The autochthonous development and evolving approach to unjust enrichment by the High Court in Australia

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Abstract

Although the High Court had once been lauded by English unjust enrichment scholars for its percipience in its early willingness to recognise the concept of unjust enrichment in 1987, its development and treatment of unjust enrichment has since been the subject of academic and legal controversy. This paper attempts to navigate and interrogate those controversies. It traces, examines and evaluates the evolving approach to unjust enrichment by the High Court from 1987 until today. In so doing, it proffers two observations. First, the High Court has developed and emphasised a conscience-based approach towards restitution, which has not been without contention. Second, despite the common refrain that the Australian and English courts have departed in almost incompatible ways with respect to their jurisprudential understanding and judicial methodology towards unjust enrichment, there is ostensibly greater substantive consistency between the two jurisdictions today than has been hitherto claimed.

Introduction

1987 and 1991 marked watershed moments when unjust enrichment was recognised in Australia and England.\(^1\) Since then, however, it has been claimed that the two jurisdictions have diverged in irreconcilable ways.\(^2\) More remarkably, Australia’s approach to unjust enrichment has been censured as being ‘in a sorry state’.\(^3\) Given such criticisms, an evaluation of the High Court’s approach is both apposite and timely.

\(^1\) Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221 (‘Pavey’); Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548 (‘Lipkin Gorman’).
This paper begins with a historical background to restitution law and unjust enrichment. Thereafter, it traces the autochthonous development of unjust enrichment by the High Court, and makes two observations. First, the High Court has adopted a conscience-based methodology which was driven by concerns that unjust enrichment was illusory. It is, however, questionable whether a conscience-based approach to the common money counts is truly a more cogent basis than unjust enrichment. Second, the disagreements underlying the unjust enrichment debate revolve largely around questions of taxonomy and form. Critics of the High Court’s conscience-based approach tend to fixate on its outward inconsistencies with England and other common law jurisdictions. Yet, beyond the dissimilarities in judicial methodology, there is arguably little significant difference in substantive outcomes between the Australian and English approaches. Both approaches may, for instance, be explained by unjust enrichment rationale. Ultimately, this essay suggests that when evaluated as a matter of substance, there is today greater similarity between Australia’s and England’s approaches to unjust enrichment than has been previously acknowledged.

A brief history of the law surrounding restitutionary claims

Restitution law

Since time immemorial, Roman law has provided restitutionary remedies that reverse a defendant’s gains as opposed to providing compensation for losses arising from some wrongdoing. Similarly, restitutionary claims could historically be brought in England via several forms of action at common law. These included the writs of debt and account, which hid the restitutionary nature of the claim beneath a bare plea that money was owed as a debt or must be accounted for. The forms of actions were extended following Slade’s case, whereby it became permissible for restitutionary claims to be pleaded on assumpsit – the action of

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7 Barker and Grantham, above n 6.
8 James Edelman, ‘Australian Challenges for the Law of Unjust Enrichment’ (Speech delivered at the Summer School, University of Western Australia, 24 February 2012) 3.
9 (1648) Style 138.
which was premised upon the breach of a fictional implied contract. Unfortunately, the formulaic nature of these claims meant there was no impetus for the early common law courts to articulate a more comprehensive theory for the various common money counts. This state of affairs came to a head in Moses v Macferlan. In that case, Lord Mansfield faced a doctrinal deficiency underpinning the action for money had and received, and thus acknowledging that the nature of the case was not one where such actions had traditionally laid, his Lordship supplemented the fiction of implied contract with principles of ‘natural justice and equity’. This, as shown below, has had lasting effects for unjust enrichment in Australia; particularly in the High Court’s development of a conscience-based approach to unjust enrichment claims.

Unjust enrichment

Moving into the twentieth century, the fiction of implied contract became increasingly curtailed, and would ultimately be discarded. Instead, unjust enrichment was first raised as a possible explanation for money had and received in the House of Lords in 1943, and by 1954, had even become a cause of action in Canada. In the latter half of the century, academic interest quickly burgeoned over the possibility of ridding the remnants of the old forms of action for restitution, at law and equity, and of unifying them under a singular theory and framework of unjust enrichment.

