# BOOK REVIEWS

*An Introduction to Property Law in Australia* by Robert Chambers (Sydney: LBC Information Services, 2001) pages i–xliv, 1–524. Price A$86.65 (softcover). ISBN 0 455216 92 4.

## I INTRODUCTION

Robert Chambers' *An Introduction to Property Law in Australia*[1] is a very different kind of property law text. As the author notes in the preface to the work, it is neither a reference work nor a summary of property law. Rather, it seeks to 'help the reader gain a deeper understanding of property law by explaining (in plain language) the analytical framework of the subject.'[2] In this respect, it succeeds admirably, as will be discussed in due course. However, it also achieves more than its stated aim. It forcibly reminds us of the critical importance of taxonomy to legal understanding, whatever the particular area of study or arena of practice.

As Chambers writes:

> it is important that the law be applied consistently. Lawyers and judges must sort through the seemingly infinite variety of human affairs in search of legally significant events. Without meaningful bases of comparison, questions regarding the existence of legal rights cannot be answered with certainty.[3]

He also notes:

> When presented with a long, complicated story, we need to be able to identify the relevant facts which attract legal intervention. In other words, what are the particular events which create legal rights? The answers to this question are the basic building blocks of the law. If those answers are not clear, the law lacks certainty and predictability and those bound to observe the law suffer. At the very least, this uncertainty will increase the cost and likelihood of litigation. At its worse, like cases are not treated alike and the law ceases to be just.[4]

In this text, Chambers seeks to orientate the law of property within the wider legal landscape. To that end, he removes the traditional divide between personal and real property and examines how property law as a whole affects, and interacts with, an enormous range of legal areas (including subjects which are often taught in isolation to the law of property).[5] In so doing, Chambers reminds

[1] Robert Chambers, *An Introduction to Property Law in Australia* (2001).

[2] Ibid v.

[3] Ibid 42.

[4] Ibid 235.

[5] These include such law school staples as trusts, intellectual property rights, torts and contract. I leave out for the moment unjust enrichment law, as that is one area where the boundaries of legal subjects are constantly under conscious review and where the role of property law is the subject of particular controversy: see, eg, Peter Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] *New Zealand Law Review* 623; Ross Grantham and Charles Rickett, 'Property

us that unless we are prepared to look beyond the confines of our specialist areas of knowledge, we run the real risk of losing sight of their true legal significance. Ultimately, Chambers' work challenges us to reconsider the location and boundaries of every legal area in which we learn, teach or practise.

Before considering the text in more detail, it is worth making a few comments about the general presentation and quality of this work. Chambers writes in a wonderfully clear and engaging style. He uses familiar and interesting scenarios drawn from contemporary life, together with a limited number of key cases, to clarify the principles under discussion. While this results in the text being very easy to read and digest, Chambers does not 'dumb down' or overly dilute its content. On the contrary, for someone professing not to be offering a summary of property law, Chambers covers a great deal of substantive legal ground in the course of discussing the structure of the law of property and its place in the legal landscape.

Chambers' considerable scholarship is evident throughout the work, albeit often unacknowledged. It is on this latter point alone that this reviewer has some reservations about this otherwise excellent work. Chambers' aim is to provide an overall, integrated approach to the law of property, rather than an encyclopaedia of relevant rules. In keeping with this aim, there are no traditional footnotes, and legal citations and internal page references are kept to a minimum. This conversational approach to the subject greatly adds to its accessibility. However, the approach also has some drawbacks. There are times when the reader's interest is so stimulated by Chambers' discussion that a 'further reading' or general references section (perhaps at the end of the chapter, where it would not interfere with the 'flow' of the work) would be welcome. A related problem is that, in an effort to clearly convey the overall picture, Chambers sometimes glosses over, or underplays, the considerable controversies that surround some areas under review. This point will be expanded upon below.

In summary, this is an excellent text which should be of real value to every student, teacher and practitioner, whatever their area of legal study or expertise. As will be seen, it not only offers insight into the structure and operation of the law of property, but also promotes an appreciation of the true value of taxonomy to legal understanding. In order to understand how Chambers achieves these ends, it is worth spending some time on the overall structure and content of the text, before proceeding to examine in detail the issues of taxonomy raised by this work.

