ESSAY

PETER BIRKS AND UNJUST ENRICHMENT IN AUSTRALIA

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[Professor Peter Birks contributed significantly to the development of private law in Australia. This article traces Birks' thinking about unjust enrichment by reference to notable High Court decisions, including Pavey and Roxborough. It does so through the perspective of Birks' own ideas on the subject, as they evolved over the years. This article concludes that Australian private law is not the bleak, undifferentiated law of wrongs — based on unconscionable conduct and with no special place for unjust enrichment — that Birks proposed. Rather, it is partly because of Birks' contributions that Australian law is better structured than he perceived.]

CONTENTS

I INTRODUCTION

The late Professor Peter Birks was a frequent visitor to Australia. He taught in Australian law schools, encouraged young scholars and lectured extensively in the wider Australian legal community. From his visits flowed books and articles that gave expression to his evolving ideas on the structure of private law.[1] Indeed, one of his final publications reviewed the latest edition of the leading equity text in this country.[2]

Birks had a keen interest in Australian private law. Australian colleagues and students in Oxford drew his attention to cases and developments, as did his numerous friends. Yet, his interest was largely self-generated. Decisions of the

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1 Visits to Perth were an important stimulus to his writing. Outcomes included Peter Birks, *Restitution — The Future* (1992) and numerous articles published in the *University of Western Australia Law Review*, of which the most relevant to this article is Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1. The visits also resulted in fruitful collaboration with Chin Nyuk Yin: see Peter Birks and Chin Nyuk Yin, 'On the Nature of Undue Influence' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (1995) 57. Published lectures delivered in Melbourne include Peter Birks, 'Change of Position: The Nature of the Defence and Its Relationship to Other Restitutionary Defences' in Mitchell McInnes (ed), *Restitution: Developments in Unjust Enrichment* (1996) 49; Peter Birks, 'Equity, Conscience, and Unjust Enrichment' (1999) 23 *Melbourne University Law Review* 1.

2 Peter Birks, 'Reviews and Notes: *Meagher, Gummow and Lehane's Equity Doctrines and Remedies. 4th ed*' (2004) 120 *Law Quarterly Review* 344. The text in question was R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, 2002).

High Court on unjust enrichment were at different times enthusiastically welcomed or furiously belaboured, but they were always carefully dissected. They were never received with indifference.

This article intends neither to add to the obituary notices[3] nor to assess Birks' influence on the development of private law. It is sufficient to note that Birks' influence on private law scholarship was immense. In particular, he demonstrated, through his writings and lectures, ways of thinking about legal doctrine which have been applied by many of those who disagree with his views, as well as by those who concur with them. Even so, it is too early to measure the impact of his writing on the development of legal doctrine. This article pursues the more modest aim of tracing the evolution of his thinking about private law by reference to relevant High Court decisions on unjust enrichment. It attempts to examine unjust enrichment from the perspective of Birks' own ideas on the subject, as they evolved over the years. Alternative analyses of unjust enrichment (of which there is no scarcity in Australia or elsewhere) are relevant only to the extent that they persuaded Birks to modify or refine his views, or to restate them more vigorously in response.

To this writer, who did not know him well, it always seemed that Birks was uncertain whether Australian cases on unjust enrichment should be integrated within his preferred model of obligations or should be seen to represent the kind of law to which his model stood in contradistinction. Australian cases were received with varying degrees of enthusiasm. Some, such as *Pavey & Matthews Pty Ltd v Paul*,[4] were initially assimilated into his scheme of unjust enrichment but were later reanalysed to take account of revisions in his own thinking.[5] Other cases helped to fill gaps in his scheme. These included decisions of the New South Wales Supreme Court which held that restitution can be ordered of payments made in response to a threat to break a subsisting contract.[6] He used this Australian authority to support a principle that he considered to be sufficiently established, although there was a dearth of English authority to demonstrate its existence.[7]

In contrast, the High Court decision in *Roxborough v Rothmans of Pall Mall Australia Ltd*[8] did not meet with his approval.[9] Insofar as the High Court appeared to locate unjust enrichment in notions of equity and conscience, Birks regarded *Roxborough* as the antithesis of what a decision on unjust enrichment ought to be. He saw the decision as validating a conscience-based equity that, through its application of overly broad discretionary criteria, confused the distinct remedial objectives of compensating for losses and restoring unjustified

3 See especially 'Professor Peter Birks: Regius Professor at Oxford Who Shaped the Law of Restitution as a Modern Discipline', *The Times* (London), 9 July 2004, 37.

