple Pty Ltd [No 4]* [2018] FCA 953 (18 June 2018) ($9 million).

35 [2018] FCA 953 (18 June 2018).

36 Ibid [57].

37 Ibid [2]–[3]. See also *Reckitt* (2016) 340 ALR 25, 67 [178], where Jagot, Yates and Bromwich JJ stated that '[s]itting as trial judges, we would have been entitled to impose a considerably greater

courts influencing subsequent awards and the factors identified by courts in quantifying penalties risks undermining the deterrent purpose of the award. It may allow companies to discount the consequences of contravention and to manage the risk of sanction ex post by showing cooperation with the regulator and remorse for the misconduct.[38] As we will see below, the new penalty awards allow a court to have regard to corporate turnover.[39] Nonetheless, we suggest that if these kinds of conservative considerations continue to dominate judicial reasoning in awarding civil pecuniary penalties for misleading conduct, the increase in available penalty amounts may not automatically translate into substantially greater awards in practice.[40]

However, the real constraints on the efficacy of the civil penalties regime in deterring contraventions of the legislation do not lie solely, or even largely, with the courts. Even if courts were inclined to award more significant penalties, the fact remains that not all widespread or egregious patterns of misleading conduct can be the subject of penalties actions by the regulator. Limits of time and resources mean that the regulator must choose the cases it will pursue carefully and in accordance with identified enforcement priorities.[41]

This means that many serious and deliberate forms of misleading conduct will of necessity be left to regulation through private litigation. Admittedly, individual consumers subject to misleading conduct are unlikely to bring their case to court, the cost factor acting as an almost insurmountable hurdle to this course of action. There is however much that can be achieved by strengthening the deterrent effect of the prohibition in commercial litigation[42] and through the growing interest in class actions defending the collective rights of consumers.[43]

The following analysis demonstrates that the range of existing remedies available under the *ACL* are subject to significant restrictions that affect the extent to which they can achieve the deterrent aims of the Act. In particular, the provisions' focus on redressing 'loss or damage' means that, currently, courts have very limited capacity to make use of traditional deterrent remedies such as the account of profits. Moreover, as we have raised in discussing the civil pecuniary penalties jurisdiction, there may be a case for using the redress provisions of the *ACL* for punitive ends to express social disapproval of conduct that offends, at least where deliberate, the community standards of fair

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penalty, given the losses which we consider were occasioned by the conduct and that these were serious contraventions even within the spectrum of the liable to mislead category'.

38 Paterson and Bant, 'Judicial Interpretation of the Discretionary Power to Award Civil Penalties under the *Australian Consumer Law*', above n 9.

39 Below text at n 117.

40 Paterson and Bant, 'Judicial Interpretation of the Discretionary Power to Award Civil Penalties under the *Australian Consumer Law*', above n 9.

41 Australian Competition and Consumer Commission, *Compliance & Enforcement Policy & Priorities* (19 June 2018) <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>.

42 See also Peter Jaffey, 'The Law Commission Report on Aggravated, Exemplary and Restitutionary Damages' (1998) 61 *Modern Law Review* 860, 863.

43 A comprehensive review of class actions in this area is beyond the scope of this article. For useful discussion of key issues affecting the regime, some of which (eg, co-ordination of claims) may be relevant to this discussion, see Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Discussion Paper No 85 (June 2018).

dealing embodied in the legislation.[44] As we will see, in both these spheres, the broader common law, equitable and statutory context in which the *ACL* is located offers numerous insights for the effective reform of the remedial scheme for misleading conduct under the *ACL*, to meet these remedial gaps. In using the surrounding law in this way, the analysis adopts and continues an important interpretive tradition established by Australian courts, in which general law doctrines and cognate statutory provisions are drawn upon to the extent that they are consistent with and promote the statutory scheme and purpose.

B The boundaries of private rights of redress

The existing private rights of redress for victims of misleading conduct include injunctive relief under s 232, which clearly has a strong deterrent effect. However, in many cases, injunctive relief comes too late to prevent the misleading conduct and its negative impacts. In that context, the primary private remedies arise under s236 and ss 237–9.

Section 236 entitles a plaintiff to recover damages for the amount of 'loss or damage' suffered 'because of' misleading conduct.[45] In general, the relevant 'loss or damage' is conceptualised as the extent to which a plaintiff is left 'worse off' by reference to the 'actual' loss suffered as a result of misleading conduct.[46] This sum is usually conceptualised as a 'reliance loss', comparable to the measure used in the tort of deceit[47] and negligent misstatement.[48] Section 236 damages are not, however, restricted to reliance loss.[49] Indeed, as we will show below, it is only if a falsely restrictive view is taken of the range of analogous common law torts that this becomes a danger. A broader view allows identification of the full range of measures that are consistent with the language and purpose of the statute.

Adopting this broader perspective, courts have demonstrated that some 'gain-based' awards of damages may be compensatory in character and fall squarely within the s 236 concept of 'loss or damage'. Where the plaintiff's loss equates to the defendant's gain,[50] a remedy assessed by reference to the defendant's profit may be appropriate to address

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44 Paterson and Bant, 'Judicial Interpretation of the Discretionary Power to Award Civil Penalties under the *Australian Consumer Law*', above n 9.

45 For a detailed examination of the varied meanings of 'loss or damage' for misleading conduct under the *ACL*, see Bant and Paterson, 'Exploring the Boundaries of Compensation for Misleading Conduct', above n 21.

46 See, eg, *Gates* (1986) 160 CLR 1, 12 (Mason, Wilson and Dawson JJ); *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 515 (McHugh, Hayne and Callinan JJ) ('*Marks*').

47 See, eg, *Kizbeau* (1995) 184 CLR 281, 291; *Kenny & Good* (1999) 199 CLR 413, 460–1 [129] (Kirby and Callinan JJ).

48 *Gates* (1986) 160 CLR 1, 11 (Mason, Wilson and Dawson JJ); *Marks* (1998) 196 CLR 494, 511 (McHugh, Hayne and Callinan JJ). The law of negligent misstatement has perhaps been under-utilised by courts to date: see the discussion in 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.

49 *Gates* (1986) 160 CLR 1, 14 (Mason, Wilson and Dawson JJ).

50 See the first two categories of claim articulated in *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd* [1975] 1 WLR 819. In the context of passing off, see, eg, *A G Spalding & Bros v A W Gamage Ltd* (1918) 35 RPC 101.

the extent to which a plaintiff is 'worse off'[51] as a result of the defendant's conduct. Potential examples of both non-reliance damages and gain-based compensation include where a defendant has, through misleading conduct, diverted trade from the plaintiff to the defendant, or has falsely disparaged the plaintiff or his goods to generate sales. In these cases, the plaintiff's lost profits may be, at least in part, calculated by reference to the defendant's gains.

An early illustration of these kinds of cases is *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd*.[52] The plaintiff alleged that the defendant's misleading conduct had induced members of the public and pharmacists to purchase the defendant's drug 'Combantrin' instead of the plaintiff's drug 'Vermox', thereby causing the plaintiff to lose sales. Lockhart J granted an injunction to prevent the contravening conduct. In considering the claim for damages, his Honour also held that reliance by the plaintiff on the defendant's misleading conduct was not a pre-condition of recovery under the precursor of the *ACL* s 236 (s 82 of the *Trade Practices Act 1974* (Cth)).[53] His Honour reached this conclusion in part drawing on cases in which s 82 claims had coincided with claims of passing off and defamation.[54] Under this reasoning, and drawing on common law insights beyond those offered by deceit and negligent misstatement, and which remain consistent with the statutory language and purpose, the pathway is open for the plaintiff to claim damages for its loss of profit arising from the wrongful diversion of its business. The possibility under the *ACL* is that the gain to the defendant might be used as a proxy for that measure.

