Introduction

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This book of essays is dedicated to Professor Michael Bryan on the occasion of his retirement after 37 years of legal scholarship. Michael, who was educated at the Universities of Oxford and London, taught at Oriel College Oxford and Queen Mary and Westfield College, London, before arriving in 1991 at the then Faculty of Law of the University of Melbourne (now the Melbourne Law School). Over his time in Melbourne, Michael has been a much-loved and respected teacher, mentor and colleague. Indeed, of the 24 scholars who have come together to create this book (22 authors and two editors), no fewer than ten have been students or colleagues of Michael during his Melbourne years. However, as the book attests, Michael's influence as a scholar has been felt far beyond Melbourne: he has earned the respect and affection of private lawyers all over the world, from both the common law and the civilian traditions. The authors of the essays in this book are judges and scholars from across Australia, as well as Canada, England, Germany, Hong Kong, New Zealand, Singapore and South Africa. All of these authors jumped at the chance to participate in this project, and their essays are a heartfelt tribute both to Michael's scholarly achievements and to the quiet – and always positive – influence he has had on the research, the careers and the lives of his friends around the world.

The book aims to honour Michael by exploring those areas of private law that have long dominated the intellectual landscape of his teaching and research activities. The terrain is expansive, ranging over many difficult and overlapping areas often classified in the classroom as falling within the law of contract, tort, unjust enrichment, equity and trusts, remedies and property. Michael has always been particularly interested in the intersection, or meeting point, of different rules, doctrines and principles: as Birke Häcker notes in her essay, he has 'never been one for thinking of the law in terms of isolated "compartments"'.[1] This fluidity

[1] 200.

of legal categories is reflected in the book, and many of the essays extend across classroom classifications. Thus, for example, Sarah Worthington's essay is at the boundary of contract, unjust enrichment and equity, a boundary that Michael himself has explored often in his own work.[2] Tony Duggan's essay brings together contract and equity, while Kelvin Low's contribution considers the proper relation of equity and statute. Richard Nolan and Matthew Conaglen range across fiduciary and non-fiduciary contexts in illuminating the concept of good faith in private law. Robert Chambers' contribution deals with the intersection of personal and proprietary liability, and unjust enrichment and wrongs. And Birke Häcker's essay occupies ground at the intersection of contract, property and unjust enrichment.

Notwithstanding the considerable challenges of classification presented by such wide-ranging essays, and the considerable debate in private law scholarship about taxonomical matters generally, we have chosen some divisions for the presentation of the essays in the book. We hasten to add, however, that these divisions have been chosen with readers' ease, rather than classificatory elegance, in mind. These are Method, Unjust Enrichment, Equity and Trusts, and Remedies. The latter three have been selected because they describe subjects that Michael has taught for many years, often with the scholars who have contributed to this book. The first has been selected because of the overarching theme of the book, to which we now turn.

As a scholar as well as a man, Michael is modest: he has never sought to articulate a 'grand vision' of private law. Nonetheless, there is a discernable method in Michael's work, and it is this method that we celebrate in this book. It is the method implied by the book's title: *Exploring Private Law*. One trend in recent literature on private law has been to use the metaphor of 'mapping' the law to refer to method in private law scholarship.[3] Certainly, the 'mapping' metaphor is apt: no explorer should shirk from

[2] See eg, M Bryan, 'Rescission, Restitution and Contractual Ordering: The Role of Plaintiff Election' in A Robertson (ed), *The Law of Obligations: Connections and Boundaries* (Cavendish, London 2004) 59; M Bryan, 'Unjust Enrichment and Unconscionability in Australia: A False Dichotomy' in JW Neyers, M McInnes and SGA Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, Oxford 2004) 47; M Bryan, 'Unconscionable Conduct as an Unjust Factor' in S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (LawBook Co, Sydney 2008) 295; M Bryan, 'Equitable Relief from Forfeiture: Performance or Restitution?' in CEF Rickett (ed), *Justifying Private Law Remedies* (Hart Publishing, Oxford 2008) 363.

