

BOOK REVIEW

***Restatement (Third) of Restitution and Unjust Enrichment* by the American Law Institute (St Paul: American Law Institute, 2011) vol 1, pages v–xxxvi, 1–670; vol 2, pages iii–xxxii, 3–745. Price US\$131.00 (hardcover) each. ISBNs 978-0-314-02062-4 and 978-0-314-60468-2.**

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One unfortunate feature of Commonwealth restitution jurisprudence is its scant use of American scholarship. It is not often appreciated just how much the present law owes to academic work performed in America over the last century, and the wealth of that learning remains significantly under-utilised. The publication by the American Law Institute of the *Restatement (Third) of Restitution and Unjust Enrichment* ('*Third Restatement*')¹ — under the direction of reporter Professor Andrew Kull — should, it is hoped, assist in redressing matters.

As is well known, Lord Mansfield in *Moses v Macferlan* injected into the action for money had and received the Roman notion of a contract 'quasi ex contractu',² and used it to structure the action around notions of conscience and the 'right to retain' the monies in issue. However, few efforts at any formal systematisation followed this jurisprudential innovation. The work of Sir Williams Evans, writing in 1802, is probably the most notable attempt, although it was limited to the action in money had and received and did not attempt to draw together the other common counts.³ Justice Gummow has remarked upon the factors making the milieu in England unfavourable to such a process,⁴ and so

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¹ American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011).

² (1760) 2 Burr 1005, 1008; 97 ER 676, 678. Cf *Saunders v Plummer* (1662) O Bridg 223, 227; 124 ER 557, 560 (Bridgman CJ).

³ William David Evans, 'An Essay on the Action for Money Had and Received' in William David Evans, *Essays on the Action for Money Had and Received, on the Law of Insurances, and on the Law of Bills of Exchange and Promissory Notes* (Merritt & Wright, 1802) 1, reprinted in [1998] *Restitution Law Review* 1. The commonality between the actions was clear: see Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* (5th ed, 1788) 128–9. Professor Ames traced the origins of the common counts from the decision in *Slade's Case* (1595) 4 Co Rep 91a; 76 ER 1072, and particularly from cases in the late 16th and early 17th centuries, in James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Harvard University Press, 1913) 153–4.

⁴ Justice W M C Gummow, 'Moses v Macferlan: 250 Years On' (2010) 84 *Australian Law Journal* 756, 757, reprinted in (2011) 68 *Washington and Lee Law Review* 881. All subsequent references will be to the *Australian Law Journal* version.

it is not at all surprising that the first significant steps towards the creation of restitution jurisprudence were taken in America.

The seminal work was Dean William Keener's 1893 masterpiece, *A Treatise on the Law of Quasi-Contracts*,⁵ in which the author clinically analysed the deficiencies in the concept of a 'contract implied in law' and advanced in its place a doctrine based upon unjust enrichment.⁶ Setting, perhaps, a pattern for many future book reviews of contributions on the subject of restitution, a reviewer first noted approvingly the analytical work undertaken, observing that Keener 'brought to the exploding point the uneasy consciousness of many legal writers that the usual division of obligations into those of contract and those of which the violation is a tort is inadequate, if not erroneous',⁷ before offering criticism based upon personal differences of opinion as to specific points of private law covered.

The utility of Keener's analysis was enhanced by Frederic Woodward.⁸ Woodward's treatise appeared in 1913, a year before the House of Lords delivered its judgment in *Sinclair v Brougham*,⁹ a case that may well constitute the nadir of English jurisprudence on the topic of restitution. Its well-criticised confusion between a *contract* implied in law and an *obligation* implied in (or, rather, imposed by operation of) law is all the more surprising given Viscount Haldane LC's quotation of Professor James Ames' observations as to 'the essentially equitable quasi-contracts growing out of the principle of unjust enrichment.'¹⁰

In 1937, following a period in which the most notable English contribution to the subject may have been Scrutton LJ's oft-quoted remark in *Holt v Markham*,¹¹ the American Law Institute published the *Restatement of the Law of Restitution*

⁵ William A Keener, *A Treatise on the Law of Quasi-Contracts* (Baker, Voorhis and Co, 1893). Keener's work is dedicated to Ames, who should be credited with first adumbrating some of the essential points upon which Keener expanded: see J B Ames, 'The History of Assumpsit' (1888) 2 *Harvard Law Review* 53, 63–9. See also Andrew Kull, 'James Barr Ames and the Early Modern History of Unjust Enrichment' (2005) 25 *Oxford Journal of Legal Studies* 297.

⁶ Keener — as did Lord Mansfield — located unjust enrichment within notions of equity. The opening words of the first substantive chapter in Keener, above n 5, 26 are illustrative:

The recovery at law of money paid under mistake affords not only one of the most striking illustrations of the equitable nature of the quasi-contractual obligation, where the liability rests upon the doctrine of unjust enrichment, but also shows, in common with the other topics belonging to the law of Quasi-Contracts, how utterly foreign to the subject are the principles of the law of Contract.

⁷ Everett V Abbot, 'Keener on Quasi-Contracts' (1896) 10 *Harvard Law Review* 209, 209. Note Everett V Abbot, 'A Retraction' (1898) 11 *Harvard Law Review* 402.

⁸ Frederic Campbell Woodward, *The Law of Quasi Contracts* (Little, Brown, and Co, 1913).

⁹ [1914] AC 398.

¹⁰ *Ibid* 417, quoting Ames, *Lectures on Legal History*, above n 3, 166.

¹¹ [1923] 1 KB 504, 513 ('the whole history of this particular form of action has been what I may call a history of well-meaning sloppiness of thought'). This may be contrasted with the speech of the Earl of Birkenhead concerning Scottish law in *Cantiare San Rocco SA v Clyde Shipbuilding and Engineering Co Ltd* [1924] AC 226, 236. So far as English law is concerned, the period is also capped by Richard Jackson's useful work: R M Jackson, *The History of Quasi-Contract in English Law* (Cambridge University Press, 1936).

(‘*First Restatement*’),¹² for which Professors Austin Scott and Warren Seavey were the reporters. This work, for the first time, collected common threads behind a collection of seemingly disparate corners of the law and arranged them thoughtfully, all the while expressed with the reporters’ characteristic lucidity.¹³ It appears not often to be appreciated just how much of an influence the *First Restatement* had upon Commonwealth law. Two illustrations ought to suffice.

The first is Lord Wright’s celebrated speech in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* (‘*Fibrosa*’),¹⁴ the reasoning of which is pervaded by the analysis set out in the *First Restatement* even though the work itself is cited only once.¹⁵ Lord Wright endorsed ‘a third category of the common law which has been called quasi-contract or restitution’,¹⁶ highlighted its fundamental place in a civilised legal system,¹⁷ emphasised its separateness from contract and tort,¹⁸ and cemented its rationale as the avoidance of unjust enrichment.¹⁹ All of these fundamental points, which set the stage for the orderly development of the subject, are traceable directly to the *First Restatement*.

Indeed, the depth of Lord Wright’s familiarity with the *First Restatement* can be seen in his earlier article on *Sinclair v Brougham*²⁰ (itself cited in *United Australia Ltd v Barclays Bank Ltd*)²¹ and in his extensive review of the *First Restatement*, written some six years before *Fibrosa*.²² His approval of its contents is clear. The comment that the English authorities in the area, ‘though never fully analyzed or classified in any English textbook ... seem, on the whole, to agree with the American law’²³ is telling. Of note also is the prophetic comment, made after contrasting the then current English scholarship on restitution with that of the United States, that:

I feel some hope that the *Restatement* will induce English lawyers to produce a reasoned treatise on the subject, and to classify, analyze and rationalize the

¹² American Law Institute, *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts* (1937).