4 (1987) 162 CLR 221 ('*Pavey*').

5 See below nn 16–29 and accompanying text.

6 *Nixon v Furphy* (1925) 25 SR (NSW) 151; *T A Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 SR (NSW) 323, both referred to in Peter Birks, *An Introduction to the Law of Restitution* (revised ed, 1989) 176.

7 Birks, *An Introduction to the Law of Restitution*, above n 6, 176.

8 (2001) 208 CLR 516 ('*Roxborough*').

9 See, eg, Peter Birks, *Unjust Enrichment* (2003) 108–9.

gains. Believing that unconscientiousness ex post had no explanatory value, and distrusting the exercise of strong discretions, he saw no merit in developing private law along these lines.[10] He was, in my view, unduly pessimistic. Much of *Roxborough* — not least its use of methodology enabling the payers of the unconstitutional levy in that case to obtain restitution — is consistent with his analysis of unjust enrichment.[11] Nevertheless, obiter dicta in *Roxborough*, along with some commentary, reinforced his long-held view that Australian private law was improperly based on a liberal application of conscience supplemented with an unstructured discretionary remedialism. This view was derived from his disapproval of the pre-eminence of equitable and statutory principles governing relief from unconscionable transactions in Australian law.[12] *Roxborough* confirmed his darker view of the law of obligations in Australia as subordinating principle to the application of what he termed 'intuitive conscience'.[13]

In examining Birks' response to the High Court decisions this article makes no claims to comprehensive coverage. Only those themes which seemed most significant to him will be considered.[14] For the purposes of exposition, the article distinguishes the common law of unjust enrichment from its equitable counterpart. This is an organisation of doctrine with which Birks would have profoundly disagreed, and against which he often inveighed,[15] but it remains useful in tracking the path of his own thinking.

II UNJUST ENRICHMENT AT COMMON LAW

The High Court's decision in *Pavey* recognised the concept of unjust enrichment as a unifying legal concept in Australia.[16] The case can also be seen as a weathervane for changes in Birks' views as to how unjust enrichment should be understood. The decision was warmly welcomed in the revised edition of *An Introduction to the Law of Restitution*, where Birks noted that:

> The judgments, especially that of Deane J, are of first importance not only for the history of the emancipation of the request counts but also for the analysis of enrichment and the handling of restitutionary claims to limit the effects of failure of formal requirements, so far as permissible in the light of the policy of the Act in question.[17]

The decision was later faulted on the ground 'that neither the High Court nor any jurist had successfully demonstrated that facts of the *Pavey* configuration did

10 See below n 59 and accompanying text.
11 See Birks, *Unjust Enrichment*, above n 9, 108–9.
12 Birks, 'Equity, Conscience, and Unjust Enrichment', above n 1, 19–27.
13 Ibid 20.
14 Decisions not discussed include *Australia & New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 164 CLR 662 (ministerial receipt) and *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (the 'pass it on' issue in unjust enrichment). He wrote about both decisions, but neither is relevant to the themes discussed in this article.
15 See, eg, Birks, 'Equity in the Modern Law', above n 1, 3.
16 (1987) 162 CLR 221, 256–7 (Deane J); see Keith Mason and J W Carter, *Restitution Law in Australia* (1995) 31.
17 Birks, *An Introduction to the Law of Restitution*, above n 6, 448 fn 2.

disclose a sufficient "unjust" factor to support a cause of action in unjust enrichment'.[18] But this was a weakness which *Pavey* shared with many other decisions before the work of systematising cases according to their ground of restitution (or 'unjust factor') had begun.