Today, it is commonly accepted that a successful claim in unjust enrichment requires a four-part inquiry. First, the defendant must have benefitted or have been enriched; second, the enrichment must be at the expense of the plaintiff; third, the enrichment must be unjust; and fourth, there must be no defences that are available, such as a change of position. Such a framework is premised upon an ‘event-based’, as opposed

11 Ibid 39.
12 (1760) 2 Burr 1005.
14 See Sinclair v Brougham [1914] AC 398, 452 (Lord Sumner).
to a ‘response-based’, taxonomical understanding of private obligations. For example, Birks originally argued that unjust enrichment was one category, out of four, that covered every legal event which triggered a restitutionary remedy. This ‘generic conception’ would be further subdivided into ‘restitution from wrongs’, and ‘autonomous unjust enrichment’ not arising from wrongs. However, this broad conceptualisation of unjust enrichment – as being coterminous with restitution law – was heavily criticised as overly encompassing and therefore internally incoherent. Consequently, Birks formulated a narrower theory which limited unjust enrichment to ‘all events materially identical to the mistaken payment of a non-existent debt’.

On Birks’ subsequent and narrower view, unjust enrichment becomes a ‘subset’ of restitution law, and is decoupled from the remedy of restitution. This view was better received, as restitution had since been recognised to arise from legal events outside of unjust enrichment too – such as from wrongs or property rights. Ostensibly, the English Supreme Court recently adopted and affirmed the narrower view when it branded the concept of unjust enrichment with cases involving the correction of ‘normatively defective transfers of value’. Arguably, the High Court took the narrow view too when it held that the ‘unjust factors’ within ‘unjust enrichment’ are concerned with vitiated intention, and not wrongdoing. Nevertheless, in addition to understanding the background history between restitution law and unjust enrichment, it is perhaps more critical to consider more carefully the High Court’s particular evolving approach to unjust enrichment in Australia.

(4 November 2015) [18]; Commissioners for her Majesty’s Revenue and Customs v The Investment Trust Companies (in liq) [2017] UKSC 29 (11 April 2017) [24] (‘Revenue and Customs’).

21 Peter Birks, An Introduction to the Law of Restitution (Clarendon Press, 1985) 16–17; see also Goff and Jones, above n 18, 5.
25 Ibid 17.
Autochthonous development in Australia

Broadly speaking, Australia’s treatment of unjust enrichment might be divided into three epochs. The first epoch began in 1987 when, without precedent, the High Court dispensed with the fiction of implied contract for restitutionary claims, and explicitly recognised unjust enrichment as a ‘unifying legal concept’ in *Pavey*.

In that case, contract could not form a ‘juristic explanation’ of the respondent’s enrichment because of her repudiatory breach. Thus, the appellant builders were entitled to restitution on the basis of *quantum meruit*, which in turn, was said to be ‘based on unjust enrichment’. Immediately thereafter, several lower court decisions attempted to follow suit by embracing unjust enrichment. This was despite a gaping uncertainty as to whether unjust enrichment was a legal principle in its own right, or something else. A high-water mark was reached in 1993 when Deane and Dawson JJ suggested there could even be an ‘action in unjust enrichment’. However, although this proposition was soon decisively rejected by the High Court, greater relevance was made for unjust enrichment with the removal of the restitutionary bar for mistakes of law, the creation of a structured approach to unjust enrichment based upon unjust factors (such as mistake, duress or illegality), and the incipient recognition of the change of position defence.

A second epoch arrived at the turn of this century, which saw the High Court retreat from the concept of unjust enrichment, and which involved the development of a conscience-based approach towards restitutionary claims. In *Roxborough*, Gummow J cast much doubt on the continued relevance of unjust

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29 (1987) 162 CLR 221, 227–8, 256.
30 Bryan, ‘Peter Birks and Unjust Enrichment in Australia’, above n 5, 728.
34 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 379 (‘Baltic Shipping’).
37 *David Securities* (1992) 175 CLR 353; see also Stevens, above n 22, 13.
38 See *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 (‘Roxborough’).
39 Ibid.
enrichment in Australia. His Honour held that while the fiction of implied contract was conclusively rejected by Pavey, that case did not identify ‘a satisfactory doctrinal basis’ for the common money counts. Instead, though unjust enrichment might be useful in furthering ‘legal inquiry’ as a ‘unifying legal concept’, it could ‘contrive legal analysis’ if directly applied as a legal principle since it was apt to conceal the particular responsibilities and relationships which provide the legal and policy basis upon which restitution is granted. Unjust enrichment was an ‘all-embracing theory of restitutionary rights’. Its acceptance would lead to ‘top-down reasoning’ upending common law judicial methodology, which ‘may distort well settled [equitable] principles’ and remedies. Moreover, actions for money had and received were historically laid even against defendants who were never enriched. Thus, his Honour suggested that a conscience-based approach, focusing on the unconscionability in retaining a conferred benefit, was a superior basis for restitution than unjust enrichment. Such criticisms would be repeated by the High Court over subsequent years.