## II Overall Structure and Content

The text is divided into six parts: 'What is Property?'; 'Possession'; 'The Variety of Property Rights'; 'Creation of Property Rights'; 'Priority of Property

and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?' [1997] *New Zealand Law Review* 668; William Swadling, 'A Claim in Restitution?' [1996] *Lloyd's Maritime and Commercial Law Quarterly* 63; Elise Bant, '"Ignorance" as a Ground of Restitution — Can It Survive?' [1998] *Lloyd's Maritime and Commercial Law Quarterly* 18; Peter Watts, 'Property and Unjust Enrichment: Cognate Conservators' [1998] *New Zealand Law Review* 151; Andrew Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 *Law Quarterly Review* 412.

Rights'; and 'Registration of Property Rights to Land'. Each consecutive part builds on the former, expanding on concepts previously considered and often applying approaches introduced in earlier sections of the text. For this reason, the excellence of the text is best appreciated by reading it from front to back, rather than by 'dipping into' separate chapters. Indeed, the minimalist approach to internal referencing in the text almost demands this approach.[6]

Part I (containing chapters 1–5) introduces some of the key ideas which underpin the subsequent, more substantive, parts of the text and is therefore worth looking at in some detail. Chapter 1 introduces Chambers' approach to teaching property law and explains the overall structure of the text. Chapter 2 addresses the nature of proprietary rights. Here, Chambers explains the difference between personal and proprietary rights and narrows down the essential features of the latter to 'a right to a thing, which corresponds to a general duty placed on other members of society not to interfere with that right.'[7] This is a test to which he constantly returns throughout the book and is an important concept in demonstrating where the law of property begins and ends (a fundamental aim of Chambers' taxonomical work). For example, in Part III of the text, Chambers looks at the variety of property rights and asks the question whether some rights, such as rights to confidential information[8] and corporate shares,[9] are properly regarded as proprietary or personal in nature. His thoughtful points elucidate the earlier theoretical discussion and reinforce the reader's growing understanding of the boundaries of property law.

Chapters 3 and 4 address broader questions such as what 'things' can be subject to property rights, how property rights should be distributed in society and why these questions matter. In some ways, the very interesting discussions contained in these chapters are tangential to the main thrust of the book, as Chambers himself notes.[10] The debates relate not to the nature and existence of property rights, but to their allocation or distribution in society. However, when viewed against the overall aim of the text, Chambers' discussion is entirely apposite in that, once again, it helps clarify the bounds of property law — this time within the political and moral spheres.

[6] Chambers clearly envisages the work being read in this manner: Chambers, above n 1, v–vi.

[7] Ibid 10. Chambers uses the word 'thing' as a term of art. He adopts James Penner's definition of 'thing' as 'those items in the world which are contingently related to us': James Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Review* 711, 807. Thus, things that are intrinsically connected to us, such as our bodies and personal reputations, cannot be subject to property rights. See Chambers, above n 1, 10 and see generally ch 3. 'Things' do, however, include some intangibles, such as forms of expression, scientific advances and non-personal reputation (such as the goodwill of a business): see generally ch 17.

[8] Chambers, above n 1, 187–93. Using Chambers' definition of property, the right to confidential information is proprietary in nature: at 191–3.

[9] Chambers identifies the corporation itself as the 'thing' that is the subject of any property right associated with corporate shares: ibid 196–7. Chambers then considers different rights held by shareholders to determine whether any of them can be regarded as proprietary in nature. Of the three main rights identified (rights to vote, receive dividends and share any corporate assets which remain after the corporation is dissolved) the right to vote has, in his view, most claim to being a property right: at 198–203.

[10] Ibid 35.

Chapter 5 briefly explains the significance of taxonomy in making sense of the law of property. Chambers helpfully sets out a number of different ways of classifying property rights and explains their relative advantages and disadvantages. He further explains that, in this work, he will adopt the taxonomy developed by Professor Birks in which rights are classified according to the events which create them.[11] This classification is at the heart of Part IV of the book ('Creation of Property Rights') and will be explored below.