Another example of a profit-based measure of loss, this time drawn from the ancient tort of injurious falsehood, is where the defendant falsely tells customers of the plaintiff that the plaintiff's store has closed down, thereby diverting those consumers to the defendant.[55] Again, the actionable loss is suffered not through reliance by the plaintiff, but through the loss of business to the plaintiff caused by third parties relying on the defendant's conduct. In these cases, any profits diverted from the plaintiff to the defendant represent lost profits caused by the misleading conduct and hence are actionable losses for the purposes of s 236 damages. It remains necessary for the plaintiff to prove the extent to which any profits obtained by the defendant would have been enjoyed by the plaintiff, as opposed to being referable to other factors. However, the point remains that the profit of the defendant represents the starting point for ascertaining the plaintiff's loss.

This coincidence of the sphere of operation of the *ACL* and this broader range of doctrines concerned to respond to misleading conduct has been very helpful in developing the statutory jurisprudence.[56] In particular, it has emphasised that

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51 *Marks* (1998) 196 CLR 494, 515 (McHugh, Hayne and Callinan JJ).

52 (1992) 37 FCR 526 ('*Janssen-Cilag*'). See also *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 ('*Hornsby*').

53 *Janssen-Cilag* (1992) 37 FCR 526, 529–30.

54 See, eg, *Snyman v Cooper* (1989) 24 FCR 433; *W H Brine Co v Whitton* (1981) 37 ALR 190.

55 See *Ratcliffe v Evans* [1892] 2 QB 524, the leading case on this matter. See also *Draper v Trist* [1939] 3 All ER 513.

56 The value of careful consideration of analogous principles from this field is not to assert that the statute reflects simple statutory re-enactment of the tort of passing off or that courts should engage in indiscriminate importation of passing off and trade mark law: see *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177, 197 (Deane and Fitzgerald JJ), addressing the relationship

compensation under s 236 is not limited to reliance damages, an erroneous assumption, caused by overemphasis on the measures drawn from deceit and negligent misstatement that continues to cause problems for the courts.[57] As we will see, the same overlap in operation also renders these and other general law doctrines concerned with misleading conduct relevant when considering the role of restitutionary and disgorgement awards under the Act.

C The outer limits of ss 237–9 orders: Restitution and disgorgement

1 The range of available orders

Sections 237–9 allow a court to make 'such orders as it thinks appropriate' against a person who has contravened the legislation. Illustrations of the kinds of orders courts may make under these powers are set out in s 243. The guiding principle is that the orders must be such as will compensate the injured person 'in whole or in part for the loss or damage' or 'prevent or reduce the loss or damage suffered, or likely to be suffered' by the injured person.[58]

By contrast with s 236, the compensatory orders under ss 237–9, have been interpreted to embrace a broader conception of 'loss or damage' and hence range of discretionary orders that may be made to 'compensate' or 'prevent or reduce' that loss or damage. As has been addressed elsewhere,[59] courts use this combination of provisions to order a wide range of remedies, from declaring the affected transaction void on terms, requiring the defendant to refund or return benefits obtained from the plaintiff, amending the terms of the impugned transaction and awarding compensation measured by reference to a reasonable rate of hire or royalty for unauthorised use of the plaintiff's assets arising from the misleading conduct. Many of these remedies depart significantly from the measure of awards made pursuant to s 236. Indeed, many are restitutionary in focus and their award depends on a generous characterisation of the relevant 'loss or damage' as extending to 'recovery through restitution of a position lost'.[60] Given the more restrictive approach to 'loss or damage' traditionally taken under s 236 *ACL*, it is the broader conception offered under ss 237–8 — drawing on the wide range of analogous concepts of loss, damage and detriment found in the surrounding general law — that is a more likely route to profit-based relief.

But even on the most generous terms, there are limits to the boundaries of orders that may be made under ss 237–8 of the *ACL* given the statutory direction that they must

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between s 52 of the *Trade Practices Act* and passing off, endorsing *Hornsby* (1978) 140 CLR 216, 227 (Stephen J).

57 See, eg, *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322. For other claims of market-based causation, see *Re HIH Insurance Ltd (in liq)* (2016) 335 ALR 320; *Melbourne City Investments Pty Ltd v UGL Ltd* [2015] VSC 540 (7 October 2015); *Grant-Taylor v Babcock & Brown Ltd (in liq) [No 1]* [2014] FCA 437 (2 May 2014).

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

59 Bant and Paterson, 'Exploring the Boundaries of Compensation for Misleading Conduct', above n 21.

60 It has been suggested that some forms of restitutionary relief press this broad conception of loss or damage to breaking point, threatening conceptual incoherence both in application of the statute and in the broader common law, equitable and statutory context: see Bant and Paterson, 'Exploring the Boundaries of Compensation for Misleading Conduct', above n 21.

'compensate', 'prevent or reduce' loss or damage suffered because of misleading conduct. This is particularly the case once one moves into the sphere of remedies that have a specifically deterrent aim or effect. Thus, exemplary damages, which both punish and deter contraventions of the law, are not available under the *ACL*.[61] On any view, exemplary damages are not compensatory in nature, but rather focus wholly on the egregious conduct of the defendant.[62] It follows that they cannot readily be shoehorned into the remedial scheme of the *ACL*, even as a 'proxy' for compensation in cases where loss is difficult or impossible to assess — at least not without legislative amendment.

By contrast, to date, courts have left open whether the instruction to 'redress', 'prevent or reduce' 'loss or damage' in ss 237–9 extends to orders to 'disgorge the respondent's … profits enjoyed at the expense of the plaintiff'.[63] In *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd [No 2]*,[64] Gummow J strongly rejected the common assumption that contract and tort define the universe of relevant analogues for the purposes of the statutory prohibition on misleading conduct. His Honour went on to identify a suite of circumstances in which equitable doctrines may be used to remedy detriment suffered as a result of misleading conduct. They include proprietary estoppel, rescission for innocent misrepresentation and breach of fiduciary or other equitable duty (for example, where a fiduciary fails to disclose a conflict of interest). True to this observation, courts have repeatedly held that the principles of equitable rescission provide ready sources of guidance for orders made pursuant to s 243 to reverse transactions induced by misleading conduct.[65]

Some of the other examples offered by Gummow J would suggest further and potentially more expansive remedial options: the award made for unauthorised distributions of trust assets in *Re Dawson*,[66] for example, has been described as an equitable analogue of debt[67] while the detriment suffered in cases of proprietary estoppel may (but not must) be met by a monetary award that fulfils the representee's reasonable expectations.[68] If this is correct, then ss 237–9 damages may, in the court's discretion, extend to requiring a defendant to make good his representation in circumstances where this is required to avoid loss to the plaintiff. This would be consistent with the relatively few but extant cases where courts have modified contractual obligations under ss 243(a)–(b) to reflect the defendant's representation.[69] Relevantly for current purposes, Gummow J's suggestion makes it proper to ask the

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61 *Musca v Astle Corporation Pty Ltd* (1988) 80 ALR 251, 262 (French J) ('*Musca*').

62 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448, 471 (Brennan J), cited with approval in *Lamb v Cotogno* (1987) 164 CLR 1, 8–9 ('*Lamb*'); *Musca* (1988) 80 ALR 251, 262 (French J).

63 *Munchies* (1988) 58 FCR 274, 287–8.

64 (1987) 16 FCR 410, 420–1.

65 *Munchies* (1988) 58 FCR 274, 288; *Marks* (1998) 196 CLR 494, 535 (Gummow J). See also *Tenji v Henneberry & Associates Pty Ltd* (2000) 98 FCR 324, 329–30 [12] (French J).

66 [1966] 2 NSWR 211.

67 Justice James Edelman, 'An English Misturning with Equitable Compensation' in Simone Degeling and Jason N E Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, 2017) 91.

68 *Giumelli v Giumelli* (1999) 196 CLR 101.

69 *Haydon v Jackson* [1988] ATPR ¶40-845.

question of whether equity's remedies to require defendants to disgorge profits obtained consequential on an account could be pressed into service under ss 237–9, consistently with the existing language and purpose of the statute. If this can be achieved, further reform to address a formal 'gap' in the legislative suite of remedies may be unnecessary and inappropriate.