In *Pavey*, the plaintiff carried out building work in consequence of an unenforceable oral agreement.[19] To the extent that the High Court judgments identified any ground of restitution in that case, it appeared that the defendant, Mrs Paul, had freely accepted the benefit of the plaintiff's work.[20] This is the basis upon which later decisions have awarded a non-contractual *quantum meruit*.[21] While Birks accepted this explanation in *An Introduction to the Law of Restitution*,[22] he was later persuaded by arguments of principle and precedent that as a 'defendant-sided' unjust factor, free acceptance was not an appropriate basis for awarding restitution.[23] He abandoned what continues to be the standard understanding of the case in Australia in favour of the analysis that the consideration (or basis) of the work undertaken by the builders had failed.[24] Provided that one is willing to subscribe to the proposition that the grounds of restitution for money and services should, as far as possible, be the same, the argument for basing restitution in *Pavey* on failure of consideration is logical. It is relevant to note, however, that the failure of consideration in *Pavey* was partial and not total, for Mrs Paul had paid part of the price of the building work completed by the plaintiffs.[25]

In his final book, *Unjust Enrichment*, Birks' study of civilian models of unjust enrichment led him to take the radical step of abandoning the identification of 'unjust factors' altogether, in favour of awarding restitution in unjust enrichment on the more general ground that there was no explanatory basis for the defendant's enrichment.[26] This approach necessitated yet another reanalysis of *Pavey*, in terms that were even further removed from the actual decision. The unenforceability of the contract under which the plaintiffs had done their work could not of itself show that there was no explanation for the defendant's enrichment.[27] An unenforceable contract, unlike a void, voidable or terminable contract, is

18 Peter Birks, 'In Defence of Free Acceptance' in Andrew Burrows (ed), *Essays on the Law of Restitution* (1991) 105, 111.

19 (1987) 162 CLR 221, 225 (Mason and Wilson JJ).

20 Ibid 226–7 (Mason and Wilson JJ), 256–7 (Deane J). The building contract was unenforceable by reason of the *Builders Licensing Act 1971* (NSW) s 45. The analysis of legislative policy in the case is controversial: see Gareth Jones, 'Restitution: Unjust Enrichment as a Unifying Concept in Australia?' (1988–89) 1 *Journal of Contract Law* 8.

21 *Brenner v First Artists' Management Pty Ltd* [1993] 2 VR 221; *Angelopoulos v Sabatino* (1995) 65 SASR 1.

22 Birks, *An Introduction to the Law of Restitution*, above n 6, ch 8.

23 Andrew Burrows, 'Free Acceptance and the Law of Restitution' (1988) 104 *Law Quarterly Review* 576; Michael Garner, 'The Role of Subjective Benefit in the Law of Unjust Enrichment' (1990) 10 *Oxford Journal of Legal Studies* 42. Both articles are considered in Birks, 'In Defence of Free Acceptance', above n 18.

24 This consideration was that the builders would be paid reasonable remuneration according to industry rates.

25 See *Pavey* (1987) 162 CLR 221, 225 (Mason and Wilson JJ).

26 Birks, *Unjust Enrichment*, above n 9, 99–101.

27 Ibid 112.

perfectly valid, and any benefits conferred under it can be retained. Unenforceability only means that no action can be brought on the contract. But in *Pavey*, Mrs Paul's repudiatory breach in refusing to pay a reasonable amount for the work done entitled the builders to treat the contract as terminated and to claim in unjust enrichment. Upon termination, the contract no longer constituted a valid 'juristic explanation' of the enrichment and the builders were, on this analysis, entitled to restitution.[28]

The successive re-analyses of *Pavey* provide a good example of Birks' intellectual restlessness in trying to tease out more satisfying explanations of cases where more quiescent writers would have been disinclined to challenge the orthodox explanation. For Birks, a good account of the law was never sufficient if a better one could be found. It is doubtful whether the latest rationalisation of *Pavey* in terms of the terminability of the building contract will come to be accepted. It is premised on a model of unjust enrichment based on 'absence of basis'[29] for an enrichment which common law jurisdictions, including Australia, have not adopted, whatever its attractions may be for civilian jurisprudence.[30] The explanation also turns on a fact, namely the terminability of the building contract, which was never directly considered by the High Court. Moreover, 'free acceptance' may, for better or worse, be too deeply entrenched in Australian law as the basis of restitution for requested services to be displaced by alternative explanations.