The third epoch, arriving at the start of this decade, has most noticeably been marked by the High Court’s softening of its criticisms against unjust enrichment, and return to the structured approach towards unjust enrichment claims as originally expounded upon in David Securities. Thus, in a 2012 decision, it was reaffirmed that restitutionary rights were distinct from contractual claims. In so doing, however, the High Court stated that unjust enrichment retained a useful ‘taxonomical function referring to [the] categories of cases’ which attract restitution. To that extent, unjust enrichment was not the ‘all-embracing theory’ as

40 (1987) 162 CLR 221.
41 Roxborough (2001) 208 CLR 516, 540 [64].
42 Ibid 543 [70].
43 Ibid 544 [72].
46 Roxborough (2001) 208 CLR 516, 554 [100].
50 Ibid 516 [30].
previously thought, and may develop the law in ‘novel occasions’. Furthermore, although the High Court was divided over whether illegality or the failure of consideration provided the qualifying or vitiating factor in that case, the full bench agreed that the more critical question was whether the allowance of restitution, in circumstances of illegality, would stultify statutory purpose, and hence undermine coherence in the law. Ostensibly, it has been argued that the High Court had, in effect, permitted ‘policy-motivated reasons’ for restitution that were independent of the existence of a ‘qualifying or vitiating unjust factor’.

If true, unjust enrichment is not merely a ‘sterile exercise in taxonomy’, but may have taken on more ‘normative force’ in Australia than has been explicitly recognised. In the proceeding section of this paper, two observations are made as commentary on the High Court’s evolving approach to unjust enrichment.

Observations

Conscience

The first observation that may be made on the High Court’s evolving approach to unjust enrichment relates to its apparent reliance upon the concept of conscience. A closer evaluation of the High Court’s conscience-based approach is germane given its tendency for controversy between ‘equity’ and ‘restitution’ lawyers. Since Roxborough, conscience-based reasoning has seen increased prominence in the courts. Most recently, it was reiterated that unjust enrichment (and disenrichment) was ‘not the basis for restitutionary relief in’ Australia. Instead, restitution is awarded pursuant ‘to equitable principles’, viz., whether the

53 Ibid 518 [33]–[34] (French CJ, Crennan and Kiefel JJ), 541 [103] (Gummow and Bell JJ), 547–8 [122] (Heydon J).
57 (2001) 208 CLR 516.
60 Ibid 597 [78].
retention of money paid to the defendant is ‘inequitable’ or ‘unconscionable’. As aforementioned, the preference for a conscience-based approach stemmed from concerns that unjust enrichment was vague, and so shrouded the nature of liability for restitution. Moreover, a conscience-based approach is consistent with the equitable language of settled case law for money had and received, and the judicial predisposition in Australia for remedies to be guided by ‘appropriateness and not a priori specification’.

It is nonetheless doubtful that a conscience-based approach is more cogent than the four-part inquiry framework as strictly set out under unjust enrichment theory. First, unconscionability, especially when used as a ‘basal principle’, may be more ambiguous than unjust enrichment. This is because unlike unjust enrichment, unconscionability has no self-evident content. Conscience’s ‘guiding criteria’ would always require ex post facto enunciation by the courts to be practically understood by lawyers, and it is little consolation that unconscionability ‘is not indeterminate’ if given time to develop. Indeed, the judicial norms underpinning unconscionability and its function (as a doctrinal rationale or determinant of liability) differ according to the legal doctrine at hand. This may result in ‘judicial idiosyncrasy’ in its application.

