

# Unjust Enrichment in Australia

## A Commentary

Professor Kit Barker

[k.barker@law.uq.edu.au](mailto:k.barker@law.uq.edu.au)



AUSTRALIAN  
CENTRE FOR  
PRIVATE LAW

# Unjust Enrichment – Roles for the Concept

1. A Moral Principle
2. A Cause of Action?
3. A 'Unifying' Legal Principle
4. A Taxonomic Legal Category
5. An Analytical Framework

# Role 1 – A Moral Principle?

‘nem hoc natura aequum est, neminem cum alterius detrimento fieri locupletioem’.

[‘it is by nature fair that no one should gain through another’s loss’]

D12, 6, 14

## REJECTED:

*Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256–7 (Deane J); *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 378–9 (Mason, Deane, Toohey, Gaudron, McHughJJ); *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14 [141] (Gageler J); [20] (French CJ); *Wasada Pty Ltd v State Rail Authority of New South Wales (No 2)* [2003] NSWSC 987 at [16] (Campbell J); *Eastenders Cash & Carry* [2014] UKSC 26 at [102] (Lord Toulson, Baroness Hale, Lords Kerr, Wilson and Hughes JJSC agreeing); Birks, *Introduction to the law of Restitution* (1985) p

## Role 2 – A Cause of Action?

‘a factual situation the existence of which entitles a person to obtain from a court a remedy’  
(*Letang v Cooper* [1965] 1 QB 232, 242-3, per Diplock LJ )

Facts (i) necessary + (ii) sufficient for a legal claim

### REJECTED:

- **‘not a cause of action’**: *David Securities* at 406 (Dawson J)
- **‘not definitive according to its own terms’**: *David Securities* at 378-9 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Hills* at [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ); *Farah v Say-Dee* [2007] HCA 22 at [151] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Bofinger v Kingsway Group Ltd* [2009] HCA 44 at [86] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); *Equuscorp Pty Ltd v Haxton* [2012] HCA 7 at [29] (French CJ, Crennan and Kiefel JJ); *Wasada* at [18], [22] (Campbell J).
- **not the ‘basis’ of restitutionary relief’/ capable of ‘direct application’/ ‘sufficient premise for direct application in particular cases**: *Hills* at [78]; *Lumbers* at [85]–[86] (Gummow, Hayne, Crennan and Kiefel JJ); *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd (No 3)* [2014] WASC 162 at [50]-[51] (Edelman J).
- **looks to ‘other legal standards’**: *Wasada* at [22] (Campbell J)

## Role 3 – ‘Unifying Legal Principle’

*Legal:* derived from existing legal (and equitable) rules

*Principle:*

- higher-level proscription
- non-dispositive (directively weak)
- interpretive function (understanding/‘organising’/‘informing’?)
- normative, developmental function?

*Unifying:* how much variety can be tolerated?

### ACCEPTED:

*Muschinski v Dodds* (1985) 62 ALR 429 at 455 (Deane J); *Pavey* at 256 (Deane J); *David Securities* at 406 (Dawson J); *Roxborough v Rothmans* [2001] HCA 68 at [72] (Gummow J); *Bofinger* at [86]-[89] (Gummow, Hayne, Heydon, Kiefel and Bell JJ – ‘a concept’); *Friend v Brooker* (2009) 239 CLR 129 at [7] (French CJ, Gummow, Hayne and Bell JJ) (‘link’ between categories of liability); *Lumbers v W Cook Builders Pty Ltd (In liq)* (2008) 232 CLR 635 at [85] (Gummow, Hayne, Crennan and Kiefel JJ- ‘concept unifying a variety of distinct categories of case’); *Hills* [2014] HCA 14 at [139] (Gageler J) (‘link’ between categories of liability); *Lampson* at [51] (Edelman J) (‘directs attention to a common legal foundation shared by a number of instances of liability...’)

### QUESTIONED?

*Hills* at [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ);  
*Southage Pty Ltd v Vescovi* [2015] VSCA 117 at [45], [48] (Warren CJ, Santamaria JA and Ginnane AJA).

## The Puzzle of *Hills* para [78]

The approach argued by AFSL does not involve an inquiry as to whether it would be inequitable to require the recipient to repay. Instead, AFSL'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 receipt. Such a "principle" does not govern the resolution of this 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.

## The Puzzle of *Hills* para [78]- explained ?

The approach argued by AFSL does not involve an inquiry as to whether it would be inequitable to require the recipient to repay. Instead, AFSL'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 receipt. Such a "principle" does not govern the resolution of this 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.

## Role 4 – Legal Category

‘Unjust enrichment... has a taxonomical function referring to categories of case in which the law allows recovery by one person of a benefit retained by another’

(*Equuscorp* at [29]-[30] per French CJ, Crennan and Kiefel JJ)

### ACCEPTED:

*Equuscorp* at [29]-[30] (French CJ, Crennan and Kiefel JJ); *Hills* at [20] (French CJ); at [138]-[139] (Gageler J); *Lampson* at [51] (Edelman J).

### QUESTIONED:

‘In several cases... [the HCA] 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’: *Vescovi* at [45], [48] (Warren CJ, Santamaria JA and Ginnane AJA).



# Role 5 – Analytical Framework

1. Enrichment
  2. At P's expense
  3. Unjust – Unjust Factor (+ No right (D) to receive)
- 

4. Defences?
5. Remedy (Personal/ Proprietary?)

## ACCEPTED:

*David Securities at 379* (Mason CJ, Deane, Gaudron, Toohey, McHugh JJ) (2 Stages); *Roxborough at [139]* fn 2 (Kirby J)(Stages 1-4); *Equuscorp at [30]* (French CJ, Crennan and Kiefel JJ) ('An approach to determining claims': Stages 1-4 - compressed into 2).  
Wide range lower court authority (see notes to this slide).

## QUESTIONED:

*Southage Pty Ltd (ACN 050 240 965) v Vescovi [2015] VSCA 117 at [49]* (Warren CJ, Santamaria JA and Ginnane AJA); 'authority binding on this court is against liability....being established... by answering the five questions identified by the judge'; *Sunwater Pty v Drake Coal Pty Ltd [2016] QCA 255 at [36]* (P McMurdo JA); [15] (Gotterson JA and Phillipides JA agreeing); *Woolcorp Pty Ltd v Rodger Constructions Ltd [2017] VSCA 21 at [12]-[13]* (Santamaria, Kyrou JJA and Elliott AJA).