Birks warmly welcomed the later High Court decision of *David Securities Pty Ltd v Commonwealth Bank of Australia*,[31] which dealt with restitution of mistaken payments.[32] It was not just the removal of the bar on recovery of payments made under a mistake of law that won his approval.[33] Of equal importance was the High Court's logical analysis of the elements of an unjust enrichment claim, which clearly identified the ground of restitution.[34] In a passage that may come to be relevant for determining the precise scope of the subsequent High Court decision in *Roxborough*, the decision also firmly rejected any requirement that the plaintiff must show that the enrichment was 'unjust', in addition to proving the existence of an established ground of restitution.[35] There

28 Ibid.

29 Ibid 99.

30 Ibid 88–9, 112–13.

31 (1992) 175 CLR 353 ('*David Securities*').

32 Peter Birks, 'Modernising the Law of Restitution' (1993) 109 *Law Quarterly Review* 164. The case involved the plaintiff company entering a foreign currency loan with the defendant bank: *David Securities* (1992) 175 CLR 353, 359–60 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

33 Birks, 'Modernising the Law of Restitution', above n 32, 166–7.

34 Ibid 165. The preceding case note in that issue considered the then recent House of Lords decision in *Lord Napier and Ettrick v Hunter* [1993] AC 713: Justice William Gummow, 'Names and Equitable Liens' (1993) 109 *Law Quarterly Review* 159. Among the reasons Justice Gummow advanced for welcoming the decision was that '[t]he phrase "unjust enrichment" is absent from all four speeches in the House': at 164.

35 It was stated that 'it 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': *David Securities* (1992) 175 CLR 353, 379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).

was justifiable grumbling about the tortuous analysis of 'good consideration' received by a claimant in unjust enrichment and regarding the uncertain scope of the defence of voluntary submission to an honest claim.[36] However, these were minor reservations,[37] and the final verdict on *David Securities* was that it 'once again demonstrates the scholarly and innovative qualities of the High Court of Australia under Mason CJ.'[38]

It is doubtful whether the High Court had committed itself to a policy of innovation in the law of restitution going beyond the removal of well-known cobwebs like the 'mistake of law' rule. But in any event, any illusions about the Court taking the lead in removing doctrinal obstacles to the recognition of a coherent law of unjust enrichment were soon dispelled. *Baltic Shipping Co v Dillon*[39] confirmed the survival of what unjust enrichment writers regarded as two relics of the pre-unjust enrichment action for money had and received. The first was the principle that restitution will only be ordered for failure of consideration if the failure is total.[40] Birks justified the plaintiff's failure to recover the price of her cruise ticket in *Baltic Shipping* by reference to a fact not relied upon in the High Court judgments, namely that she had already received a 'pro rata' refund from the shipping company.[41] The Court's insistence on the totality of a failure of consideration, he argued, 'now looks very old-fashioned'.[42] It is still an open question whether the requirement will be abolished or simply outflanked by the technique approved in *David Securities* of apportioning consideration where the basis of apportionment can be clearly identified.[43] In *Roxborough*, the majority was prepared to sever contractual payments in respect of an unconstitutional tax from the rest of the purchase price for cigarettes in order to permit restitution of the contractual payments.[44] The amounts payable in respect of tax were clearly distinguished in the defendant payee's invoices.[45] However, courts will not always have the benefit of transparent invoicing to assist the apportioning process and, in its absence, apportionment may not be possible. A more sensitive method of balancing the claims of both payer and payee, where both have conferred benefits under a vitiated transaction or terminated contract, is to allow the plaintiff restitution for partial

