

# UNJUST ENRICHMENT IN AUSTRALIA: WHAT IS(N'T) IT? IMPLICATIONS FOR LEGAL REASONING AND PRACTICE

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*Much confusion currently attends the idea of unjust enrichment in Australian private law. Although Australia was amongst the first Commonwealth common law jurisdictions to recognise the idea, a more sceptical High Court in the latter part of the 20<sup>th</sup> century and early years of the 21<sup>st</sup> century preferred to analyse restitutionary problems through the historical lens of the ancient forms of action and traditional equitable concepts of good conscience. This article articulates and distinguishes between five different roles that unjust enrichment might play in modern legal reasoning in Australia, providing a clearer picture of both what it is and — equally importantly — what it is not. A clearer view of the scope and function of the concept in legal reasoning will lead, it suggests, to a more confident acceptance, and coherent use, of the idea of unjust enrichment by courts. It also has key implications for the pleading of restitutionary claims.*

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## I INTRODUCTION

Much confusion currently exists in Australian law about the precise status of the concept of unjust enrichment. There is an unfortunate historical irony in

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Cite as:

Kit Barker, 'Unjust Enrichment in Australia: What Is(n't) It? Implications for Legal Reasoning and Practice'  
(2020) 43(3) *Melbourne University Law Review* (advance)

this. Pipped at the post only by radicals in Canada,<sup>1</sup> Australia was, after all, amongst the first Commonwealth common law jurisdictions to vent the idea, and indeed did so at the highest appellate level<sup>2</sup> some four years before this occurred in England and Wales.<sup>3</sup> Ordinarily, this advanced position on the field of intellectual play would be a ground for celebration, not to say some lighthearted mockery of the Old Country's historic conservatism and particularised, insular ways of thinking. But something then happened, in the wake of the retirement of Justice Deane and Chief Justice Mason from the High Court Bench, that abruptly silenced the cheering crowd.<sup>4</sup> At some stage in the mid-to-late 1990s, the Court abruptly lost its enthusiasm for the ball, just as English courts really started to run with it. Influential members of the new Court reverted to older, more familiar training patterns, preferring to analyse restitutionary problems through the lens and language of the ancient forms of action and traditional equitable concepts, rather than to accord the idea of unjust enrichment any very meaningful role in the law. Some members of the Bench went so far as to excoriate the idea as 'top-down reasoning' or 'dogma',<sup>5</sup> and as an unwelcome, academic import. Lower appellate courts that dared to use the idea creatively to change existing legal or (especially) equitable rules were publicly rebuked and instructed bluntly to desist.<sup>6</sup> Unjust enrichment was cast, for a time, as an invasive outsider, set on disrupting a

<sup>1</sup> *Degelman v Guarantee Trust Co of Canada (Administrator of the Estate of Laura Constantineau Brunet, deceased)* [1954] SCR 725; *Pettkus v Becker* [1980] 2 SCR 834.

<sup>2</sup> *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 ('Pavey').

<sup>3</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 ('Lipkin Gorman'). Commonwealth civilian jurisdictions were onto the idea somewhat earlier, Scotland and Quebec having made their own recognitions previously. On the history in Quebec, see generally Justice George Chailles, *The Doctrine of Unjustified Enrichment in the Law of the Province of Quebec* (Wilson & Lafleur, 2<sup>nd</sup> ed, 1952).

<sup>4</sup> For a useful account of the various phases of the High Court's engagement (and disengagement) with unjust enrichment reasoning from its early years to the current day, see Elise Bant, 'The Evolution of Unjust Enrichment and Restitution Law in the High Court of Australia' (2017) 25 (Autumn) *Restitution Law Review* 121.

<sup>5</sup> *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 544–5 [73], 545 [74] (Gummow J) ('Roxborough'), quoted in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 156 [151] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) ('Farah'). See also Justice WMC Gummow, 'Moses v Macferlan: 250 Years On' (2010) 84(11) *Australian Law Journal* 756, 757. Interestingly, in *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 ('Bofinger'), Gummow, Hayne, Heydon, Kiefel and Bell JJ described top-down reasoning as a feature of 'some all-embracing' theories of unjust enrichment, rather than of *all* such theories: at 300 [90] (emphasis added).

<sup>6</sup> *Farah* (n 5) 148–59 [130]–[158] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

house that was already very much in order and that could happily live without its interfering tendencies.

It is only in recent times, with further changes in the composition of the High Court, that there are signs of a new, cautious acceptance. The development in Australian law of a defence of change of position in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* ('Hills')<sup>7</sup> has now made this re-engagement with unjust enrichment thinking inevitable. Indeed, despite an unfortunate and often misunderstood paragraph in the plurality judgment in *Hills* (to which we shall return), this case will almost certainly prove to be Australia's *Lipkin Gorman v Karpnale Ltd* ('Lipkin Gorman')<sup>8</sup> — a little late in coming, perhaps, but here at last. In the meantime, the American Law Institute has completed its third restatement of the law, in the process elevating the concept of unjust enrichment to the title page of the work,<sup>9</sup> and the High Court has referenced that work several times (albeit in a different context) in the recent decision of *Thorne v Kennedy*.<sup>10</sup> One (new) member of the current High Court Bench, Justice Edelman, is co-author of an important text, now in its second edition, that also bears the concept boldly upon its cover,<sup>11</sup> and his Honour's influence can already be seen, I suggest, in the plurality judgment of the High Court in the most recent case of *Mann v Paterson Constructions Pty Ltd* ('Mann').<sup>12</sup> Whilst the next 10 years will be critical in determining Australia's attitude to the unjust enrichment game, there are therefore good reasons to think that the ball that was dropped by the High Court in the early years of the new millennium may yet be retrieved from the mud.

<sup>7</sup> (2014) 253 CLR 560 ('Hills').

<sup>8</sup> *Lipkin Gorman* (n 3).

<sup>9</sup> American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011) § 1 ('Third Restatement'). Interestingly, the term was originally to feature in even the first restatement, but was dropped, at the publisher's instigation, because of its unfamiliarity amongst practitioners: Andrew Kull, 'Restitution and Unjust Enrichment' in Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar, 2020) 62, 69–70.

<sup>10</sup> (2017) 263 CLR 85, 99 [30] n 48, 100 [32] n 57 (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

<sup>11</sup> Justice James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2<sup>nd</sup> ed, 2016). The elevation of the concept to the title page is now a clear trend: see, eg, Peter Birks, *Unjust Enrichment* (Oxford University Press, 2<sup>nd</sup> ed, 2005); Robert Goff and Gareth Jones, *The Law of Unjust Enrichment*, ed Charles Mitchell, Paul Mitchell and Stephen Watterson (Sweet & Maxwell, 9<sup>th</sup> ed, 2016); Kit Barker and Ross Grantham, *Unjust Enrichment* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2016).

<sup>12</sup> (2019) 373 ALR 1, 29–63 [109]–[217] (Nettle, Gordon and Edelman JJ) ('Mann').

Australia is not the only country to have suffered crises of confidence over the idea of unjust enrichment. There are scholars elsewhere who continue to harbour old doubts and even to express new ones.<sup>13</sup> The purpose of this piece is to identify the role that the idea currently plays in Australian law in the post-*Hills* era, and to suggest how it can fruitfully be understood and accommodated within the developing jurisprudence of this country. Many of the reservations about the idea that have troubled the High Court in recent times, I shall argue, stem from a failure to distinguish clearly between five distinct roles that the idea might play in legal reasoning, as well as from the Court's justified anxiety about two of these roles in particular. A clearer view of what unjust enrichment is and, equally importantly, what it is *not* can lead, I suggest, to its more confident acceptance and coherent use by Australian courts. It will also assist practitioners in determining how properly to plead modern restitutionary claims.

## II UNJUST ENRICHMENT: WHAT ROLE DOES IT PLAY?

### *A Role 1: A Purely Moral Principle?*

The first role that the idea might play, which has been clearly rejected by the High Court, the American *Restatement (Third) of Restitution and Unjust Enrichment* ('*Third Restatement*'), and all other courts to date, is as a purely moral principle, external to the law and lying recumbent in the conscience of a judge. The seeds of a moral principle are certainly ancient and can be found in Pomponius's well-known maxim: 'It is by nature fair that no one should gain through another's loss'.<sup>14</sup> Even as a moral proposition, this idea needed some work, for it is by no means obvious that the mere fact of gaining by another's loss identifies anything that is 'by its nature' unfair. In any market economy, the fact that one's own profit corresponds to a loss another has

<sup>13</sup> For the latest wave of scepticism (of a sort), see, eg, Lionel Smith, 'Restitution: A New Start?' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2019) 91; Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 (October) *Law Quarterly Review* 574.

<sup>14</sup> *The Digest of Justinian*, ed Alan Watson tr Alan Watson (University of Pennsylvania Press, 1985) vol 1, 380, [12.6.14] (*Nem hoc natura aequum est, neminem cum alterius detrimento fieri locupletioem*). In the cited secondary source, the English translation appears as: 'For it is by nature fair that nobody should enrich himself at the expense of another.' This is colloquially easier than the translation provided in the text, but it does not highlight the key meaning of the word 'detrimento' (loss, damage) that is the central focus of the point being made — namely, that a loss on the part of A is insufficient, without more, to give rise to any moral responsibility on the part of B for a resulting gain.

suffered is surely regarded as (at worst) ethically neutral in the absence of some identifiable error, exploitation, or wrongdoing. For any moral 'unfairness' to be present in a transaction, the winner's gain, correlating to the loser's loss, must hence be attended by additional circumstances making it unjust.<sup>15</sup> Pomponius' principle must therefore be understood as a principle against 'gaining *unjustly* through another's loss', not simply 'gaining from loss'. Indeed there are points in the Digest which suggest as much.<sup>16</sup> Even when this adjustment is made, however, it is clear that, for *legal* purposes, the definition of injustice in this formulation cannot lie outside of the law itself in the personal conscience of a judge, or even in his or her perception of the moral consensus of the community. Courts and commentators are unanimous on this point, emphasising that any principle against unjust enrichment existing in the modern law is a *legal* principle derived from decided cases and concrete legal norms.<sup>17</sup> It works from the legal ground up, not from the moral heavens down.

The point was made right from the outset by Deane J in *Pavey & Matthews Pty Ltd v Paul* ('*Pavey*')<sup>18</sup> in 1987, where his Honour emphasised that identifying a law of restitution unified by a principle of unjust enrichment is 'not to assert a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate.'<sup>19</sup> The passage was cited by the High Court in *David Securities Pty Ltd v Commonwealth Bank of Australia* ('*David Securities*')<sup>20</sup> in 1992, where the majority added:

<sup>15</sup> For a plaintiff to be morally responsible to another for a gain, there must be not just a causal correlation between the two, but an infringement of an entitlement of the plaintiff — some 'harm' to the plaintiff: Kit Barker, 'The Nature of Responsibility for Gain: Gain, Harm, and Keeping the Lid on Pandora's Box' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) 150, 152–8.

<sup>16</sup> The additional element appears in an alternative formulation of the maxim: 'By the law of nature it is fair that no one become richer by the loss and injury of another' (*Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiozem*): Watson (n 14) vol 4, 483, [50.17.206]. The additional concept of *iniuria* in this version emphasises not simply loss, but *wrongful* loss. See also Alan Rodger, 'What Did *Damnum Iniuria* Actually Mean?' in Andrew Burrows and Lord Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, 2006) 421.