2 Restitution and disgorgement compared

Before we proceed to consider this question, a point of definition is in order, as the terminology in this field is unsettled. In this article, an order of restitution is treated as requiring the defendant to 'give back' the objective or market value of a benefit obtained from the plaintiff.[70] It denotes a very limited order that effects a strict form of corrective justice between the parties. We have seen that courts have been prepared to countenance such awards under ss 237–9 where it would restore (refund, return, including through rescission) to the plaintiff some benefit obtained from them by the defendant as a result of the misleading conduct.[71] Restitution in this sense is distinguished from an order requiring a defendant to 'give up' some profit obtained as a result of the contravention, but which benefit has not necessarily come from the plaintiff's assets or labour.[72] An order to give up a profit to the plaintiff is on this definition a far more intrusive remedy than restitution, operating to redistribute some gain held by the defendant to the plaintiff, and requires further and different justifications.[73] This latter award, traditionally labelled by reference to the equitable remedy of account of profits, may be labelled 'disgorgement damages'[74] to focus on the nature of the ultimate order, rather than the process by which the measure of that order is reached. Unlike an award of restitution, disgorgement reaches to subjective or actual profits that have been received by the defendant from third parties as a result of the defendant's misleading conduct or have been generated by the defendant as a result of wrongdoing to the plaintiff. A simple example of a clear case of disgorgement, taken

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70 *Anderson v McPherson [No 2]* (2012) 8 ASTLR 321, 353 [226] ('*Anderson [No 2]*'); *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 409 [414] (Heydon JA) ('*Harris*'); *Maximum Financial Services Inc v 1144517 Alberta Ltd* [2015] ABQB 646 (14 October 2015) [84] (Romaine J); *ACES System Development Pte Ltd v Yenty Lily* [2013] 4 SLR 1317 [30] 1331-2. Cf *One-Step (Support) Ltd v Morris-Garner* [2018] 3 All ER 659, 665–6 [11] (Lord Reed), 693–4 [111], 695–6 [114]–[115] (Lord Sumption); *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44 (2 August 2018) [186].

71 See above text at n 60.

72 On the distinction, see Justice James Edelman, *McGregor on Damages* (Sweet and Maxwell, 20th ed, 2018) 447–8 [14-001]–[14-003], 472–3 [15-001]; Lionel D Smith, 'Disgorgement of the Profits of Breach of Contract: Property, Contract and "Efficient Breach"' (1994) 24 *Canadian Business Law Journal* 121.

73 See below Part III. For a seminal discussion, see Sarah Worthington, 'Justifying Claims to Secondary Profits' in E J H Schrage (ed), *Unjust Enrichment and the Law of Contract* (Kluwer Law International, 2001) 451.

74 See, eg, *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 360 ALR 1, 4 [1], 5 [4], 5 [7] (Kiefel CJ, Keane and Edelman JJ) ('*Ancient Order of Foresters*'); *Anderson [No 2]* (2012) 8 ASTLR 321, 353 [226]; *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157, 196–7 [159]–[162]; *A-G v Blake* [2001] 1 AC 268, 291–2 (Lord Steyn).

from the fiduciary context, is where a fiduciary is required to disgorge (account for and then give up to the plaintiff) the sum of a bribe received by the breaching fiduciary.[75]

Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd [No 2][76] may constitute a good example of the need for a clearer appreciation of the distinct nature and justifications of restitutionary and disgorgement awards. In that case, 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. The defendants had warranted to the third-party associations that the defendants had 100 per cent copyright in the material and that the material did not infringe copyright held by any other person. However, contrary to those representations, the trial judge found that the defendants' material had infringed the plaintiff's copyright in another, earlier song. The role of the third-party associations was to collect performance royalties on behalf of their members and distribute back payments in accordance with the stipulated percentage of entitlements. Although the allegations of breach of copyright and misrepresentation were fiercely denied by the defendants, they conceded that if established, the plaintiffs had suffered loss or damage because of the misrepresentations.[77]

By consensus between the parties, Jacobson J assessed damages under s 82 of the *Trade Practices Act* (s 236 of the *ACL*) on the basis of a hypothetical bargain that would have been struck between a willing licensor and licensee of the copyright in the song which was the subject of the dispute. 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'.[78] This award has subsequently been analysed as a restitutionary remedy, albeit one given to redress the loss caused by infringement of the plaintiff's copyright and so, in that sense, also compensatory in nature.[79]

However, there is a problem with this restitutionary analysis. We have seen that the claim of misleading conduct was parasitic on the earlier copyright infringement. While the court ordered the defendants to pay a reasonable fee for that wrongful user, it is difficult to see how the misuse of copyright (if that was the loss, broadly construed, the subject of the compensatory order of damages) was suffered *because of* the misleading conduct as required by s 236. Rather, it was the other way around: the breach of copyright was what rendered the defendants' subsequent statements to the third parties misleading. No doubt with that in mind, the plaintiff characterised its loss as the royalty

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75 The requirement to give up the gain is often achieved through a 'constructive trust': see *A-G (Hong Kong) v Reid* [1994] 1 AC 324; *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 418–23 [569]–[583] ('*Grimaldi [No 2]'*).

76 (2010) 188 FCR 321 ('*Larrikin [No 2]'*). See also *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*').

77 *Larrikin* (2010) 263 ALR 155, 183 [263] (Jacobson J).

78 *Larrikin [No 2]* (2010) 188 FCR 321, 323 [8].

79 *Winnebago Industries Inc v Knott Investments Pty Ltd [No 4]* (2015) 241 FCR 271; *Eight Mile Style LLC v New Zealand National Party* (2017) 127 IPR 318. The 'dual characterisation' of the awards as both compensatory and restitutionary in nature is criticised in Bant and Paterson, 'Exploring the Boundaries of Compensation for Misleading Conduct', above n 21.

payments that it said would otherwise have been due from the third parties.[80] However, those payments were due *as matter of contractual stipulation* between the third parties and the defendants. Importantly, the trial judge accepted evidence that the third-party associations 'distribut[e] income according to the member notified percentage shares, *not according to who actually owns the copyright*'.[81] It follows that the defendant received no benefit 'from' the plaintiff's property in its copyright: the benefits it received were a matter of valid contractual arrangements with and derived from the third parties.[82] It was precisely for this reason that the plaintiff's alternative claim for restitution of unjust enrichment failed.[83]

Seen in this light, the plaintiff's claim takes on the aspect of a partial account of profits: in essence, the defendants had reaped profits (in the form of the royalty payments from the third party) as a result of the misleading conduct and should be required to disgorge some part of them to the plaintiff. Had it been seen in this way, a number of important questions would have arisen for express consideration and argument, such as: does the *ACL* justify disgorgement remedies; what relevance was the low degree of culpability in this case; why should the plaintiff recover given it was the third party who had been misled, had made the royalty payments and was not seeking their recovery?

3 Disgorgement for misleading conduct?

In considering these questions, we have seen that the starting point must be to ask whether any award of disgorgement (such as that made pursuant to an account of profits) is consistent with the language and purpose of ss 237–9. The nature and purpose of the equitable process of accounting and subsequent order to disgorge identified profits must first be assessed to determine its 'fit' with the statutory scheme. However, as outlined below, the nature of the account of profits is the subject of increasing research and debate. It is relatively clear that there may be a number of very different rationales for this process of relief, which will directly affect its nature and operation in different contexts. These different roles will similarly directly affect the extent to which it can offer an appropriate analogical tool for the compensation orders available under ss 237–9.

At one end of the spectrum, Lionel Smith has argued that the requirement that a fiduciary account for profits received within the scope of her duty is a simple issue of attribution and therefore a primary duty.[84] This has the consequence that limiting questions of causation, remoteness and novus actus — commonly confronted by courts seeking to assess the scope of damages for breach of duty — have no part to play in the award: the simple question is 'what was received as fiduciary'? The obligation to account for that benefit then follows.

To similar effect, albeit on different grounds, J A Watson has recently argued[85] that the duty to account historically arose both at common law and in equity in circumstances

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80 *Larrikin* (2010) 263 ALR 155, 182–3 [259]–[260] (Jacobson J).