36 Birks, 'Modernising the Law of Restitution', above n 32, 167.
37 Ibid 167–8.
38 Ibid 168.
39 (1993) 176 CLR 344 ('*Baltic Shipping*'). This case involved a contract between the plaintiff, Mrs Dillon, and the Baltic Shipping Company. In consideration of her advance payment, the shipping company would carry the plaintiff on a 14 day cruise on its ship, *The Mikhail Lermontov*. When the ship sank on the 10th day, the plaintiff suffered personal injury and lost some possessions. She sued for breach of contract and for restitution of her fare: at 346–8 (Mason CJ).
40 Ibid 353 (Mason CJ), 383 (Toohey J), 386–7 (Gaudron J), 392–3 (McHugh J).
41 Birks, *Unjust Enrichment*, above n 9, 106.
42 Ibid.
43 (1992) 175 CLR 353, 382–3 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).
44 (2001) 208 CLR 516, 526–9 (Gleeson CJ, Gaudron and Hayne JJ), 558 (Gummow J), 589 (Callinan J), 577–9 (Kirby J, in dissent).
45 Ibid 523–4 (Gleeson CJ, Gaudron and Hayne JJ), 534–5 (Gummow J).

failure of consideration, offset by an award of counter-restitution to the defendant in respect of benefits conferred on the plaintiff.[46]

The second doctrinal relic preserved by the High Court in *Baltic Shipping* is that a plaintiff must elect to claim either for expectation damages or for restitution.[47] The rule against cumulation of remedies is based on sound policy, but the election requirement is a blunt instrument for giving effect to the policy. If, upon termination of a contract for breach, damages compensate the plaintiff for loss of the defendant's expected full performance, then that award must take account of the fact that the plaintiff has to pay the price of the performance. The plaintiff is not entitled to restitution of the price in addition to damages.[48] Yet it seems preferable, as Birks and others have argued, to apply the principle against double counting in order to limit recovery, rather than to put the plaintiff to an election between claiming compensation for losses and seeking restitution of gains.[49]

In spite of the plaintiff's failure to obtain restitution of her fare, *Baltic Shipping* is not inconsistent with the model of unjust enrichment championed by Birks. To the extent that the High Court recognised failure of consideration, however attenuated, as a ground of restitution for unjust enrichment, the decision supports that model. A far more serious challenge to the recognition of unjust enrichment as an independent head of obligation and also to Birks' model of the law of obligations, predicated as it is on a series of responses to events, is posed by the strong and distinctive role played by equitable doctrine in Australian private law.

III UNJUST ENRICHMENT IN EQUITY

The dissonance between common law and equitable responses to the same, or similar, legally causative event was a recurrent theme in Birks' writings. It finds expression on the first page of chapter one of *An Introduction to the Law of Restitution*.[50] No sooner is it stated that '[o]ne who parts with value cannot just demand it back, not even if he received nothing in return',[51] than the proposition is immediately qualified in a footnote by the caveat that 'equity's presumptions of resulting trust might seem to contradict this simple starting point' by placing the onus on the donee to show that a gift really has been made.[52] From the outset he was alert to disjunctions, as he saw them, between common law and equitable doctrine.

46 Cf *David Securities* (1992) 175 CLR 353, 400 (Brennan J).

47 (1993) 176 CLR 344, 359 (Mason CJ), 372 (Brennan J), 382–3 (Deane and Dawson JJ), 383 (Toohey J), 387 (Gaudron J). As a result, the plaintiff could not claim recovery of the fare in addition to claiming full damages for breach of contract.

48 The principles of election and cumulation are explained in the Privy Council decision in *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514, 521–2 (Lord Nicholls).

49 See, eg, Peter Birks, 'Overview: Tracing, Claiming and Defences' in Peter Birks (ed), *Laundering and Tracing* (1995) 289, 340–1; G H Treitel, *Remedies for Breach of Contract: A Comparative Account* (1988) 102–4.