¹³ The treatise is noteworthy in that the criticisms offered in reviews, following the initial praise, are conspicuously scarce and muted: see, eg, Garrard Glenn, ‘*Restatement of the Law of Restitution*’ (1938) 24 *Virginia Law Review* 828.

¹⁴ [1943] AC 32.

¹⁵ *Ibid* 71.

¹⁶ *Ibid* 61.

¹⁷ *Ibid*.

¹⁸ *Ibid* 62.

¹⁹ *Ibid* 64–5.

²⁰ Lord Wright, ‘*Sinclair v Brougham*’ (1938) 6 *Cambridge Law Journal* 305, 322–3.

²¹ [1941] AC 1, 12 (Viscount Simon LC).

²² Lord Wright, ‘*Restatement of the Law of Restitution*’ (1937) 51 *Harvard Law Review* 369.

²³ *Ibid* 370. Note also his Lordship’s comments in *Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265, 275. Shades of his acceptance of the *First Restatement* appear in *Brook’s Wharf and Bull Wharf Ltd v Goodman Brothers* [1937] 1 KB 534, 545, where his Lordship stated:

These statements of the principle do not put the obligation on any ground of implied contract or of constructive or notional contract. The obligation is imposed by the Court simply under the circumstances of the case and on what the Court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties or any privity of contract.

large mass of authority in English case law. They will find an admirable model and example in the *Restatement*.²⁴

One particularly important aspect of Lord Wright's speech in *Fibrosa* was its emphasis upon the lack of any right in the defendant to retain the monies in issue as generating the 'unjust enrichment':

The claim for repayment is not based on the contract which is dissolved on the frustration but on the fact that the defendant has received the money and has on the events which have supervened no right to keep it. The same event which automatically renders performance of the consideration for the payment impossible, not only terminates the contract as to the future, but terminates the right of the payee to retain the money which he has received only on the terms of the contract performance.²⁵

Lord Wright's analysis is consonant with the *First Restatement*²⁶ (and with present Australian law),²⁷ although it has not always been maintained in some later English scholarship (particularly that which has tended not to analyse or cite directly from the *First Restatement*).²⁸

It would not be overstating matters to suggest that the decision in *Fibrosa* was the springboard for the development of restitution scholarship in England and then the Commonwealth, despite some early suspicions from the bench.²⁹ A good deal of the reason for this is the clarity and sense with which Lord Wright was able to introduce and explain the new doctrinal structure he was creating in English law.

The second illustration of the importance of the *First Restatement* is its prominence in the analyses of the earliest persuasive Commonwealth texts in the area. The very first footnote in the first edition of Goff and Jones' work refers to the *First Restatement*,³⁰ and the doctrinal analysis adopted, commencing with the selection of the avoidance of unjust enrichment as the underlying principle explaining why actions lay,³¹ is traceable to that work. The *First Restatement*

²⁴ Wright, 'Restatement of the Law of Restitution', above n 22, 369.

²⁵ [1943] AC 32, 65.

²⁶ See *First Restatement*, above n 12, § 1 comment c.

²⁷ *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 528–9 [24], 529 [27] (Gleeson CJ, Gaudron and Hayne JJ), 548 [83], 549–50 [86], 551 [89] (Gummow J) ('*Roxborough*'); Ben Kremer, 'The Action for Money Had and Received' (2001) 17 *Journal of Contract Law* 93, 94–7, 101–2.

²⁸ In particular, Peter Birks made relatively few and shallow references to the *First Restatement* in his influential first text: Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985) 5, 103 n 1, 355 n 21. In later works, he corrected this: see, eg, Peter Birks, *The Foundations of Unjust Enrichment: Six Centennial Lectures* (Victoria University Press, 2002) 18–21. This tracked an apparent change in his approach away from a purely 'unjust factors' approach to an 'unjustified enrichment' approach: Peter Birks, *Unjust Enrichment* (Oxford University Press, 2003) ch 5.

²⁹ See, eg, *Boissevain v Weil* [1950] AC 327, 335–6 (Lord Simonds); *Reading v A-G* [1951] AC 507, 513–14 (Lord Porter). While Viscount Simon LC and Lord Atkin did refer to the *First Restatement* in *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 18 (Viscount Simon LC), 26 (Lord Atkin), it is Lord Wright's speech that has proved more influential.

³⁰ Robert Goff and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 1966) 3 n 1.

³¹ *Ibid* 11–26.

figures prominently in the elaboration of the basics of the topic,³² and is frequently cited (along with other American material) when the work deals with particular instances of claims, often in those areas where there was either no direct or no clearly settled English authority.³³ A good understanding of the *First Restatement* is also evident in works by Winfield³⁴ and Stoljar,³⁵ which guided Australian courts before the topic reached vogue.³⁶

Later Commonwealth scholarship has never fully acknowledged its analytical debt to its American roots. One reason may be the unfortunate tendency away from use of comparative law, given the growing insularity of practitioners and academics, who focus (often out of necessity) upon their legal system alone. Another is probably the decline in popularity of American restitution scholarship that occurred in the latter part of the 20th century, just as Commonwealth interest picked up.³⁷ Professor Kull himself has offered as a reason for that decline the subject ceasing to be taught as a discrete unit in American law schools, with the result that practitioners never became familiar with its principles and in turn simply failed to recognise restitutionary situations when encountered in practice.³⁸ It might also be that the quality of the *First Restatement* contributed to this somewhat paradoxical result, as it so well settled the field in American law as perhaps to give the impression that there was little left to do academically other than tinker at the edges. However, it is testament to the regard in which the *First Restatement* has been held in Australia that no less an authority and scholar than Windeyer J was content to cite it, with unelaborated approval, in support of a proposition of law in the unlawful exaction case of *Mason v New South Wales*.³⁹ Later references to the *First Restatement* by the High Court in a series of important cases are to similar effect.⁴⁰

³² Ibid 12, 17 n 80, 36–37.

³³ Ibid 62 n 8, 65 n 24, 69 n 41, 75 n 81, 80 n 15a, 81 n 24, 90 n 89, 91 n 5, 92 n 8 (mistake), 96 n 4 (quantum meruit), 127 n 19 (rescission), 179 n 42, 181 n 55, 190 n 35 (contribution), 217 n 63 (payment of another's liability), 227 n 11 (reversal of judgments), 231 n 2 (necessity), 304–5 (illegality), 357 n 1 (anticipated contracts which fail to materialise), 364 n 11 (conditional gifts), 405 n 15 (usurpation of office), 427, 429 n 25, 429 n 32 (waiver of tort), 457 n 70 (breach of fiduciary duty), 465 n 1, 465 n 10, 466 n 2, 474 n 42 (defences generally), 482–3, 493 n 61, 498 n 99, 498 n 3 (change of position).

³⁴ P H Winfield, 'The American *Restatement of the Law of Restitution*' (1938) 54 *Law Quarterly Review* 529 (where it is stated at 529 that 'English lawyers cannot have their attention directed too often or too emphatically to this branch of the law'); P H Winfield, 'Equity and Quasi-Contract' (1948) 64 *Law Quarterly Review* 46; Sir P H Winfield, *The Law of Quasi-Contracts* (Sweet & Maxwell, 1952).