Part II examines in detail the legal concept of possession, including the nature of possession and how it is created (chapter 6), how the law protects possession and deals with competing claims to possession (chapter 7) and how possession and the right to possession can become ownership through passage of time (chapter 8). In some ways, this early and separate consideration of possession sits uncomfortably within the structure of the book, in that much of it could have been dealt with in Part III ('The Variety of Property Rights') and results in some repetition at that later stage. However, this special treatment of possession is designed to highlight the fundamental importance of the concept to the law of property.[12] As Chambers notes, possession is a property right in itself, the source of many other property rights and a fact which provides evidence of the existence of property rights. It is the starting point of any understanding of property rights in Australia and as such deserves (and rewards) separate analysis.

Once the role of possession is fully appreciated, Chambers moves on in Part III to discuss the variety of property rights. Here, Chambers covers an enormous amount of ground, from the concepts of ownership, tenure and estates, through to property rights to intangible 'things', licences and native title. His intention again is not to give a definitive treatment of each kind of right, but rather to clarify each in a relative sense to the other property rights already considered. Accordingly, ownership is explained against a background of an understanding of possession, tenure builds on the notions of estates and possession, and so on. Each type of right is thus located on a sliding scale of property rights. This treatment of rights again accords with the overall aim of this text, that is, to provide a clearer, overall map of the law of property.

Chambers' brief treatment of equitable property rights (chapter 13) merits separate mention. This chapter is a miniature of the text in many ways. It raises a number of key issues in a clear, thoughtful and remarkably concise way. In only 11 pages, Chambers manages to trace the development of equitable property rights, pinpoint those elements of equity which are of particular relevance to the modern law of property, examine the proprietary aspects of trusts law, and clarify the nature of equitable property interests. In relation to the last point, Chambers isolates the difference between equitable and legal property rights as concerning the 'things' to which the rights relate. Legal property rights relate *directly* to 'things'. Equitable property rights, by way of contrast, relate to 'things' only indirectly, by attaching to *other persons' rights to 'things'*.[13] This has two

[11] See Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1, 8.

[12] 'Possession is the cornerstone of the law of property': Chambers, above n 1, 45.

[13] Chambers, above n 1, 115.

important consequences. The first is that any sort of right can be the subject of equitable property rights, whether the subject right is legal or equitable, personal or proprietary. Thus, a personal right such as a bank account can be held on trust, because it is the *trustee's right* which is the subject of the trust, rather than any 'thing' to which the trustee's right relates. Secondly, the parasitic nature of equitable property interests means that, properly understood, they are not carved out of the legal estate, but impressed upon it. Though supported by authority, the significance of this second point is not often appreciated. Chambers does not make this mistake, and explores, both at the time and later in the text,[14] the ramifications of equity's parasitic nature on a variety of different areas of property law.

The manner in which Chambers explores the parasitic nature of equitable property rights also affords an example of the way in which his minimal use of citations and internal referencing can underplay the significance of points being made. There are often no 'signposts' to the unwary (or ignorant) reader that Chambers is dealing with an issue which is or has been controversial, or that the point he is making is novel, or has implications (to be explored later in the text) that have not always been considered.

For example, when initially addressing the significance of the parasitic nature of equitable property rights, Chambers limits himself to a brief discussion of *DKLR Holding Co [No 2] Pty Ltd v Commissioner of Stamp Duties*.[15] There is no reference to the significance of the point for our understanding of resulting trusts and priorities. With respect to resulting trusts, it follows from the fact that equitable interests are not carved out of the legal estate that the traditional division of resulting trusts into 'presumed' and 'automatic'[16] must be wrong. Chambers briefly addresses this point in Part IV[17] but even there does not explicitly tie it back to the earlier discussion. Later, Chambers does provide a link when he explains the scope of operation of the principle *nemo dat quod non habet* in Part V and why that principle has limited operation in respect of equitable property rights.[18] However, the internal referencing is minimal and relies on the reader being familiar with the content and layout of the earlier parts of the text.