50 Birks, *An Introduction to the Law of Restitution*, above n 6, 9.

51 Ibid.

52 Ibid 9 fn 1.

An endnote to the revised edition of *An Introduction to the Law of Restitution* drew attention to the High Court decision in *Muschinski v Dodds*,[53] stating that it 'makes a major contribution to this field [transfers for purposes] and to the wide concept of failure of consideration the recognition of which is advocated in the text.'[54] On this point Birks was later vindicated by the acceptance of the wider concept in *Roxborough*, where the joint judgment of Gleeson CJ, Gaudron and Hayne JJ recognised that '[f]ailure of consideration is not limited to non-performance of a contractual obligation, although it may include that'.[55] In this respect, *Roxborough* provides a modest example of the integration of common law and equitable doctrine. The definition of failure of consideration applied for the purpose of permitting restitution in an action for money had and received was in substance identical to the criteria for the award of a constructive trust where money or other property has been contributed to a failed joint venture.[56]

The integration of common law and equity was a theme of much of Birks' writing.[57] He was an integrationist, not a fusionist.[58] He had no time for pious appeals to the 'morality of equity', for the very good reason that the values applied to adjudication do not depend on the particular jurisdiction in which that adjudication is made. He also saw nothing in the application of equitable discretion to distinguish it from the exercise of common law discretion. There was no place in his scheme of obligations for unconscientiousness ex post, which meant that he was fundamentally out of sympathy with the High Court's espousal of 'unconscionable enforcement of legal rights' as a basis for legal intervention.[59] To grant relief on the basis of the fairness of outcomes as opposed to the unfairness of processes was, for him, to indulge in a dangerously subjective form of decision-making of no predictive value.

Given the special role that equity plays in Australian private law and the established tradition of equity scholarship, it was predictable that Birks' views would meet with strong disagreement. It was also likely that the reaction would be forceful, the more so because he expressed his ideas vigorously and often combatively. What was less predictable was that the High Court decision that would set alight the debate on the equitable character of unjust enrichment would be a common law decision on restitution for money had and received.

In *Roxborough*, retailers who had purchased cigarettes from a wholesaler for a price which included an amount in respect of an unconstitutional tax were held by a majority of the High Court to be entitled to restitution of that amount from the wholesaler. As has already been noted, there are aspects of the decision

53 (1985) 160 CLR 583.

54 Birks, *An Introduction to the Law of Restitution*, above n 6, 462 fn 14.

55 (2001) 208 CLR 516, 525, citing *Muschinski v Dodds* (1985) 160 CLR 583, 619–20 (Deane J) as authority for this proposition.

56 *Muschinski v Dodds* (1985) 160 CLR 583, 618–19 (Deane J).

57 See, eg, Birks, 'Equity in the Modern Law', above n 1; Birks, 'Equity, Conscience, and Unjust Enrichment', above n 1.

58 Birks, 'Equity in the Modern Law', above n 1, 3.

59 Birks, *Unjust Enrichment*, above n 9, 6. See *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 ('*Garcia*'). The contortions of the post-*Garcia* case law, in struggling to define who is protected by the 'special equity' recognised in that case, might be thought to justify Birks' scepticism.

which could have met, and did meet, with Birks' approval.[60] The concept of 'failure of consideration' was liberated by the Court from its specifically contractual applications and extended to non-contractual payments where 'a contemplated state of affairs has disappeared.'[61] The majority also flexibly apportioned the tax component from the rest of the price of the cigarettes to facilitate restitution.[62]

These positive features of *Roxborough* are overshadowed, however, by two passages in the judgment of Gummow J which directly challenge the model of unjust enrichment advocated by Birks. The first argues that the process of systematising the law of obligations so that the legally causative 'event' of unjust enrichment attracts a restitutionary 'response' is inconsistent with the established judicial method of deducing principle from authority:

> Considerations such as these, together with practical experience, suggest caution in judicial acceptance of any all-embracing theory of restitutionary rights and remedies founded upon a notion of 'unjust enrichment'. To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writing of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around.[63]

Judicial acceptance of Birks' analysis of unjust enrichment was in fact never a measure of the validity of the analysis. Whether a conceptual framework of an area of the law wins intellectual acceptance may be primarily regarded as a matter for the community of scholars to whom it is addressed.[64] Judged by this criterion, Birks enjoyed mixed success; hence the numerous revisions and recantations which characterised his work as he reacted to the responses of that community to his thinking on unjust enrichment.[65] However, as an academic wholeheartedly committed to the spirit of academic inquiry, wherever that inquiry might lead, Birks was less concerned with judicial validation than with his sense of 'getting it right' in terms of his own understanding of the structure and aims of private law.