³⁵ S J Stoljar, *The Law of Quasi-Contract* (Law Book, 1964).

³⁶ *Dellas v Kourtesis* [1962] VR 456, 458–62 (Little J); *Vandyke v Vandyke* (1976) 12 ALR 621, 648 (Mahoney JA) (New South Wales Court of Appeal); *J & S Holdings Pty Ltd v NRMA Insurance Ltd* (1982) 41 ALR 539, 551, 557 (Blackburn, Deane and Ellicott JJ) (Full Court of the Federal Court of Australia).

³⁷ See, eg, Andrew Kull, 'Rationalizing Restitution' (1995) 83 *California Law Review* 1191; Ernest J Weinrib, 'Restoring Restitution' (2005) 91 *Virginia Law Review* 861.

³⁸ Kull, 'Rationalizing Restitution', above n 37, 1195.

³⁹ (1959) 102 CLR 108, 144.

⁴⁰ *Baumgartner v Baumgartner* (1987) 164 CLR 137, 153 (Toohey J); *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 370, 385 n 20 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ), 398, 399 n 69 (Brennan J) ('*David Securities*'); *Giumelli v Giumelli* (1999) 196 CLR 101, 120 n 72 (Gleeson CJ, McHugh, Gummow and Callinan JJ).

It is quite clear that any attempt to update or replace the *First Restatement* would always have faced formidable obstacles. For one, Professors Scott and Seavey left large shoes to fill.⁴¹ For another, the subject is (at least in the Commonwealth) usually never short of academic opinions that are often as mutually exclusive as they are forceful.⁴² Thankfully, the American Law Institute has amply met the challenge in the form of the *Third Restatement*.⁴³

The first notable change in the *Third Restatement* is a fundamental reorganisation of its content. One unusual aspect of the *First Restatement* was its division into two parts. The first (overseen by Professor Seavey) reflected, roughly, the area formerly analysed as quasi contract (but with enlargements into areas originating in tort or equity), while the second (overseen by Professor Scott) comprised an area consisting largely of constructive trusts, resulting trusts, tracing and some equitable defences (material that was consciously carved out of the *Restatement of the Law of Trusts*,⁴⁴ a point to which I will return). The separation not only accommodated the expertise of the respective reporters, but reflected the fact that they were attempting to create a new unified whole from previously disparate areas. The division was echoed in the work's subtitle ('Quasi Contracts and Constructive Trusts'). However, it did — at least, at a superficial level — leave itself open to a charge of undue deference to history with consequent duplication of material across the two halves.⁴⁵ By contrast, the *Third Restatement* divides the subject into a more familiar organisation of liability, remedies and defences, although — intentionally — it does not much change the ambit of the material covered.⁴⁶ As will be shown below, this has helped to streamline the treatment of material, although with an attendant risk of de-emphasising the content of material where it varies depending upon a legal or equitable origin.

The second notable feature of the *Third Restatement* is the compression of principles into fewer, but more detailed, sections: the number of separate sections has dropped from 215 to 70, although the length of the work has increased, a fact somewhat concealed by the formatting used.

The material is arranged in the usual manner of topical chapters broken down into numbered sections that set out the points of principle. Each section in turn has a series of comments that tease out and explain the broadly stated principles, as well as illustrations comprising hypothetical fact situations and succinct reasons for the result that should be reached. Finally, reporter's notes conclude

⁴¹ It should also be noted that the Committee charged with assisting work on the *First Restatement* included such distinguished jurists as Erwin Griswold, Edwin Patterson, Edward Thurston and Francis Bohlen.

⁴² It might be observed that a grouping of n restitution academics has at least $(n + 1)$ viewpoints on the subject at any time. A calculation that includes past (usually inconsistent) viewpoints is left as an exercise for the reader.

⁴³ The non-consecutive numbering between the *First Restatement* and the *Third Restatement* is a result of the failed attempt to agree upon a second edition of the *Restatement*, which was discontinued in 1984 — itself a testimony to the difficulty of the challenge.

⁴⁴ American Law Institute, *Restatement of the Law of Trusts* (1935).

⁴⁵ See for example mistake, which is covered in both chapters 5 and 9.

⁴⁶ See *Third Restatement*, above n 1, § 1 reporter's note *a*.

each section, explaining textual choices, noting the decided cases from which illustrations were derived, and listing relevant material from other restatements, cases, texts and articles. The commentary is first-rate, and the list of material is invariably extensive, so much so that the work is extremely valuable as a research manual in its own right. It is noteworthy that the *Third Restatement* makes significant use of recent Commonwealth material, including cases and academic material from Australia,⁴⁷ Canada and England, as well as useful comparisons with provisions of civil law.

The clear depth of scholarship that has gone into the *Third Restatement* becomes evident once one engages with its substance. Unfortunately, the sheer size of the work — it runs to over 1400 pages — precludes the usual analytical techniques in a review such as this. To do it justice, it is most useful to concentrate on specific points of detail that are likely to be of most interest to an Australian audience, particularly matters which it is thought highlight points of commonality or difference with Australian law, or which deal with matters not finally settled in this country.

Whereas the *First Restatement* dealt with the principles underlying the subject in just three short sections,⁴⁸ chapter 1 of the *Third Restatement* presents a much more detailed basis for the theoretical model that underpins the work. Interestingly, many of the points made are closer to Australian law than English law in those areas where they differ. For example, § 1 comment *b* is at pains to point out that the term ‘unjust enrichment’ does not involve an ‘open-ended’ appeal to general notions of fairness, but rather involves ‘enrichment that lacks an adequate legal basis’; indeed, it is stated that ‘[b]ecause of its greater explanatory power, the term *unjustified enrichment* might thus be preferred to *unjust enrichment*, were it not for the established usage imposed by the first *Restatement of Restitution*’.⁴⁹

As Justice Gummow has observed, the American approach is based on the anterior notion of good conscience, in line with the decision in *Bofinger v Kingsway Group Ltd*,⁵⁰ and contrary to the predominant English academic approach.⁵¹ The High Court of Australia has, on numerous occasions, confirmed that ‘unjust enrichment’ is neither a determinant of an action nor an appeal to abstract notions of justice,⁵² and (while still acknowledging that ‘recognised unjust factors’ play a role in determining whether a restitutionary action lies) has made statements suggesting that the underlying rationale for the action is tending towards the approach in the *Restatement*.⁵³ In contrast, the English approach still

⁴⁷ Although *David Securities* (1992) 175 CLR 353, referred to in § 5 reporter’s note *g*, appears to have been omitted erroneously from the index of cases.

⁴⁸ *First Restatement*, above n 12, §§ 1–3.

⁴⁹ *Third Restatement*, above n 1, § 1 comment *b* (emphasis in original).

⁵⁰ (2009) 239 CLR 269.

⁵¹ Gummow, ‘*Moses v Macferlan*’, above n 4, 758.