81 Ibid 190 [328] (Jacobson J).

82 *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 655 [47]–[48] (Gleeson CJ), 663 [79] (Gummow, Hayne, Crennan and Kiefel JJ).

83 See *Larrikin* (2010) 263 ALR 155, 189–91 [318]–[336] (Jacobson J).

84 Lionel Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7 *Journal of Equity* 87, 100–3.

85 J A Watson, *The Duty to Account: Development and Principles* (Federation Press, 2016).

where a person obtained or dealt with property in circumstances where her entitlement to do so was qualified: namely, the property was not free to be employed to her own, self-interested ends but must be dealt with to the use of another.[86] Where this duty to account arose, it was in the nature of a primary obligation, rather than a remedy for breach of duty. Watson argues that, in that light, an account of profits for the tort of passing off, for example, arises due to the fact that the defendant is using the plaintiff's property in the common law trademark.[87]

It may be possible to argue, on that same basis, that where misleading conduct under the *ACL* involves the wrongful appropriation of another's property, such as a common law trademark, goodwill, reputation or other property, that an account should be open on the existing language of ss 237–9 to strip the defendant of her profits and return them to the plaintiff. On this analysis, the line between restitution and disgorgement is very fine, the profits being treated as the inherent fruit of the plaintiff's property wrongly received by the defendant.[88] As we have seen previously, if a very broad approach is taken to the ambit of the compensation orders available under ss 237–9, this kind of next step is not impossible. As it simply requires a causal connection between profit and the wrongful appropriation of profit, it may extend to the sort of facts in play in *Larrikin*.

Other, contrasting analyses of the equitable account of profits, taken from the fiduciary context, stress its deterrent purpose.[89] This instrumental approach justifies the award of disgorgement damages without the necessity of some proprietary or pseudo-proprietary base. Indeed, on one account, the tort of passing off itself may provide an example of equity's more instrumental approach to awards that strip the defendant's profit. As Gummow J has explained, at common law the tort of passing off was considered as an action for deceit, the difference lying in the fact that the deceit was practised not upon the plaintiff but upon those who were his customers or potential customers.[90] Equity, by contrast, emphasised the 'proprietary' nature of the wrong because at the time the protection of proprietary interests was thought to be the basis for equity's auxiliary jurisdiction.[91] This was an instrumental argument, pressed into service to allow the award of equitable remedies where common law compensatory damages were inadequate. As Gummow J explained in *ConAgra Inc v McCain Foods (Aust) Pty Ltd*:

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86 Ibid 155.

87 Ibid 118–19. On some of the further implications of the analysis, see Joe Campbell, 'The Duty to Account: Development and Principles' (2017) 39 *Sydney Law Review* 429.

88 This will not always be the case: the defendant's own skill and labour may have added disproportionately to the profit, in which case an allowance must be made to avoid the plaintiff's own unjust enrichment: see *Warman International Ltd v Dwyer* (1995) 182 CLR 544 ('*Warman*').

89 *Ancient Order of Foresters* (2018) 360 ALR 1, 10–11 [24] (Kiefel CJ, Keane and Edelman JJ); *Warman* (1995) 182 CLR 544, 557–8; *Bray v Ford* [1896] AC 44, 51 (Lord Herschell); James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) 83–6; Edelman, *McGregor on Damages*, above n 72, 474–5 [15-005]. Cf Katy Barnett, *Accounting for Profit for Breach of Contract: Theory and Practice* (Hart Publishing, 2012), arguing that disgorgement damages have both deterrent and punitive aims.

90 *10th Cantanae Pty Ltd v Shoshana Pty Ltd* (1987) 79 ALR 299, 319–23 (Gummow J) ('*10th Cantanae*'), citing Williams LJ in *Jamieson & Co v Jamieson* (1898) 15 RPC 169, 191 ('*Jamieson*').

91 *ConAgra Inc v McCain Foods (Aust) Pty Ltd* (1992) 33 FCR 302, 363 (Gummow J) ('*ConAgra*').

> The lack of a proprietary right in one's personal reputation as a citizen was one reason why an injunction ordinarily would not go to restrain commission or repetition of libel or slander. … So it is not surprising that as regards the passing-off action which at law was a variant of a claim in deceit, Chancery strove to put its intervention on a proprietary basis. As Windeyer J pointed out, there was an element of circularity in the reasoning employed in the cases: *Colbeam Palmer Ltd v Stock Affiliates Pty Limited* …[92]

As Gummow J further explained, while injunctions were thus made available on the 'proprietary' character of the wrong, the account of profits was withheld unless there was shown some fraud, including by continued breach following notice of the misuse. Innocent misuse was not remediable by account of profits. This emphasises the essentially instrumental and deterrent nature of the remedy.[93] For this reason, Gummow J has emphasised the force of the view that equity's jurisdiction to intervene in cases of passing off lies not in its so-called proprietary nature but in the prevention of fraud as full as would support an action at common law in deceit.[94]

This emphasis on deterrence sitting behind the account of profits, particularly in cases where injunctive relief is no longer possible, is certainly consistent with the instrumental purpose of the prohibition on misleading conduct: to deter unfair trading practices and to protect consumers. And on this approach, broader questions such as those posed above in relation to the *Larrikin* case, potentially remain relevant in determining the availability and measure of the remedy.

As a matter of theory, therefore, it is possible to conceptualise the rationale(s) of disgorgement orders in different ways, but in ways that remain consistent with the overall protective purposes of the *ACL*. However, the challenge remains to align this form of order with the specific language and remedial purpose of the statutory forms of relief, which as we have seen, require the order to 'compensate' or 'prevent or reduce' 'loss or damage'. It might be possible to draw a connection, as Kit Barker[95] and Ralph Cunnington[96] have done in different contexts, and indeed as the history of passing off suggests, between the availability of injunctive relief and the award of gain-based damages. Drawing on those accounts, it might be argued that where there is a contravention of the s 18 prohibition, the court will be unable, as a matter of practicality,[97] to award injunctive relief under s 232 for past misbehaviour. The act of misleading conduct has, on this approach, caused the loss of the protection offered by injunctive relief. The 'next best thing' to putting the parties into the position they would have occupied had an injunction been awarded is to strip the defendant of the profit that would have been prevented by its award had the plaintiff sought that award at the outset

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92 Ibid 364 (citations omitted).

93 Ibid 362–4 (Gummow J).

94 Ibid 363.

95 Kit Barker, '"Damages Without Loss": Can Hohfeld Help?' (2014) 34 *Oxford Journal of Legal Studies* 631.

96 Ralph Cunnington, 'The Measure and Availability of Gain-Based Damages for Breach of Contract' in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 207. See also Katy Barnett, 'Substitutability and Disgorgement Damages in Contract' in Elise Bant and Matthew Harding, *Exploring Private Law* (Cambridge University Press, 2010) ch 17.

97 In theory, s 232 does not require proof of an ongoing threat of contravention: the policy of the *ACL* means an injunction may have an important expressive role notwithstanding that it is too late to prevent a past breach.

when the contravention was merely imminent. The 'loss' here that provides the statutory gateway to an award of disgorgement is the loss of the protection of an injunction (caused by the concluded act of misleading conduct). The profit-stripping relief operates by way of substitute for that lost relief.[98]

This analysis suggests that it might be possible to call disgorgement remedies into play in limited circumstances in a manner that remains consistent with the existing language and deterrent purpose of the *ACL*. However, the arguments remain highly speculative as they are, to date, untested (either by courts or through detailed academic analysis). Moreover, they depend for their success on a very generous approach to the key requirements of the statutory power to award compensatory orders, being to 'compensate', or 'prevent or reduce' loss or damage.