In the second passage, Gummow J emphasised the equitable nature of the action for money had and received, by reference to Australian, English and American authority.[66] The emphasis is most clearly evident in the following dictum of an American judge, cited by Gummow J with evident approval:

> Such an action [for money had and received], though brought at law, is in its nature a substitute for a suit in equity; and it is to be determined by the applica-

60 See above n 11 and accompanying text.

61 *Roxborough* (2001) 208 CLR 516, 525 (Gleeson CJ, Gaudron and Hayne JJ); see also Birks, *An Introduction to the Law of Restitution,* above n 6, 223.

62 See above n 44 and accompanying text.

63 *Roxborough* (2001) 208 CLR 516, 544 (Gummow J).

64 See Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (2003) 16–17, 59, 109–10, 163, 189, 194, 205, 229 for a critique of legal taxonomies developed by Birks and others in the context of judicial method.

65 See, eg, Birks' reanalyses of *Pavey*, discussed in above nn 16–29 and accompanying text.

66 *Roxborough* (2001) 208 CLR 516, 545–55.

> tion of equitable principles. In other words, the rights of the parties are to be determined as they would be upon a bill in equity. The defendant may rely upon any defense which shows that the plaintiff, in equity and good conscience, is not entitled to recover in whole or in part.[67]

This dictum, along with other dicta to the same effect cited to support an equitable reading of *Moses v Macferlan*,[68] raises as many questions as it answers. Is the equitable analysis of the action for the money had and received consistent with the structured model of unjust enrichment, based on recognised grounds of restitution, approved by the High Court in *David Securities*? Is the equitable analysis consistent with the holding in *David Securities* that a plaintiff is not required to prove, in addition to a ground of restitution, that the recipient's retention of the enrichment was unjust?[69] Does the conscience-based approach subsume the defence of change of position recognised by the High Court in *David Securities*? In the absence of any discussion of these questions, the precise level at which conscience operates in deciding an unjust enrichment claim remains uncertain.

For the purposes of this article the status of these dicta in Australian law matters less than how Birks understood them. There is a respectable case for saying that Gummow J's equitable analysis of the action for money had and received did not form part of the ratio decidendi of the decision. One would have expected the other majority judges to have expressly indicated their agreement with this part of his judgment if it in fact represented the views of them all. Gummow J's analysis of the action goes, after all, to the very foundations of unjust enrichment in Australia and therefore ought not to be passed over in silence. Accordingly, it is reasonable to infer from the failure of the other judgments to consider this issue directly that those judges had no wish to consider an argument which was not necessary for the determination of the case.

If Birks had treated the dicta of Gummow J as no more than a personal disquisition on the respective roles of conscience and unjust enrichment in private law, the decision in *Roxborough* would not have constituted a serious challenge to his preferred model of unjust enrichment.[70] He had often discussed unconscionability alternatives to unjust enrichment in his previous writings and had deplored the scope of discretion that they conferred.[71] On this issue he had supporters and opponents, and the lines of the unconscionability debate are by now clearly drawn.[72] Nothing in *Roxborough* added to that debate and the actual decision is,

67 Ibid 549, quoting *Myers v Hurley Motor Company*, 273 US 18, 24 (1927) (Sutherland J).

68 (1760) 2 Burr 1005; 97 ER 676.

69 See generally *David Securities* (1992) 175 CLR 353, 378–9 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); see above n 35 and accompanying text.

70 Other problematic issues remain, including the termination of the sales contracts (see Jack Beatson and Graham Virgo, 'Contract, Unjust Enrichment and Unconscionability' (2002) 118 *Law Quarterly Review* 352, 357) and the 'pass it on' issue which elicited a dissent from Kirby J (*Roxborough* (2001) 208 CLR 516, 564–70; see Mitchell McInnes, '*Roxborough v Rothmans of Pall Mall Australia Pty Ltd* — Passing On' (2002) 118 *Law Quarterly Review* 212). These do not, however, touch upon the analysis of the action for money had and received discussed in Gummow J's judgment.

