



FOREWORD

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There are periods in the development of a country's common law (by which I mean judge made law) when a taking stock of the law itself is called for. The abolition of Privy Council appeals thirty years ago provided such an occasion. As I discovered then, the time was a propitious one to harness the goodwill and experience of judges, practitioners and scholars to reflect together on particular bodies of law and to publish in editions of essays papers written by them that had been subjected to critical analysis.

There is every indication that we are today at another such juncture. There are a number of disparate impulses to this. Some are the products of pervasive change. How, for example, does our common law accommodate itself variously to the broad sweep of statutory encroachment; to domestic participation in global commerce; and to the closer alignment of important parts of our law of obligations with United States', not English, jurisprudence?

This book, though, reflects a quite different (but nonetheless pressing) concern in today's common law. In significant respects our common law suffers both from overmuch classification little connected to reasoned informing principle, and from incoherence and inconsistency born of myopic doctrinal and jurisdictional preoccupations. Taking as their focus the law governing proprietary remedies, it is this malaise which the chapters here address. This particular body of remedial law, which has the constructive trust at its core, is notable for its enduring controversies in both Australian and English law. The inspiration of this volume is the search for order, rationality and coherence.

In identifying the bounds of a research project in which this book is embedded, the editors' approach has been painstaking and methodical. Over a number of years research papers were produced, seminars were participated in both here and abroad, and colloquia held. Themes and issues were identified. All this led to the meeting for which the chapters of this book were prepared and discussed.

For my own part, and as a participant in this process, I was again convinced of the advantage to be derived from involving judges, practitioners and scholars alike in such a common enterprise — the scholarship of all benefits from that interaction. More importantly, it helps maintain an environment of mutual influence between the academy and practitioner which can only foster understanding, insight and, hopefully, stimuli to the law's ordered evolution. The final paragraph of the volume expresses not only the editors' appreciation of this but also their hope that such collaboration will become a far more common feature of the Australian legal system. One can only endorse that aspiration.

The first and final chapters were written by the editors. They are in every sense the bookends of the book. The first chapter describes the genesis and course of their 'Proprietary Remedies' project. It identifies recurrent themes and issues in our jurisprudence. And, in an extended explanation of the burden of the ensuing chapters, it relates each individually to these themes.

Some of the chapters are quite sharply focused; others are more panoramic in their compass. Some seek to locate their particular concern in a jurisprudential, or else a taxonomical, framework; others are tied to legal ordering in the everyday world of human affairs. Together the chapters explain, instruct and challenge. They invite reconsideration even when they do not necessarily convince. Such is the book's great virtue.

The one chapter I would mention specifically is that of the Hon Keith Mason. It reviews some aspects of the *Restatement (Third) of Restitution and Unjust Enrichment*¹ which bear on what are — or should be — lively controversies in our own law. I refer to it for a distinctive reason. Of recent times some number of serving and former Australian judges have, in extra-curial writings, exhorted the

¹ American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011).

Australian legal community to open its mind to the insight and understanding to be derived from United States legal scholarship and judicial decision in those areas of the law which are of common interest to both countries. I would note, for instance, the Hon William Gummow² and Chief Justice (then President of the NSW Court of Appeal) James Allsop.³ I too have been such an advocate.⁴ Mason's chapter tellingly demonstrates the advantages to be derived from looking across the Pacific.

The final chapter is the editors' summation of the Proprietary Remedies project itself. Against the backdrop of four years research activity (including this volume), they outline their own conclusions on 'the principles governing proprietary relief for unjust enrichment and for wrongdoing'. Those conclusions and their justifications warrant serious attention, reflecting as they do a very lengthy period of study, scholarly contestation and considerable collaboration. They cannot be précised here. That would not do them justice. They need to be read and their justifications understood. Necessarily the editors have made their choices and now they cast their bread upon the waters.

One cannot anticipate what their influence may be. What I can say with confidence, though, is that the editors have demonstrated splendidly that their search for order, rationality and coherence in a significant but controversial area of law was not an impossible one. They are to be congratulated for a job well done and for the important contribution they have made.

It is to be hoped that the collaborative example the editors have provided will be replicated in legal scholarship as Australian common law reinvigorates — if not reinvents — itself in a world now demanding more from the law itself.

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² William Gummow, 'Knowing Assistance' (2013) 87 *Australian Law Journal* 311.

³ President James Allsop, 'Some Reflections on the Sources of Our Law' (Paper presented at the Supreme Court of Western Australia Judges Conference, University of Western Australia, Perth, 18 August 2012)

⁴ See Paul Finn, 'Internationalisation or Isolation: the Australian *cul de sac*? The case of Contract law' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 41.