<sup>17</sup> For commentators, see, eg, Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985) 19 ('*Introduction*'); Goff and Jones (n 11) 7–8; Edelman and Bant (n 11) 12–13.

<sup>18</sup> *Pavey* (n 2).

<sup>19</sup> *Ibid* 256.

<sup>20</sup> (1992) 175 CLR 353 ('*David Securities*').

[I]t is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable. Instead, recovery depends upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality.<sup>21</sup>

More recently, in the *Hills* case, Gageler J observed, consistently with this line of thinking, that the notion of injustice lying at the heart of the principle against unjust enrichment is ‘descriptive, accumulative and incremental’.<sup>22</sup> His Honour cited the following passage from the first instance judgment of Campbell J in *Wasada Pty Ltd v State Rail Authority of New South Wales [No 2]* (*‘Wasada’*),<sup>23</sup> which neatly summarises both the objection to the idea of unjust enrichment as a purely moral idea and the conclusive answer to that objection:

‘Unjust’ is the ‘generalisation of all the factors which the law recognises as calling for restitution’. Because we need to search for *recognised* factors, examination of which involves an analysis of case law, the reference to ‘injustice’ as an element of unjust enrichment, is not a reference to judicial discretion. Normal judicial processes are involved and it is only in cases where there is no recognised basis for saying that injustice has arisen that problems can arise.<sup>24</sup>

Statements to similar effect appear in the jurisprudence of the House of Lords,<sup>25</sup> the United Kingdom Supreme Court,<sup>26</sup> and the *Third Restatement*.<sup>27</sup> They ought straightforwardly to eliminate any misconception that unjust enrichment plays a loose moral role, tends to subjectivity, or derives its meaning in isolation from existing rules of law.

<sup>21</sup> Ibid 379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>22</sup> *Hills* (n 7) 619 [141]. See also at 579 [20] (French CJ).

<sup>23</sup> [2003] NSWSC 987 (*‘Wasada’*).

<sup>24</sup> Ibid [16], quoted in *Hills* (n 7) 619 [141] (emphasis added) (citations omitted). This passage, which itself quotes Keith Mason and JW Carter, *Restitution Law in Australia* (Butterworths, 1995) 59–60 [227], was cited with approval in *Barnes v Eastenders Cash & Carry plc* [2015] AC 1, 41 [102] (Lord Toulson JSC for the Court) (*‘Eastenders’*).

<sup>25</sup> See, eg, *Lipkin Gorman* (n 3) 578 (Lord Goff).

<sup>26</sup> *Investment Trust Companies v Revenue and Customs Commissioners* [2018] AC 275, 294 [39] (Lord Reed JSC for the Court) (*‘Investment Trust’*).

<sup>27</sup> *Third Restatement* (n 9) § 1 cmt (b).

### B Role 2: A 'Unifying' Legal Principle

If the proscription against unjust enrichment is a principle, it is therefore a legal principle, not a moral one. Legal principles can (and hopefully do) of course have moral content and merit, but the point is that their morality is embedded in existing rules and precedents and is therefore objectively determined. It does not spring in a Panglossian rush from hope itself. Legal principles may be understood as differing from legal rules in the detail that they operate at a higher level, expressing in a more general way the reason(s) underpinning those rules and precedents.<sup>28</sup> They are not usually used in the law in a dispositive manner<sup>29</sup> — that is, to determine cases, or to dictate results by themselves, without reference to lower-order rules. This is because their generality makes them hard to apply predictably to naked sets of facts and leaves too much to a court's discretion. Both of these features make legal principles potentially problematic from a rule of law point of view. However, by referring judges to the broader values and aims that underpin existing rules, they can assist in interpreting and applying those rules and in deciding new cases. In this regard, principles have an important developmental role to play. The reasons behind rules — referenced through the principles that extrapolate from them — are capable of extending their normative logic beyond the limits of the rules themselves, thereby casting light upon the path ahead. In so far as legal principles play only this broad, guiding role and are insufficient in themselves to 'ground' legal claims in private law, they are to be clearly distinguished from 'causes of action', or legal 'bases of decision'. Their use is entirely consistent with a cautious, incremental approach to the development of the law.

The idea that the proscription against unjust enrichment is a high-level, unifying legal principle in the defined sense was endorsed by Deane J (Mason J agreeing) in the early case of *Muschinski v Dodds* ('*Muschinski*'),<sup>30</sup>

<sup>28</sup> The distinction between legal rules and principles is sometimes expressed by writers in different ways, and the value of the distinction itself is sometimes contested. For the senses in which the proscription against unjust enrichment can usefully be understood as a principle, not a rule, see Kit Barker, 'Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and Its Reasons' in Jason W Neyers, Mitchell McInnes and Stephen GA Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, 2004) 79, 90–2 ('Understanding the Unjust Enrichment Principle').

<sup>29</sup> In the common law tradition at least. Matters are somewhat different in codified, civilian traditions and there is some evidence that the principle has, on occasion, been used in this way in Canada: see MM Litman, 'The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust' (1988) 26(3) *Alberta Law Review* 407.

<sup>30</sup> (1985) 160 CLR 583 ('*Muschinski*').

where his Honour described the idea as a ‘notion underlying a variety of distinct categories of case in which the law has recognized an obligation on the part of a defendant to account for a benefit derived at the expense of a plaintiff’.<sup>31</sup> In *Pavey*, his Honour expanded upon the analysis in a now much-cited passage, opining that unjust enrichment is

a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case.<sup>32</sup>

The clear suggestion in this excerpt that unjust enrichment is a ‘legal’ idea, that can ‘explain why’ the law contains various rules requiring restitution to be made, that it helps decide whether there ‘should’ be such duties, and that it has a role in helping judges to apply and ‘develop’ these rules in new cases, sits comfortably with the proposition that it is an explanatory legal principle with normative weight.<sup>33</sup> His Honour’s words have been cited on numerous occasions in the High Court,<sup>34</sup> so that the developmental function of the principle must now be taken to have been endorsed. In *Bofinger v Kingsway Group Ltd* (*‘Bofinger’*),<sup>35</sup> even Gummow, Hayne, Heydon, Kiefel and Bell JJ (a decidedly sceptical bench) hence accepted that the idea can be used constructively to ‘compar[e] and contras[t] various categories of liability’<sup>36</sup> and to ‘assist in the ... recognition of obligations in a new or developing category of case’.<sup>37</sup> The Court has also said on several occasions, in the context of unjust

<sup>31</sup> Ibid 617.

<sup>32</sup> *Pavey* (n 2) 256–7.

<sup>33</sup> See also *David Securities* (n 20) 406, in which Dawson J noted that ‘unjust enrichment does not of itself constitute a cause of action, [but] provides a “unifying legal concept”’. Birks appears originally to have denied the principle any normative status: Birks, *Introduction* (n 17) 23–4. However, he later revised that view, describing the principle as ‘weakly normative’ in ‘gather[ing] up’ the law’s ‘reasons’: Birks, *Unjust Enrichment* (n 11) 274.

<sup>34</sup> See, eg, *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 665 [85] (Gummow, Hayne, Crennan and Kiefel JJ) (*‘Lumbers’*); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 515 [29] (French CJ, Crennan and Kiefel JJ) (*‘Equuscorp’*); *Hills* (n 7) 615 [130] (Gageler J); *Mann* (n 12) 21 [74] (Gageler J), 56 [199] (Nettle, Gordon and Edelman JJ).

<sup>35</sup> *Bofinger* (n 5).

<sup>36</sup> Ibid 299 [88].

<sup>37</sup> Ibid 300 [89]. See also *Friend v Brooker* (2009) 239 CLR 129, 141 [7] (French CJ, Gummow, Hayne and Bell JJ) (*‘Friend’*); *Lumbers* (n 34) 665 [85] (Gummow, Hayne, Crennan and Kiefel JJ); *Hills* (n 7) 618 [139] (Gageler J).



enrichment, that ‘the emergence of a general principle [is not] precluded when derived from judicial decisions upon particular instances.’<sup>38</sup> This is important, because it shows that there is nothing objectionable, in the Court’s view, about a principle against unjust enrichment, *provided* that it does not operate a priori and in pure abstraction, but rather as an interpretive device in understanding and developing existing restitutionary rules. In *Mann*, this use of the principle as a device for incrementally developing existing restitutionary rules was expressly approved by the plurality.<sup>39</sup>

An example of the principle’s utility as a developmental tool that has recently been provided by the High Court itself is the recognition that payments made by mistake of law should be recoverable in exactly the same way — and for the same underlying reasons — as those made by mistake of fact.<sup>40</sup> Another is the recognition in *Mann* and other cases that a failure of consideration provides a ground for restitution in cases involving the supply of services, as much as it does in cases involving money or property.<sup>41</sup> Other examples — not yet fully accepted in Australia, but acknowledged elsewhere — are the recognition that some (not all) cases involving equitable remedies such as subrogation,<sup>42</sup> equitable contribution, indemnity and the

<sup>38</sup> *Equuscorp* (n 34) 516–17 [30] (French CJ, Crennan and Kiefel JJ), citing *Farah* (n 5) 158 [154] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). See also *Roxborough* (n 5) 544 [72] (Gummow J); *Friend* (n 37) 141 [7] (French CJ, Gummow, Hayne and Bell JJ): ‘the concept of unjust enrichment ... may assist, by the ordinary processes of legal reasoning, in the development of legal principle’.

<sup>39</sup> *Mann* (n 12) 61–2 [213] (Nettle, Gordon and Edelman JJ).

<sup>40</sup> *Bofinger* (n 5) 300 [89] (Gummow, Hayne, Heydon, Kiefel and Bell JJ), discussing *David Securities* (n 20). Another potential example of its developmental function is *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1991) 101 ALR 363, 373–6 (Federal Court) (*‘Winterton’*), where Gummow J refused to strike out a novel claim for unjust enrichment, in the light of the field’s rapid development, even though the claim in that case seems now to have been almost certain to fail.

<sup>41</sup> *Mann* (n 12) 22 [78] (Gageler J), 45 [168]–[169] (Nettle, Gordon and Edelman JJ); *Cobbe v Yeoman’s Rowe Management Ltd* [2008] 1 WLR 1752, 1756 [3], 1774 [43] (Lord Scott, Lord Hoffmann agreeing at 1754 [1], Lord Brown agreeing at 1789 [94], Lord Mance agreeing at 1789 [95]) (House of Lords); *Benedetti v Sawiris* [2014] AC 938, 982 [98] (Lord Reed JSC) (*‘Benedetti’*); *Eastenders* (n 24) 1297–9 [108]–[116] (Lord Toulson JSC, Baroness Hale DPSC and Lords Kerr, Wilson and Hughes JSC agreeing). In Australia, see *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd* [No 3] [2014] WASC 162, [92]–[94] (Edelman J) (*‘Lampson’*).

<sup>42</sup> See, eg, *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 231–7 (Lord Hoffmann, Lord Griffiths agreeing at 228) (*‘Banque Financière’*); *Menelaou v Bank of Cyprus UK Ltd* [2016] AC 176 (*‘Menelaou’*); *Swynson Ltd v Lowick Rose llp (in liq)* [2018] AC 313, 325 [19] (Lord Sumption JSC, Lord Neuberger PSC and Lords Clarke and Hodge JSC agreeing) (*‘Swynson’*).

constructive (or resulting) trust<sup>43</sup> proceed according to the same normative logic as cases in which parties have benefitted others through the payment of money by mistake, under compulsion, on a basis that has failed, or where they have had money or other assets taken from them without their knowledge and consent.

