

EQUITY'S AUSTRALIAN ISOLATIONISM*

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*In this essay, delivered as the WA Lee Equity Lecture 2008, the author begins with a reminder of the history and original purposes of equitable doctrines and remedies. Skirting around the 'fusion' controversy that followed the Judicature Act reforms, starting in the 1870s, he examines the disinclination of Australian courts to develop the rules and remedies of equity by the techniques of analogous reasoning: a common engine for growth and change in the common law. By reference to several recent cases he suggests that a special Australian hostility to the development of equitable doctrine has emerged: *Garcia v National Australia Bank*;¹ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*² and *Breen v Williams*.³ After reviewing judicial and academic responses to these and other cases, he calls for a change to this attitude. He urges a restoration of the former functional approach to the ambit of the binding rule established by decisions of the High Court of Australia and recognition of the proper and necessary function of Australia's intermediate courts in developing judge-made law by analogous reasoning. Finally, he supports calls for a restoration of civility in judicial discourse in order to maintain respect for the appellate process and to recognise the debatable character of many appellate decisions and what they stand for.*

I A VITAL SOURCE OF PRINCIPLE

It is a privilege to deliver the W A Lee Equity Lecture. I have known Tony Lee for 30 years. I pay tribute to his scholarship and his teaching of the law to generations of Australian lawyers.

My thoughts are, like Caesar's Gaul, divided into three parts. First, I will speak against the opinion that equity's doctrines in Australia are closed and hostile to growth and adaptation. Secondly, I will reflect on an application of that opinion as it affects particular developments in the law of unjust enrichment. And thirdly, I will conclude with some observations on the role of the High Court of Australia and intermediate

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¹ [1998] HCA 48.

² [2007] HCA 22.

³ (1996) 186 CLR 71.

courts in deciding cases about equitable doctrines and remedies and on the need to observe civility between courts within Australia's integrated judicature.

Strangely, there are few areas of Australian law that generate so much passion as equity.⁴ Sir Frank Kitto, Justice of the High Court of Australia from 1950 to 1970, described equity as: 'the saving supplement and complement of the Common Law ... prevailing over the Common Law in cases of conflict but ensuring, by its persistence and by the very fact of its prevailing, the survival of the Common Law'.⁵

This developed system of law was originally created to repair the gap 'wherever the Common Law might seem to fall short of [the] ideal in either the rights it conceded or the remedies it gave.'⁶ Equity has historically been, and still is, a fruitful source of legal principle for Australian society.⁷ The authors of the notable and opinionated Australian text, *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies*, attribute this fruitfulness to the fact that: 'the fundamental notions of equity are universal applications of principle to continually recurring problems; they may develop but cannot age or wither.'⁸

Sir Anthony Mason too has praised the enduring vitality of equity. In 1994 he commented that:

The ecclesiastical natural law foundations of equity, its concern with standards of conscience, fairness, equality and its protection of relationships of trust and confidence, as well as its discretionary approach to the grant of relief, stand in marked contrast to the more rigid formulae applied by the common law and equip it better to meet the needs of the type of liberal democratic society which has evolved in the twentieth century.⁹

Necessarily, the vitality of equity in Australia is dependent on the readiness of our courts to develop equitable principles to respond to modern conditions and needs. The central theme of this lecture is that the categories of equity are never closed. Lawyers have responsibilities for the ongoing renewal of equity's doctrines and remedies.

⁴ See, for example: A Mason, 'Fusion' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (2005) 11.

⁵ Foreword to the First Edition. See now: R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) vii (hereafter *Meagher, Gummow and Lehane*).

⁶ F Kitto, Foreword to the First Edition, Meagher, Heydon and Leeming, above n 5, v.

⁷ See: M Tilbury, 'Fallacy or Furphy? Fusion in a Judicature World' (2003) 26 *University of New South Wales Law Journal* 357, 637; A Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238; A Mason, 'Themes and Prospects' in P Finn (ed), *Essays in Equity* (1985) 242.

⁸ Preface – Second Edition, Meagher, Heydon and Leeming, above n 5, xv.

⁹ A Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' above n 7, 239.

II EQUITY'S ISOLATIONISM?