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61 Ibid 568 [1], 594 [69].
62 Ibid 592 [65].
63 Roxborough (2001) 208 CLR 516, 543 [70].
64 Moses v Macferlan (1760) 2 Burr 1005, 1008–12, quoted in Roxborough (2001) 208 CLR 516, 548 [83]; see also Ben Kremer, ‘Case Comment: Restitution and Unconscientiousness: Another View’ (2003) 119 Law Quarterly Review 188.
65 Finn, ‘Equitable Doctrine and Discretion in Remedies’, above n 4, 266; see also Bofinger (2009) 239 CLR 269, 300–1 [92].
67 Edelman and Bant, Unjust Enrichment in Australia, above n 6, 93 n 130; Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378, 392 (Lord Nicholls).
71 Pauline Ridge, ‘Modern Equity: Revolution or Renewal from Within?’ in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), Revolution and Evolution in Private Law (Bloomsbury Publishing, 2018) 251, 266.
Second, a conscience-based approach may also be incompatible with the structured approach as laid down by David Securities. Unconscionability’s opaqueness lends itself to conceptual confusion. Arguably, this has manifested in the lower courts’ attempts at developing an alternative jurisprudence of ‘unconscionable retention of benefit’. This may have the effect of threatening unjust enrichment’s conceptual coherence by requiring knowledge on the defendant’s part, and by subsuming the secondary issue of change of position under the primary question of liability. Additionally, a focus on a defendant’s unconscionable retention (as opposed to receipt) suggests liability is contingent upon the quality of the defendant’s conduct. Thus, there is a risk that unconscionability introduces considerations of wrongdoing inconsistent with the strict liability approach taken in David Securities. Consequently, because restitution focuses upon the defendant’s gain, and not loss caused, the more appropriate remedy for cases like Roxborough should arguably be compensation. If understood as a species of wrongdoing, unconscionability may paradoxically need to ‘generate new fictions … to support its thesis’. This is because wrongdoings typically require further judicial pronouncement of the antecedent obligation that was breached.

Nevertheless, attempts have been made to strengthen the doctrinal cogency of the conscience-based approach, although they have not been wholly satisfactory. One academic, for instance, argues that unconscionability is an unjust factor grounding restitution for unjust enrichment, and not a wrong unless statutorily prescribed. Others argue that normativity in judge-made law is inevitable, and unconscionability is but an honest way of confronting this reality. More pertinently, the High Court has

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73 (1992) 175 CLR 353, 376; see also Bryan, ‘Peter Birks and Unjust Enrichment in Australia’, above n 5, 733.
74 See Edelman and Bant, Unjust Enrichment, above n 26, 27.
78 (1992) 175 CLR 353, 376; see also Edelman and Bant, Unjust Enrichment in Australia, above n 6, 32–3, 94.
79 Grantham, above n 77, 400.
80 (2001) 208 CLR 516.
81 Grantham, above n 77, 400.
82 Roxborough (2001) 208 CLR 516, 545 [74].
83 Grantham, above n 77, 401–2.
85 See, eg, Ridge, above n 71, 269–70; Kremer, above n 64, 191–2.
moved to narrow Gummow J’s comments in *Roxborough*. Thus, unconscionability is not a ‘subjective evaluation of what is fair or unconscionable’, but must be understood by reference to ‘a qualifying or vitiating factor’. The High Court has even gone so far as to clarify that ‘principles of restitution or unjust enrichment can be equated with seminal equitable notions of good conscience’; thereby suggesting that unconscionability has no separate function than to describe the presence of unjust factors. Yet, if true, this reduces unconscionability to mere tautology; and, if so, the question remains about the utility of retaining unconscionability as the ‘fifth wheel on the unjust enrichment coach’.

**Form over substance**

A second observation that may be made is that criticisms of Australia’s approach to unjust enrichment tend to fixate upon its outward discrepancies with England and other common law jurisdictions. Disagreements tend to be over questions of form – taxonomy, methodology and what unjust enrichment ‘should look like’ – than of substance. One illustration is captured by the debates surrounding the role unjust enrichment ought to play. For example, Barker writes that unjust enrichment serves four potential roles: it may be a ‘classificatory unit’; an ‘extrinsic norm’; a legal principle with normative force and legal status; or a cause of action. Similarly, Virgo suggests that unjust enrichment is typically understood in a ‘descriptive sense’, which simply describes ‘a state of affairs where the defendant [obtains] a benefit in circumstances of injustice’, or in a ‘substantive sense’, where unjust enrichment is legally dispositive of a defendant’s