Given that the object of Chambers' work is to provide an overall, integrated approach to property law, it is understandable that he should not want to litter the text with footnotes or divert from a particular point to make a foray into an area best dealt with later. However, it does seem that the complete lack of footnoting and minimal internal referencing does give rise to a danger that the important ramifications of points being made by Chambers may be lost to the unwary reader.

[14] See, eg, ibid 329.

[15] (1982) 149 CLR 431. For this discussion see ibid 116.

[16] *Re Vandervell's Trusts [No 2]* [1974] Ch 269, 289–90 (Megarry J). This case was previously always regarded as soundly based on a simple exercise in proprietary arithmetic: Jeffrey Hackney, *Understanding Equity and Trusts* (1987) 153–4.

[17] Chambers, above n 1, 329.

[18] Ibid 403–4.

Returning to the overview of the text, having examined what is a property right and the various types of property rights, in Part IV of the text Chambers turns to the important question of how property rights are created. He examines how property rights arise in response to the main categories of legally significant events: wrongs, consent, unjust enrichment and others, such as detrimental reliance, accession, specification, and so on. It is this part that distinguishes Chambers' work most significantly from all other Australian property texts and it is here that his work potentially has its most significant role in the education of a broad legal audience. For that reason, it will be returned to in greater detail below.

Adopting Chambers' approach, once the kind of right being dealt with and how it was created has been determined, the next (and indeed last) logical step is to ask whether that right has been destroyed by any other conflicting rights. In the context of property rights, this is the question of priority and is the subject of Part V of the text. Here, Chambers continues to demonstrate his ability to explain difficult legal principles clearly and without fuss, all the while linking the discussion back to principles and themes considered earlier in the book.[19] Nevertheless, the brevity of some of the discussion is no indicator of the level of sophistication of the thought evidently behind it or its resulting value. In this regard, Chambers' analyses of the bona fide purchaser defence, the role of notice in equity and the problematic nature of 'mere equities' should provide welcome relief to many a puzzled property student. Finally, Chambers takes some time at the end of Part V to bring together all of the relevant principles and steps required to resolve priorities disputes. Here, he reinforces the integrated nature of his approach, showing how each step in the inquiry is dependent upon issues canvassed at earlier points in the book.

This brings Chambers to the final part of the book, Part VI, dealing with registration of property rights. Consistent with his aim to provide an integrated approach to property law, Chambers notes the existence of registration systems for personal property rights, but concentrates most of his attention on deeds registration systems and the Torrens system.[20] He does not attempt to go into the minutiae of the systems, but focuses on the effect they have on matters already addressed in the book, in particular on the creation of property rights and on the issue of priorities. In this way, this last part builds upon and assumes an understanding of the first five parts of the book.

Despite the limited purpose of the discussion, Chambers still manages to provide a great deal of information in this part and, again, the brevity of the discussion does not reflect its degree of sophistication or value. Of particular note here is Chambers' discussion of the troublesome in personam exception to

[19] The significance of the parasitic nature of equitable property rights to the application of the principle *nemo dat quod non habet* is one example: ibid.

[20] Chambers explains the decision to do so by reference to the underlying cost–benefit rationale for registration systems and the tendency, on that basis, for the most complete registration system to be concerned with interests in land: ibid 431–2.

indefeasibility under the Torrens system.[21] Chambers explains that the so-called in personam exception is simply a recognition by the courts that new, unregistered rights may be created on or after registration that can affect the registered proprietor's enjoyment of their land. Thus, the question in any particular case as to whether an in personam exception applies is answered by looking at the alleged events which led to its creation (discussed earlier by Chambers in Part IV). In this simple way, Chambers is able to show clearly and indisputably why a general appeal to 'unconscionability', or some ground of intervention based on what appears to be the fair result, is misguided.[22] Only legally significant events of a recognised type (consent, detrimental reliance, unjust enrichment, etc) can give rise to relevant claims against a registered proprietor. Chambers' discussion again brings together concepts discussed at earlier stages in the book into an integrated whole. He also reinforces by example the importance of having a sensible taxonomy by reference to which legal decisions and principles can be usefully evaluated and ultimately understood.