[3] See eg, A Burrows and Lord Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, Oxford 2006).

the task of mapping, including an explorer of private law. However, the mapping metaphor captures only part of what it means to explore private law. An explorer, as opposed to a planner, or even a Utopian visionary, must map what he sees from the ground, feeling his way where he must as well as taking the bird's eye view where he can. In this sense, the explorer brings order to chaos, but not by turning away from the chaos, and not by refusing to bear the responsibility of imposing order. Exploring private law is therefore methodologically pluralistic, and not singular: it entails both mapping in accordance with abstract ordering principles, and the rougher art of observation.

This pluralistic method, captured – we hope – in the metaphor of the explorer, is the overarching theme of this book. According to Sir Isaiah Berlin, '[t]here is little need to stress the fact that monism … has always proved a deep source of satisfaction both to the intellect and to the emotions'.[4] We hope that the essays in this collection, celebrating as they do the pluralistic method entailed in exploring private law, go some way to unsettling the satisfactions of monism, something of which Berlin of course would have approved thoroughly. And we hope that in doing so, the essays reflect both Michael's own refusal, over the years, to engage in what Robert Chambers in his essay calls 'arid debates about classification',[5] as well as his suspicion of what might be called the 'forest floor' method of reasoning by analogy from case to case with little effort – at least explicitly – to identify overarching principles of likeness that could guide the analogizing. In the parlance of contemporary legal scholarship, the essays in this book insist on the value of both 'top-down' and 'bottom-up' styles of reasoning.[6] A pluralistic method that takes in both styles of reasoning is, in our view, fitting to thinking about law, given that law entails a sophisticated array of human practices and institutions that on the one hand must reflect and respect, and on the other hand shape and bring order to, the diversity and messiness of human life.

In celebrating a pluralistic method in exploring private law, many of the essays in this book are also works of considerable comparative scholarship: a form of legal discourse that can occupy only a marginal place in

[4] I Berlin, 'Two Concepts of Liberty' in I Berlin, *Four Essays on Liberty* (Oxford University Press, Oxford 1969) 118, 170.

[5] 245.

[6] RA Posner, 'Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 U Chi L Rev 433 reprinted as RA Posner, *Overcoming Law* (Harvard University Press, Cambridge MA 1995) ch 5. See also K Mason, 'What Is Wrong with Top-Down Legal Reasoning?' (2004) 78 ALJ 574.

a strictly bottom-up method and that can be pressed into the service of overly ambitious ends by devotees of a rigorous top-down style. Many of the essays look beyond the traditional distinction of law and equity to discern appropriate paths for judicial decision-making in areas of private law in which there exists no authoritative precedent. All engage in close consideration of the innumerable cases that, taken together, are the bedrock of private law in the common law world. The balance of this Introduction provides an overview of these original, distinctive and significant contributions to private law scholarship.

A. Method

The first part of the book contains a series of essays exploring different methods of legal reasoning, their respective strengths and weaknesses, and their effect on the development of legal doctrine. The essays progress from a wide-ranging analysis of the current method of the High Court of Australia, to a more focused consideration of legal reasoning with reference to confidential information and a developing law of privacy, before concluding with an examination of the particular value of pluralistic method in the context of teaching trusts law in the 21st century. This first part, then, introduces the methods of legal reasoning – top-down and bottom-up – that the essays in the rest of the book explore and exemplify in specific legal settings.

Part I commences with Keith Mason's essay on judicial method. In many ways, this essay exemplifies the aim of the whole book: to show the ways in which a pluralistic method assists the development of private law, and how this must and should be so. Mason considers the High Court of Australia's use of the distinction, first drawn by Richard Posner, between top-down and bottom-up reasoning.[7] He argues that the Court's repeated castigation of top-down method is a departure from Posner, and is inconsistent and unjustified. Mason shows that the Court has a long tradition of top-down reasoning and argues that such reasoning has been indispensible: indeed, rational judicial decision-making demands it. He also argues that the Court has failed to draw the important distinction between an inherently unstable concept and a wrongful application of a stable concept. Drawing on his own experience as a judge, Mason argues that both top-down and bottom-up reasoning have their place in a sound judicial method: 'the two concepts

[7] Posner (n 6).

inevitably meet in the day-to-day exertions of any conscientious judge, whether or not he or she is prepared to admit it'.[8] As a former President of the New South Wales Court of Appeal, Mason provides a unique insight into judicial method and his discussion of *Harris v Digital Pulse Pty Ltd*[9] and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[10] – both cases on which he sat – illustrate this distinct perspective.