A further, famous, but unsuccessful, attempt was made by the New South Wales Court of Appeal in *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* (*Farah (Court of Appeal)*)<sup>44</sup> to use the unjust enrichment principle to inform the development of the law of knowing receipt, so as to liberalise existing liability principles and bring them into line with standards of liability and logics applying in unjust enrichment claims at common law. On this occasion, the High Court held this to be a mistake.<sup>45</sup> Since then, however, the principle has ironically been used by lower courts to develop a separate range of strict, personal liabilities both at law and in equity outside the knowing receipt category, which achieve similar, liberalising effects in cases involving misdirected assets — at least in cases in which recipients of those assets still possess them at the time of trial.<sup>46</sup> These developments have not been regarded by lower courts as inconsistent with the continuation of fault liability under the first limb of *Barnes v Addy*,<sup>47</sup> even though they diminish its practical importance in certain instances and incrementally change the legal landscape for the benefit of victims of fraud. Although they do not formally contradict the law of knowing receipt, they therefore nevertheless coalesce toward the acceptance of a greater range of strict liabilities that calls traditional fault-based assumptions into question. The logic of the posited strict liabilities lies in claims at common law that are based on a defendant's unjust enrichment.

<sup>43</sup> See, eg, *Muschinski* (n 30); *Black v S Freedman & Co* (1910) 12 CLR 105; *Wambo Coal Pty Ltd v Ariff* (2007) 63 ACSR 429 (Supreme Court of New South Wales) (*Wambo*). See also James Edelman, 'Unjust Enrichment and the Law of Trusts' (2011) 35(3) *Australian Bar Review* 219; Edelman and Bant (n 11) 38–42.

<sup>44</sup> [2005] NSWCA 309, [218]–[221] (Tobias JA for the Court) (*Farah (Court of Appeal)*). For another unsuccessful attempt, this time to use unjust enrichment to extend the doctrine of equitable contribution to cases involving common designs, see *Friend* (n 37) 154–5 [63]–[66] (French CJ, Gummow, Hayne and Bell JJ).

<sup>45</sup> *Farah* (n 5) 148–59 [130]–[158] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

<sup>46</sup> See, eg, *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732, 742–3 [45]–[47] (Leeming JA, Bathurst CJ agreeing at 734 [1], Sackville AJA agreeing at 750 [88]); *Great Investments Ltd v Warner* (2016) 243 FCR 516, 530 [54]–[55] (Jagot, Edelman and Moshinsky JJ). See also Elise Bant and Michael Bryan, 'Outflanking *Barnes v Addy*? The Persistence of Strict Recipient Liability' (2017) 11(3) *Journal of Equity* 271, 273–80.

<sup>47</sup> (1874) LR 9 Ch App 244.

The availability to innocent recipients of the new defence of change of position makes such strict personal liabilities more morally acceptable in the modern day than they were in the past.

Whilst there is still disagreement, therefore, about the precise categories of case which instantiate the idea of unjust enrichment (a matter we address further below), there is now little dissent, I suggest, from the view that it functions as a 'unifying legal principle' in those cases in which it is *genuinely in point*.<sup>48</sup> The idea that the principle is 'unifying' should not be taken to suggest that there is only one (and the same) reason for restitution in every instance.<sup>49</sup> The idea is simply that cases of unjust enrichment share certain normative features implicit in the idea of one person gaining unjustly at the expense of another. The precise reason why the gain is unjust may differ as between different types of case. It will also be evident from this conception that the degree of guidance which the principle is capable of providing in new cases is weak, if one attempts to apply it *in abstracto*. Indeed, in its wholly abstracted format, the principle is as inchoate as the vague idea, instantiated in the law of torts, that one should not unjustly cause another person loss. What could this possibly mean in practice? How could one use the principle precisely? The principle against unjust enrichment only usefully assists a judge in making choices in a fresh, concrete instance when it is used to refer the judge back to the reasons underpinning the individual rules and cases from which it abstracts. It is this capacity of the idea to connect courts to common reasons appearing in a wide range of particularised cases that makes it useful as a guide in developing the law incrementally in new instances.<sup>50</sup>

Assuming that the proscription against unjust enrichment is genuinely a legal principle, how, then, is it best expressed? Currently, its form differs slightly between jurisdictions. At least since the High Court's decision in

<sup>48</sup> This proposition appears to be strongly rejected by Ian Jackman, who suggests that the High Court of Australia has 'repeatedly refused to adopt the supposed over-arching principle of "unjust enrichment at the plaintiff's expense" and that it is "not feasible to force uniformity on [the cases] in terms of the so-called unifying principle": Ian Jackman, *The Varieties of Restitution* (Federation Press, 2<sup>nd</sup> ed, 2017) vii, 1. These assertions seem to be based on a different understanding of what constitutes a 'unifying principle' to that adopted here, or by the cases cited in this part. The main thesis of Jackman's book is that the field contains a wide variety of different classes of case and that there is no single reason for restitution (I would say no single cause of action) — propositions which this article endorses.

<sup>49</sup> See Barker, 'Understanding the Unjust Enrichment Principle' (n 28) 95.

<sup>50</sup> Ibid 92–5. See also Kit Barker, 'Theorising Unjust Enrichment: Being Realist(ic)? (2006) 26(3) *Oxford Journal of Legal Studies* 609, 615–16.

*Roxborough v Rothmans of Pall Mall Australia Ltd* ('Roxborough'),<sup>51</sup> it has hence been customary for Australian courts to state the principle as one according to which a person must make restitution of benefits which it would be 'against conscience' or 'unconscionable' for him or her to retain,<sup>52</sup> much being made of the 'equitable' historical foundations of even the common law action for money had and received in *Moses v Macferlan* ('Moses').<sup>53</sup> This statement provides two contrasts with the way in which the principle is stated in England and Wales, neither of which turns out to be of consequence, once it is unpicked.

The first lies in the fact that English courts generally express the principle in terms of the 'injustice' of benefitting at another's expense, not its 'unconscionability' or 'unconscientiousness'.<sup>54</sup> This is a distinction without a practical difference. As the High Court recognised in *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* ('Westpac'),<sup>55</sup> *Equuscorp Pty Ltd v Haxton*<sup>56</sup> and *Hills*, 'legal principles of restitution or unjust enrichment can be equated with seminal equitable notions of good conscience',<sup>57</sup> which is to say that there is no difference in substance between liability for unjust benefits and unconscionable or unconscientious ones. 'Unjust enrichment' is the modern terminology for enrichment that has historically been regarded as 'against conscience'.<sup>58</sup>

<sup>51</sup> *Roxborough* (n 5).

<sup>52</sup> *Ibid* 543 [71], 555 [100] (Gummow J). See also *Perpetual Trustees Australia Ltd v Heperu Ltd Pty Ltd* (2009) 76 NSWLR 195, 221 [128] (Allsop P and Handley AJA) ('*Perpetual Trustees*'); *Hills* (n 7) 592–3 [65]–[66] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>53</sup> (1760) 2 Burr 1005; 97 ER 676, 678–9 (Lord Mansfield for the Court) ('*Moses*').

<sup>54</sup> See, eg, *Benedetti* (n 41) 982 [99] (Lord Reed JSC); *Investment Trust* (n 26) 294 [39] (Lord Reed JSC for the Court).

<sup>55</sup> (1988) 164 CLR 662 ('*Westpac*').

<sup>56</sup> *Equuscorp* (n 34).

<sup>57</sup> *Westpac* (n 55) 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ), quoted in *Equuscorp* (n 34) 517 [32] (French CJ, Crennan and Kiefel JJ), *Hills* (n 7) 576 [16] (French CJ), 595 [74] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>58</sup> *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 359 (Mason CJ) ('*Baltic Shipping*'). See also *W Cook Builders Pty Ltd (in liq) v Lumbers* (2007) 96 SASR 406 ('*Lumbers (Full Supreme Court)*'), where the plurality noted that the 'injustice' of a plaintiff not being remunerated for work can also be expressed as 'unconscionable' retention of a benefit by the defendant: at 420 [63] (Sulan and Layton JJ); *Hills* (n 7) 618 [138] (Gageler J). Note that this is *not* to say that the concepts of unjust enrichment and unconscionability are *fully coterminous*, because the latter concept has clearly been used as the foundation of liability in a host of situations not involving liability for benefits obtained. This is the point made by Gummow J in *Roxborough* (n 5) 543–4 [71]. The point being made in the text is that where liability has historically been imposed on a defendant for a benefit obtained at the expense of a plaintiff, it

The second contrast lies in the fact that the Australian formulation of the principle emphasises the unconscionability of a defendant *retaining* an enrichment at the plaintiff's expense, as opposed to the injustice of him or her first *receiving* it.<sup>59</sup> This is potentially a genuine difference, but is best understood as a historical anomaly arising from the fact that, until very recently, Australian law lacked any (explicit) change of position defence.<sup>60</sup> This may have led courts to concern themselves, when formulating the basic liability principle, with ensuring that defendants who had innocently dissipated a benefit (and who therefore no longer still 'retained' it) had no liability to restore its value. The subsequent development of the change of position defence in *Hills* means that concerns about the unfairness of requiring an innocent to repay value he or she no longer retains can now be accommodated at the defence stage. Indeed, in *Southage Pty Ltd v Vescovi* ('*Vescovi*')<sup>61</sup> — decided a year or so after *Hills* — the Victorian Court of Appeal took an important step in this direction, suggesting that the question whether it is unconscionable for a defendant to 'retain' a benefit is now relevant only to restitutionary defences, not to the basic liability principle.<sup>62</sup> That interpretation is consistent with *Hills* and with the approach of the High Court itself in *David Securities*.<sup>63</sup> If it is followed, as I propose it should be, then the second distinction between Australian and English formulations of the principle against unjust enrichment will turn out to be as illusory as the first.

### C Role 3: A Legal Category

A third role for the idea, which has also recently been embraced by some members of the High Court, is a taxonomic one. Unjust enrichment in this construction describes a defined and distinct body of private law, alongside contract and tort,<sup>64</sup> which collects for interpretive and organisational purposes those legal events in consequence of which one person has gained unjustly

makes no difference whether this is expressed in terms of liability for 'unjust' or 'unconscionable' enrichment.

<sup>59</sup> See, eg, *Roxborough* (n 5) 548 [83] (Gummow J); *Perpetual Trustees* (n 52) 221 [128] (Allsop P and Handley AJA); *Hills* (n 7) 592–3 [65]–[67] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

<sup>60</sup> See generally Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) 1.

<sup>61</sup> (2015) 321 ALR 383 ('*Vescovi*').

<sup>62</sup> *Ibid* 395 [48]–[50] (Warren CJ, Santamaria JA and Ginnane AJA).