A *Judicature Acts and Fusion?*

The effect of the enactment in England of the *Judicature Acts 1873 – 1875*,¹⁰ which combined the administration of the common law and equity, has been the subject of a remarkably heated debate in Australia for many years. In this country a rather isolationist view of equity has generally prevailed.¹¹ In *Pilmer v Duke Group Limited*, I acknowledged that the High Court has repeatedly held that ‘in Australia, the substantive rules of equity have retained their identity as part of a separate and coherent body of principles.’¹² Dr Simone Degeling and Dr James Edelman consider that a primary reason for the dominance of this view has been the ‘depth of legal scholarship and the learning of its adherents’, especially as expressed in *Meagher, Gummow and Lehane*.¹³

The authors of that text are at pains to show that the doctrines and remedies of equity are (as they consider they should be) distinct and separate from common law doctrines and remedies. In response to an initial attempt to discover an answer to the question ‘are equity and common law fused?’ Professor Andrew Burrows suggested that: ‘There was one book that stood out. Not that the authors made the question any easier for me to understand but rather because of the vehemence with which they expressed the view that equity and common law are certainly not fused.’¹⁴

Two decades ago the late John Lehane challenged ‘those who assert that law and equity are fused’ to ‘explain what they mean, how it happened and what follows from it.’¹⁵ The present authors of the text note that Lehane’s challenge ‘has been found, by those prepared to face up to it, to be unanswerable.’¹⁶

Professor Michael Tilbury has suggested that the most profound legacy of Meagher, Gummow and Lehane’s work upon Australia’s legal imagination lies in its exposition of what they describe as the error of the ‘fusion fallacy’.¹⁷ Meagher, Gummow and Lehane describe the ‘fusion fallacy’ as involving:

[T]he administration of a remedy, for example common law damages for breach of fiduciary duty, not previously available at law or in equity, or in the modification of principles in one branch of the jurisdiction by concepts that are imported from the other

¹⁰ The statutory equivalents to the *Judicature Acts* in Australia are: *Supreme Court Act 1970* (NSW) ss 57-63 and the *Law Reform (Law and Equity) Act 1972* (NSW); *Judicature Act 1876* (Qld) ss 4-5; *Supreme Court Act 1935* (SA) ss 17-28; *Supreme Court Civil Procedure Act 1932* (Tas) ss 10-11; *Supreme Court Act 1958* (Vic) s 62; *Supreme Court Act 1935* (WA) ss 24-5.

¹¹ See, for example: J Dietrich, ‘Attempting Fusion: Professor Worthington’s ‘Equity’ and Its Integration with the Common Law’ (2005) 34 *Common Law World Review* 62, 65. Tilbury, above n 7, 359; P Loughlan, ‘The Historical Role of the Equitable Jurisdiction’ in P Parkinson (ed), *The Principles of Equity* (2003) 21.

¹² *Pilmer v Duke Group Limited (In Liquidation)* (2001) 207 CLR 165, 231 [173].

¹³ S Degeling and J Edelman, ‘Fusion: The Interaction of Common Law and Equity’ (2004) *Australian Bar Review* 195, 197.

¹⁴ A Burrows, ‘We Do This At Common Law But That In Equity’ (2002) 22 *Oxford Journal of Legal Studies* 1, 3.

¹⁵ J Lehane, ‘Book Review’ (1987) 46 *Cambridge Law Journal* 163, 165.

¹⁶ Preface – Fourth Edition, Meagher, Heydon and Leeming, above n 5, xi. See also: W M C Gummow, ‘Equity: Too Successful?’ (2003) 77 *Australian Law Journal* 30, 33.

¹⁷ Tilbury, above n 7, 358.

and thus are foreign, for example by holding that the existence of a duty in tort may be tested by asking whether the parties concerned are in fiduciary relationships.¹⁸

According to this analysis, there are two limbs to the fusion fallacy.¹⁹ The first limb concerns the availability of *remedies*. The second limb is more general. It concerns the alteration of the principles of equity or the common law by reference to the *principles* of the other. According to Meagher, Gummow and Lehane, examples of the 'fusion fallacy' include the provision of damages for part performance, the doctrine in *Walsh v Lonsdale*²⁰ that an agreement for a lease is as effective legally as a lease, and the view that a plaintiff, who can sue at law in trespass without proving special damage, might obtain an injunction in equity to restrain the trespass without that requirement.²¹

Illustrations of the vehemence with which the distinguished authors attack the notion of fusion include the following purple passages:

Those who commit the fusion fallacy announce or assume the creation by the Judicature system of a new body of law containing elements of law and equity but in character quite different from its components. The fallacy is committed explicitly, covertly, and on occasion with apparent indifference. But the state of mind of the culprit cannot lessen the evil of the offence.²²

and:

[The fusion fallacy] involves the conclusion that the new system was not devised to administer law and equity concurrently but to 'fuse' them into a new body of principles comprising rules neither of law nor equity but of some new jurisprudence conceived by accident, born by misadventure and nourished by sour but high-minded wet-nurses.²³

In his foreword to *Meagher, Gummow and Lehane*, Sir Frank Kitto noted that the description of the fusion fallacy by the authors was 'too often unthinkingly repeated'.²⁴ Perhaps Sir Frank paused to weigh up some of the more delicious adjectives, such as 'sour' and 'high minded', which conjure up such horrible images. A brave sub-editor might have been tempted to wield an eraser but, if so, it was to no avail.

B *The Fusion Debate in Other Jurisdictions*

Meagher, Gummow and Lehane particularly lament the contemporary state of equity in English-speaking countries other than Australia. They note that there is much support for doctrinal 'fusion' in the United Kingdom. Professor Andrew Burrows explains that those educated in England during the post-war period were taught that common law and equity were but 'historic labelling'.²⁵ On the other hand Sir Frank Kitto (raised like the authors in New South Wales before any hint of statutory intrusion) wrote in his

¹⁸ Meagher, Heydon and Leeming, above n 5, 54 [2-105].

¹⁹ See Tilbury, above n 7, 358ff.

²⁰ (1882) 21 Ch D 9. Compare with P Sparkes, 'Walsh v Lonsdale: The Non-Fusion Fallacy' (1988) 8 *Oxford Journal of Legal Studies* 350.

²¹ For further examples see: Meagher, Heydon and Leeming, above n 5, 57-74 [2-130]-[2-265].

²² Ibid 54 [2-105].

²³ Ibid 57 [2-135].

²⁴ Foreword to the First Edition, *ibid* vii.

²⁵ Burrows, above n 14, 2.

foreword that the ‘very selection of Equity as a specific subject for study emphasises the [fusion] fallacy’.²⁶ Ironically, to similar effect, the general editor of the 31st edition of *Snell’s Equity* writes in his preface: ‘In a perfect world there would be no place for a book such as this.’²⁷

On the judicial front, Lord Diplock has been described (denounced seems an apter word) as ‘the most forceful exponent of the fusion fallacy’ in recent times.²⁸ In *United Scientific Holdings Ltd v Burnley Borough Council* Lord Diplock invoked Ashburner’s fluvial metaphor.²⁹ He stated that ‘the waters of the confluent streams of law and equity have surely mingled now.’³⁰ He further suggested that ‘to speak of the rules of equity as being part of the law of England in 1977 is about as meaningful as to speak of the Statute of Uses or of *Quia Emptores*.’³¹ Meagher, Gummow and Lehane are horrified by this doctrinal barbarism. They describe it as the ‘low water-mark of modern English jurisprudence’.³² They state that: ‘Lord Diplock did not explain how equity vanished or what were the consequences of its disappearance. Moreover, when he spoke, *Quia Emptores* remained in force as a pillar of English real property law.’³³

Lord Denning can probably be described as the runner-up to Lord Diplock as chief barbarian.³⁴ Thus, in *Central London Property Trust Ltd v High Trees House Ltd* Lord Denning observed that: ‘At this time of day it is not helpful to try to draw a distinction between law and equity. They have been joined together now for over seventy years, and the problems have to be approached in a combined sense.’³⁵

Meagher, Gummow and Lehane bemoan the fact that the examples of the fusion fallacy that they cite are ‘depressing evidence of the damage done to equity in England since 1873 as one epigenous generation has succeeded another’³⁶ (Epigenous means fungal and I do not think the word was intended as flattery). Probably chastised by this antipodean opprobrium Professor Jill Martin hints that there may possibly have been a partial return to orthodoxy in England.³⁷ She indicates that so much might appear from English cases on mortgages and decisions of the House of Lords that include a thorough analysis of the distinct origins of common law and equity and of their respective principles in areas such as subrogation and illegality.³⁸ Likewise, Professor Worthington suggests that most judges, practitioners and academics in the United Kingdom are

²⁶ Foreword to the First Edition, Meagher, Heydon and Leeming, above n 5, vii.

²⁷ Preface, J McGhee, *Snell’s Equity* (Sweet and Maxwell, 31st ed, 2005) v. See also: A Burrows, *Fusing Common Law and Equity: Remedies, Restitution and Reform* (Sweet and Maxwell, 2002) 3.