The second essay in the book is by Justice Paul Finn of the Federal Court of Australia. His paper examines the profound effect that legal culture, in particular, the culture of the High Court of Australia, has had on the substantive law of contract in Australia. The paper is in three parts. The first tracks Australia's journey from legal colonialism, through the development of a species of legal realism in the Mason years that focused on developing an Australian common law and embraced comparative developments from other common law jurisdictions, to the development of the current and fairly restrictive form of legal nationalism. This last stage of development is evident in the current High Court of Australia's emphasis on the unification of the common law of Australia and the importance of strict doctrinal analysis and the rule of precedent over broader questions of policy. The second part considers international developments in contract law, in particular, the modernization and harmonization of contractual principles that have been achieved through both legislative and 'soft law' instruments such as the Uniform Commercial Code in the United States, the Convention on the International Sale of Goods and the Principles of International and Commercial Contracts. The third part considers why Australian courts and practitioners have failed to avail themselves of this rich source of learning, to the increasing cost of Australian contract law. Finn argues that unless Australian courts, the profession and the academy start to integrate comparative law into their analysis and discourse, Australian contract law is in danger of becoming an isolated and irrelevant museum of legal doctrine. Furthermore, it is only through the combined efforts of all those judges, practitioners and academics who are experts in the field that a much-needed systematic reappraisal of Australian contract law can be achieved.

Like Keith Mason's essay, Andrew Burrows' essay takes up the theme of the High Court of Australia's criticism of top-down reasoning. However, Burrows focuses in particular on three recent cases of the

[8] 40. [9] (2003) 56 NSWLR 298.
[10] (2007) 230 CLR 89 ('*Farah*'). The decision of the New South Wales Court of Appeal was *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309.

Court: *Roxborough v Rothmans of Pall Mall Australia Ltd*,[11] *Farah*, and *Lumbers v W Cook Builders Pty Ltd*.[12] Burrows regards all three cases as rightly decided, but he is critical of the reasoning of the Court in each of the cases, especially on questions of judicial method in private law. Starting with *Roxborough*, Burrows argues that Gummow J's criticism in that case of unjust enrichment scholarship as characterized by top-down reasoning was unfounded, pointing out that unjust enrichment scholarship displays a clear bottom-up pedigree. Burrows also looks at Gummow J's use of the concept of unconscionability in *Roxborough*, arguing that it may itself reveal top-down reasoning. With regard to *Farah*, Burrows' indictment is more serious: he argues that in a sense the Court refused to engage in reasoning of any kind in that case, by failing to explain inconsistencies between the common law and equity and, indeed, within equity as well. Finally, Burrows argues that the Court demonstrated an unjustified atavism in its decision in *Lumbers*, preferring the language of the abolished forms of action to the rational and well-established framework for liability that characterizes the modern law of unjust enrichment. Burrows concludes with a plea for the Court to get 'back on track'.[13]

The next two essays consider questions of judicial method with reference to a developing law of privacy.

As a former New South Wales Law Reform Commissioner who has been considering the protection of the privacy interest in Australian law in recent years, Michael Tilbury is well placed to consider the extent to which the common law of Australia is able to protect that interest. Tilbury undertakes a survey of the law of tort and the law of breach of confidence, arguing that the protection of privacy provided by established causes of action is indirect, piecemeal, and may lead to incoherence in the law. He also argues that no new 'tort of privacy' is likely to, or indeed should, develop in Australian law. This leads Tilbury to the conclusion that the privacy interest must be protected by statute, not by the common law. Thus, his essay may be read as a demonstration of the limits of the bottom-up method that has traditionally characterized private law decision-making.

Megan Richardson takes the opposite view: she argues that the common law, with its incrementalism, is well suited to protecting the privacy interest. Richardson's paper tracks the protection of the privacy interest

[11] (2001) 208 CLR 516 ('*Roxborough*'). [12] (2008) 232 CLR 635 ('*Lumbers*').