⁵² *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 156 [151] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) (‘*Farah*’); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 299 [85]–[86] (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

⁵³ *Roxborough* (2001) 208 CLR 516, 529 [27] (Gleeson CJ, Gaudron and Hayne JJ) (‘That, in our view, is the critical question. As between the appellants and the respondent, who has the superior

leans towards the ‘unjust factors’ approach rather than an ‘unjustified enrichment’ approach, although Lord Hoffmann has identified the correctness of this preference as a question for another day.⁵⁴

The *Third Restatement* also makes explicit the use of examples forged by the application of basal principle, allowing certainty in commonly encountered areas but retaining, all the while, the flexibility to deal with novel cases. For example, comment *a* to § 1, setting out the basic place of unjust enrichment, states that

[t]he attempt to make the list comprehensive cannot make it exclusive: cases may arise that fall outside every pattern of unjust enrichment except the rule of the present section. The tradition from which we receive the modern law of restitution authorizes a court to remedy unjust enrichment wherever it finds it, but not to treat as ‘unjust enrichment’ every instance of enrichment that it regards as unjust.

This ‘bottom-up’ approach is somewhat in contrast with English ‘top-down’ scholarship that tends to elevate ‘unjust enrichment’ into a general determinant of an action rather than a descriptive or explanatory concept explaining why and when it lies⁵⁵ — an approach rejected in Australia.⁵⁶ In particular, under the English approach, focus tends to be directed towards identifying ‘enrichments’ as establishing the bounds of the subject,⁵⁷ as if the term ‘unjust enrichment’ were statutory words needing to be construed.

The *Third Restatement* also attempts to demarcate the limits of the subject, including the boundaries between it and other areas of obligations. For example, § 2(2) sets out a ‘limiting principle’ that ‘[a] valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment.’ This proposition, amplified by § 25, was the point applied by the plurality in *Lumbers v W Cook Builders Pty Ltd (in liq)* (*‘Lumbers’*) by reference to § 29 of the then current draft of the *Third Restatement* (which is now comment *b* to § 25).⁵⁸ Similarly, § 2(1) provides that mere receipt of a benefit without paying for it does not, of itself, mean that the recipient has been unjustly enriched; this cautions against any unconscious tendency automatically to equate unpaid-for benefits with liability.

claim?’); *Farah* (2007) 230 CLR 89, 156 [151] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) (‘The areas in which the concept of unjust enrichment applies are specific and usually long-established’); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 299–300 [88]–[92] (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

⁵⁴ *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558, 569 [22].

⁵⁵ See, eg, *ibid* 569 [21] (‘The answer, at any rate for the moment, is that unlike civilian systems, English law has no general principle that to retain money paid without any legal basis (such as debt, gift, compromise, etc) is unjust enrichment’); *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561, 583 [23] (Lord Hope) (‘The enrichment must, of course, have been “unjust”’).

⁵⁶ *Roxborough* (2001) 208 CLR 516, 543–5 [70]–[74] (Gummow J); *Farah* (2007) 230 CLR 89, 156 [151] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

⁵⁷ See, eg, Birks, *Unjust Enrichment*, above n 28, 9–10, 151–2.

⁵⁸ (2008) 232 CLR 635, 663 [79] (Gummow, Hayne, Crennan and Kiefel JJ). See also at 654–5 [46] (Gleeson CJ).

Such an analysis, with refreshingly clear and bright-line boundaries, is a useful counterpoint to Commonwealth scholarship, which has a tendency to define the subject in a more freestanding manner, even to the extent of treating it as a primary and fully coordinate area of the law of obligations alongside contract and tort⁵⁹ — an approach which facilitates a conterminous but inconsistent operation alongside equitable, contractual and tortious rights.⁶⁰ Even tempered with the unhelpful construct of ‘unjust factors’,⁶¹ such an approach is more likely to lead to expansive interpretations that impinge upon other areas of law, particularly rights flowing from ownership of property.⁶² The American approach conforms more readily to the Australian position that restitution is more an ‘interstitial’ subject that primarily plays a gap-filling role.⁶³

Chapter 2 of the *Third Restatement* deals with transfers subject to avoidance. The subject matter brought under this rubric forms much of the heartland of the old common counts, running the gamut from various forms of mistake to fraud, duress, undue influence, incapacity and lack of authority, as well as monies paid under judgments later reversed or under compulsion of law.⁶⁴

Some points are of particular interest to an Australian audience. The general proposition outlining when restitution will be available for transfers induced by mistake (§ 5) appears close to the law in Australia, requiring a causative mistake (termed an ‘invalidating mistake’, defined in § 5(2), and of course without any distinction between fact and law), and requiring that the payment was not voluntary (expressed in the sense of the claimant ‘bear[ing] the risk’ of the payment, in § 5(3)).⁶⁵ It is the interrelation of this section with others that yields interesting pointers towards areas not fully settled in Australian law. For example, comment *e* to § 59 and illustration 1 to § 60 suggest that a mistaken payor in a *Chase Manhattan* situation⁶⁶ would be entitled to claim a constructive trust over the wrongly paid funds provided they are traceable, although it does not appear to address the question of whether the trust is imposed from the date of payment or (as appears to be the preferable situation) from the date of realisation by the recipient sufficient to make retention unconscientious.⁶⁷ Comment *f* to

⁵⁹ See, eg, Andrew Burrows, *The Law of Restitution* (LexisNexis Butterworths, 2002) 1–2.

⁶⁰ See, eg, the argument rejected by the High Court in *Farah* (2007) 230 CLR 89, 157–8 [153] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

⁶¹ See Birks, *Unjust Enrichment*, above n 28, 91–4. While the concept of ‘unjust factors’ was adopted in *David Securities* (1992) 175 CLR 353, the High Court has since made it clear that unjust factors do not exclusively cover all ground: see, eg, above n 53 and accompanying text.

⁶² The logical tendencies are well expressed in Andrew Burrows, ‘The Relationship between Unjust Enrichment and Property: Some Unresolved Issues’ in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook, 2008) 333.

⁶³ *Roxborough* (2001) 208 CLR 516, 545 [75] (Gummow J).

⁶⁴ In the organisation of the chapter, one sees echoes of Lord Mansfield’s judgment in *Moses v Macferlan* (1760) 2 Burr 1005, 1011–12; 97 ER 676, 680–1.

⁶⁵ Cf *David Securities* (1992) 175 CLR 353, 373–4, 376–8 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

⁶⁶ See *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] 1 Ch 105.

⁶⁷ See *Wambo Coal Pty Ltd v Ariff* (2007) 63 ACSR 429, 437 [42] (White J) (New South Wales Supreme Court). As illustrated in *Farah* (2007) 230 CLR 89 itself, issues of knowledge, notice and conscience illuminate differences, sometimes subtle and sometimes not, between traditional equitable approaches and approaches developed via top-down reasoning. Focusing upon plain-

§ 60, and reporter's notes *b* and *c* to § 60, contain a useful discussion of the policy implications of the interaction between proprietary remedies and insolvency regimes, which is where the difference is most pertinent.

The topic of mistaken improvements (§ 10) begins with the statement that one who 'improves the real or personal property of another, acting by mistake, has a claim in restitution as necessary to prevent unjust enrichment.' This includes not just cases traditionally dealt with in Australia by proprietary estoppel — in other words, where there is some degree of acquiescence or encouragement of the mistaken expenditure — but also cases in which the owner of the property is entirely unaware. While the *Restatement* then provides that '[a] remedy for mistaken improvement that subjects the owner to a forced exchange will be qualified or limited to avoid undue prejudice to the owner', and the text in comment *a* to § 10 recognises the problem of undue hardship to the truly innocent owner, the basic regime appears to be at odds with Australian law (leaving aside specific statutory provision)⁶⁸ to the extent that it goes beyond the estoppel cases;⁶⁹ rather, it is more in accordance with English academic writing.⁷⁰ In practice, it may be that the difference is relatively small, as in many cases the mistaken improvement will, on the evidence, be sufficiently obvious to the owner to engage the principles of estoppel,⁷¹ and any voluntariness or risk-taking in the plaintiff's actions is also likely to emerge.