Further, the very difficult conceptualisations of the rationales and nature of the account of profits at general law, which have been noted above, make a difference in terms of the elements, reach and measure of the remedy. On Smith's analysis, for example, the defendant's state of knowledge is irrelevant to the duty to account for his profits received as fiduciary, whereas on the narrative offered by Gummow J, knowledge of infringement of the plaintiff's rights is critical to both the award and measure of relief. The foundations and effect of the equitable remedy therefore remain highly contentious and, correspondingly, an uncertain foundation on which to build any statutory jurisprudence. At the least, there must be transparent justification for its award that conforms with and supports the protective purposes of the *ACL*. This is no small task for courts in the absence of further legislative guidance.

Moreover, as is also the case with restitutionary damages,[99] it must be acknowledged that there is a clear danger of confusion and collapse of distinct classes of remedial order in the forms of compensation and an account of profits. As has been discussed, the remedial regime in the *ACL* might be made to stretch so far as to cover disgorgement under its admittedly broad and flexible remedial regime of compensation orders. However, what may be permissible as a matter of interpretation nonetheless presents significant challenges to maintaining coherence in the law. We have seen that sometimes compensation may be measured by reference to a defendant's gain, for example, in 'diverted profit' cases. However, on any account, at general law, the two categories of remedy have distinct roles, elements and aims. Making both conceptually distinct forms of relief available under the *ACL* via a difficult process of characterisation of relief for 'loss or damage' may have the effect of blurring the very distinctions between the categories, introducing confusion and inconsistency into the remedial regime. These risks may, moreover, flow beyond the legislative regime through a feedback process into the surrounding general law.

Thus, while an argument might be made for including disgorgement awards as part of the suite of orders available under ss 237–9, we suggest that there are jurisprudential and policy reasons against doing this. Such an approach strains the language of the statutory provisions and risks undermining what are important distinctions between the

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98 A similar analysis would justify award of a licence fee where the circumstances of the case (for example, the relatively minor nature of the contravention, the hardship that would be caused through the award of an injunction, etc) suggest no injunction would have been ordered. In these cases, the court is effectively sanctioning the breach but on terms: see Cunnington, above n 96, 241.

99 Bant and Paterson, 'Exploring the Boundaries of Compensation for Misleading Conduct', above n 21.

categories of compensation and disgorgement. Indeed, the conceptual work that needs to be done to justify disgorgement awards within the existing regime itself may undermine the importance in this type of regime of transparency in the purpose and scope of its provisions. For these reasons, there appears to be a strong case for examining afresh whether disgorgement or other deterrent remedies should be expressly permitted and defined under the statute. This enquiry is the subject of the balance of this article.

We further suggest that part of this conversation should also be the possibility of exemplary damages. These also effect deterrence, but go beyond disgorgement remedies in providing a punitive response to egregious behaviour.[100] A disgorgement award may of course be seen as punishing the defendant by extracting his or her profits, possibly without any concession for his or her role in earning those profits.[101] However, on any analysis, the purpose of the award is not primarily punitive. Conversely, while punitive damages may have an incidental effect in deterring wrongful conduct, this is not the primary factor informing this remedial response. The responsiveness of such awards to the culpability of the defendant may be particularly compelling in a regime premised on fair dealing and the protection of consumers.

III The range of deterrent/punitive orders

A The surrounding context

There is precedent for recognition of expressly deterrent and, indeed, punitive remedies for private law claims that operate (if not exclusively) to redress misleading conduct. The close relationship between the torts of deceit, passing off,[102] defamation and injurious falsehood,[103] and their proximity in terms of field of operation to misleading conduct, make all relevant and interesting sources of comparison for forms of deterrent and punitive awards. Statutory schemes responding to (inter alia) misleading conduct are another important resource.

An account of profits has long been available to plaintiffs at their election in cases of passing off and under intellectual property legislation.[104] Nor do deterrent and punitive awards need be restricted to cases involving infringement of property rights. In Australia, the tort of deceit attracts exemplary damages[105] and, it has been argued, has traditionally and should continue to attract disgorgement relief.[106] Defamation is

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100 See, eg, *Lamb* (1987) 164 CLR 1, 9; *Gray v Motor Accident Commission* (1998) 196 CLR 1.

101 See *Harris* (2003) 56 NSWLR 298, 369 [305], 406–10 [406]–[420] (Heydon JA). Cf with the judgment of Mason P: at 332 [173].

102 See, eg, *10th Cantanae* (1987) 79 ALR 299, 319–23 (Gummow J), citing Vaughan Williams LJ in *Jamieson* (1898) 15 RPC 169, 191. See also *ConAgra* (1992) 33 FCR 302.

103 See, eg, *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388.

104 See, eg, *ConAgra* (1992) 33 FCR 302, 362–4 (Gummow J) (passing off); *Copyright Act 1968* (Cth) s 115(2); *Designs Act 2003* (Cth) s 75(1); *Patents Act 1990* (Cth) s 122(1); *Trade Marks Act 1995* (Cth) s 126(1). See also *Circuit Layouts Act 1989* (Cth) s 27(2); *Plant Breeders Rights Act 1994* (Cth) ss 56(3), 56A(3). Our sincere thanks to Professor Stephen Graw for drawing these provisions and their potential interplay with profit-based measures to our attention.

105 *Musca* (1988) 80 ALR 251.

106 Edelman, *McGregor on Damages*, above n 72, 493–4 [15-041]–[15-044].

another tort in which misleading conduct rests at the heart of the wrong.[107] While concern over unstable jury awards has seen exemplary damages in that field removed by statute,[108] as those amendments also demonstrate, there are other mechanisms available to address unpredictable or disproportionate awards, such as placing the assessment of damages in the hands of the court, and placing 'caps' on the value of damages for non-pecuniary loss.[109] Moreover, the move against exemplary damages in that field has not been followed elsewhere. Additional damages have long been widely available under intellectual property statutes for 'flagrant' and deliberate breaches.[110] Further, in the nascent field of privacy law, the Australian Law Reform Commission has recommended that exemplary damages be retained for any statutory wrong of breach of privacy and that aggravated damages (compensatory for the hurt and humiliation suffered by particularly egregious breaches of conduct) be removed as a separate head of damages and rather managed through a generous conceptualisation of compensation.[111]

Another possible model, operating in a field closely related to the *ACL*, is found in the *National Credit Code* ('*NCC*') in sch 1 of the *National Consumer Credit Protection Act 2009* (Cth). The *NCC* contains a regime of penalty awards available for contraventions of so-called 'key requirements'[112] under the *NCC*, which predominantly relate to disclosure, a comparable field of obligation to the prohibition on misleading conduct. Under this unique regime, a key requirement penalty may be imposed by the court on application by a debtor, a guarantor, the Australian Securities and Investments Commission or the credit provider itself (such an application being a way of containing the award that might otherwise be made).[113] Where the application is made by the debtor or a guarantor, the maximum civil penalty that may be imposed is the debtor's loss resulting from the contravention or an amount equivalent to interest charged or fees payable under the contract, which, in a credit contract, approximates the gain to the credit provider from the transaction.[114]

Meanwhile, in the United States, consumer protection statutes commonly provide for 'double damages' and 'triple damages' awards (reflecting the level of defendant's culpability) in cases of deliberate or egregious misleading conduct, multiplied by reference to the value of what would otherwise be the principal compensatory award.[115]

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107 Ibid.

108 The legislation was prompted by the jury award made in the new trial following *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44. See, eg, *Defamation Act 2005* (Vic) s 37.

109 See, eg, *Defamation Act* s 35.

110 See *Copyright Act* s 115(4); *Designs Act* s 75(3); *Patents Act* s 122(1A); *Trade Marks Act* s 126(2); *Circuit Layouts Act* s 27(4).

111 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) 12, Recommendations 12–13, 12–14.