## III Mapping Property Law

This brings us to a consideration of the issues raised and addressed by Chambers in Part IV of his work. As mentioned previously, in this part Chambers examines how property rights are created by reference to a taxonomy of legally significant events. Here Chambers most clearly displays his own background in the law of unjust enrichment and corresponding debt to the work of Professor Birks. In a series of influential albeit controversial articles,[23] Professor Birks explored the importance of taxonomy in legal study and practice and helpfully provided a 'starter' map of the law,[24] dividing it into categories of legally significant events (consent, wrongs, unjust enrichment and a miscellany of 'other legal events') and the law's responses to those events. This taxonomy enabled Professor Birks to examine the similarities and rationality of differences between various areas of the law that had previously tended to be studied in isolation. His point was that rights can be classified in a number of ways and that it is essential to keep a consistent classification in mind if one hopes to reach a proper understanding of the law. Like must be compared with like or errors will inevitably follow.

[21] The in personam exception is not a true exception to indefeasibility as it does not involve some pre-existing proprietary interest detracting from the registered proprietor's indefeasible title: ibid 475–6.

[22] For examples of the misapplication of the exception, see *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32; Peter Butt, 'Indefeasibility and Sleights of Hand' (1992) 66 *Australian Law Journal* 596.

[23] See Birks, 'Equity in the Modern Law', above n 11, 1; Birks, 'Property and Unjust Enrichment', above n 5, 623; Peter Birks, 'The Law of Restitution at the End of an Epoch' (1999) 28 *University of Western Australia Law Review* 13. See also Peter Birks, *An Introduction to the Law of Restitution* (1985), itself an enormous exercise in taxonomy; Peter Birks, 'Unjust Enrichment and Wrongful Enrichment' (2001) 79 *Texas Law Review* 1767; Peter Birks, 'The Concept of a Civil Wrong' in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) 31; Peter Birks, 'Definition and Division: A Meditation on Institutes 3.13' in Peter Birks (ed), *The Classification of Obligations* (1997) ch 1; Peter Birks, 'Misnomer' in W R Cornish et al (eds), *Restitution: Past, Present and Future* (1998) ch 1.

[24] Importantly this map of the law includes equity.

This approach to understanding law is at the heart of Chambers' work, and Part IV in particular. Chambers shows how the usual bifurcation of property rights into those created 'by intention' and those created 'by law' is overly simplistic. The latter category fails to reveal fails to reveal what events (other than consent) produce property rights. To understand how property rights arise other than by consent, Chambers adopts Professor Birks' taxonomy of legally significant events. He then goes on to subdivide the 'other legal events' category into detrimental reliance, physical changes to things, and a resultant, smaller miscellany of legal events. This process of categorisation is designed to narrow down the sources of property rights and lead to a greater precision of analysis and comparison of those rights with other kinds of rights.

Chambers also includes a separate chapter on the ways in which property rights are transferred in a particular contextual situation, namely the death of the owner of property rights.[25] Chambers justifies the separate treatment by explaining that different rules apply to property transfers depending on whether the transfer of rights is inter vivos (the focus of the balance of Part IV) or testamentary. After a brief introductory section on the ways in which property rights are transferred upon death, Chambers returns to his taxonomical approach, dividing the material into intentional testamentary dispositions and transfers upon death by 'operation of law'. This latter category is then dissected by Chambers to identify the real source of the property rights under discussion, which he argues in the cases of secret trusts and mutual wills is detrimental reliance and, in the remaining instances, statute.

Importantly, throughout Part IV, equitable property rights are analysed by Chambers according to the same categories of legal events as their common law counterparts. For example, in the case of intentional transfers, Chambers notes:

> The intentional creation of equitable property rights involves the same two basic questions discussed above in relation to legal rights: did the transferor intend to create the right and did he or she take the steps necessary to give effect to that intention. As with legal property rights, the steps needed to transfer an equitable property right depend upon the nature of the right and the nature of the thing subject to that right.[26]

This consistent approach enables Chambers to show the extent to which equitable and common law property rights are comparable and to examine the rationale for their differences.[27]

Chambers' approach of analysing property rights by reference to their creating event gives a very different perspective on property rights to that found in other Australian property law texts. It enables Chambers to integrate into the law of property subjects which are often estranged from it (such as testamentary dispositions, trusts and estoppel). It ties together the majority of the law of property into an integrated whole, a process which highlights irrational incon-

[25] Chambers, above n 1, ch 22.

