Restitution Law in Australia by Keith Mason and J W Carter (Sydney: Butterworths, 1995) pages i-lviii, 1-981, bibliography 983-8, index 989-1026. Price $145 (hardback). ISBN 0 409 30135 3.

It has taken Australian academic lawyers a very long time to come to terms with the High Court's recognition of the unjust enrichment principle. More than eight years have passed since the High Court's rejection of the implied contract theory in *Pavey and Matthews Pty Ltd v Paul*[1] and Deane J's affirmation of the value of unjust enrichment as a 'unifying concept'.[2] Only now has the first authoritative statement of the law of restitution in Australia been published.[3] As Mason and Carter amply demonstrate, a wealth of Australian law exists on the law of restitution, so why has only one major text been published in Australia compared with, say, the three texts on restitution law in Canada which have been published since 1980?

Part of the reason is that academics do not really know what to make of the Australian recognition of unjust enrichment. If it is an expansive principle with a strong moral content, as Kirby P proposes in *Bryson v Bryant*,[4] the principle attracts easy criticism on the ground that it permits judges to 'say nothing with words'[5] by reducing the principle to the level of incoherent generalisation. The alternative approach of reading down and structuring the basic elements of injustice, enrichment and the fact that the enrichment must be 'at the expense of' the plaintiff may bring conceptual clarity to restitution. However, filtering Australian cases through the organisational structures of Birks,[6] Burrows[7] and other leading scholars of their analytical persuasion does not really amount to an Australian law of restitution. The dilemma is not unique to Australia. In Canada the propositions enunciated by Dickson CJ in *Pettkus v Becker*[8] on the essential elements of unjust enrichment largely conceal a body of case law in which judges try to make sense of the familiar but smaller ideas of mistake, duress, incapacity and so on. But there is a feeling in Australia that the High Court has laid the foundations of the law of restitution without, so far, having elucidated the relationship of that body of law to developments elsewhere in private law, such as the recognition of estoppel as a source of obligation and the vogue for 'defendant-sided' conscience liability.

The first point to note about Keith Mason and J W Carter's *Restitution Law in Australia* is the title. The book is not a text on 'the Australian Law of Restitution'

1 (1987) 162 CLR 221 ('*Pavey*').

2 Ibid 256.

3 Samuel Stoljar, *The Law of Quasi-Contract* (2nd ed, 1989) never purported to be an account of the law of restitution in Australia. Stoljar's organisation of the subject has, in any event, been implicitly rejected in recent High Court decisions. See, eg, *Pavey* (1987) 162 CLR 221; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

4 (1992) 29 NSWLR 188, 205.

5 Arthur Leff, 'Unconscionability and the Code — The Emperor's New Clause' (1967) 115 *University of Pennsylvania Law Review* 485, 559.

6 See, eg, Peter Birks, *An Introduction to the Law of Restitution* (1985).

7 See, eg, Andrew Burrows, *The Law of Restitution* (1993).

8 [1980] 2 SCR 834.

and, while divergences from English doctrine are duly noted, no attempt has been made to construct a distinctive intellectual tradition for restitution in Australia. Maddaugh and McCamus, in their authoritative text on restitution in Canada,[9] pointed to the existence of a discrete Canadian jurisprudence, some of it preceding the landmark decision of *Deglman v Guaranty Trust Co of Canada & Constantineu*.[10] Mason and Carter are more modest in their claims for restitution in Australia. They have unearthed a great deal of relevant case law decided before the *Pavey* decision (the *Deglman* of Australia in more ways than one) but, sensibly, they do not pretend that these fragments constitute a significant departure from the English model. Although full justice is done to the High Court and other case law since *Pavey* the book belongs firmly to the tradition of Anglo-Australian scholarship and its theoretical perspectives are derived from that tradition.

Restitution Law in Australia is intended to be used by both legal practitioners and students. Few, if any, law books give complete satisfaction to both sets of consumers and this book is no exception. Practitioners will find a wealth of information on all the established areas of restitution, as well as on fringe areas such as wrongful death. They will be assisted by an excellent index. Chapters on interest and on pleading restitutionary claims and defences have an obvious practical slant. Perhaps even more importantly, the authors do not try to argue against the grain of the authorities. The *Pavey* case remains a decision on 'acceptance', not on 'failure of consideration', and the book faithfully documents the not always convincing attempts of judges in later cases to make sense of the 'acceptance' world. The book's vision of the law of restitution is very much that of the High Court. No violence is done to the authorities in the name of higher theory.

The value of *Restitution Law in Australia* to students of restitution is harder to assess. For pedagogic purposes, its most significant defect is the organisation of topics on the basis of claims for restitution. As the authors admit, the structure makes for a certain amount of repetition. It also makes for a great deal of dispersal of the basic elements of an unjust enrichment claim. Duress is dealt with in the chapter on improper pressure as well as in the chapter on contracts rescinded or set aside. Undue influence, on the other hand, gains inclusion only in the latter chapter. The claims-based taxonomy adopted by the authors is combined with a special emphasis on restitutionary claims where a contractual failure has occurred. A student of restitution will not properly appreciate from the text that the law of restitution is a law of *transactions*, both contractual and non-contractual. Undue influence and the rules relating to unconscientious dealings are considered only as factors rendering contracts liable to be set aside. The significance of the case law on gifts liable to be set aside on these grounds is almost wholly ignored. Restoring gifts, or the value of gifts, vitiated by undue influence or exploitative behaviour can give rise to complex remedial problems,

[9] Peter Maddaugh and John McCamus, *The Law of Restitution* (1990).
[10] [1954] 3 DLR 785 ('*Deglman*').

as the South Australian courts discovered in *Louth v Diprose*,[11] but discussion of these transactional issues is a casualty of the book's structure.