<sup>63</sup> *David Securities* (n 20) 379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>64</sup> See *Banque Financière* (n 42) 227 (Lord Steyn), cited in *Investment Trust* (n 26) 294 [39] (Lord Reed JSC for the Court).

at another's expense and may be required to relinquish that gain to the other. In *Equuscorp*, French CJ, Crennan and Kiefel JJ hence indicated that

[u]njust enrichment ... has a taxonomic function referring to categories of cases in which the law allows recovery by one person of a benefit retained by another. ... [I]t does not found or reflect any 'all-embracing theory of restitutionary rights and remedies'.<sup>65</sup>

Recent references to the taxonomic function of the idea also appear in the judgments of French CJ and Gageler J in *Hills*,<sup>66</sup> and in the first instance judgment of Edelman J in *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3]* ('*Lampson*'),<sup>67</sup> where his Honour suggested that the 'category ... assists in understanding' and 'directs attention to a common legal foundation shared by a number of instances of liability formerly concealed within the forms of action or within bills in equity'.<sup>68</sup> They also appear in the plurality judgment in *Mann*, to which his Honour contributed.<sup>69</sup>

These statements accept that unjust enrichment law is indeed a legal category. They also suggest that it has further *subcategories*, that it is capable of expanding incrementally, that it contains rules originating both at common law and in equity, and that — although it collects cases that have important features in common — it is not an 'all-embracing theory'. This last statement is ambiguous, but I take it to mean that the scope of the category is limited and does not encompass or explain ('theorise') everything. Given that it is a logical impossibility for an interpretive category to contain or explain more than that which it encompasses, the intention of this statement must be to reflect the High Court's view that academics and judges have sometimes gone too far in seeking to rationalise particular rules and doctrines as lying within the domain of unjust enrichment law.

The precise scope of the category lies beyond the reach of this piece. Here I identify just two main points of controversy.<sup>70</sup> One — which troubles academ-

<sup>65</sup> *Equuscorp* (n 34) 516 [30], quoting *Roxborough* (n 5) 544 [72] (Gummow J).

<sup>66</sup> *Hills* (n 7) 579 [20] (French CJ), 618 [138]–[139] (Gageler J).

<sup>67</sup> *Lampson* (n 41).

<sup>68</sup> *Ibid* 17 [51].

<sup>69</sup> *Mann* (n 12) 39 [150], 42–3 [162], 56 [199] (Nettle, Gordon and Edelman JJ).

<sup>70</sup> Two others concern: (i) whether cases in which a plaintiff traces his or her property through a variety of substitutes (losing title to the original property in the process) are to be classified as lying in property law, or unjust enrichment law; and (ii) in which cases (if any) a claim for 'user fee' damages or for a reasonable license fee are claims for compensation for loss, or restitution of a negative gain made by a defendant. Both topics are too large to broach here.

ics more than it currently does courts — is whether it comprises *all* cases in which defendants have gained at another's expense (including cases in which they have done so by a recognised wrong, such as a tort), or only cases in which there has been a gain without such a wrong — typically by virtue of a transfer of resources between the parties which is subject to a volitional defect. The *Third Restatement* places all such cases within the category of unjust enrichment, whilst recognising that they are still different in important respects,<sup>71</sup> whereas most modern English and Australian authors (including Justice Edelman writing extracurially with Professor Bant)<sup>72</sup> take the narrower view, so as to exclude cases involving recognised wrongs.<sup>73</sup> Interestingly, none of the antagonists on this question take issue with one another about the basic rules governing recovery, or the remedies that may be recovered, which may explain why courts have not rushed in to resolve the taxonomic question. The United Kingdom Supreme Court appears now to prefer the narrower view,<sup>74</sup> and there is one obiter dictum in the High Court in *Farah*, which hints at the same preference.<sup>75</sup> The identification of unjust enrichment law with claims involving 'vitiating transfers' also seems to be assumed by the High Court's approach in both *David Securities*<sup>76</sup> and *Equuscorp*.<sup>77</sup> On the other hand, there

<sup>71</sup> *Third Restatement* (n 9) § 1 cmt (a).

<sup>72</sup> Edelman and Bant (n 11) 19–21.

<sup>73</sup> For the narrow view, see, eg, Keith Mason, JW Carter and GJ Tollhurst, *Mason and Carter's Restitution Law in Australia* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2016) 43 [135]; Goff and Jones (n 11) 4–5; Birks, *Unjust Enrichment* (n 11) 274 (changing his mind on this point from Birks, *Introduction* (n 17) 26); Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3<sup>rd</sup> ed, 2015) 417–18. Andrew Burrows' position is more complex — although he describes unjust enrichment as a 'cause of action' distinct from wrongs (see below Part II(E)), he nonetheless maintains that restitution for wrongs is based on an 'underlying principle' of unjust enrichment: Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford University Press, 2012) 26 § 1(3) (for the former proposition) ('*Restatement*'); Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3<sup>rd</sup> ed, 2011) 12 (for the latter). My own preference for the broad view is iterated and explained further in Barker, 'Understanding the Unjust Enrichment Principle' (n 28).

<sup>74</sup> See, eg, *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] 1 AC 561, 605–6 [116] (Lord Nicholls), 649–50 [230]–[231] (Lord Mance); *Benedetti* (n 41) 959 [24] (Lord Clarke JSC); *Investment Trust* (n 26) 295 [43] (Lord Reed JSC for the Court), holding that the purpose of unjust enrichment is to correct 'normatively defective transfers of value'; *Swynson* (n 42) 326 [22] (Lord Sumption JSC for the Court). This view is shared by the editors of Goff and Jones (n 11) 5 [1.04].

<sup>75</sup> *Farah* (n 5) 156 [150] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), citing Edelman's view that cases of breach of fiduciary duty are 'foreign to unjust enrichment': James Edelman, 'A Principled Approach to Unauthorised Receipt of Trust Property' (2006) 122 (April) *Law Quarterly Review* 174, 178.

<sup>76</sup> *David Securities* (n 20) 378 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

are multiple indications in cases involving equitable wrongdoing and intellectual property torts that the purpose of an account of profits is to prevent and deter the unjust enrichment of the wrongdoer.<sup>78</sup> *Bullen and Leake* continues to assume that cases of wrongdoing fall within the unjust enrichment category for pleading purposes.<sup>79</sup> The aims of gain-based remedies can clearly be different in cases involving wrongdoing (encompassing deterrence as well as corrective justice), but the question is whether this is a good enough reason to interpret them as lying in an entirely separate legal category, or merely a reason to identify them as a distinct *subcategory* of unjust enrichment law. I tend toward the latter view on the basis that the cases have sufficient in common to justify treating them as a ‘family’, even if relations between some family members are pretty remote.<sup>80</sup> Part of the logic of keeping a family together under the same roof is that differences between its constituent members can be examined and properly worked out. This does not happen if its more errant members are asked to leave.

A second point of controversy that is probably of greater concern to pleaders concerns which aspects of equitable doctrine and remedies lie within its rubric. In Australia, it seems to be accepted that the category includes: many (but not all) claims involving the old common law counts of money had and received, money paid to another’s use, *quantum meruit* and *quantum valebat*;<sup>81</sup> cases involving the equitable right to recover part payments of money upon a failure of consideration;<sup>82</sup> (perhaps) some claims for rescission;<sup>83</sup> some

<sup>77</sup> *Equuscorp* (n 34) 516 [30] (citing *David Securities*), 517–18 [32] (citing *Roxborough and Farah*) (French CJ, Crennan and Kiefel JJ). See also *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 75 (Mason CJ).

<sup>78</sup> See, eg, *Dart Industries Inc v The Decor Corp Pty Ltd* (1993) 179 CLR 101, 111 (Mason CJ, Deane, Dawson and Toohey JJ); *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Harris v Digital Pulse Pty Ltd* 56 NSWLR 298, 331 [165], 332 [168]–[172] (Mason P), 383–4 [334] (Heydon JA); *Ancient Order of Foresters in Victoria Friendly Society v Lifeplan Australia Friendly Society Ltd* (2018) 360 ALR 1, 22–3 [78] (Gageler J) (‘*Ancient Order of Foresters*’).

<sup>79</sup> Blair et al, *Bullen and Leake and Jacob’s Precedents of Pleadings* (Sweet & Maxwell, 18<sup>th</sup> ed, 2016) vol 2, 1047–9 [108-01]–[108-02].

<sup>80</sup> As in life, so in law. See Barker, ‘Understanding the Unjust Enrichment Principle’ (n 28) 92–5, rejecting essentialist approaches to classification and concluding that ‘[u]njust enrichment law ... is a *mixed* bag without being an *incoherent* bag’.

<sup>81</sup> See, eg, *Pavey* (n 3) 227 (Mason and Wilson JJ); *Westpac* (n 55) 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ); *David Securities* (n 20) 401 (Dawson J), citing *Westpac* (n 55); *Mann* (n 12) 38–9 [150] (Nettle, Gordon and Edelman JJ).

<sup>82</sup> See, eg, *MSD Securities Pty Ltd v MFB Properties (NQ) Pty Ltd [No 2]* [2018] 2 Qd R 51, 86–7 [130]–[131] (Bond J); *McDonald v Dennys Lascelles* (1933) 48 CLR 457, 470 (Starke J), citing *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446, 454–5 (McPherson J).



cases involving equitable liens (where the objective is to secure a restitutionary debt),<sup>84</sup> and arguably (although more tenuously, because the language of unjust enrichment is currently rarely used) a range of cases involving constructive trusts.<sup>85</sup> Australian courts, like English ones,<sup>86</sup> have to date rejected the view that 'presumed' resulting trusts are restitutionary, on the hypothesis that such trusts represent the implied intentions of the parties, not the failure thereof.<sup>87</sup> Furthermore, the High Court is not (yet) fully sold on the idea that unjust enrichment provides the explanation for claims for equitable contribution,<sup>88</sup> or non-consensual subrogation,<sup>89</sup> and (consistently with the observations made above) it has commonly been asserted that such claims rest

<sup>83</sup> Mason, Carter and Tolhurst (n 73) 556–7 [1305]. In the UK, see, eg, *Pitt v Holt* [2013] 2 AC 108. Rescission has generally been regarded as a process in respect of a contract or deed that occurs before restitution takes place, in order to strip away allocations of risk, but restitution of money, property or the value of work then often follows on unjust enrichment grounds. The key question is whether, in such instances, this is a distinct process, or part of rescission itself.

<sup>84</sup> See, eg, *Young v ACN 081 162 512* (2005) 218 ALR 449; *Atco Controls Pty Ltd (in liq) v Stewart* [2013] VSCA 132, [85] (Warren CJ), [185] (Redlich JA) ('*Atco*'). The decision in *Atco* was reversed on appeal in *Stewart v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 307, 334–5 [6] (Crennan, Kiefel, Bell, Gageler and Keane JJ) (on reasoning specific to the issue of the plaintiff's entitlement to a liquidator's lien under the principle in *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171).

<sup>85</sup> See, eg, *Muschinski* (n 30) 612, 616–17 (Deane J); *Baumgartner v Baumgartner* (1987) 164 CLR 137, 149 (Mason CJ, Wilson and Deane J); *Bryson v Bryant* (1992) 29 NSWLR 188, 209 (Kirby P); *Wambo* (n 43); *Break Fast Investments Pty Ltd v Giannopoulos [No 5]* [2011] NSWSC 1508; *Re Wan Ze Property Development (Aust) Pty Ltd* (2012) 90 ACSR 593, 605–6 [51]–[52] (Black J) (Supreme Court of New South Wales); *Thorn v Boyd* [2016] NSWSC 1344, [81] (Sackar J); *Zuecker v Bruggmann [No 3]* [2017] QSC 259, [124] (Bond J).