[26] Ibid 250.

[27] See, eg, Chambers' discussion of the formalities associated with creating equitable property rights: ibid 250–1.

sistencies in the law which can then be the subject of legitimate criticism on that basis.

It is not surprising, given the relative novelty of this approach, that some classifications made by Chambers are quite controversial. For example, his views of how property interests arise in response to unjust enrichment (dealt with in chapter 24) are far from universally accepted.[28] Indeed, in so far as his analysis of the role of presumed intention resulting trusts is concerned,[29] it is arguable that in England at least there is authority to the contrary at the highest level.[30] In the case of the resulting trust, Chambers does, albeit briefly, indicate that there is a different view.[31] However, the extent of the controversy is underplayed and the lack of further references means that a reader who was not independently aware of the debate would be left thinking that Chambers represented the clearly ascendant view. This seems a great pity. Chambers' considerable scholarship could withstand greater scrutiny, were that opportunity afforded to the reader. Further, a more overt acknowledgment of the controversies might well in turn lead to a more balanced appreciation of the considerable complexities surrounding the classification of property interests.

It may well be that the reason why Chambers tends to underplay the extent of the novelty surrounding his classifications, or their controversial nature, is that he is trying to introduce an integrated map of property law to the Australian legal community. Detailed excursions into debates about the core features of his map may only deter readers from using it.

However, while such a concern may be justified, it would be a mistake for readers to be deterred from using Chambers' classifications on that basis. There can be no real criticism of the fact that Chambers has located various property principles and rules within certain categories of legally significant events, even though these choices may well be open to critical review. Chambers' analysis provides a starter map for the law of property which can, and indeed should, be refined, altered or replaced as it is tested against the case law landscape. Notwithstanding any later refinements that may be made, Chambers has created a reasoned and defensible starting point for organising what would otherwise be a mass of unrelated property decisions into a sensible and digestible whole which can then be usefully compared to other areas of the law.

[28] For the general debate regarding property rights and unjust enrichment see the authorities cited above n 5.

[29] Chambers, above n 1, 327–32.

[30] See *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, in which the leading judgment of Lord Browne-Wilkinson endorsed the contrary thesis of William Swadling, at least in so far as presumed intention resulting trusts were concerned. See William Swadling, 'A New Role for Resulting Trusts?' (1996) 16 *Journal of Legal Studies* 110; Peter Birks, 'Trusts Raised to Reverse Unjust Enrichment: The *Westdeutsche* Case' [1996] *Restitution Law Review* 3.

[31] Chambers, above n 1, 332.

## IV THE ROLE AND IMPORTANCE OF TAXONOMY TO LEGAL UNDERSTANDING

Recent criticism has been made at the highest level in Australia of a supposed tendency in some academic quarters to impose foreign, civil law maps onto our common law system. In the recent High Court decision in *Roxborough v Rothmans of Pall Mall Australia*,[32] Gummow J warned against 'top down' reasoning by which a theory about an area of law is 'invented or adopted and then applied to existing decisions to make them conform to the theory and to dictate the outcome in new cases.'[33] His Honour was there referring to the 'notion'[34] of unjust enrichment, an 'all-embracing theory of restitutionary rights and remedies'[35] which, in his Honour's view, is fundamentally misguided.

One cannot help but agree with his Honour that 'invented' maps (made without reference to existing case law) will be at best of little use and at worst misleading. No doubt that is why they are seldom, if ever, created. It is also entirely legitimate to 'test' proffered maps against the case law and modify or, indeed, replace them if they are found wanting. This point will be returned to below. However, if his Honour meant by the above statement to criticise the very exercise of map-making (or taxonomy) then, with great respect, that criticism must be rejected.