Similarly, § 11, which deals with mistaken gifts, includes within its purview the topic of imperfect assignments in the course of attempting to make a gift. The proposition in § 11 is that 'the intended donee has a claim in restitution as necessary to prevent the unjust enrichment of the unintended recipient or of the donor's successors, as the case may be', but the illustrations directly refer to remedies involving rectification and/or declaration, coupled with specific performance or imposition of a constructive trust. While the requisite elements to make out a claim appear to be similar to Australian law,⁷² the danger in downplaying the link between the claim (based upon failure of the gift owing to mistake) and the means to remedy that claim (via the remedy awarded) by simply saying that 'restitution' is available is that it tends to divert attention away from the principles by which the remedy is usually awarded. While this appears

tiff-sided factors, or objective facts such as 'enrichment', will often produce discrepant results from an approach focusing upon the conscience of the defendant.

⁶⁸ See, eg, *Encroachment of Buildings Act 1922* (NSW).

⁶⁹ See *Lumbers* (2008) 232 CLR 635, 663–4 [80] (Gummow, Hayne, Crennan and Kiefel JJ); I M Jackman, *The Varieties of Restitution* (Federation Press, 1998) 20–2.

⁷⁰ John McGhee, 'The Nature of the Enrichment Enquiry' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook, 2008) 79, 84–8.

⁷¹ Particularly in the case where it is a non-removable improvement; removable improvements self-evidently do not pose analytical trouble.

⁷² The requirement (in § 11(3)) of the donor's belief at the time of incapacitation or death that the gift 'has been perfected', augmented with the point in comment *d* that the rule applies to donors who became aware of a mistake but did not have an opportunity to correct it, appears to sit well with *Corin v Patton* (1990) 169 CLR 540 and the cases that preceded it, summarised in R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) 232–9 [6-110]–[6-155].

to be a conscious choice in the *Third Restatement*,⁷³ it poses evident dangers for development of the law in a jurisdiction in which the underlying equitable principles remain generally understood.

Chapter 3 deals with unrequested intervention, where a plaintiff seeks payment for conduct undertaken usually by way of some necessity. It is an area that is still developing in Australia,⁷⁴ although, notably, its recent tentative development has expressly acknowledged the *First Restatement*.⁷⁵ It is also of note that, in a case involving improvements made by an adverse possessor, Santow J considered a restitutionary claim of this kind lay in a manner that appears to be in accordance with the principles set out in § 27 of the *Third Restatement*.⁷⁶

Chapter 4 deals with the important relationship between restitution and contract. Again, there is much useful material, particularly in those areas where the principles in the *Third Restatement* align with Australian law or cover areas not yet the subject of conclusive authority. The propositions regarding restitution in the case of ineffective contracts (§ 31) state in a clearer fashion principles that are, with varying degrees of clarity, found in *Pavey & Matthews Pty Ltd v Paul* ('*Pavey*').⁷⁷ The default rule is that where a plaintiff has conferred a benefit under an ineffective contract (ie one that is extant but unenforceable by the plaintiff), restitution is available to avoid unjust enrichment, subject to important exceptions. One, not clearly dealt with in Australian law, is the rule that no restitution is available where the contractual counter-performance has been received (§ 31(1)); if accepted here, such a rule would appear to support the idea that the contractual price might be a ceiling on recoverable relief if it turns out that the reasonable cost of the benefit on a *quantum meruit* basis is above the contractual price. Another exception, unfortunately not as clearly articulated in *Pavey* as it could have been, is that restitution will be barred where it 'would defeat the policy of the law that makes the agreement unenforceable' (§ 31(2)). This, it is suggested, is the result in Australian law if a close reading is paid to the illegality case of *Nelson v Nelson* ('*Nelson*').⁷⁸

The same principles appear in the section dealing with the effects of illegality upon contract (§ 32), where it is stated that restitution will be allowed either where it is required by the policy of the underlying prohibition, or 'as necessary to prevent unjust enrichment, if the allowance of restitution will not defeat or frustrate the policy of the underlying prohibition.' This is an accurate summary of the applicable basic principle in Australian law for illegality in both contract and trusts, following *Nelson* and *Fitzgerald v F J Leonhardt Pty Ltd* ('*Fitzger-*

⁷³ See the introductory note to topic 2 of chapter 7.

⁷⁴ See *Lumbers* (2008) 232 CLR 635, 663–4 [80] (Gummow, Hayne, Crennan and Kiefel JJ); but note *Burns Philp & Co Ltd v Gillespie Brothers Pty Ltd* (1947) 74 CLR 148, 175–7 (Latham CJ), 194–6, 202 (Dixon J) and *Gemmell v Briennesse* (1933) 33 SR (NSW) 472, 476–7 (Harvey ACJ).

⁷⁵ *Suburban Towing and Equipment Pty Ltd v Suttons Motor Finance Pty Ltd* (2008) 74 NSWLR 77, 85 [42], 86–7 [48]–[53] (Hoeben J).

⁷⁶ *Cooke v Dunn* (1998) 9 BPR ¶16 489, 16 510–13 (Santow J).

⁷⁷ (1987) 162 CLR 221.

⁷⁸ (1995) 184 CLR 538. See also Ben Kremer, 'Recovering Money Paid under Void Contracts: "Absence of Consideration" and Failure of Consideration' (2001) 17 *Journal of Contract Law* 37, 43–51.

ald'),⁷⁹ although it does not invoke the principle — considered by McHugh J in *Nelson*⁸⁰ and applied by McHugh and Gummow JJ and Kirby J in *Fitzgerald*⁸¹ — of assessing the proportionality of the sanction of refusing to enforce rights as against the seriousness of the unlawful conduct. The clear statement that, in some cases, the policy underlying the prohibition *requires* restitution (§ 32(1)) helpfully reiterates a principle as old as (at least) the usury cases,⁸² which was well restated in *Kiriri Cotton Co Ltd v Dewani*.⁸³

The section dealing with restitution and incapacity (§ 33) would provide a good guide in throwing light on this area of the law in Australia. The policy expressed in § 33 — limiting restitution to people dealing bona fide with the relevant incapable party, and only to the extent that it is not inconsistent with the policy behind the protection that the doctrine of incapacity is intended to afford — respects the underlying fact that the very existence of a doctrine of incapacity has the potential to cause unfairness to third parties in those situations where to grant relief on grounds of justice would nevertheless undermine the statutory policy behind the incapacity. The requirement to focus directly upon the policy served by the rule is one that is often lost sight of, but which can explain the results of difficult cases.⁸⁴

The section dealing with profit from opportunistic breach (§ 39) is likely to be of interest once the High Court comes to deal with a claim of the kind in *Attorney-General v Blake* ('Blake').⁸⁵ As the reporter's notes make clear, this section is new, having no counterpart in the *First Restatement*, although it draws on a significant amount of American material and — explicitly — Commonwealth material, including *Blake* itself. Although the rule is clearly framed narrowly — requiring 'opportunistic breach', a profit to the defaulting promisor, and an inadequacy of protection by the 'available damage remedy' for the promisee's 'contractual entitlement' — the rule stated is still beyond the Australian cases⁸⁶ although not academic writings.⁸⁷ Illustration 4 specifically engages with and denies one possible explanation for *Blake*, which is that the profit sought to be made arose directly by reason of a flagrant, dishonest breach of a fiduciary relationship and was therefore available on orthodox grounds.

