Foreword

Rethinking Unjust Enrichment is a collection of engaging, stimulating, and provocative essays on the "law of unjust enrichment". The unifying theme is to challenge and question unjust enrichment orthodoxy from numerous different perspectives and by scholars from across the globe. In the life of the law, development, refinement and sometimes radical realignment require such questions to be asked. The largest questions being asked in this book concern the content of the concept of unjust enrichment and the extent to which it can be treated as a "universal idea" or "overarching principle". The views expressed by the contributing scholars range from those who seek to qualify or refine the existing structure and content of unjust enrichment to those who suggest radical re-structuring or even abolition of unjust enrichment. The unique nature of this book is that it gathers a wide range of critical opinion with the goal of invigorating a constructive dialogue on the future development of this category of law.

One of the most significant lessons of this book is that answers to any questions about the structure of unjust enrichment will depend upon the reason the question is being asked. As the structure of this book powerfully shows, the nature or structure of "unjust enrichment" may depend upon whether the question is asked from the perspective of history, sociology, theory, or doctrine — perspectives which are not rigid alternatives. Importantly, in many respects, the law of unjust enrichment, like all other areas of public and private law, is a story of levels of generality.

It is sometimes necessary to think about an area of law at a very high level of generality. This is most obvious when an area of law has historically been treated broadly or where broad sociological impact is being considered. So too with doctrine. A high level of generality can also be required by the approach taken to issues such as limitation periods, conflict of laws, or even procedural questions such as service of process outside a jurisdiction. At that high level of generality there might be dispute about the boundaries of a category of unjust enrichment: for instance, should a claim for restitution of a wrongful payment be treated in the same way as a claim for restitution of a mistaken payment or in the same way as compensation for a tort? On the other hand, at this high level of generality no reasonable court is likely to treat a claim for restitution of the value of a chattel as being analogous to a claim to enforce a contract, or to obtain monetary relief for a tort, rather than being analogous to a claim for restitution of the value of a payment made by mistake. The importance of the high level of generality is that it allows these questions to be asked in a coherent manner.

On the other hand, doctrine and theory will both sometimes require attention to be directed to lower levels of generality, particularly when issues arise such as whether analogies should be drawn in deciding how a particular type of claim should develop. Then, smaller differences between each type of claim can become more important when deciding whether an analogy can be drawn. The danger of what the editors of this excellent book describe as the "seductive" principle of unjust enrichment is that the development of particular claims might occur by reference to principles formulated at a high level of generality. Errors will occur if relevant differences are overlooked. For instance, even in an apparently simple case where a claimant seeks restitution following a mistaken transfer of a chattel to a defendant, at the low levels of generality relevant to developing the law, the "enrichment" of a defendant will be a different concept, requiring the application of different rules, depending upon whether a claimant seeks restitution in the form of: (i) the return of the physical chattel; (ii) the creation of a trust over rights held by the defendant to the chattel; or (iii) the return of the value of the defendant's rights to the chattel. The same can be said of whether an enrichment is "at the expense of" a plaintiff or whether an enrichment is "unjust" or "unjustified".

Ultimately, the level of generality at which a claim falls to be characterised will depend on the question being asked. Many of the essays in this book do not dispute the very existence of this area of law as might have been done when the *Restatement of the Law of Restitution* was published in 1937 or even when Goff and Jones published *The Law of Restitution* in 1966. The focus is generally upon the proper arrangement of the category and its utility. Perhaps the most important question is: what should be the content of this area of law as a subject to be taught to the next generation? In this respect, as this book admirably demonstrates, the high priests and the heretics may disagree at almost every level but, for the moment, disagreement about orthodoxy requires unjust enrichment to be taught, and sceptical essays to consider the subject, at a high level of generality that includes a vast range of disparate claims. Only in that way can category errors or false analogies be highlighted. With that approach, the editors have produced a book that will be a great success in encouraging the rethinking of unjust enrichment.

J J Edelman
High Court of Australia
Canberra
21 April 2023