There can be little wrong with attempts to extract key features from what appear to be common cases, to draw from those key features a generalised map of the area of law and then to use that map to help analyse decided cases and predict outcomes of actions. This is, after all, exactly what has been done in the law of contract for some years, through the key concepts of offer and acceptance, consideration, and intention to create legal relations.[36] This now dominant map of contract law has not been without considerable — and valuable — criticism over the years, both as to its core components and its underlying philosophical foundations.[37] However, can it really be said that the map is unhelpful or (apparently even worse) antithetical to our common law tradition?

Furthermore, nor does it seem wrong that jurists undertaking a taxonomical exercise may have regard to civil law concepts in identifying key components of common law areas.[38] Reference to comparative law in helping clarify common law concepts has been a longstanding feature of the common law.[39]

[32] [2001] HCA 68 (Unreported, Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ, 6 December 2001) ('*Rothmans*').

[33] Ibid [73].

[34] Ibid [72].

[35] Ibid.

[36] On the development of the concepts of offer and acceptance, and consideration, see generally John Baker, *An Introduction to English Legal History* (1990) 398–400.

[37] For some of the main debates see, eg, Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (1979); Grant Gilmore, *The Death of Contract* (1974); Charles Fried, *Contract as Promise* (1981).

[38] The warning against using civil law concepts seems rather ironic since both Gummow J and Kremer (whose work has clearly been a significant influence on his Honour's reasoning) note how Lord Mansfield masterfully transplanted civil and equitable notions into the common law when he thought they fitted: see *Rothmans* [2001] HCA 68 (Unreported, Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ, 6 December 2001) [84]; Ben Kremer, 'The Action for

Indeed, far from being an illegitimate or unhelpful process, as Chambers' work demonstrates, classification allows one to make sense of what would be 'an otherwise overwhelming mass of disorganised details'[40] and understand how rules relate to each other and to other areas of the law. Further, unless there is some systematic basis for comparing different legal (including equitable)[41] areas, those areas run a real risk of developing in isolation and to inconsistent effect.[42] Attention to taxonomy is thus at the heart of every area of legal practice.

Interestingly, having criticised the prevailing 'map' of the law of unjust enrichment, Gummow J appears to have in mind at least a hazy outline of his own map of the law as a whole, as well as a more detailed vision of where claims often brought within the event of 'unjust enrichment' properly belong. As to an overall map, his Honour talks in *Rothmans* of the 'three great sources of obligation in private law, tort, contract and trust'.[43] As will be noted by readers of Chambers' work, this classification distinguishes between common law and equity, which immediately tends to discourage reference to and comparisons between the two. However, more importantly, it sets up 'trust' as part of the same categorical order as contract and tort (or, to use Chambers' terminology, neutral to the law/equity divide, consent and wrongs). Again, however, as readers of Chambers' text will note, that cannot be the case. Trusts arise in response to legally significant events,[44] such as consent (as in the case of express trusts[45]). Trusts are not themselves events that happen in the physical world to which the law responds. They are a legal response to an act or event, and therefore cannot be directly compared with contract or tort.

As to the event known as unjust enrichment, Gummow J goes on to argue that the action for money had and received (at issue in the *Rothmans* case) cannot be explained by unjust enrichment theory and rather reflects an historic importation of equitable principles into the common law.[46] Here, his Honour's reasoning leans heavily on the work of Kremer, who has recently argued that the prevailing structure of unjust enrichment theory fails to take into account the historic concern for the 'conscience' of the defendant evidenced in actions for money had

Money Had and Received' (2001) 17 *Journal of Contract Law* 93, 104 and see below n 47 and accompanying text. Kremer's 'absence of reason event' has a distinctly civil law flavour: see generally Sonja Meier and Reinhard Zimmermann, 'Judicial Development of the Law, *Error Iuris* and the Law of Unjustified Enrichment — A View from Germany' (1999) 115 *Law Quarterly Review* 556.

39 For an example, again in the area of contract theory, see Baker, above n 36.

40 Chambers, above n 1, 37.

41 Any suggestion that equitable rights, unlike their common law counterparts, operate in a 'gap filling' capacity (*Rothmans* [2001] HCA 68 (Unreported, Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ, 6 December 2001) [75] (Gummow J)) that somehow defies classification must be rejected. Equity, like the common law, must respond to events that take place in the real world. The question is: what are those events?