<sup>86</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 689–90 (Lord Goff), 708–9 (Lord Browne-Wilkinson).

<sup>87</sup> *Raulfs v Fishy Bite Pty Ltd* [2012] NSWCA 135, [44]–[51] (Campbell JA, Meagher agreeing at [113], Barrett JA agreeing at [114]).

<sup>88</sup> See, eg, *Friend* (n 37) 134 (French CJ, Gummow, Hayne, Heydon and Bell JJ); *HIH Claims Support Ltd v Insurance Australia Ltd* (2011) 244 CLR 72, 87–90 [36]–[48] (Gummow ACJ, Hayne, Crennan and Kiefel JJ); *Lavin v Toppi* (2015) 254 CLR 459, 469 [32] (French CJ, Kiefel, Bell, Gageler and Keane JJ). But see at 471 [41]. See also JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrine and Remedies* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2015) 398–9 [10-040]. This position contrasts with rationalisations of contribution claims under some statutory provisions: see, eg, *James Hardie & Co Pty Ltd v Wyong Shire Council* (2000) 48 NSWLR 679, 686 [36] (Handley JA); *Lukey v Corporate Investment Australia Funds Management Pty Ltd* [2005] FCA 298, [335] (Emmett J).

<sup>89</sup> *Bofinger* (n 5). Although, interestingly, reference to unjust enrichment is made: at 299–300 [88] (Gummow, Hayne, Heydon, Kiefel and Bell JJ). For a view representative of this position, see Mark Leeming, 'Subrogation, Equity and Unjust Enrichment' in Jamie Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012) 27, 40.

instead on established principles of equity, unconscionability, the fair sharing of obligations between the parties, or 'natural justice'.<sup>90</sup> These objections rather miss the point that there is, in fact, no taxonomic clash between equity and unjust enrichment because the former category is drawn along historic, jurisdictional lines, and the latter along substantive ones.<sup>91</sup> It is perfectly possible for a claim to be one for unjust enrichment, to be equitable in jurisdictional origin, and to be just in the natural law (moral) sense.

Leaving these matters aside for now, the more pressing question is whether the plurality judgment of the High Court in *Hills* has now rejected any taxonomic role for the concept. Extraordinarily, the Victorian Court of Appeal appears recently to have thought so, concluding (in obiter dicta) in *Vescovi* that the High Court

has rejected the idea that unjust enrichment is the overarching legal genus of which, for example, payment under a mistake or failure of consideration or duress or undue influence or demands made without authority are merely species.<sup>92</sup>

This conclusion appears, with respect, to be a misinterpretation of a particular paragraph in the plurality judgment, in which the High Court was considering arguments about the way in which the new defence of change of position should operate in restitutionary claims in Australian law. In the relevant passage, the plurality rejected the idea that this defence operates only to the extent that defendants can prove that they have lost the enrichment received with mathematical exactitude. Their Honours concluded instead that the key inquiry is whether a defendant has, on the faith of the receipt, sustained a detriment that it would be inequitable to force him or her to bear:

[The plaintiff's] approach focuses upon the extent to which Hills and Bosch have been 'disenriched' subsequent to the receipt. This approach seeks to give effect to an understanding of unjust enrichment as a principle of direct application, which operates by measuring the extent of enrichment or, where a defence of change of position is invoked, the extent of disenrichment subsequent to that

<sup>90</sup> See, eg, *Burke v LFOT Pty Ltd* (2002) 209 CLR 282, 294 [22] (Gaudron ACJ and Hayne J); *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342, 351 (Kitto J); *Mahoney v McManus* (1981) 180 CLR 370, 378 (Gibbs CJ), 385 (Wilson J).

<sup>91</sup> Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26(1) *University of Western Australia Law Review* 1, 67.

<sup>92</sup> *Vescovi* (n 61) 394 [45] (Warren CJ, Santamaria JA and Ginnane AJA). Although this interpretation was based on the Court's interpretation of the High Court's view in 'several cases', it clearly took *Hills* to instantiate that view.

receipt. Such a 'principle' does not govern the resolution of this case because the concept of unjust enrichment is not the basis of restitutionary relief in Australian law. The principle of disenrichment, like that of unjust enrichment, is inconsistent with the law of restitution as it has developed in Australia. Disenrichment operates as a mathematical rule whereas the inquiry undertaken in relation to restitutionary relief in Australia is directed to *who* should properly bear the loss and *why*. That inquiry is conducted by reference to equitable principles.<sup>93</sup>

The assertion in this extract that the principle of unjust enrichment is 'not the basis of restitutionary relief in Australian law' was clearly not necessary for the way in which the Court chose to formulate the change of position defence. It is best interpreted simply as proscribing the use of the concept in the fifth possible role described below — as a definitive *cause of action*. This interpretation is consistent with the Court's assertion in the second extracted sentence that the principle is not one of 'direct application' and coheres also with the High Court's past approval of the idea as a useful developmental tool and unifying concept.<sup>94</sup> It is a more credible interpretation, I suggest, than the view that the Court intended to rule out the idea that there is any such category as unjust enrichment law in Australia, even accepting that there are still debates about the subject's precise boundaries.<sup>95</sup>

The cautious conclusion of this section is therefore that the concept of unjust enrichment does refer to a *particular body of law* in Australia, as well as operating as a device for the development of the rules that fall within it. At its core are those cases involving the old praecipe writs and the money counts that came to be known by the unfortunate title of 'quasi-contract', but it clearly extends beyond these instances. Depending on the answers to the two questions identified above, it is either broader or narrower (I suggest broader), but in either case it contains a range of causes of action in respect of gains that one person has made at the expense of another, drawing those categories together for analysis in a way that crosses traditional jurisdictional boundaries, but which is not insensitive to the different contexts in which the various rules have developed. Because the category contains a mixture of different causes of action for unjust gain, it resembles the law of torts more than it does

<sup>93</sup> *Hills* (n 7) 596–7 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ) (emphasis in original).

<sup>94</sup> See above nn 30–4 and accompanying text.

<sup>95</sup> For a similar conclusion, see Edelman and Bant (n 11) 25–6. Note also that the taxonomic function of the concept has recently been reiterated by the judgment of the (differently constituted) plurality of the High Court in *Mann*: see above n 69 and accompanying text.

the law of contract.<sup>96</sup> For this reason too, it is probably best to refer to it as ‘the law of unjust enrichments’, or (perhaps) ‘the laws of unjust enrichment’, rather than ‘the law of unjust enrichment’. The latter title carries a vague implication that the category is based on a singular legal proscription, which it is not. Instead, the category comprises a congeries of rules that share a number of important family resemblances,<sup>97</sup> but which lack any single, ‘essential’ quality beyond the fact that all the claims in question are for gains made by a defendant, not losses suffered by the plaintiff.

#### D Role 4: An Analytical Framework

A fourth role for the idea of unjust enrichment, which sits comfortably with the third, is that it can provide a framework for the analysis of the various claims that fall within the category just described. In England and Wales, this analytical role is now clearly accepted. In *Banque Financière de la Cité v Parc (Battersea) Ltd* (‘*Banque Financière*’),<sup>98</sup> Lord Steyn hence suggested that four analytical questions arise that are common to all cases of unjust enrichment:

- 1 Has [the defendant] benefited or been enriched?
- 2 Was the enrichment at the expense of [the plaintiff]?
- 3 Was the enrichment unjust? and
- 4 Are there any defences?<sup>99</sup>

To this, it is common to add a fifth analytical question, namely:

- 5 What is the nature of the remedy provided — personal or proprietary?<sup>100</sup>

Lord Steyn’s approach has been endorsed several times by the United Kingdom Supreme Court.<sup>101</sup> The various analytical questions are not akin to the

<sup>96</sup> See Steven A Smith, ‘Unjust Enrichment: Nearer to Tort than Contract’ in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) 181.

<sup>97</sup> For an exposition of this conception of unjust enrichment with Wittgenstein’s theory of family resemblance, see Barker, ‘Understanding the Unjust Enrichment Principle’ (n 28) 92–5.

<sup>98</sup> *Banque Financière* (n 42).

<sup>99</sup> *Ibid* 227. See also at 234 (Lord Hoffmann).

<sup>100</sup> Justice Keith Mason, ‘What Has Equity to Do with Restitution? Does It Matter?’ (2007) 15 *Restitution Law Review* 1, 1 (‘What Has Equity to Do with Restitution?’). See *Investment Trust* (n 26) 294 [38] (Lord Reed JSC).

precise requirements of a single cause of action, but are, rather, 'broad headings' which assist in expounding and structuring courts' approach to a variety of different restitutionary claims. This was explained by Lord Reed in *Investment Trust Companies v Revenue and Customs Commissioners* ('*Investment Trust*')<sup>102</sup> in the following, pellucid way:

Lord Steyn's four questions are no more than broad headings for ease of exposition. They are intended to ensure a structured approach to the analysis of unjust enrichment, by identifying the essential elements in broad terms. If they are not separately considered and answered, there is a risk that courts will resort to an unstructured approach driven by perceptions of fairness, with consequent uncertainty and unpredictability. At the same time, the questions are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements. In particular, the words 'at the expense of' do not express a legal test; and a test cannot be derived by exegesis of those words, as if they were the words of a statute.

The structured approach provided by the four questions does not, therefore, dispense with the necessity for a careful legal analysis of individual cases.<sup>103</sup>

This analytical framework has not, as yet (or in full), been unanimously adopted by the High Court of Australia. In *Roxborough*, Kirby J described the four-stage approach as 'generally accepted',<sup>104</sup> but this was probably an exaggeration of the views of the High Court Bench itself at that time. However, more recently in *Equuscorp*, the High Court accepted and applied what it called an 'approach to determining' unjust enrichment claims which operates at a 'fairly high level of abstraction' and which has two analytical stages: the establishment of an enrichment that is prima facie unjust by reference to recognised classes of qualifying or vitiating factors; and the identification of circumstances (defences) which displace that prima facie liability by establishing that an order for restitution would be unjust.<sup>105</sup> This analysis was based on

<sup>101</sup> See, eg, *Benedetti* (n 41) 955 [10] (Lord Clarke JSC, Lords Kerr JSC and Wilson JSC agreeing); *Menelaou* (n 42) 187–8 [18]–[19] (Lord Clarke JSC, Lord Neuberger PSC agreeing at 197 [61], Lords Kerr and Wilson JJSC agreeing at 218 [141]); *Eastenders* (n 24) 41 [102] (Lord Toulson JSC for the Court); *Investment Trust* (n 26) 295 [41] (Lord Reed JSC for the Court). See also *Investment Trust Companies (in liq) v Revenue and Customs Commissioners* [2012] STC 1150, 1167 [38] (Henderson J) (England and Wales High Court, Chancery Division).

<sup>102</sup> *Investment Trust* (n 26).

<sup>103</sup> *Ibid* 295 [41]–[42].

<sup>104</sup> *Roxborough* (n 5) 568 [139] n 257.