[13] 85. At the end of his essay, Burrows notes that the High Court has recently restated its criticisms of unjust enrichment reasoning in *Bofinger v Kingsway Group Ltd* [2009] HCA 44.

over time, and she focuses especially on developments in the law of breach of confidence since the celebrated *Spycatcher* case.[14] She argues that the common law, by refusing to theorize the privacy interest, has been able to remain responsive to that interest – whatever it might be – notwithstanding rapid technological, social and even moral change. In this, she contends that the common law has demonstrated its ability to accommodate the 'messiness of the self'.[15] Richardson concludes with some observations about the nature of the privacy interest itself: as a site of conflicting values that are ever changing, the privacy interest itself is forever in flux, and the day may come when 'even privacy may become an arcane concept'.[16]

Part I concludes with an essay tackling questions of method in quite a different, and novel, way. Tang Hang Wu considers the important role of method in the teaching of trusts law. His essay demonstrates how comparative analysis – comparing the laws of different jurisdictions, and the rules, doctrines and principles of the common law and equity – can usefully inform a trusts course. Tang acknowledges that there is no one way to teach trusts law. However, he advocates encouraging students to form a 'transactional mindset', and he therefore argues that trusts teachers ought to design their courses to reflect trusts practice. For Tang, this aim may be achieved in two ways. First, Tang argues that teachers of trusts law should contextualize the trust. He explains how he does this by introducing the trust as a wealth management vehicle, pointing his students to the uses of offshore trusts, and taking his students through two commercial applications of the trust: securitization, and investment in real estate. For Tang, comparative analysis plays an important pedagogical role in this process, illustrating the benefits and limitations of domestic trusts law in commercial settings. Second, Tang argues for introducing students to the theoretical approach to the express trust that regards it as analogous to – if not a type of – contract, an approach that is well represented in this book.[17] He explains how contractarian theory may assist in getting students to think about exclusion clauses and settlor control devices.

B. Unjust enrichment

The second part of the book is made up of four essays exploring issues in the law of unjust enrichment. Part II opens with three contributions that might just as easily have been placed in Part I, considering broad questions

[14] *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.
[15] 111, 123. [16] 124.
[17] In the essays by Tony Duggan and James Edelman.

from a comparative perspective. These essays are good examples of the problem of easy classification that we alluded to at the beginning of this Introduction. And indeed the same is true of the contribution that closes Part II, which tackles a notoriously difficult question at the interface of property, civil wrongs, and unjust enrichment.

Helen Scott and Daniel Visser explore in their essay how judicial method has influenced the development of legal doctrine. They take as their starting point a puzzle in the South African law of unjustified enrichment: despite adopting the traditional civilian 'absence of legal ground' approach to unjustified enrichment, South African courts have increasingly pointed to 'unjust factors' in their decision-making. Scott and Visser argue that the influence of unjust factors in South African law may be attributable to the common law method itself, a method that treats judicial decisions as authoritative, accords a key role to judicial reasoning as a technique for justifying the exercise of law-making power and – in consequence – tends to promote the use of specific and positive reasons for restitution over negative propositions such as that embodied in the absence of legal ground approach. To test the argument, Scott and Visser compare the position in South Africa with another civilian jurisdiction: France. They argue that because French judges are formally prohibited from giving reasons, judicial creativity tends to be concealed: the true reasons for judicial decisions are to be found not in the brief and opaque *arrêt* of the court itself but rather in the *rapports* and *conclusions* of individual magistrates. Coupled with a strong absence of legal ground approach, this hidden reasoning has led to great breadth and unpredictability in the French law of unjustified enrichment. Scott and Visser's essay demonstrates that judicial method can have a profound effect on substantive law, a lesson worth meditating on when reading the essays by Keith Mason, Paul Finn and Andrew Burrows in Part I of the book. Their essay is also food for thought for those engaged in debates about the retention of 'unjust factors' in the law of unjust enrichment in the common law world.