42 Chambers, above n 1, vi.

43 [2001] HCA 68 (Unreported, Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ, 6 December 2001) [64].

44 Chambers, above n 1, 237.

45 Ibid 252–4.

46 [2001] HCA 68 (Unreported, Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ, 6 December 2001) [76]–[89].

and received.[47] Kremer argues that the underlying rationale of the action for money had and received was the 'conscionability' or 'equity' of the defendant retaining the monies in issue.

This notion of conscience did not operate at large, inviting the court to dispense 'palm tree justice'[48] by reference to its own subjective sense of conscience. Rather, it invited the defendant to show 'any valid reason'[49] to keep the money, whether that reason (or 'right'[50] or 'entitlement'[51]) was legal, equitable or moral.[52] If the defendant could show such a reason, he or she could in conscience keep the money. Kremer argues that there were many matters that were accepted as a matter of precedent as allowing the defendant in conscience to keep the money, such as an existing albeit unenforceable debt owed by the plaintiff to the defendant, or a promise to perform a secret trust or a trust void for want of writing.[53] However, the categories were not closed and the court would always return to the litmus test of whether the defendant could in conscience retain the money.

It is not immediately obvious to this reviewer how a court can determine whether a defendant's 'reason to retain' is valid by reference to purely moral considerations and yet escape the charge that it is simply measuring the chancellor's foot. However, assuming Kremer is right and his thesis can withstand charges of 'imponderability',[54] then it is clear that his thesis offers a new map of the law as it relates to actions for money had and received. The unjust enrichment map, tested against the old cases, is found wanting by Kremer and rejected in favour of a new analytical structure.[55]

This brings us back to Gummow J's criticism of the development and use of 'all-embracing theories' of the law. It seems that while the result of Kremer's analysis of actions for money had and received, approved by Gummow J,[56] is different to that of unjust enrichment theorists,[57] the exercise is the same. Both Kremer and unjust enrichment theorists seek to provide a structure for what would otherwise be a 'mass of disorganised details'[58] linked only by a particular

47 Kremer, above n 38, 93.
48 Ibid 107.
49 Ibid 109.
50 Ibid 102.
51 Ibid 96.
52 Ibid 109.
53 Ibid.
54 Ibid 106.
55 In Kremer's map, the legally significant category of event in these cases is not 'unjust enrichment' but 'absence of reason/right to retain'. In turn, this means that the prevailing approach of requiring the plaintiff to show an 'unjust factor' (such as mistake, duress or failure of consideration) as a ground for obtaining restitution (see *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 379) is incorrect. Rather, the plaintiff must allege facts showing that the defendant has 'no reason to retain' (which could include, but would not be limited to, mistake etc) and it is then for the defendant to point to some valid reason to retain: Kremer, above n 38, 109, 114–19.
56 *Rothmans* [2001] HCA 68 (Unreported, Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ, 6 December 2001) [76]–[90].
57 Who are not identified by Gummow J in *Rothmans*, but would certainly include Professor Birks and, by his adoption of unjust enrichment as a category of relevant legal event, Chambers.
58 Chambers, above n 1, 37.

and historical form of action. As discussed in the previous section, critical analysis of existing 'maps' and remapping, where found necessary, are legitimate and positive activities that must be encouraged. The fact that both Kremer and Gummow J have engaged in that taxonomical process provides further support for the view that mapping is not about imposing foreign structures on the law but providing a sound basis for understanding it.

## V CONCLUSION

It is clear that Chambers' work is an excellent introduction to property law for students. It sets out the key features of the law of property as a whole and orientates those features in the wider legal landscape. In this way, it encourages the integration of the law of property with other course-work subjects from which it is often isolated. It also allows useful comparisons to be made between property and other legal concepts.

It would be a terrible shame, however, if this text were to be limited to a student audience. In his preface, Chambers states that the work is 'written for property law students and teachers, lawyers and judges'.[59] In the opinion of this reviewer, this is not an overambitious aim. All those who study, teach or practise the law would benefit from a close consideration of this work and, most importantly, adoption of its taxonomical inquiries.

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[59] Chambers, above n 1, v.

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