Unjust Enrichment in Australia

A Commentary

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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 locupletiorem’.

[‘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);
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); *Equuscop* 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);