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86 (2001) 208 CLR 516.
87 *Equuscorp* (2012) 246 CLR 498, 518 [32].
88 Ibid; see also *Hills* (2014) 253 CLR 560, 596 [76].
89 *Hills* (2014) 253 CLR 560, 576 [16], 595 [74].
90 Bant, ‘Illegality and the Revival of Unjust Enrichment in Australia’, above n 54; Edelman and Bant, *Unjust Enrichment in Australia*, above n 6, 94.
91 Birks, above n 24, 5–6; Edelman and Bant, *Unjust Enrichment*, above n 26, 27.
93 See, eg, ibid 35.
96 Virgo, ‘What is the Law of Restitution About?’, above n 26, 310.
liability to make restitution upon the above-mentioned four-part inquiry.97 Ostensibly, disagreements with the High Court’s approach occur largely at this level of analysis.98

Unlike the High Court, unjust enrichment scholars posit that unjust enrichment ought to be understood in the substantive sense and given effect via a strict adherence to taxonomy. This is driven by the academic desire for coherence in the law that like cases be treated alike.99 Such desire is demonstrated by a rigorous taxonomical approach that emphasises the purity of an ‘event-based’ taxonomy, and direct application of ‘unjust enrichment at the claimant’s expense [as a] cause of action’.100 Unjust enrichment should be organised as a uniform ‘category of claims … whose members respond to the same normative concerns and share the same normative justification’.101 This is because there is intrinsic good in having a settled taxonomical paradigm which makes the law easier to apply, more accessible, logically transparent and elegant.102 A taxonomical approach concerns itself with the ‘deep structures’ of normativity underlying legal doctrine, beyond the ‘merely contextual or jurisdictional categories’ characterising the old forms of action.103

Accordingly, it has been contended that the High Court’s apparent preference for traditional pleadings and refusal to apply the four-part inquiry is reminiscent of the old forms of action and should be discouraged. For example, in Farah Constructions,104 the High Court favoured a traditional equitable analysis and fault-based standard for knowing receipt over the unjust enrichment analysis and strict liability approach taken by the Court of Appeal. This conclusion was criticised as undermining legal coherence since it potentially meant having two ‘models of restitutionary liability’ — in equity and unjust enrichment — applying to ‘essentially the same fact pattern’.105 Similarly, the High Court’s emphasis on the need to show work done

97 Ibid 310–11.
98 Barker and Grantham, above n 6, 12.
100 Burrows, The Law of Restitution, above n 3, 4–5, 27 (emphasis added); cf Bofinger (2009) 239 CLR 269, 301 [93]; cf Revenue and Customs [2017] UKSC 29 (11 April 2017) [41].
101 Lionel Smith, ‘Unjust Enrichment: Big or Small?’ in Simone Degeling and James Edelman (eds), Unjust Enrichment in Commercial Law (Thomson Reuters, 2008) 35.
104 (2007) 230 CLR 89.
at the defendant’s request for a quantum meruit claim, was denounced as contradictory to unjust enrichment’s aims of disaggregating the old forms of action for greater logical transparency.\(^{107}\)

Yet, focusing on the High Court’s outward methodological discrepancies arguably distracts from the anterior question as to why such discrepancies exist,\(^{108}\) and is apt to ignore the substantive similarities between Australia’s approach and that taken by other common law jurisdictions. For example, the high-level ‘quest for “coherence”’ undertaken by unjust enrichment scholars is equally important to the High Court too.\(^{109}\) Arguably, the High Court’s apparently idiosyncratic methodology to unjust enrichment stems from a localised legal history more strongly rooted in equity than England.\(^{110}\) Australia has a ‘strong “preservationist” tradition’ for equity owing to the ‘late “fusion” of law and equity in New South Wales’, and equity continues to be normatively seen as indispensable today.\(^{111}\) Thus, the taxonomical debates led by unjust enrichment scholars have not influenced the direction of unjust enrichment in Australia as it has in England.\(^{112}\) Consequently, although coherence would be understood by the High Court and unjust enrichment scholars as a preference for ‘doctrinal or conceptual fit to historical fit’,\(^{113}\) this has been expressed in outwardly divergent ways. A clear example is the role of equity within unjust enrichment. To unjust enrichment scholars, coherence means amalgamating restitution at common law and equity into an ‘event-based’ taxonomy as reflected under a four-part inquiry.\(^{115}\) To the High Court, however, coherence means assimilating equitable notions of ‘good conscience’ into the ‘fabric of the common law’, with equity prevailing.\(^{116}\)

\(^{106}\) See Lumbers (2008) 232 CLR 635.