112 See *National Consumer Credit Protection Act 2009* (Cth) sch 1 s 113(2) ('*NCC*').

113 Ibid s 112(1).

114 Ibid s 114. In such cases, the penalty is payable to the debtor or guarantor: s 115(1).

115 See, eg, the discussion of the Supreme Judicial Court of Massachusetts on the intention and operation of multiple damages in *International Fidelity Insurance Co v Wilson*, 443 NE 2d 1308, 1317–19 (Mass, 1983) ('*International Fidelity*'). A majority of State jurisdictions allow similar awards: see Carolyn L Carter, 'Consumer Protection in the States: A 50-State Report on Unfair

These are, in most jurisdictions, coupled with awards to cover plaintiff's attorney fees. The purposes of these awards are to mark the legislature's disapproval of the defendant's conduct, to deter that conduct, to encourage private lawsuits and also encourage their settlement.[116] This strategy may be of particular interest to Australian reformers as these multiplier clauses have the benefit of reducing the 'at large' and random character of exemplary damages awards that ultimately led to their removal in the context of defamation law, while retaining most of the remedial aims of exemplary damages awards.

Finally, the new civil pecuniary penalty thresholds in the *ACL* provide that the maximum amounts that may be awarded against a corporation are as follows:

> (a) $10,000,000;
>
> (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission—3 times the value of that benefit;
>
> (c) if the court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the act or omission occurred or started to occur.[117]

While we have also suggested that to make the penalty provisions effective, legislative guidance on the relevant considerations in the award should be specified,[118] the use of measures of benefit gained through the contravention and on turnover are pertinent. As we will see below, these features are likewise desirable in the context of litigation by an individual plaintiff and need to be considered in any proposed reforms.

Against this broader context, we identify three broad strategies that could be employed to address the current gap in the remedial armoury of the *ACL*. The following does not attempt to be an exhaustive analysis of each option: rather, the object is to trace the benefits and potential drawbacks of each, with a view to stimulating further consideration of these and other similar options in the future.

B Provide for an account of profits

1 Benefits

It would be possible to follow the lead of the intellectual property statutes and provide that the plaintiff may seek, in the alternative to compensation, an order that disgorges part or all of the profit obtained by the defendant as a result of the misleading conduct. Another option is to adopt the idea of profit-stripping awards from those statutes, but in a way that retains the existing *ACL* template and normative underpinnings. So, rather than giving the plaintiff a right to elect for an account of profits, that remedy could be permitted at the discretion of the court. This could be done through amendment to ss 237–9, to recognise deterrence as an explicit and justified aim of the remedial scheme, as well as including disgorgement as a head of order under s 243. This would leave the precise balance of orders to be made in cases of misleading conduct in the discretion of the courts, as currently is the case. Whichever strategy is adopted as a matter of

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and Deceptive Acts and Practices Statutes' (Report, National Consumer Law Center, February 2009).

116 *International Fidelity*, 443 NE 2d 1308, 1318 (Mass, 1983).

117 *ACL* s 224(3A). See also *ACL* s 151(5) for an example of a criminal penalty provision.

118 See above text at n 40.

legislative drafting, a separate authorisation is vastly preferable to the rightly-criticised 'plain English' strategy adopted in s 1317H of the *Corporations Act 2001* (Cth), which defines compensation to include an account of profits.[119] This sort of drafting sacrifices any form of conceptual coherence in the name of efficiency, with the concomitant dangers discussed previously.

Two specialist pieces of legislation provide interesting examples of the integration of profit-stripping remedies with legislation concerned with misleading conduct. The *Major Sporting Events (Indicia and Images) Protection Act 2014* (Cth) and *Olympic Insignia Protection Act 1987* (Cth) prohibit the unauthorised use of sporting images and so naturally address conduct that is likely to mislead consumers into thinking that there is a formal association between the defendant's products or services and the major sporting event covered by the Acts.[120] The Acts then expressly provide for the plaintiff (generally, the host organisation or a licence-holder) to elect between damages and an account of profits.[121] The Acts further explicitly state that the available remedies are 'in addition to' available remedies under the *ACL* for misleading conduct, nominating the general prohibition under s 18 and relevant specific prohibitions.[122] This recognition of the connection between the field of operation of the specific statutes and the more generalised regulation of misleading conduct under the *ACL* suggests there would be nothing inherently inapt in providing expressly for gain-based awards for misleading conduct under the *ACL* itself.[123]

In design terms, making express provision for disgorgement awards has a straightforward elegance as both a remedial strategy and in deterring contravening conduct. It merely asks the defendant to give up what has been gained from its wrongful conduct. Making this available would enable courts to ensure that defendants are not tempted to adopt misleading conduct as part of a deliberate business strategy and serve as strong specific and general deterrence. It would be a more targeted approach than 'at large' exemplary damages awards, focusing the attention of the court on the gains actually made by the defendant. Further, it would serve as an incentive for private litigants to take action to pursue contraventions. As we have seen, this is a strategy employed by the NCC. This is important given that many consumer disputes involve small losses that are not worth litigating if compensation is the only likely outcome. This inefficiency must serve indirectly to encourage contravening behaviour. The

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119 *Grimaldi [No 2]* (2012) 200 FCR 296, 433–4 [630]–[631].

120 *Major Sporting Events (Indicia and Images) Protection Act 2014* (Cth) s 16; *Olympic Insignia Protection Act 1987* (Cth) ss 8, 36.

121 *Major Sporting Events (Indicia and Images) Protection Act* s 48; *Olympic Insignia Protection Act* ss 9, 44–5.

122 *Major Sporting Events (Indicia and Images) Protection Act* 50; *Olympic Insignia Protection Act* ss 9A, 48. Both Acts specifically identify ss 18 (general prohibition on misleading or deceptive conduct), 29(1)(g) (representations that goods or services have sponsorship or approval that they do not have) and 29(1)(h) (representations that a person has a sponsorship, approval or affiliation that the person does not have).

123 A somewhat different example of sporting event legislation is found in the *Commonwealth Games Arrangements Act 2011* (Qld). This Act does not explicitly reference the *ACL*, though it does address situations that would arguably amount to misleading conduct. See, in particular, ss 51–2 (prohibitions), 62 (damages), 63 (account of profits), s 64(2) (aggrieved party cannot recover both damages and an account of profits in relation to the same conduct). However, s 77 (saving rights and remedies available otherwise than under the Act) presumably means that s 18 and the accompanying remedies under the *ACL* may still be applicable.

award would also give substantive relief where the plaintiff has been the subject of serious misleading conduct but where loss is difficult or impossible to identify or assess.

2 Dangers

There are a number of issues that would need to be addressed were private rights of redress for misleading conduct to extend to an account of profits. An important first step would be to identify the grounds for standing of any plaintiff seeking a disgorgement award. In the intellectual property and related statutes, the plaintiff tends to be the holder of property or property-like rights that have been infringed and which have contributed significantly to the defendant's profits. This will not be the case for many garden-variety consumer cases of misleading conduct and any direct contribution that will have been made by the consumer will be minimal. Consumers of the misleadingly-labelled 'targeted' brand of Nurofen, for example, paid twice the price of the identical, everyday product.[124] Were a profit-stripping remedy introduced under the *ACL*, there would need to be clear articulation of why it should ever extend beyond simple return of the difference in price (already available under the legislation and not, in any event, practically actionable) and how the value of the award should be calculated. Under the *NCC*, courts are given a direction to provide a remedy based on either disgorgement or compensation, whichever is the greater.[125] Thus the court retains a discretion over the quantum of the award but the flexibility to pursue deterrence over compensation.

A related, second issue is the measure of profits. In *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd [No 7]*, Edelman J noted that the task of attributing profit to an instance of misleading conduct becomes particularly arduous if a 'but for' test is applied, in practice requiring the precise impact of the misleading conduct on the total profit to be identified and measured.[126] His Honour suggested that a test of contribution (that is, was the misleading conduct 'a factor' in bringing about the profit that was in fact earned) may avoid some of these difficulties.[127] Further, courts could reduce very complex calculations by refocusing on the known *revenue* generated through the misleading conduct, rather than the precise profits. As Edelman J noted, these more generous approaches may be justified by the deterrence aim of the penalties regime.[128] A further and more far-reaching step would be to reverse the onus, placing on defendants the onus of showing why they should be entitled to retain profits, or some allowance for their skill and expertise in generating the profits. While this may be consistent with the approach taken for breaching fiduciaries,[129] in the hands of experienced corporate counsel it might be expected to add considerably to the costs, complexity and duration of trials.[130] A final possibility is to gauge the award as a percentage of turnover, as is contemplated under the civil penalties provisions summarised above. Here, however, the approach clearly shifts from a purely

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124 *Reckitt* (2016) 340 ALR 25.