⁷⁹ (1997) 189 CLR 215.

⁸⁰ (1995) 184 CLR 538, 613.

⁸¹ (1997) 189 CLR 215, 228, 230 (McHugh and Gummow JJ), 250–1 (Kirby J).

⁸² *Smith v Bromley* (1760) 2 Doug 696, 697; 99 ER 441, 443.

⁸³ [1960] AC 192, 205 (Lord Denning for Lords Denning and Jenkins and L M D de Silva).

⁸⁴ For example, there is no collision with the policy underlying the doctrine of minority to require a minor to account for the property, or its traceable proceeds, received under an invalid contract, as in *Stocks v Wilson* [1913] 2 KB 235. This approach would also provide the answer where an incapable party attempts to use their incapacity inequitably as a sword to defraud third parties.

⁸⁵ [2001] 1 AC 268.

⁸⁶ See, eg, *Short v Crawley* [2005] NSWSC 928 (15 September 2009) [24] (White J); *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157, 196 [159] (Emmett J); *Multi-group Distribution Services Pty Ltd v TNT Australia Pty Ltd* (2001) 109 FCR 528, 547 [41]–[42] (Gyles J).

⁸⁷ James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002); Keith Mason, J W Carter and G J Tolhurst, *Mason and Carter's Restitution Law in Australia* (LexisNexis Butterworths, 2nd ed, 2008) 643 [1526].

However, even though that relationship had ceased many years before the profit was made, the causative element was still present such that the underlying policy would have been served by an award of an account of profits: it seems, with respect, that the point was wrongly jettisoned before the case reached the House of Lords.⁸⁸

Chapter 5 deals with restitution for wrongs, an area in which it would seem that the *Third Restatement* is partly in accord with, and partly contrary to, such Australian law as exists. The section dealing with profits made by interference with real or personal property rights (§ 40) covers matters that have not yet been settled in Australian law. In particular, the measure of damages to be awarded against a party that gains a benefit via trespass, or conversion, of another's property has not yet been authoritatively settled. The *Third Restatement* proposes (comment *b*) that the measure of damages depends upon the state of mind of the infringing defendant, in that a conscious wrongdoer 'will be stripped of gains' while the measure awarded against a defendant without fault 'will not exceed the value obtained in the transaction for which liability is imposed.' This approach, which does not seem to allow operation of the fiction of 'subjective devaluation',⁸⁹ appears to be in accord with the approach urged for Australian law,⁹⁰ particularly given the rejection of the related fiction of 'free acceptance' in *Lumbers*.⁹¹

However, the sections that deal with misappropriation of financial assets (§ 41), interference with intellectual property and similar rights (§ 42) and fiduciary or confidential relations (§ 43) are probably not likely to be of as much use in Australian law. Turning first to intellectual property rights, there is a question as to the extent to which general law notions are of use when dealing with the statutorily conferred remedies of accounts of profits for infringements

⁸⁸ *Blake* [2001] 1 AC 268, 276 (Lord Nicholls), 291 (Lord Steyn). Illustration 3 can likewise be decided on the basis of confidential information.

⁸⁹ Applied in *Ministry of Defence v Ashman* [1993] 2 EGLR 102, 105 (Lord Hoffmann), but apparently rejected in *Benedetti v Sawiris* [2010] EWCA Civ 1427 (16 December 2010) [144]–[154] (Etherton LJ), [172] (Rimer LJ). 'Subjective devaluation' is a gedanken experiment construct; it is premised upon the searching for an 'enrichment', expressed in terms broad enough to cover any receipt of services or property, and posits a notional argument by a defendant that they did not value those non-monetary benefits so as to call into question whether there was any 'enrichment' at all: see Birks, *An Introduction to the Law of Restitution*, above n 28, 109–10. It arises because of the focus upon receipt of an 'enrichment' by a defendant rather than a request by him or her for the work to be performed. It is inconsistent with the historical development of the *quantum meruit* (and other common counts): it was always open to a defendant to plead that the reasonable value of the services was lower than claimed (*R v Feilding* (1686) Comb 29, 29; 90 ER 323, 324 (Aston J)), but such a plea simply went to *quantum*, and particularly the valuation of the service or work by the jury, not as to whether, in theory, any claim lay at all.

⁹⁰ Edelman, above n 87, 71; Jackman, above n 69, 112–16.

⁹¹ (2008) 232 CLR 635, 661–4 [75]–[80] (Gummow, Hayne, Crennan and Kiefel JJ). See also Joachim Dietrich, *Restitution: A New Perspective* (Federation Press, 1998) 59–62. The fiction of free acceptance was an extension of the 'subjective devaluation' thought experiment, designed as one potential response to overcome it: see Birks, *An Introduction to the Law of Restitution*, above n 28, 114.

of copyright, trade marks, patents or kindred rights.⁹² Although the overall exercise might be phrased as ‘removing’ the ‘unjust enrichment’ of the infringer,⁹³ the inquiry required by a statutory accounting is as to the profits actually derived from the infringement.⁹⁴ As the High Court has recognised, this often raises difficult questions,⁹⁵ especially where the infringing item is but one component of a larger item, or where its sale is just part of the infringer’s business.

The other two sections demonstrate that the *Third Restatement* classifies as ‘restitutionary’ remedies that are, in Australia, still thought of as stemming from the nature of the underlying institution: either property or the institution of the fiduciary relationship. Taking § 41 (misappropriation of financial assets) first, it seems unusual to need a rule, let alone a rule described as restitutionary, governing a claim against a thief or a person who later takes the property either with notice or as a volunteer (or both). Where the thief (or third party) holds the original property, legal title remains in the rightful owner; and it appears to have been accepted since at least 1910, when *Black v S Freedman & Co*⁹⁶ was decided, that the thief (or third party) holds the traceable proceeds of misappropriated property on constructive trust for the owner.⁹⁷ It seems unnecessary to invoke the concept of restitution where what is being sued upon is the underlying, anterior property right, and what is sought is that property or its traceable proceeds.⁹⁸

Similarly, it seems unlikely following *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*⁹⁹ that the rule in § 43 relating to ‘benefits’ obtained in breach of fiduciary duty will be applied in its terms. There is an inherent tension with principle in seeking to deal with such situations on the basis that an unjust enrichment has occurred — as if this were the predominant factor motivating a remedy — without direct reference to the nature of the institution involved. As has been recognised since *Keech v Sandford* itself,¹⁰⁰ those in fiduciary positions must

⁹² See, eg, *Copyright Act 1968* (Cth) s 115(2); *Trade Marks Act 1995* (Cth) s 126(b); *Patents Act 1990* (Cth) s 122(1); *Plant Breeder’s Rights Act 1994* (Cth) s 56(3); *Circuit Layouts Act 1989* (Cth) s 27(2).

⁹³ *Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101.

⁹⁴ *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, 33–34 (Windeyer J); *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557, 565–8 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

⁹⁵ *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 409 [71] (Gaudron, McHugh, Gummow and Callinan JJ).

⁹⁶ (1910) 12 CLR 105.

⁹⁷ See *Zobory v Federal Commissioner of Taxation* (1995) 64 FCR 86; *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230; *Clarke v Abou-Samra* [2010] SASC 205 (20 July 2010) [84]–[90] (Kourakis J); *Hraiki v Hraiki* [2011] NSWSC 656 (30 June 2011) [39] (White J).