\(^{107}\) Burrows, The Law of Restitution, above n 3, 41.

\(^{108}\) Barker, ‘Unjust Enrichment: Containing the Beast’, above n 94, 463.

\(^{109}\) Justice Mason, above n 18.

\(^{110}\) Swain, above n 33, 1049–50.

\(^{111}\) Barker and Grantham, above n 6, 55; see Supreme Court Act 1970 (NSW) s 57.


\(^{113}\) Swain, above n 33, 1050.

\(^{114}\) Justice Mason, above n 18; see also Baltic Shipping (1993) 176 CLR 344, 376 (Deane and Dawson JJ); Hill v Van Erp (1997) 188 CLR 159, 231 (Gummow J); Tame v New South Wales (2002) 211 CLR 317, 381 [191] (Gummow and Kirby JJ).


\(^{116}\) Roxborough (2001) 208 CLR 516, 554 [100].
Nevertheless, despite disagreements over judicial methodology, it has been noted that similar substantive outcomes would be reached under either approach.\(^\text{117}\) Indeed, the High Court’s preference for the old forms of action (e.g. money had and received) can easily be translated into the four-part framework and explained by unjust enrichment rationale.\(^\text{118}\) Moreover, the apparent dissimilarities between the High Court’s use of unconscionability, and England’s preference for the four-part inquiry,\(^\text{119}\) disappear when examined as a matter of substance. As above-mentioned, unconscionability has ostensibly been recently clarified as not having an independent role outside an unjust factor.\(^\text{120}\) Thus, it may presently be the case, that whereas ‘unjust enrichment operates to establish whether the receipt of the enrichment is unconscionable in a principled sense’ in England,\(^\text{121}\) ‘unconscionability can only be interpreted in a principled way’ by reference to unjust enrichment in Australia.\(^\text{122}\) To distinguish one from the other simply on the basis of methodology is, today, arguably a distinction without difference.\(^\text{123}\)

**Conclusion**

This paper has examined and evaluated the High Court’s evolving approach to unjust enrichment since 1987. It began with a brief historical account of restitution law and the concept of unjust enrichment. Thereafter, it traced the autochthonous development of unjust enrichment by the High Court at case law and made two observations. First, the High Court has adopted a conscience-based methodology for cases involving unjust enrichment. This was driven by concerns that unjust enrichment was illusory. It, however, remains open whether a conscience-based approach is a superior basis for restitution than that provided by unjust enrichment. Second, criticisms of the High Court’s approach tend to fixate upon its outward inconsistencies with the rest of the common law world. Yet, as this paper suggests, as a matter of substance there ultimately exists, today, greater similarity between Australia’s and England’s approaches to unjust enrichment than has been previously acknowledged. If this is true, it may now be possible to say, at least,

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\(^{118}\) See Lionel Wirth, ‘Unjust Enrichment: Unifying Concept or Cause of Action?’ (2015) 89(5) *Law Institute Journal* 34; see also Edelman and Bant, *Unjust Enrichment in Australia*, above n 6, 85 n 65.

\(^{119}\) See *Revenue and Customs* [2017] UKSC 29 (11 April 2017) [24], [41].


\(^{121}\) See especially *Revenue and Customs* [2017] UKSC 29 (11 April 2017) [39]–[41].

\(^{122}\) Graham Virgo, ‘Conscience or Unjust Enrichment?: The Emperor’s Old Clothes: Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd’ on *Opinions on High* (19 May 2014) <blogs.unimelb.edu.au/opinionsonhigh/2014/05/19/virgo-hills-industries/>.

\(^{123}\) Ibid; see especially Boadle, above n 72, 653 n 128; Edelman and Bant, *Unjust Enrichment*, above n 26, 13–14.
that the Australian and English approaches to unjust enrichment are no longer so divergent or irreconcilable as popularly believed.