Mitchell McInnes explores a relatively neglected area within the law of unjust enrichment, namely, the role and operation of natural obligations. McInnes argues that natural obligations – which are not positively enforceable, but negatively explain why an unjust or unjustified enrichment may be retained – have featured not only in civilian legal systems, but also in the common law. He traces their acceptance in the common law in eighteenth-century cases, through their fall in the nineteenth century, to their rise again in the twentieth century in the wake of the abolition of the mistake of fact/mistake of law distinction. Drawing on

Duncan Sheehan's work,[18] McInnes argues for a two-fold test for natural obligations that asks: first whether the reason for refusing positive enforcement also impugns the transfer itself; and second whether the reason for refusing positive enforcement aims to protect a party that has performed its side of a bargain. McInnes argues that there is room for natural obligations wherever the law wants to send the message that a transfer is condoned without being assisted, in the grey area 'between law and morality'.[19] He tests his analysis by considering a number of natural obligations arising in the context of gaming, usurious loans, obligations extinguished by the passage of time, and minority contracts. He concludes by considering some possible future avenues for the concept of natural obligations, including payments to 'dating services' and payments by bankrupts in satisfaction of discharged debts.

Birke Häcker's essay ranges over a wide variety of impaired consent transfers, adopting a comparative perspective. Drawing the civilian distinction between 'causal' and 'abstract' transfers, Häcker asks to what extent the common law and equitable approaches to transfers in England and Australia reflect those two models. Although this might seem a curious topic for the 'Unjust Enrichment' part of the book, Häcker demonstrates that a satisfactory account of causality and abstraction in the common law tradition cannot be given without an analysis of proprietary restitution and, in particular, the role of equity in reversing impaired consent transfers made without a legal basis. Häcker finds that at common law, abstract transfers are the norm (at least outside sale), so that the validity of a conveyance does not depend on the validity of the underlying legal basis for the transfer. However, she also finds that there is a tension in equity between the causal and the abstract models. Where equity automatically reverses transfers made without sufficient legal basis and pursuant to an 'unjust factor', equity operates a causal model. Scholars like Robert Chambers take this view in their accounts of the resulting trust, according to which the right to proprietary restitution vests immediately upon transfer.[20] However, Häcker argues that matters are more complicated, and that a 'power model' under which equity does not automatically reverse vitiated transfers but rather empowers the defendant to rescind or reverse them, also explains many of the cases. This 'power model' is structurally similar to the abstract model of transfer associated with the

[18] D Sheehan, 'The Instance and Effect of Natural Obligations in English Law' (2004) LMCLQ 170.
[19] 197. [20] R Chambers, *Resulting Trusts* (Oxford University Press, Oxford 1997).

common law. Through her comparative analysis, Häcker thus identifies a profound inconsistency in any common law system which allows equity to alternate between the abstract and the causal approaches.

The last essay in Part II, by Robert Chambers, explores the trust as a response to theft. As Chambers points out, not only is the availability of the trust in response to theft an important practical issue, it also raises fascinating questions about the proper relation of law and equity. He considers in detail two types of case. The first is where assets are stolen and retained by the thief. Here Chambers argues that a trust is possible notwithstanding that the victim of the theft retains a (non-possessory) title. However, Chambers goes on to argue that there is no reason why a trust should arise, because the thief is not unjustly enriched at the expense of the victim and the wrong of theft is insufficient to warrant proprietary relief. The second type of case is where assets are stolen and sold by the thief, generating proceeds. Here, Chambers argues that a trust is both possible and justified, because the proceeds represent an unjust enrichment at the expense of the victim of the original theft. In making this argument, Chambers advocates what Häcker would call a thoroughly 'causal' model for the operation of a trust, developing his argument with reference to the recent Australian decision of *Heperu Pty Ltd v Belle*.[21] He concludes with some observations about the possibility of a trust of proceeds of stolen assets where the victim of theft retains legal title to the assets in question.

C. Equity and trusts

The third part of the book contains a set of five essays dealing with issues in equity and trusts. This part commences with a contribution questioning the long-standing equitable jurisdiction to relieve against forfeiture. It then presents a trio of essays on a topic that has attracted a great deal of scholarly interest in recent times: fiduciary relationships and obligations. The final essay in Part III tackles another topic of recent interest: what duties do trustees owe regarding the provision of information to their beneficiaries? The essays, taken together, demonstrate the value of pluralistic method in the development of private law in areas where the cases provide an incomplete explanation of what the law is, or where what courts say and what they do diverge.

[21] [2009] NSWCA 252.