⁹⁸ The imposition of a constructive trust is a remedy conferring upon the owner the nearest possible approximation (an exclusive equitable proprietary right, sequestered from the claims of others, allowing recapture of the property) of their original ownership (legal title to the property with consequent ability to exclude others) that presently exists as a recognised remedy.

⁹⁹ (2007) 230 CLR 89.

¹⁰⁰ (1726) Sel Cas T King 61; 25 ER 223.

conduct themselves above the level of the general crowd;¹⁰¹ this involves qualitatively different concerns from mispaid monies, which, like actions in negligence, can involve complete strangers, as well as those dealing at arms length. To focus on the macroscopic fact that a person has been ‘enriched’ when in a fiduciary capacity, no differently from what occurs in a case of a mistaken payment or a frustrated contract, tends to lose sight of the particular policy considerations of the law that are in play. While ‘enrichment’ may be the highest common factor, it is not the best *discrimen*. The High Court has specifically warned that ‘unjust enrichment’ is not a useful concept in breach of fiduciary duty cases,¹⁰² and any focus upon the broad genus has the tendency to deflect attention from the underlying inquiry, which is into the actions and knowledge of the defendant: to focus merely upon receipt of a benefit, without proper inquiry as to the recipient’s knowledge of the facts surrounding that receipt, was the very error into which the New South Wales Court of Appeal fell in *Farah*.¹⁰³

Section 43 must, in particular, be read with the section dealing with constructive trusts (§ 55, in chapter 7). To be sure, the inclusion of constructive trusts within the American restitution paradigm was intentional and was done by no less an authority than Professor Scott himself. In his work on trusts, in the introductory passages relating to constructive trusts, he stated:

The general principles with reference to unjust enrichment which are at the basis of constructive trusts and the analogous equitable remedies of equitable lien and subrogation are also at the basis of quasi-contractual obligations. The chief difference is that quasi-contractual obligations are ordinarily enforceable by an action at law, the purpose of which is to impose a personal liability upon the defendant; whereas the enforcement of a constructive trust is by a proceeding in equity to compel the defendant to surrender specific property. The distinction is procedural rather than substantive. For this reason it is believed that it is more logical to treat the subject of constructive trusts with the subject of quasi contracts rather than with the subject of trusts. At any rate, this was what was determined upon by the American Law Institute, and there has been no reason to think that the decision was unwise. It is true that the title ‘Restitution’ has no familiar ring in the ears of the American lawyer, who has been accustomed to deal with quasi contracts as a part of the law of contracts, which it very clearly is not, and to deal with constructive trusts as a part of the law of trusts, which, we believe, it is not.¹⁰⁴

Acceptance of these propositions is what appears to divide present Australian law on this area from that expounded in the *First Restatement* and the *Third Restatement*. It should be observed that constructive trusts need not necessarily have a home within ‘the law of trusts’ in the event that they are not located within the topic of restitution. They may, for example, be a *sui generis* remedy,

¹⁰¹ *Meinhard v Salmon*, 164 NE 545, 546 (Cardozo CJ for Cardozo CJ, Pound, Crane and Lehman JJ) (NY, 1928).

¹⁰² *Farah* (2007) 230 CLR 89, 156 [151] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁰³ See *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 (15 September 2009).

¹⁰⁴ Austin Wakeman Scott, *The Law of Trusts* (Little, Brown and Co, 3rd ed, 1967) vol 5, 3411 § 461 (citations omitted).

applicable across a number of instances, including in response to conduct raising an estoppel, mistaken payments in certain cases, a failure of a joint endeavour without attributable blame, or a breach of fiduciary duty (paradigmatically a breach of trust or of a director's duties to their company). The occasions on which it will be awarded, and the consequences for the constructive trustee, will vary according to the particular circumstances of these conceptually distinct situations. The fact that their origin was equitable remains important where, for example, they are sought in a court of limited jurisdiction,¹⁰⁵ or where this fact otherwise goes to jurisdiction (a point equally relevant in the United States).¹⁰⁶ It is not the occasion to dwell upon the degree to which basic knowledge upon this topic appears to have been lost,¹⁰⁷ or to opine upon the extent to which a tendency to decry the legal/equitable divide as of purely historical concern is to blame.

Similar points apply to other portions of chapter 7, which deals with remedies, and chapter 8, which deals with defences. For clarity, these will be dealt with out of order here. Again, while bringing rescission (§ 54), equitable liens (§ 56), subrogation (§ 57), tracing and following (§§ 58–9) and the defence of unclean hands (§ 63) within the rubric of 'restitution' involves a certain superficial level of taxonomic neatness,¹⁰⁸ the extent to which this is compatible with current Australian law is questionable. It seems clear that the *Third Restatement* is not attempting to describe the universe of these remedies: for example, comment *a* to § 56 (dealing with equitable liens) states that the section offers a description that is 'limited to cases of unjust enrichment' and that

[t]raditional applications of the remedy are potentially much broader, extending generally to transactions in which it may be inferred that a claimant is to have recourse to a specific asset or fund for the satisfaction of another's personal liability.

For the purposes of Australian law, locating the remedy within a discussion of the body of principle that both originated the remedy and covers the universe of

¹⁰⁵ See, eg, *Commonwealth Bank of Australia v Hadfield* (2001) 53 NSWLR 614.

¹⁰⁶ See, eg, the Seventh Amendment of the *United States Constitution*, which gives a right to a jury trial only in cases at common law involving value in controversy exceeding \$20. Another example is statutes granting federal jurisdiction in cases where equitable relief is sought, as in *Mertens v Hewitt Associates*, 508 US 248 (1993).

¹⁰⁷ The tendency is, for example, evident in all the judgments, but particularly the dissent of Ginsburg J, in *Great-West Life & Annuity Insurance Co v Knudson*, 534 US 204 (2002), which was treated charitably in reporter's note *c* to § 4.

¹⁰⁸ For example, one may (improvidently) obtain rescission of a *beneficial* transaction, such as where a vendor seeks to rescind a sale (made above market price) that was induced by a fraudulent misrepresentation. The existence of a remedy in rescission has nothing to do with any enrichment of the defendant, who in fact loses by the original transaction and gains by its rescission. In this context, one must be careful not to confuse the requirement of '*restitutio in integrum*' for rescission with restitution proper. The two are separate concepts, even if judicial decision has amended the content of the common law to bring it into line with the approach formerly employed only in equity: see, eg, *Halpern v Halpern* [2008] QB 195; Meagher, Heydon and Leeming, above n 72, 860–4 [24-040]–[24-060].

application — that is, principles of equity generally — seems clearly to remain the better course.¹⁰⁹

Nevertheless, the exposition of the rules in the *Third Restatement* does expose the depth of thought that has been applied to the topic, and this learning can be valuably applied with the caution noted above. For example, § 55(2), dealing with constructive trusts, clearly circumscribes the liability of a constructive trustee, in that it declares their obligation to be ‘to surrender the constructive trust property to the claimant, on such conditions as the court may direct.’ This adopts the position expressed in the *First Restatement* and in Professor Scott’s work: that one is a constructive trustee because one is compelled to return the property, and not the inverse.¹¹⁰ Surprisingly, this basic proposition does not appear to have been authoritatively settled in Australia,¹¹¹ but the *Third Restatement* seems not to countenance the wider obligations sometimes imposed upon a constructive trustee in Australian law — for example, a duty to preserve the property pending its surrender.¹¹² Likewise, the *Third Restatement* is clear that a holder who has come by the property wrongfully will not be entitled to claim for ‘unrequested benefits’ in the form of improvements they have made to the property (comment *l* to § 55). This appears to reflect Australian law (albeit it is stated with more certainty and clarity), which, like English law, is reluctant to award a just allowance to a wrongfully defaulting fiduciary, but is often liberal in the case of an innocent holder.¹¹³