125 *NCC* s 114.

126 (2016) 343 ALR 327, 341 [59] ('*Reckitt [No 7]*') (overturned on appeal on different grounds in *Reckitt* (2016) 340 ALR 25).

127 *Reckitt [No 7]* (2016) 343 ALR 327, 341 [59].

128 Ibid [65].

129 *Harris* (2003) 56 NSWLR 298, 384 [335] (Heydon JA).

130 Hence the potential value of actual costs orders, discussed further below at D1.

deterrent approach to one that embraces punitive aims, and needs to be considered in that context.

An additional concern might be raised in response to this reform about the potential for profit-stripping remedies to serve as an incentive for spurious litigation or profiteering behaviour. This might be particularly egregious if combined with group litigation procedures.[131] However, by the very nature of things, the profit attributable to a contravention is capped[132] and, once disgorged, cannot be made the subject of further orders. [133] Further, the inherent processes of court supervised litigation should effect some control upon the risks of this behaviour.[134] We suggest the cumulative effect of these various qualifications on disgorgement awards reduces the real likelihood of 'gaming' by plaintiffs. Certainly, this has not been the experience under the *NCC*, particularly given the added safety net under that regime of the possibility of the wrongdoer itself applying to the court for declaration of a contravention and seeking a more modest penalty award against it that may reflect its efforts to 'make good' the contravention.[135]

Conversely, it might be suggested the award will not go far enough to deter egregious contraventions of the regime. In economic terms it has been suggested that to effectively subvert the corporate cost-benefit analysis that informs a decision to contravene the law, or take inadequate precautions to avoid contravention, the cost of that conduct will be discounted by the likelihood of being detected and pursued.[136] On this reasoning, and assuming that defendants act rationally, an effective deterrent award should exceed the profit gained. Refocusing on revenue over profit as described above may be of assistance in this respect, but it should then be recognised that the ultimate award would, in that event, be more accurately described as exemplary damages.

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131 The impact of group plaintiff litigation on exemplary awards has significantly troubled law reform bodies and courts in other jurisdictions: see, eg, discussion in Law Reform Commission (Ireland), *Report on Aggravated, Exemplary and Restitutionary Damages*, Report No 60 (2000) 43–9 [2.070]–[2.094]; Law Commission (England and Wales), *Aggravated, Exemplary and Restitutionary Damages*, Report No 247 (1997) [5.159]–[5.185]. By contrast, the Law Commission (England and Wales) considered that restitutionary awards did not raise the same concerns: see Law Commission (England and Wales), *Aggravated, Exemplary and Restitutionary Damages*, Report No 247 (1997) [3.77]–[3.81].

132 This makes it an inherently proportionate measure of penalty for misleading conduct: see Paterson and Bant, 'Judicial Interpretation of the Discretionary Power to Award Civil Penalties under the *Australian Consumer Law*', above n 9.

133 Law Commission (England and Wales), above n 131, [4.180]. The Commission considered that if restitution of a benefit obtained by a wrong had been fully awarded against one plaintiff, there could be no question of granting a further order in favour of subsequent plaintiffs. This 'first past the post' effect was then expressly adopted for multiple plaintiff claims for exemplary awards: at [5.161]–[5.167].

134 See Law Commission (England and Wales), above n 131, [5.30]. See also [3.131]; *AB v South West Water Services Ltd* [1993] QB 507 ('*AB v South West*'), in which the Court of Appeal determined that the large and varied number of plaintiff claims made exemplary damages inappropriate.

135 See, eg, *Re Esanda Finance* (2004) ASC ¶155-070.

136 See Anthony Duggan, 'Exemplary Damages in Equity: A Law and Economics Perspective' (2006) 26 *Oxford Journal of Legal Studies* 303, 309–10; Bruce Feldthusen, 'Punitive Damages: Hard Choices and High Stakes' [1998] *New Zealand Law Review* 741, 751.

The impact on scarce judicial resources as well as disproportionate impact on low-culpability defendants would need to be carefully considered. This consideration raises the intuitive response that this more onerous liability imposed on defendants should be matched by a higher level of culpability than is required for a straightforward claim for compensation. The prohibition on misleading or deceptive conduct in the *ACL* does not include a fault requirement. However, as we have previously discussed, this consideration does come into play at the remedial stage.[137] For example, the remedial provisions providing for the reduction of damages where there has been contributory negligence of a plaintiff do not apply where the loss or damage was caused by intentional or fraudulent conduct on the part of a defendant.[138]

As an unusual and intrusive remedy, it would be legitimate and compelling to restrict its use to cases where the defendant is at moral fault. Thus, the disgorgement response might only be available in cases of deceptive (as opposed to simply misleading) conduct. This would make use of what is otherwise the often redundant phraseology currently employed by s 18 and ensure that only a limited class of plaintiff would have standing to seek the remedy. In turn this restriction would also reduce the scope for opportunistic claims for disgorgement damages. It would also be possible to situate the remedy within an expanded combination of ss 237–9, to make clear that the remedy is in the discretion of the court, to ensure that its award and measure are carefully circumscribed.

A further difficulty arises out of the interplay between the existing penalties regime and any novel disgorgement remedy. The *ACL* already requires courts to consider the interaction between compensatory orders and penalty awards, stipulating that compensation of private victims should take precedence over penalty in cases where the defendant cannot finance both.[139] Some sort of similar advertence (both with respect to the impact of any disgorgement award on future or concurrent compensation claims,[140] as well as the interplay between disgorgement and penalty awards) would need to be included in the *ACL*, were profit-stripping remedies to be permitted. One option would be to preclude the remedy where a penalty has already been awarded by the courts. This could be combined with a requirement that the regulator be notified of any claim for a profit-stripping remedy, to enable the regulator to join in the action and seek a penalty if that is considered desirable. It may also be observed that similar coordination issues arise in the context of group litigation claims and any measures that are adopted in that context could, here, be usefully considered.[141]

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137 Jeannie Marie Paterson and Elise Bant, 'In the Age of Statutes, Why Do We Still Turn to the Common Law Torts?: Lessons from the Statutory Prohibitions on Misleading Conduct in Australia' (2016) 23 *Torts Law Journal* 139; Bant and Paterson, 'Limitations on Defendant Liability for Misleading or Deceptive Conduct under Statute', above n 48.

138 *Competition and Consumer Act* s 137B(d); *Australian Securities and Investments Commission Act* s 12GF(1B)(c).

139 *ACL* s 227.

140 It is arguable that restitutionary awards that simply return benefits from defendant to plaintiff, as opposed to profit-stripping awards, do not require specific legislative attention: the relation between compensation and restitution can be handled simply through courts' usual attentiveness to guard against double recovery: Law Commission (England and Wales), above n 131, [3.71].

141 Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, above n 43, 101–12.

C Allow 'additional' damages

1 Benefits

An alternative strategy is to allow a court, in its discretion, to award additional or exemplary damages in cases of deceptive or egregious misleading conduct. This option goes beyond the deterrent objective of a profit-stripping measure to a consciously punitive measure. Again, some broad guidance could be given on relevant considerations in making the awards: they could be restricted to deceptive or egregious breaches (the latter to capture deliberate conduct conducted over long periods of time and in the face of repeated complaints) and calculated by reference to a percentage of turnover or some lump or other calculable sum.

Courts have typically not distinguished between the two facets of the statutory prohibition on misleading *or* deceptive conduct. However, what is deceptive as opposed to merely misleading carries a mental element and therefore attracts a greater degree of moral condemnation. This may justify a more severe legal response.[142] In cases of deceptive, as opposed to purely misleading, conduct there is less scope for moral objections to punitive as opposed to compensatory awards. Moreover, as noted previously, this would more closely align deceptive conduct under the statute with the treatment of deceit at common law. The element of discretion in the quantum of the award has the attraction of allowing courts to shape the remedy to respond to the level of culpability of the defendant and to take into account other compelling circumstances, ensuring a close fit between the wrong and ideas of 'just dessert' in punishment.[143] The size of the defendant's profits may inform the value of the additional damages but their highly discretionary nature (and award by courts rather than juries) seems sufficient to ensure that a lid is kept on the size of the awards.