Bibliography

Articles/books/reports
Barker, Kit and Ross Grantham, Unjust Enrichment (LexisNexis Butterworths, 2nd ed, 2018)
Birks, Peter, An Introduction to the Law of Restitution (Clarendon Press, 1985)
Birks, Peter (ed), The Classification of Obligations (Clarendon Press, 1997)
Birks, Peter, Unjust Enrichment (Clarendon Press, 2nd ed, 2005)
Bryan, Michael, ‘Unconscionable Conduct as an Unjust Factor’ in Simone Degeling and James Edelman (eds), Unjust Enrichment in Commercial Law (Thomson Reuters, 2008) 295
Burrows, Andrew, ‘We Do This at Common Law but That in Equity’ (2002) 22(1) Oxford Journal of Legal Studies 1


Degeling, Simone and Mehera San Roque, ‘Unjust Enrichment: A Feminist Critique of Enrichment’ 36 Sydney Law Review 69


Edelman, James and Elise Bant, Unjust Enrichment in Australia (Oxford University Press, 2006)


Goff, Robert and Gareth Jones, The Law of Restitution (Sweet & Maxwell, 1st ed, 1966)


Hedley, Steve, ‘Rival Taxonomies Within Obligations: Is There a Problem?’ in Simone Degeling and James Edelman (eds), Equity in Commercial Law (Lawbook Co, 2005) 78


Justice Mason, Keith, ‘Where has Australian Restitution Law Got To and Where is it Going?’ (2003) 77 Australian Law Journal 358

Kremer, Ben, ‘Case Comment: Restitution and Unconscientiousness: Another View’ (2003) 119 Law Quarterly Review 188


McConvill, James and Mirko Bagaric, ‘The Yoking of Unconscionability and Unjust Enrichment in Australia’ 7(2) Deakin Law Review 225


**Cases**

*ACCC v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51

*Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560

*Baltic Shipping Co v Dillon* (1993) 176 CLR 344

*Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221

*Baumgartner v Baumgartner* (1987) 164 CLR 137

*Benedetti v Sawiris* [2013] UKSC 50 (17 July 2013)

*Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269

*Commissioners for her Majesty’s Revenue and Customs v The Investment Trust Companies (in liq)* [2017] UKSC 29 (11 April 2017)

*Crown Prosecution Services v Eastenders Group* [2014] UKSC 26 (8 May 2014)

*David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353
Deglman v Guaranty Trust of Canada [1954] SCR 725
Equuscop Pty Ltd v Haxton (2012) 246 CLR 498
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89
Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32
Ford v Perpetual Trustees Victoria Ltd (2009) 257 ALR 658
Garcia v National Australia Bank (1998) 194 CLR 395
Heperu Pty Ltd v Belle (2009) 258 ALR 727
Hill v Van Erp (1997) 188 CLR 159
Kiriri Cotton Co Ltd v Dewani [1960] AC 192
Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548
Lowick Rose LLP (in liq) v Swynson [2017] UKSC 32 (11 April 2017)
Lumbers v W Cook Builders Pty Ltd (2008) 232 CLR 635
Martin v Pont [1993] 3 NZLR 25
Moses v Macferlan (1760) 2 Burr 1005
National Mutual Life Association of Australasia Ltd v Walsh [1987] 8 NSWLR 585
Nepean District Tennis Association Inc v Penrith City Council (1988) 66 LGRA 440
Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221
Pitt v Holt [2013] 2 AC 108
Public Trustee v Fraser [1987] 9 NSWLR 433
Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516
Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378
Semptra Metals Ltd v Her Majesty’s Commissioners for Inland Revenue [2007] UKHL 34 (18 July 2007)
Sinclair v Brougham [1914] AC 398
Slade’s Case (1648) Style 138
Tame v New South Wales (2002) 211 CLR 317
Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669
Woolwich Equitable Building Society v Inland Revenue Commissioners [1993] AC 70

Legislation

Supreme Court Act 1970 (NSW)

Trade Practices Act 1974 (Cth)

Other

Edelman, James, ‘Australian Challenges for the Law of Unjust Enrichment’ (Speech delivered at the Summer School, University of Western Australia, 24 February 2012)

Virgo, Graham, ‘Conscience or Unjust Enrichment?: The Emperor’s Old Clothes: Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd’ on Opinions on High (19 May 2014) <blogs.unimelb.edu.au/opinionsonhigh/2014/05/19/virgo-hills-industries/>