Perhaps the most topical of the sections in chapter 7 are those dealing with quantification. The *Third Restatement* draws together a set of principles that divide liability into whether the defendant is ‘innocent’ (in the sense of committing no misconduct and having no responsibility for the unjust enrichment: § 50); a ‘conscious wrongdoer’ responsible under specified sections (§ 51); or a third party recipient who does not qualify as innocent (§ 52). Each section imposes a

¹⁰⁹ It appears that the *Third Restatement* accepts that its target audience is less likely to have the shared professional familiarity that is necessary for this to be done: see *Third Restatement*, above n 1, § 55 comment *a*.

¹¹⁰ *First Restatement*, above n 12, § 160; Scott, above n 104, 3413 § 462.

¹¹¹ Note however the statement in *Barnes v Addy* (1870) LR 9 Ch App 244, 251 (Lord Selborne LC) (emphasis added): ‘Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. *That responsibility* may no doubt be extended in equity to others who are not properly trustees’.

¹¹² *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230, 257 [114] (Allsop P, Campbell JA and Handley AJA agreeing).

¹¹³ See *Grimaldi v Chameleon Mining NL [No 2]* [2012] FCAFC 6 (21 February 2012) [531] (Finn, Stone and Perram JJ); *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 371–84 [311]–[336] (Heydon JA); *Australian Postal Corporation v Lutak* (1991) 21 NSWLR 584, 596 (Bryson J); *Boardman v Phipps* [1967] 2 AC 46. That is not to say a court will never award a just allowance to a wrongfully defaulting fiduciary; as noted in *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 562 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) (citations omitted),

[w]hether it is appropriate to allow an errant fiduciary a proportion of profits or to make an allowance in respect of skill, expertise and other expenses is a matter of judgment which will depend on the facts of the given case. However, as a general rule, in conformity with the principle that a fiduciary must not profit from a breach of fiduciary duty, a court will not apportion profits in the absence of an antecedent arrangement for profit-sharing but will make allowance for skill, expertise and other expenses.

different remedial regime, but of note are the explicit recognition of ‘disgorgement’ damages against a conscious wrongdoer (§ 51(4)), discussed above, and the removal of the change of position defence against a negligent third party whose negligence exceeds that of the claimant (§ 52(3)). These are areas which are yet to be settled by the High Court, and the careful exposition of the rules in the *Third Restatement* warrants scrutiny by intermediate and first instance courts in the meantime.

Chapter 8, which discusses defences, contains material dealing with similar areas. The introduction of a specific defence based upon the ability to demonstrate no unjust enrichment when viewed in the context of the parties’ obligations to each other (§ 62) usefully picks up some cases referred to by Lord Mansfield in *Moses v Macferlan*, such as valid debts that are statute-barred, or debts valid in point of honour only.¹¹⁴ It would also appear to cover other cases that do not fit within the usual paradigm, which does not (at least, expressly) take much account of pre-existing relationships. One example might be a case in which a party mistakenly pays monies under a contract to another earlier than they intended to, in cases where the recipient is nevertheless entitled to receive the money under the contract.¹¹⁵ Although it could be said that a mistake as to timing was made, absent any contractual provisions (express or implied) allowing recovery back of such payments, it would appear that the recipient would have a good right to retain the monies and hence be able to repel any claim consequent upon the mistake. As comment *a* to § 62 indicates, while such a result ought to be reached on a properly pleaded case that no unjust enrichment has occurred — in Australian law, requiring demonstration of a valid right to retain — this defence would provide a backstop to ensure that that result was reached.

Similarly, while § 64 details a defence of ‘passing on’ that was rejected by the High Court in *Roxborough v Rothmans of Pall Mall Australia Ltd*,¹¹⁶ § 65 deals with the defence of ‘change of position’ in terms consistent with High Court authority but of broader scope. The stated defence requires the defendant to act without notice, and it requires a change of position such that an obligation to make restitution of the original benefit ‘would be inequitable to the recipient’ and reduces liability only ‘to that extent’. This is consistent with *David Securities Pty Ltd v Commonwealth Bank of Australia*¹¹⁷ and *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation*.¹¹⁸ This defence awaits definitive treatment by the High Court, although Justice Gummow has

¹¹⁴ (1760) 2 Burr 1005, 1012; 97 ER 676, 680.

¹¹⁵ For example, where the payor is the responsible entity of an illiquid unit trust in which (due to the nature of the particular trust assets) there will be a delay in realising them to meet redemption requests, and hence a delay between when a redemption request is lodged and when payment is made to the redeeming unitholder. The mistake may arise where there is a queue of redeeming unitholders (based on the time of lodgement of their redemption requests) and insufficient liquid assets to pay them all, and the payor mistakenly pays a unitholder who is later in the queue instead of one who is earlier.

¹¹⁶ (2001) 208 CLR 516, 528–530 [24]–[29] (Gleeson CJ, Gaudron and Hayne JJ), 542 [68]–[69] (Gummow J).

¹¹⁷ (1992) 175 CLR 353.

¹¹⁸ (1988) 164 CLR 662.

given its valuable extra-judicial consideration.¹¹⁹ The *Third Restatement's* observations will give profitable study. For example, the defence is stated (comment *a* to § 65) to '[give] effect to general principles of unjust enrichment' and to be available more widely than the mistaken payment paradigm, which is where in the case law this defence 'appears almost exclusively'. However, there is no a priori reason that the defence should be applicable to all areas brought within the rubric of restitution; and the fact that it both originated in, and appears in, cases involving mistaken payments points against that conclusion. If it be appreciated that the defence is a reflection of a defendant's partial or complete right to retain a mistaken payment — based upon conduct in the time between receiving the money and when the defendant became aware of the mistake — then its more confined operation is not just understandable, but rather compelling.¹²⁰

There is very much more material in the *Third Restatement* than could be surveyed, let alone analysed with any depth, even in a review an order of magnitude larger than the present. The work is to be commended for its clear and careful exposition of the law, its logical arrangement and its useful cross-referencing. The extensive reporter's notes, which explain and justify the steps taken to reach the stated principles, are invaluable. Although, as this review has attempted to show, the principles stated in the *Third Restatement* cannot simply be accepted in Australia without careful analysis, its clearly stated rules give a yardstick for testing the state of Australian law in those areas where there is difference. Perfect alignment would be neither possible nor desirable, but differences can be analysed with precision and justified coherently. In areas where Australian law is unsettled, the clear path laid out in the *Third Restatement* is one against which any proposed development of Australian law may be tested. The *Third Restatement* is an extremely valuable resource, and the American Law Institute deserves the highest praise for it.

¹¹⁹ Gummow, '*Moses v Macferlan*', above n 4, 759–63.

¹²⁰ Kremer, '*The Action for Money Had and Received*', above n 27, 117. For a competing view, based upon the concept of effective irreversibility of transfers caused by receipt of 'the enrichment', see Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) 130–43, 162–3, 207.