<sup>105</sup> *Equuscorp* (n 34) 516 [30] (French CJ, Crennan and Kiefel JJ).

the decision in *David Securities*,<sup>106</sup> and features also in the judgment of Gageler J in *Hills*.<sup>107</sup> It clearly only needs to be pressed very slightly to divulge the full and greater range of questions posed by Lord Steyn, and a detailed examination of the relevant passage suggests that it is in fact a compressed expression of the first four stages of the above analysis. In *Mann*, the plurality seems clearly to have accepted the utility of that four-stage approach as a means of structuring our understanding of restitutionary claims.<sup>108</sup> The five-stage approach has been advocated by Justice Keith Mason, writing extracurially.<sup>109</sup> There is also an extraordinarily wide range of authority in lower courts in which some or all five parts of the analytical framework have been used in legal reasoning in recent years.<sup>110</sup> The function of the framework can be understood as analogous to that of the ‘Caparo’ framework (note — framework, not test) that is used in the United Kingdom to rationalise and deter-

<sup>106</sup> *David Securities* (n 20) 379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ). The two-stage approach in *David Securities* was itself based on *Westpac* (n 55) 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

<sup>107</sup> *Hills* (n 7) 617 [136].

<sup>108</sup> *Mann* (n 12) 61–2 [213] (Nettle, Gordon and Edelman JJ). Note, however, the point that the elements of the analytical framework cannot be used dispositively as definitive elements of a restitutionary cause of action.

<sup>109</sup> See Mason, ‘What Has Equity to Do with Restitution?’ (n 100) 1; Justice Keith Mason, ‘Where Has Australian Restitution Law Got to and Where Is It Going?’ (2003) 77(6) *Australian Law Journal* 358, 361–3.

<sup>110</sup> See, eg, *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] 3 VR 16, 102 (Hansen J) (stages 1–3); *Torpey Vander Have Pty Ltd v Mass Constructions Pty Ltd* (2002) 55 IPR 542, 549 [34] (Spigelman CJ) (New South Wales Court of Appeal) (stages 1–3); *Spangaro v Corporate Investment Australia Funds Management Ltd* (2003) 54 ATR 241, 256 [48] (Finkelstein J) (Federal Court) (stages 1–4); *Farah (Court of Appeal)* (n 44) [223] (Tobias JA for the Court) (stages 1–3 described as ‘factors’: at [224]); *Ideas Plus Investments Ltd v National Australia Bank Ltd* (2006) 32 WAR 467, 485–6 [65] (Steytler P, Buss JA agreeing at 500 [113]), 496 [96] (McLure JA) (stages 1–4); *Ethnic Earth Pty Ltd v Quoin Technology Pty Ltd (in liq) [No 3]* (2006) 94 SASR 103, 117 [65] (Bleby J) (stages 1–3); *Lumbers (Full Supreme Court)* (n 58) 420 [63] (Sulan and Layton JJ) (stages 1–4); *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2011] NSWSC 267, [21]–[23] (Einstein J) (‘*Hills (Supreme Court)*’) (stages 1–4); *Henderson v McSharer* [2013] FCA 414, [73] (Barker J) (stages 1–3); *Focus Metals Pty Ltd v Babicci* [2014] VSC 380, [120]–[121] (Sloss J) (stages 1–4), citing *Hills (Supreme Court)* (n 110) [21] (Einstein J) (in respect to stages 1–3), *David Securities* (n 20) 380 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ) (in respect to stage 4); *Lampson* (n 41) [51]–[55] (Edelman J) (stages 1–4); *A & A Martins Pty Ltd v Liu* [2018] ACTSC 102, [25]–[26] (McWilliam As) (‘*A & A Martins*’) (stages 1–5); *Gambaro Pty Ltd v Rohrig (Qld) Pty Ltd* [2018] QCA 327, [18] (Sofronoff P, Philippides JA agreeing at [31], Boddice J agreeing at [32]) (‘*Gambaro*’) (stages 1–3); *Burkett v Bendigo and Adelaide Bank Ltd [No 2]* (2018) 133 ACSR 411, 441 [104] (Croft J) (Supreme Court of Victoria) (‘*Burkett*’) (stages 1–4).

mine novel duty of care questions.<sup>111</sup> It is subject to the same methodological limitations and is consistent with the normal, incremental process of development in common law systems.

Here we must unfortunately return to *Vescovi*, because the Victorian Court of Appeal in that decision appears to have interpreted the plurality judgment in *Hills*, discussed above, as not simply ruling out the idea of unjust enrichment as an overarching category or 'genus' of law, but as also precluding Australian courts from making any use of the above-mentioned analytical framework.<sup>112</sup> This construction of *Hills* is, I suggested above, a misinterpretation of the plurality's intention, which seems to have been to rule out the use of unjust enrichment as a *dispositive* norm or *cause of action*, not the use of the idea in an organisational, analytical role. It has thankfully not been followed by other Australian courts, which have continued to refer to parts of the analytical framework even after the decision in *Hills* was handed down.<sup>113</sup>

Sadly, the confusion surrounding paragraph 78 in *Hills* has given rise to other, distinct analytical mistakes. For example, both Victorian and Queensland courts have recently cited the judgment as authority for the suggestion that unjust enrichment claims can have completely different analytical elements in different types of case. In *Sunwater Ltd v Drake Coal Pty Ltd* ('*Sunwater*'),<sup>114</sup> the Queensland Court of Appeal hence concluded that, in cases of unjust enrichment in which a plaintiff is seeking to recover the value of work done, as opposed to money paid, it is unnecessary for a court to consider whether there might be any defence of change of position, or other circumstances making it inequitable to require a defendant to pay restitution. This assertion was made, in part, on the basis that *Hills* has confirmed that unjust enrichment is not a 'definitive legal principle.'<sup>115</sup> Philippides JA also suggested that it is unnecessary and inappropriate to consider even whether

<sup>111</sup> For a full explanation of the way this approach is to be understood, see *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736, 744–7 [21]–[30] (Lord Reed JSC, Baroness Hale PSC and Lord Hodge JSC agreeing).

<sup>112</sup> *Vescovi* (n 61) 395 [48]–[49] (Warren CJ, Santamaria JA and Ginnane AJA), where the Court ruled out reference to either the three- or five-stage approach.

<sup>113</sup> See, eg, *A & A Martins* (n 110) [25]–[26] (McWilliam AsJ) (stages 1–5); *Gambaro* (n 110) [18] (Sofronoff P) (stages 1–3); *Burkett* (n 110) 441 [104] (Croft J) (stages 1–4); *Mann* (n 12) 61–2 [212]–[213] (Nettle, Gordon and Edelman JJ) (stages 1–4).

<sup>114</sup> [2017] 2 Qd R 109 ('*Sunwater*').

<sup>115</sup> *Ibid* 120 [36] (Phillip McMurdo JA, Gotterson JA agreeing at 111 [1], Philippides JA agreeing at 111 [2]).

the defendant *benefitted* by the work done, in such a case.<sup>116</sup> Since the various restitutionary causes of action that comprise the category of unjust enrichment law are distinct from one another, they have, her Honour reasoned, ‘distinct elements and defences’ that should not be ‘transplanted’ across categorical lines.<sup>117</sup> The apparent consequence of this approach is that at least two of the identified five elements of the unjust enrichment framework can magically disappear as one moves from one type of case (involving money) to another (involving work), when the only difference between them lies in the technical form of the benefit received.

This conclusion is unfortunate and threatens to undermine the utility of the framework as a way of guiding judges in a stable way through the relevant forms of inquiry. A better view, which is still consistent with the rules currently governing the recovery of remuneration for work done, is simply that, where a request for the work has been proven and the work meets the request, the defendant should be presumed to have benefitted at the plaintiff’s expense, not that the existence of such a benefit is *irrelevant* to the unjust enrichment claim. Indeed, the suggestion that an unjust enrichment claim can dispense with the requirement that a defendant be enriched is curiously paradoxical and maladroit. Similarly, whilst it is perhaps less likely that a defence of change of position will apply where a defendant has requested work than when he or she has innocently received and spent money, the logical possibility of defendants detrimentally changing their position in consequence of the provision of work, such that it would be inequitable to require full payment for it, cannot and should not be ruled out.

*Woolcorp Pty Ltd v Rodger Constructions Pty Ltd*<sup>118</sup> provides a second, less serious example of the same tendency to fragment and abandon parts of the standard analytical framework in cases involving the provision of work. Whilst the Court on this occasion did not go so far as to suggest that the existence of a benefit is irrelevant in this type of unjust enrichment claim, their Honours did suggest that where work is requested, it is still ‘inappropriate to ... consider’ whether it was received at the plaintiff’s expense (the second analytical question).<sup>119</sup> This was again on the basis that the law of restitution ‘does not necessarily involve any set list of factors in determining

<sup>116</sup> Ibid 114–15 [17], citing *Hendersons Automotive Technologies Pty Ltd (in liq) v Flaton Management Pty Ltd* (2011) 32 VR 539, 553 [60]–[62] (Tate JA, Ashley JA agreeing at 541 [1], Neave JA agreeing at 541 [2]) (*‘Hendersons’*).

<sup>117</sup> *Sunwater* (n 114) 115 [19].

<sup>118</sup> [2017] VSCA 21.

<sup>119</sup> Ibid [12] (Santamaria, Kyrou and Elliott JJA).



whether a claim has been made out.<sup>120</sup> The better view again seems to be that, where D has requested work and that request has caused P to provide it to D, the work can be *presumed* to have been provided at P's expense, without further evidence needing to be adduced. The point is again not that one of the analytical stages is *irrelevant*, but that it is in practice easily met and need not greatly occupy the court's time. A benevolent reading of the case suggests that this may have been what the Court really intended to say.

The important point of the fivefold unjust enrichment framework is hence not that each question it posits has to be answered in the same way in all cases, but rather that each of the questions it identifies must be considered in each case. If the framework is to provide a useful, stabilising function in respect of the development and understanding of the modern law, it must be used in all unjust enrichment cases, not just some. Whilst it is acceptable, therefore, to suggest that some of the questions it raises are likely to be answered straightforwardly in particular categories of case, or even answered in different ways, this does not mean that the questions themselves cease to be relevant questions, or that the basic elements of an unjust enrichment claim differ completely as between different types of case.

Many of these problems are the residual product of the preference of the majority of the High Court in *Lumbers v W Cook Builders Pty Ltd (in liq)* ('*Lumbers*')<sup>121</sup> and other cases in the early part of the new millennium for analysing restitutionary claims through the traditional desiderata of the old procedural forms of action, in preference to reasoning in terms consistent with modern unjust enrichment analysis. This has led to the hiving off of claims for work done into a separate, historical analytical framework and an attendant assumption that a request by the defendant is the *only* analytical 'element' of a claim in such a case, which is both necessary and sufficient for the claim's success.<sup>122</sup> In fact, although the presence of such a request is highly relevant and undoubtedly likely to result in a claim succeeding, this is because the request assists in establishing conclusively both the fact of the defendant's enrichment and the injustice of a defendant not paying for it. It is not because a 'request' for the work is the sole 'element' of the claim. Furthermore, the absence of such a request cannot be taken to be conclusive against the success of an unjust enrichment claim, since a defendant's enrichment by the work,

<sup>120</sup> Ibid.

<sup>121</sup> *Lumbers* (n 34) 662–5 [78]–[85] (Gummow, Hayne, Crennan and Kiefel JJ).