2 Dangers

On balance, if restricted to cases of serious or deliberate misconduct, it is unlikely that this form of discretionary relief would operate as perverse incentives for poor litigation behaviour on the part of individual victims.[144] A greater danger is that, as a novel form of relief and in the discretion of the courts, they would seldom be awarded and in insufficient quantities to be convincing as an expression of the moral outrage that should accompany deliberate contraventions of the *ACL* prohibition on misleading conduct. In cases of group litigation, the possibility of exemplary or additional damages may constitute a greater incentive for defendants to settle, particularly given these would, of necessity, be cases of wide-spread contraventions that, if deliberate, would be highly likely to yield some award by way of additional damages.[145]

As for disgorgement awards, there is a need to consider the interplay between exemplary damages and compensatory awards, and the impact that multiple claims (not joined together in one group action) may have both in terms of its impact on the defendant and the danger these may pose to future or concurrent compensation claims.

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142 Cf *Reckitt [No 7]* (2016) 343 ALR 327, 349 [94] (Edelman J); *Reckitt* (2016) 340 ALR 25, 56 [131], 66 [173], 67 [177].

143 Karen Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23 *Melbourne University Law Review* 440.

144 Law Commission (England and Wales), above n 131, [5.30].

145 But see *AB v South West* [1993] QB 507, in which the English Court of Appeal determined that the large and varied number of plaintiff claims made exemplary damages inappropriate.

If multiple exemplary awards are made against the same defendant, potentially in separate proceedings, there is a danger of excessive punishment. However, there is additionally a concern that multiple awards may so deplete the defendant's resources and that legitimate claims for compensation might be compromised.[146] There are multiple routes that could be taken to address these issues. The Law Commission for England and Wales, for example, recommended that 'once punitive damages have been awarded to one or more "multiple plaintiffs" in respect of the defendant's conduct, no later claim to punitive damages shall be permitted for that conduct by any "multiple plaintiff"'.[147]

This 'first past the post' rule has the benefit of simplicity and rewards plaintiffs who take the risk of initiating and pursuing litigation to judgment.[148] Further, given the object is retribution, along with deterrence, there is less force in the complaint that the successful plaintiff has received an unwarranted windfall.[149] The recommendation has however been criticised as being unduly inequitable to equally deserving plaintiffs.[150] This however could be minimised through group litigation procedures. The concerns are also arguably out-balanced by valuable iterative role of such awards in expressing social outrage at particular conduct.

These procedural issues of concern are intrinsically connected to and potentially overshadowed by the conceptual issues that surround the role of punitive or exemplary damages in a civil law context.[151] The valuable iterative role of such awards in expressing social outrage at misconduct is clear. But the policy question remains of why this justifies an enforcement function being given to private litigants as opposed to the regulator[152] and why even misled plaintiffs should receive a windfall benefit from the award of damages on this basis. [153] One answer suggested elsewhere in this article is that, if we accept that the regulatory burden of deterrence needs to be shared between public and private litigants, and if we accept that to be effective, deterrence must contain a punitive element, the 'windfall benefit' to the plaintiff of an award of exemplary damages is the price of effective regulation. From that perspective, the award is not a 'windfall' but by way of 'bounty'.[154]

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146 See Law Reform Commission (Ireland), above n 131, 42 [2.068].

147 Law Commission (England and Wales), above n 131, [5.165].

148 Law Reform Commission (Ireland), above n 131, 46 [2.081].

149 Ibid 46 [2.082].

150 Ibid 49 [2.092].

151 See, eg, Weinrib, 'Punishment and Disgorgement as Contract Remedies', above n 20; Beever, above n 20.

152 Some US states have adopted 'split recovery' statutes under which the plaintiff is allowed to take only a proportion of the exemplary damages award, the remainder being allocated to the state or some charity. This option has not recommended itself to the Irish Law Reform Commission, not least because the relatively small size of exemplary awards make the significant administrative costs and complexity of introducing split recovery options impracticable: see Law Commission (Ireland), above n 131, 42 [2.064].

153 See further Bruce Chapman and Michael Trebilcock, 'Punitive Damages: Divergence in Search of a Rationale' (1989) 40 *Alabama Law Review* 741; Duggan, above n 136; Cass R Sunstein, Daniel Kahneman and David Schkade, 'Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)' (1998) 107 *Yale Law Journal* 2071.

154 Law Commission (Ireland), above n 131, 8 [1.15].

D Double/triple damages

1 Benefits

The third category of option is to stipulate that in cases of deceptive or egregious misleading conduct, the plaintiff is entitled to twice (or three or some other multiplier) times the amount that would otherwise be payable by way of compensation. This removes or reduces the element of judicial discretion inherent in exemplary awards and provides greater certainty around the measure of the award. This predictability should serve as an incentive to settlement and provide some greater likelihood that it will be worth the plaintiff's while to bring a complaint in cases where their pecuniary loss is modest.

The deterrent effect of what would remain, in many cases, a relatively modest sum could be bolstered through provision that, in cases of deceptive or egregious conduct, the plaintiff is entitled to reimbursement of their actual, out of pocket legal expenses. This would enhance the likelihood of plaintiffs instigating claims in cases of significant public interest, ensure they receive more effective redress for the wrong that they have suffered and serve as a strong incentive for early settlement in cases of deliberate wrongdoing.

Some United States ('US') jurisdictions require that plaintiffs first send a letter to the defendant requesting relief before initiating litigation. Refusal to grant relief in response to the plaintiff's letter, in a clear case of breach, has been taken to justify the award of multiple damages.[155]

2 Dangers

A significant drawback of the 'double compensation' approach is the inherent uncertainty and diversity in the current conceptualisations of compensation for misleading conduct, which will operate as the multiplier for any double- or triple-damages provision. The diversity of meanings under the Australian legislative regime makes any baseline for predicting the final award — desirable for meaningful settlement negotiations and litigation planning — inherently uncertain. Perhaps for this reason, some US jurisdictions provide greater certainty through a baseline for the award — an example is Alaska's statute which provides for 'three times the actual damages or $500, whichever is greater'.[156] The uncertainty of the Australian multiplier may, somewhat ironically, act as a spur to settlement if the multiplier is set sufficiently high. However, the higher the multiplier, the more random and potentially disproportionate such an award might become. Perhaps also for this reason, some US statutes provide a ceiling for multiplier damages awards. For example, in New York, the statutory private multiple damages awards are limited to $1000 more than actual damages.[157]

Another potential restriction on the availability of multiple damages, drawing from the more limited statutory coverage adopted in some US states, would be to limit plaintiff standing to natural persons. This would reflect the reality that access to justice is a

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155 *Heller v Silverbranch Construction Corporation*, 382 NE 2d 1065 (Mass, 1978).

156 50 Alaska Stat § 45.50.531 (2016).

157 NY GBL § 349(h) (McKinney 2014).

particular hurdle for consumers while reducing the risk of encouraging profiteering behaviours on the part of well-funded corporate litigants.

IV Conclusion

This article explores the use of disgorgement and exemplary damages for breach of the statutory prohibition on misleading conduct. While we make a case for expressly addressing the availability of these types of award in the *ACL*, we also acknowledge that there remains a policy choice as to whether to allow these awards directly and in the choice between disgorgement as a remedy aimed at deterrence and exemplary damages as a directly punitive measure. While this article has, accordingly, been necessarily explorative and preliminary in nature, its conclusion nonetheless is clear: there are sufficient issues of principle, precedent, policy and practice to warrant further investigation by reformers into the desirability of introducing private rights of redress, specifically geared to deterrence and punishment, against those who engage in contravening behaviour under the *ACL* and parallel regimes.