Yes, there is an Australian Law of Unjust Enrichment

Eli Ball

DPhil Candidate, Magdalen College, Oxford
Lecturer in Law, St John’s College, Oxford

It is often suggested and assumed that the Australian approach to unjust enrichment is out-of-step with the rest of the common law world: ‘unhelpful’, ‘irrational’, ‘blind’, and ‘potentially harmful’: see eg, Andrew Burrows, The Law of Restitution (OUP, 2011) 35-43. It is not uncommon for jurists (both in Australia and overseas) to go so far as to say that the law of unjust enrichment is ‘non-existent’ in Australia – an allegation (albeit hopefully made in jest) that is particularly disconcerting for Australians studying or practising the subject overseas, yet desirous of returning home! There is nearly a sense that the Australian lawyer who specialises in the subject faces the prospect of legal pariahdom.

The reality is, however, that the law of unjust enrichment is not only alive and well in Australia, it is flourishing – with a number of important and captivating judicial decisions on the subject coming from several levels of the judiciary in the last decade. These cases reveal that, far from being an outlier, Australia is a leader of the common law world in the development of a coherent and principled law of unjust enrichment.

My paper will focus upon three core themes. First, my paper will expose certain superficial taxonomical debates that tend to obscure the substance of unjust enrichment. It is often the case that critiques of the Australian approach to unjust enrichment fixate upon apparent inconsistencies with the rest of the common law world which are, in reality, merely the product of a different methodological outlook on the subject; in short, the critics and Australian courts are often talking at cross-purposes. Secondly, my paper will examine the localised historical differences between Australian and English law on the subject, focussing on the dominance of distinctly equitable jurisprudence in the former jurisdiction in contrast to the latter, and explaining how this has influenced apparent divergences of approach. Finally, my paper will consider Australian unjust enrichment caselaw, emphasising that – when read in the right context – the apparent inconsistencies with the rest of the common law world can be explained or disappear, to present a picture of an Australian law of unjust enrichment which is more convergent with the rest of the common law world than many have assumed.