<sup>122</sup> See, eg, *Sunwater* (n 114) [17]–[18] (Philippides JA), citing *Hendersons* (n 116) 553 [60]–[62] (Tate JA, Ashley JA agreeing at [1], Neave JA agreeing at [2]).

and the injustice of his or her not paying for it, could potentially be established in other ways.<sup>123</sup>

What this demonstrates is that, although progress is gradually being made, we are still at a stage in Australia at which courts and practitioners are transitioning from modes of legal analysis that are historical and based on the formulae of the old writ actions, to the new mode of analysis, which focuses on the substantive requirements of underlying restitutionary rights. The sooner the former is finally abandoned, the better.

#### E *Role 5: A Cause of Action?*

It will be evident from what has been said in the previous sections that the High Court's key modern concern relates to the idea that the concept of unjust enrichment might itself provide a cause of action, by which I have suggested the Court means a *definitive* norm which can be applied directly to the facts of a particular case in order to generate legal outcomes. The concept of a cause of action is slippery, but for current purposes I take the idea to refer to the set of factual conditions which is both necessary and sufficient to give rise to a legal claim.<sup>124</sup> Practitioners are necessarily acutely concerned to identify the cause of action accurately in any given case, precisely because this determines the facts that they must plead. As we shall see in the final section, confusion about the precise identity of the relevant 'cause of action' in restitutionary claims has resulted in recent years in a number of defective pleading practices, with some plaintiffs being forced to seek leave to amend, or having their claims struck out.

The view that unjust enrichment is not itself a cause of action in the defined sense was clear from the start. Dawson J expressly said as much, and in these terms, in *David Securities*<sup>125</sup> and other members of the Court in that

<sup>123</sup> For example, by demonstrating that the benefit was rendered in circumstances of necessity (a possibility acknowledged in *Lumbers* (n 28) 663–4 [80] (Gummow, Hayne, Crennan and Kiefel JJ)) or that it was freely accepted by the defendant. Although *Lumbers* is sometimes interpreted as inconsistent with the latter proposition, it is still very much alive: see Barker and Grantham (n 11) 94.

<sup>124</sup> *Letang v Cooper* [1965] 1 QB 232, 242–3 (Diplock LJ): a cause of action is 'a factual situation the existence of which entitles one person to obtain from the court a remedy'. On the complexities, see also Silas A Harris, 'What Is a Cause of Action?' (1928) 16(6) *California Law Review* 459; Lionel Smith, 'Sources of Private Rights' in Simon Degeling, M Crawford and Nicholas Tiverios (eds), *Justifying Private Rights* (Hart Publishing, forthcoming).

<sup>125</sup> *David Securities* (n 20) 406. See also *Burkett* (n 110) 441 [103] (Croft J), citing *Lumbers* (n 34), *Pavey* (n 2).

case were, I suggest, making the same point when they said that the principle is not 'definitive ... according to its own terms'.<sup>126</sup> That analysis has been repeated by the High Court ad nauseam<sup>127</sup> and is, I have posited above, at the core of the plurality's assertion in *Hills* that the idea of unjust enrichment is not capable of 'direct application' and does not provide 'the basis' of restitutionary relief in Australian law.<sup>128</sup> In *Lampson*, Edelman J interestingly clarified and qualified the last proposition by saying that it is not the 'direct basis' of restitutionary relief,<sup>129</sup> by which he was probably intending to preserve the idea that, although it is not a cause of action, it plays a remoter, taxonomic and organisational role. The same view seems to lie at the root of Campbell J's observation in the earlier case of *Wasada* that unjust enrichment is an 'explanatory concept', but that, because it is not actually a singular cause of action, one needs always to 'look to other legal standards to find out what ... [it] is'.<sup>130</sup>

The consequence of this is that whilst all unjust enrichment claims can be analysed through the framework identified in the previous section, each separate claim nonetheless comprises a distinct cause of action in its own right, and each cause of action has its own specific rules and requirements. The category of unjust enrichment law is a collection of individual causes of action. Each cause of action in the category can hence legitimately be described as a claim 'in' unjust enrichment (just as a claim for negligence or false imprisonment is a claim 'in tort'), but unjust enrichment is not 'a' cause of action in itself any more than 'tort' is 'a' cause of action.<sup>131</sup>

<sup>126</sup> *David Securities* (n 20) 378 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

<sup>127</sup> See, eg, *Farah* (n 5) 156 [151] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Bofinger* (n 5) 299 [86] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); *Equuscorp* (n 34) 515–16 [29] (French CJ, Crennan and Kiefel JJ); *Mann* (n 12) 61–2 [212]–[213] (Nettle, Gordon and Edelman JJ). See also *Wasada* (n 23) [18], [22] (Campbell J).

<sup>128</sup> *Hills* (n 7) 596 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ). See also *Lumbers* (n 34), where it was stated that the principle is not a 'sufficient premise for direct application in particular cases': at 665 [85]–[86] (Gummow, Hayne, Crennan and Kiefel JJ).

<sup>129</sup> *Lampson* (n 41) [50] (emphasis added).

<sup>130</sup> *Wasada* (n 23) [22] (emphasis added). By 'other legal standards', his Honour is probably referring to the lower-level, concrete legal rules which, along with the required facts, constitute the plaintiff's 'cause of action'.

<sup>131</sup> For this reason, Professor Burrows makes it clear that if one refers to unjust enrichment as a 'cause of action', it can only be as a generalising proposition (like saying that 'tort' is a cause of action), not a cause of action in the key, specific sense identified in this article: Burrows, *Restatement* (n 73) 26 § 1(3). For a recent conversion to a view close to that provided in this article, see Lionel Smith, 'Defences and the Disunity of Unjust Enrichment' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment*

A list of the causes of action in unjust enrichment law includes those named long ago by Lord Mansfield in *Moses*.<sup>132</sup> Most are well known and accurately identified in the main texts.<sup>133</sup> They include mistake, failure of basis (consideration or condition), personal incapacity, duress, legal compulsion, undue influence (in its various forms), unconscionable dealing, the ‘free acceptance’ of a benefit,<sup>134</sup> and absence of consent or want of authority in respect of the bestowal of a benefit (sometimes alternatively referred to as cases of ‘ignorance’ or cases in which the plaintiff had ‘no intention’ to make a transfer). They may also include some public policy grounds, such as illegality, and the rule in England and Wales that there should be no taxation without the authority of Parliament.<sup>135</sup> Depending on how broadly the boundaries of the unjust enrichment category are drawn, they may also include wrongs, including a number of torts, breaches of confidence, breaches of fiduciary duty, the breach of some types of contract,<sup>136</sup> and accessorial equitable wrongs. Claims for the gains made by a defendant in each of these circumstances necessarily require the injustice of the defendant’s enrichment to be proven in different ways, in accordance with well-known principles that have been worked out by courts over a long period of time. A claim for money paid on a basis that has failed hence currently still formally requires proof that the basis has failed in total,<sup>137</sup> with some (growing) exceptions.<sup>138</sup> A

(Hart Publishing, 2016) 27. For the suggestion that this is now probably also the position of the Supreme Court of Canada, see Lionel Smith, ‘The State of the Law of Unjust Enrichment in Common Law Canada’ (2015) 57(1) *Canadian Business Law Journal* 39.

<sup>132</sup> *Moses* (n 53) 680–1 [1012].

<sup>133</sup> See, eg, Mason, Carter and Tolhurst (n 73).

<sup>134</sup> *R v Vale of White Horse District Council* [2003] EWHC 388, [14] (Lightman J). In Australia, the position is less clear in the light of *Lumbers*, but still arguable: *Liebe v Molloy* (1906) 4 CLR 347, 353–4 (Griffith CJ for the Court); *Lampson* (n 41) [90] (Edelman J).

<sup>135</sup> *Woolwich Equitable Building Society v Inland Revenue Commissioners* [No 2] [1993] AC 70.

<sup>136</sup> Restrictive covenants are the main example: see the line of cases running from *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 798 (England and Wales High Court, Chancery Division). But see *A-G v Blake* [2001] 1 AC 268, 284 (Lord Nicholls) (*‘Blake’*). In *One Step (Support) Ltd v Morris-Garner* [2019] AC 649 (*‘One Step’*), the United Kingdom Supreme Court has now cast doubt on the restitutionary analysis of negotiating damages in cases of the former type. *Blake* survives, but is confined to its exceptional circumstances: at 685–6 [82] (Lord Reed JSC, Baroness Hale PSC, Lords Wilson and Carnwath JSC agreeing).

<sup>137</sup> *Baltic Shipping* (n 58) 350 (Mason CJ), 377–8 (Deane and Dawson JJ), 386 (Gaudron J), 389 (McHugh J).

<sup>138</sup> See, eg, *David Securities* (n 20) 383 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ). See also James Edelman, ‘Restitution for a Total Failure of Consideration: When a Total Failure Is Not a Total Failure’ (1996) 1(3) *Newcastle Law Review* 57, 61–2; Frederick Wilmot-Smith, ‘Reconsidering “Total” Failure’ (2013) 72(2) *Cambridge Law Journal* 414, 420–2.

claim based on mistaken payment requires proof that the mistake was causative of the payment. A claim based on duress requires proof both that a given threat was causative of payment and that the relevant threat was illegitimate. And so on. The requirements of each of these distinct causes of action can nonetheless be structured or *analysed* within the broader framework identified in the previous section.

### III IMPLICATIONS FOR THE PLEADING OF CLAIMS

Whilst it is not necessary for parties to specify the legal cause of action upon which they rely in their pleadings, they must always plead the facts material to their case.<sup>139</sup> There is unfortunately little detailed guidance available in Australia on pleading unjust enrichment claims,<sup>140</sup> and confusions as to whether or not unjust enrichment itself constitutes a cause of action and, if not, which restitutionary causes of action belong within the category, have added to the difficulties practitioners and individual litigants have experienced.

It follows from the conclusion in the preceding section that unjust enrichment is not itself 'a cause of action' in Australia, so that it is insufficient simply to plead that a defendant has been unjustly enriched, or indeed vaguely to assert that each of the elements of an unjust enrichment claim described in Part II(D) is made out. Pleadings of this sort will swiftly be struck out.<sup>141</sup> For a claim within the category to succeed, precise facts establishing each of the relevant elements of a restitutionary cause of action (the first three elements of the five-stage analysis of all such claims) must be asserted.<sup>142</sup> They must therefore show not just that the defendant has been enriched at the plaintiff's expense in a relevant and established sense, but also

<sup>139</sup> See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 13.02(1)(a).

<sup>140</sup> In England, Blair et al (n 79) provide precedents for some monetary restitutionary claims, claims for benefits provided under discharged or ineffective contracts, claims for contribution and recoupment, restitution for torts and breaches of fiduciary duty and (in separate sections) tracing, rescission and accounts, as well as some restitutionary defences, but the range is by no means complete: at 1047–69. In Australia, see generally Mason, Carter and Tolhurst (n 73) ch 29; AG Nevill and AW Ashe, *Equity Proceedings with Precedents: New South Wales* (Butterworths, 1981); Edmund Finnane, Christopher Wood and Nicholas Newton, *Equity Practice and Precedents* (Thomson Reuters, 2<sup>nd</sup> ed, 2019).

<sup>141</sup> See, eg, *Lactos Fresh Pty Ltd v Finishing Services Pty Ltd* [No 2] [2006] FCA 748, [111] (Weinberg J); *ABL Custodian Services Pty Ltd v Smith* [2010] VSC 548, [55] (Croft J).

