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# THE AUSTRALIAN LAW JOURNAL

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**ARTICLES****WASTED COSTS ORDERS AGAINST LAWYERS IN AUSTRALIA****Hon Bill Pincus QC and Linda Haller**

Applications for costs orders against lawyers alleged to have brought hopeless proceedings in courts (wasted costs orders) are becoming more common; they can involve very large sums. The jurisdiction to make such orders has been affected by statutes and rules, and attention is given in this article to such measures, especially those in New South Wales. In addition, Commonwealth proposals relating to wasted costs orders are discussed. The article considers in some detail the criteria to be applied in exercising the relevant discretion, as well as the policy questions involved – particularly the possible disadvantages of acceding too readily to applications of this kind. ....

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**ABSENCE OF BASIS: A PATH TO RECONCILIATION BETWEEN AUSTRALIAN AND ENGLISH UNJUST ENRICHMENT LAW?****Michael Borsky**

The High Court of Australia has resisted recognition of unjust enrichment as an “all-embracing theory” of when transfers of wealth should be reversed. The unjust factors scheme sought to be just that, by purporting to explain all the circumstances in which every legal basis justifying a transfer may be absent or invalid. The “absence of basis” approach to unjust enrichment supersedes the unjust factors. Under the new approach, once an enrichment of the defendant at the claimant’s expense is proven, the question becomes whether any other legal or equitable doctrine gives the defendant a right to retain the enrichment. It is hoped that the surrender of jurisdictional ground previously claimed by the unjust factors will be sufficient to persuade the High Court to embrace this more focused and coherent version of unjust enrichment as the “unifying legal concept” which the court has long professed to acknowledge. ....

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CROWN APPEALS AGAINST SENTENCE IN VICTORIA: RESULTS AND  
IMPLICATIONS OF AN EMPIRICAL STUDY

**Richard Edney**

Crown appeals in Victoria have become increasingly common in recent years. This article details the findings of an empirical study conducted between 2002 and 2004 on decisions of the Victorian Court of Criminal Appeal concerning sentence appeals by offenders and the Crown, and considers possible reasons for the increase in Crown appeals in Victoria. The implications for the criminal justice system of the increasing success of Crown appeals is discussed. It is suggested that existing principles concerning Crown appeals may have to be reconsidered in light of the empirical findings from the Victorian Court of Criminal Appeal, which disclose a significantly higher success on the basis of manifest inadequacy for the Crown than for sentenced persons on the mirror ground of manifest excess. .... 513

RESTITUTION AND THE LAW OF SUBROGATION IN ENGLAND AND  
AUSTRALIA

**Gareth Tilley**

The English Court of Appeal summarised the principles of law of subrogation in *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291 (15 March 2004). However, this summary does not entirely match the authorities as they currently stand in Australia. In this article the author highlights some of the differences in the current state of the authorities between England and Australia, particularly the relationship of subrogation with the concept of unjust enrichment. .... 518

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