71 See, eg, Birks, 'Equity, Conscience, and Unjust Enrichment', above n 1, 17–27.

72 For recent support of Birks on this question, see Sarah Worthington, *Equity* (2003) 298–303.

as we have seen, consistent with the structured model of unjust enrichment which he advocated. But in *Unjust Enrichment*, Birks painted a vivid picture of the dissolution of the law of unjust enrichment in Australia into an amorphous 'wrong' of unconscientious conduct.[73] This was in response to a case note on *Roxborough* which not only argued for a conscience-based approach to the determination of unjust enrichment claims, but also assumed that all the majority judgments supported this model.[74] In Birks' picture, even the question of the identification of the defendant's enrichment is not an essential prerequisite to recovery, and there is no principled division between compensating for loss and restitution of gains.[75]

If this is indeed the 'conscience' picture of Australian private law, it would certainly be lurid and unattractive. But it is not, in my opinion, a vision that many lawyers would recognise. Unjust enrichment is not an undifferentiated subset of wrongdoing and neither is it applied only 'at the visceral level'[76] in Australia today. It is a securely established organising principle of many restitutionary claims. The decision in *Roxborough* must be understood in the context of, and as building upon, the earlier High Court cases of *Pavey* and *David Securities*. Taken together, they support a model of unjust enrichment, based on strict liability modified by vigorous defences, of which Birks would have approved.[77] Unjust enrichment is not a cause of action in Australia, but the principle has proved robust enough to impose a coherent structure on claims brought in an action for money had and received and for a *quantum meruit*. It is true that 18th and 19th century judges comfortably mediated what would currently be termed unjust enrichment claims through a conscience-based inquiry.[78] The real question is whether that kind of inquiry is still preferable to the structured unjust enrichment approach approved in *David Securities*, now that the grounds of restitution and defences, including change of position, are better articulated than they were 200 years ago.

IV CONCLUSION

It is premature to assess Birks' contribution to the recognition and development of unjust enrichment as an independent head of obligation. We are too close to his ideas on the subject, and to the controversies they generated, to be sure of their enduring legacy to the development of the law. Yet, as this brief survey shows, he undoubtedly influenced the thinking of High Court judges on the

[73] Birks, *Unjust Enrichment*, above n 9, 6, 17.

[74] Ben Kremer, 'Restitution and Unconscientiousness: Another View' (2003) 119 *Law Quarterly Review* 188.

[75] Birks, *Unjust Enrichment*, above n 9, 237–8.

[76] Kremer, above n 74, 189. The problem here is in part the use of the adjective 'visceral', which is inadequate to describe the policies and strategies that would require consideration as part of a conscience-based inquiry.

[77] Or at least he would have approved until his final volte-face, when he argued for the rejection of 'unjust factors' in favour of 'absence of basis': Birks, *Unjust Enrichment*, above n 9, 99–101. But it is clear, nonetheless, that he preferred the 'unjust factors' approach to a conscience-based inquiry.

[78] See Kremer, above n 74, 190.

direction of Australian law. His commitment to a structured inquiry into the elements of an unjust enrichment claim was accepted by the High Court in *David Securities* and his advocacy of a broad definition of 'failure of consideration' was influential in *Roxborough*. Moreover, good theorising about the law plays an important reactive role in legal scholarship. It compels opponents of a theory to define their position more accurately in order to better attack it. Birks has placed the onus on his Australian critics to define what is meant by a 'conscience-based' approach and to defend, if they can, its predictive value within private law.

Birks' image of private law in Australia as an undifferentiated law of wrongs, based on unconscionable conduct and with no special place reserved for unjust enrichment, is exaggerated. Equitable and statutory relief against different types of unconscionable conduct contributes to private law, but not to the exclusion of claims, such as in contract and to restitution, which are manifestly non-tortious in character. If the law of obligations in Australia is better structured and perhaps even duller than he thought, he can be given some of the credit for this state of affairs. Birks took the organisation of private law seriously and by his example has encouraged judges and writers to do the same.