<sup>142</sup> *Winterton* (n 40) 375–6 (Gummow J).

that there is a sufficient, specific ground for restitution, or ‘unjust factor’<sup>143</sup> at the third stage of the analysis. In the absence of such pleaded facts, broad assertions that it would be unconscionable for the defendant not to pay for a benefit will not suffice. The point was put in the following way by Edelman J in 2012:

The presence of an unjust factor is an indispensable requirement to demonstrate the facts upon which a plaintiff relies for a claim that a defendant had no ‘right to retain’ the benefit and was unjustly enriched. The unjust factor may also affect the availability or scope of defences, such as change of position, which rely upon pleading facts which fall within established and developing rules concerning circumstances which reduce or extinguish a defendant’s duty to make restitution by ‘any matter or circumstance which shows that his or her receipt (or retention) of the payment is not unjust.’<sup>144</sup>

Precisely what is required to establish a restitutionary cause of action in unjust enrichment law hence depends always on the type of case in question. To show a cause of action in a case of mistaken payment, the relevant mistaken belief and its causative effect must be asserted alongside the details of the payment.<sup>145</sup> If the plaintiff wants a proprietary remedy in respect of the money paid, he or she must probably, on the state of the current law, plead facts which show that the defendant had knowledge of the mistake.<sup>146</sup> In a case of failure of basis, the relevant condition subject to which the benefit was provided, and the facts establishing that the condition or purpose has failed must be asserted, together with the fact that the defendant was aware of the relevant condition, so that it was within both parties’ contemplation.<sup>147</sup> In any case in which a benefit has been provided under a contract, it will also be necessary to plead facts demonstrating that the contract is invalid, incomplete, has been rescinded or discharged, or is otherwise void or voidable, so as

<sup>143</sup> *Farah* (n 5) 156 [150] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Equuscorp* (n 34) 516 [30] (French CJ, Crennan and Kiefel JJ); *Chidiac v Maatouk* [2010] NSWSC 386, [216] (Ward J) (*‘Chidiac’*); *Hightime Investments Pty Ltd v Adamus Resources Ltd* [2012] WASC 295, [183]–[185] (Edelman J) (*‘Hightime Investments’*).

<sup>144</sup> *Hightime Investments* (n 143) [185] (citations omitted).

<sup>145</sup> *Lahoud v Lahoud* [2010] NSWSC 1297, [168], [176]–[179] (Ward J). Where multiple overpayments are alleged to have been mistakenly made by a plaintiff on different dates for the same reason, it is not always necessary to plead each individual payment as opposed to the global amount, provided the defendant is not surprised at trial: *Sturesteps v Houry* [2015] NSWSC 1041, [74] (Slattery J).

<sup>146</sup> *Wambo* (n 43). The logic of this requirement is not obvious.

<sup>147</sup> *Roxborough* (n 5) 526 [17] (Gleeson CJ, Gaudron and Hayne JJ).

to negate the defendant's legal right to the benefit and displace any concern that restitution will undermine a valid contractual allocation of risk.<sup>148</sup> In cases involving wrongful enrichment, where a part of the plaintiff's cause of action resides in the wrong itself, it will normally be sufficient to prove facts establishing that the defendant breached a relevant<sup>149</sup> legal or equitable duty owed to the plaintiff, and that the gain in question was factually and legally caused by the breach.<sup>150</sup> Despite the language that has featured in the High Court, to which we alluded in Part II(B) above, it should not be necessary, to make out a *claim*, to plead facts that show the inequity of allowing a defendant to *retain* the relevant enrichment, since such facts are relevant only to establishing a restitutionary defence.

Undoubtedly the most common failing in modern pleading practices has been the failure to specify with sufficient precision facts establishing one or more of the recognised, lower-level grounds which demonstrate that an enrichment is unjust according to law, or in equity. These errors may have stemmed from the false assumption that unjust enrichment is itself a cause of action (role 5), as opposed to just a legal principle (role 2) and framework (role 4) for analysing and developing the various subspecies of restitutionary claim. They have led to a number of claims being struck out.<sup>151</sup>

Another key problem, which is a product of history, is the tendency of litigants to plead the elements of the old common law *forms* of action *alongside* or *instead of* the facts that are necessary to make out the relevant restitutionary *cause* of action. The language of the forms of action sometimes contains reference to factual elements that are undoubtedly helpful in establishing a restitutionary cause of action, such as the existence of a request

<sup>148</sup> See, eg, *Brenner v First Artists' Management Pty Ltd* [1993] 2 VR 221, 260–1 (Byrne J); *Anderson v McPherson [No 2]* (2012) 8 ASTLR 321, 350 [203]–[204] (Edelman J) (Supreme Court of Western Australia).

<sup>149</sup> That is to say, a duty within a category that has been recognised in the precedents as giving rise to gain-based claims. For a case in which the plaintiff sought to plead unjust enrichment for the wrong of a pure breach of contract, which is not (as yet) recognised as a restitutionary cause of action in Australian law, see *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153.

<sup>150</sup> *Ancient Order of Foresters* (n 78) 923 [7] (Kiefel CJ, Keane and Edelman JJ).

<sup>151</sup> See, eg, *Coshott v Lenin* (2006) 4 DCLR(NSW) 13, 22 [42] (Neilson DCJ), affd [2007] NSWCA 153 (on other grounds); *Chidiac* (n 143) [216]–[217] (Ward J) (although the restitutionary claim also failed on other substantive grounds); *Alexiadis v Zirpiadis* (2013) 302 ALR 148, 154 [29], 155–6 [32]–[34] (Kourakis CJ), 176 [133] (Gray J), 191 [220] (White J) (Supreme Court of South Australia); *Gambaro* (n 110) [26] (Sofronoff P); *Gujarat NRE India Pty Ltd v Wollongong Coal Ltd* (2018) 130 ACSR 133, 178 [270] (Robb J) (Supreme Court of New South Wales).

for work in a case in which the plaintiff is seeking remuneration for services provided. But it is a mistake to think that the old forms of action themselves *constitute, specify or restrict* the substantive grounds on which an unjust enrichment claim can be established. As regards *constitution and specification*, a ‘*quantum meruit*’ is not a cause of action in itself, but simply a historical *form* of action through which one of several different possible causes of action in unjust enrichment can be asserted, including, potentially, the fact that the work was provided for a consideration that has failed, or by mistake, or was freely accepted by the defendant.<sup>152</sup> Each of these distinct, substantive grounds for restitution is likely to require distinct facts to be pleaded.

Nor does the form of the action, with its emphasis upon a *request* for work, restrict the possibilities of unjust enrichment claims in respect of such work. A request is simply one (albeit perhaps the best) way of establishing that the defendant is enriched by work and that it would be unjust for him or her not to pay for it. There are alternative ways in which both elements can be established. As regards enrichment, for example, a service may be held to be incontrovertibly beneficial where it saves a defendant a necessary expense,<sup>153</sup> or, perhaps, because the defendant unconscientiously accepted it.<sup>154</sup> As it is, courts accommodate claims in such cases by ‘inferring’ or ‘implying’ requests for the work in circumstances in which such facts are alleged and proven.<sup>155</sup> This is confusing to all concerned. The fiction of request in such instances resurrects, in yet another form, the old ‘implied contract fallacy’ that has been resoundingly rejected by modern courts.<sup>156</sup>

It is scarcely surprising in these circumstances that the proper pleading of claims for services remains a stumbling block for plaintiffs. As it is, if no

<sup>152</sup> Exceptionally, it may also have supported the implication of a genuine agreement to pay from a request, but the cause of action then lies in contract, not in unjust enrichment law. *Pavey* (n 2) stands firmly against strained or fictional implications of this type.

<sup>153</sup> See, eg, *Monks v Poynice Pty Ltd* (1987) 8 NSWLR 662, 664 (Young J).

<sup>154</sup> On the continuing role of free acceptance even after *Lumbers*, see *Lampson* (n 41) [79]–[85] (Edelman J).

<sup>155</sup> The circumstances in which requests for benefits have been historically ‘inferred’ in this way are described by Young AJA in *Progressive Pod Properties Pty Ltd v A & M Green Investments Pty Ltd* [2012] NSWCA 225. They include cases: where a surety discharges a debtor’s debt; where a payment is made under legal compulsion; where payments are made on behalf of another in accordance with the rules of an enterprise of which both parties are aware; and where a reasonable person would expect to pay for the benefit unless they reject it within a reasonable time: at [56]–[58]. His Honour emphasises that the list of cases is not exhaustive: at [57].

<sup>156</sup> See, eg, *Pavey* (n 2) 227 (Mason and Wilson JJ); *Westpac* (n 55) 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ); *Baltic Shipping* (n 58) 356–7 (Mason CJ).



express request was made for work provided, they are formally required to plead facts which establish a basis for 'inferring' one, such as the defendant's acceptance of the work, its necessity, or its incontrovertibly beneficial nature. The confusion of historical *forms* and writs with modern *causes* of action has also sometimes led plaintiffs to claim a '*quantum meruit*' in respect of work in the *alternative* to alleging a cause of action in unjust enrichment, when the *quantum meruit* sought is actually *based upon* a defendant's unjust enrichment.<sup>157</sup>

All of this suggests that the transparency and efficiency of pleading practices in respect of restitutionary causes of action is still being seriously impacted by historical and procedural forms that should long ago have been abandoned, as well as by the uncertainty (to which this article has pointed) about the nature of the relevant 'causes of action' in unjust enrichment law. Whilst we try to rectify these deficiencies with celerity, the key practical priority for pleaders, I suggest, is to be sure to allege all the facts necessary to meet the substantive requirements of the various restitutionary causes of action falling within the unjust enrichment category, not simply the historical requirements of form, because the old forms are likely to prove deceptive as well, potentially, as unduly restrictive in the light of the developing law.

#### IV CONCLUSION

Commonly, all that lies between alliance and antagonism is a misunderstanding. The main thesis of this article has been that a failure properly to distinguish between the different roles that the idea of unjust enrichment can play in legal reasoning underlies much of the confusion and suspicion that has come to be expressed about it in recent times. If we draw upon all the evidence, there is good authority for the proposition that the idea of unjust enrichment in Australia plays the second, third and fourth roles identified in Part II above. In the post-*Hills* era, it therefore constitutes a category of law (albeit one the outer edges of which are still being fully defined). It operates as a legal principle in that category, which assists in understanding and developing the various restitutionary causes of action it contains, and it increasingly provides an analytical framework that can assist in understanding and

<sup>157</sup> See, eg, *Peet Ltd v Richmond* [2009] VSC 130, where the plaintiff's *quantum meruit* claim was originally quantified by reference to the value of the work done and the unjust enrichment claim by reference to the profit the defendant obtained as a result of it: at [11] (Hollingworth J). The latter claim was dropped on appeal: *Peet Ltd v Richmond* (2011) VR 465, 466.

structuring the various elements of different restitutionary claims. The idea is not a purely moral principle lying in the personal, ethical intuitions or discretion of a judge, nor, crucially, does it describe a singular cause of action in the dispositive, concrete sense to which I have referred.

Separating these roles from one another, and thereby distinguishing between that which unjust *is* and that which it is *not*, ought, I have argued, to give courts greater confidence in using the idea in the future. It can also improve our pleading practices. Equally importantly, perhaps, it can bring greater transparency and dignity to modern debate by revealing the extent to which supporters and critics of the idea, all of whom are spiritual allies in the cause of restitutionary justice, have hitherto been talking at cross-purposes to one another.