Much recent restitution scholarship has been devoted to exploring the functional similarities of common law and equitable doctrine. This reviewer was encouraged by the statement in the preface that the authors lamented '(a little) that the two streams continue to flow separately over the same path'.[12] Lamenting this fact even more than the authors, he looked forward to some critical analysis of the restitutionary areas of equity. Sadly, the treatment of equitable doctrine is one of the book's weaknesses. There is no discussion of the restitutionary aspects of resulting trusts, even by way of analogy to failure of consideration. The omission of any analysis of the receipt-based constructive trust is even more surprising in view of the prominence this topic has assumed in recent periodical literature. The reason for this is to be found in the authors' advocacy of the common law action for money had and received for deceit as an alternative to the equitable action. This seems a poor substitute for an exposition of the principles governing the equitable action. A work purporting to provide an authoritative account of restitution in Australia should supply some analysis of this head of liability so that readers can assess for themselves the merits of the authors' suggestion. Another sign of the authors' lack of confidence in handling equitable issues is the limited space accorded to proprietary remedies and techniques. The authors' analysis 'commences with' the well known *Chase Manhattan*[13] case but proceeds little further. The reader is left with a sense of the marginality of proprietary claims but the reason why proprietary claims are, or should be, infrequent responses to unjust enrichment claims remains obscure. Professor Beatson's call for the integration of equitable principles into the mainstream of restitution[14] remains unheeded in Australia.

The minimalist approach to the handling of equitable issues is symptomatic of a tendency evident throughout the book to avoid confronting the very issues which make restitution such an enjoyable subject to teach. For example, the treatment of estoppel and unjust enrichment in the book is more perplexing than enlightening. Even after re-reading the section on the 'relevance of reliance' and the role of estoppel where benefits are conferred under inherently ineffective transactions,[15] the authors' views on this critical issue were, in this reviewer's opinion, hard to fathom. Then again, the discussion of *Lipkin Gorman v Karpnale Ltd*[16] finesses the issue as to what the 'unjust' factor was in that case. Lord Goff's delphic pronouncements on this issue are set out but little attempt is made to engage with its complexities. Here again the organisation of the book is a

[11] (1992) 175 CLR 621 (High Court), affirming *Diprose v Louth (No 2)* (1990) 54 SASR 450 (Full Court), affirming *Diprose v Louth (No 1)* (1990) 54 SASR 438 (King CJ).

[12] Keith Mason and J W Carter, *Restitution Law in Australia* (1995) viii.

[13] *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105. See Mason and Carter, above n 12,¶ 445.

[14] J Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Unjust Enrichment* (1991) ch 9.

[15] Mason and Carter, above n 12, ¶ 936-41.

[16] [1991] 2 AC 548, 568. See Mason and Carter, above n 12, ¶ 1635.

hindrance. 'Ignorance', the unjust factor favoured by some writers, is rejected in a footnote separated by over 500 pages from the paragraph in the text devoted to the case. Somewhat confusingly the *Lipkin Gorman* case is discussed in the chapter on tort even though the reader is informed that 'the plaintiff's action is not founded upon the defendant's tort.'[17] Another example is the analysis of estoppel as a defence, which is not confined to one chapter but is spread across a number of chapters to reflect the various defensive functions of estoppel. This has the unfortunate consequence of avoiding any detailed consideration of whether the recognition of change of position renders otiose the use of estoppel as a general restitutionary defence.

These failings are all the more frustrating given that there is much to admire in the book. The introduction to each chapter helpfully sets out the informing policies and conceptual pattern of the various claims and defences. The introduction to the chapter on 'necessitous intervention' should be singled out in this connection for making sense of a notoriously intractable 'ragbag' of topics. The careful analysis of *Baltic Shipping Co v Dillon*[18] in chapter nine is another highlight; it teases out the difficulties in applying failure of consideration as an unjust factor and convincingly demonstrates that the High Court's decision is not the formidable obstacle to restitution for ineffective transactions which it is sometimes made to appear. Finally, the chapter entitled 'Restitution Against the Revenue' contains a stimulating analysis of the House of Lords decision in *Woolwich Equitable Building Society v Inland Revenue Commissioners*.[19] The authors welcome the decision but are alert to the dangers of an unconsidered application of 'automatic restitution' to the Australian constitutional context. Even here, however, an opportunity is missed for exploring the various types of public authority which might be covered by the *Woolwich* principle.

Restitution Law in Australia is a landmark in the recognition of the law of restitution in Australia and can be strongly recommended as a reliable guide to the emerging case law on the subject. But, oh, if only the authors had written a different (or, at least, differently organised) book which engaged more directly with the intellectually challenging areas of restitution.

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[17] Mason and Carter, above n 12, ¶ 1635.
[18] (1993) 176 CLR 344.
[19] [1993] AC 70. See Mason and Carter, above n 12, ¶2003.

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