²⁸ J D Heydon and P L Loughlan, *Cases and Materials on Equity and Trusts* (Butterworths, 6th ed, 2002) 28.

²⁹ See: D Browne, *Ashburner’s Principles of Equity* (Butterworths, 2nd ed, 1933) 18.

³⁰ *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, 925.

³¹ *Ibid* 924.

³² Preface – Second Edition, Meagher, Heydon and Leeming, above n 5, xv.

³³ *Ibid* xv.

³⁴ J Martin, ‘Fusion, Fallacy and Confusion; A Comparative Study’ (1994) *The Conveyancer and Property Lawyer* 13, 14.

³⁵ *Central London Property Trust Ltd v High Trees House Ltd* [1956] 1 All ER 256, 259. See also comments in *Federal Commerce and Navigation Ltd v Molena Alpha Inc* [1978] QB 927, 974-5; *Chief Constable of Kent v V* [1983] QB 34, 41.

³⁶ Meagher, Heydon and Leeming, above n 5, 74 [2-275].

³⁷ Martin, above n 34, 29.

³⁸ *Ibid* 29, citing *Napier and Ettrick (Lord) v Hunter* [1993] 2 WLR 42; *Tinsley v Milligan* [1993] 3 All ER 65.

committed to maintaining the 'intellectual or doctrinal dualism' of equity and common law.³⁹ Francis Reynolds also speculates that there may have been a more general resurgence of equity in the United Kingdom in recent times.⁴⁰

Warming to a puritan-like castigation of error, Professor Martin has pointed out that a number of judges in Commonwealth countries have recently overtaken Lord Denning as exponents of the fusion 'heresy'.⁴¹ In New Zealand, she suggests, a trend has appeared to consider remedies as being potentially available to respond to an established legal wrong, regardless of the historical source of the underlying cause of action. This approach is usually traced to the enactment of the *Judicature Acts* and the termination of the separate courts which, in England and later in its colonies, had first devised, nurtured and applied distinctive legal doctrines – such as the equitable doctrine of Chancery with its peculiar and more flexible remedies.⁴²

In a number of decisions the former President of the New Zealand Court of Appeal, later Lord Cooke of Thorndon, indicated his view that law and equity had by now mingled or merged.⁴³ Of the situation in New Zealand, the present editors of *Meagher, Gummow and Lehane* remark:

The prospect of any principled development of equitable principles seems remote short of a revolution on the Court of Appeal. The blame is largely attributable to Lord Cooke's misguided endeavours. That one man could, in a few years, cause such destruction exposes the fragility of contemporary legal systems and the need for vigilant exposure and rooting out of error.⁴⁴

Those familiar with the successive 'rooting out' of heretics in England under the later Tudors will recognise the *genre* of this denunciatory writing. Burning at the professional stake would seem too kind a fate for such doctrinal rascals.⁴⁵

C Other Australian Points of View

In 2004 the New South Wales Court of Appeal was divided over an issue of fusion in its decision of *Harris v Digital Pulse Pty Ltd*.⁴⁶ A majority of the Court (comprising of Chief Justice Spigelman and Justice Heydon) overturned a decision of a trial judge who had awarded exemplary damages for a proved breach of fiduciary duty.

The majority rejected the argument that equity recognised punitive awards in other fields and thus that the jurisdiction to award exemplary damages already existed. They also rejected the assertion that, if the jurisdiction did not exist in the past, it should now be recognised by analogical judicial reasoning in parallel with tort law. In other words,

³⁹ S Worthington, *Equity* (Clarendon Press, 2003) 18.

⁴⁰ F Reynolds, 'Marine and other Influences on the Common Law' (2002) *Lloyd's Maritime and Commercial Law Quarterly* 182, 195-6.

⁴¹ Martin, above n 34, 14.

⁴² Ibid 15.

⁴³ *Day v Mead* [1987] 2 NZLR 443, 451; *Acquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 301; *Mouat v Clark Boyce* [1992] 2 NZLR 559, 566.

⁴⁴ Preface – Fourth Edition, Meagher, Heydon and Leeming, above n 5, xi.

⁴⁵ Compare with: A Hogge, *God's Secret Agents* (Harper, 2006).

⁴⁶ (2003) 56 NSWLR 298.

the court refused to accept that equity could develop and recognise a new remedy of exemplary damages.

In relation to the second argument, all three of the judges in the New South Wales Court of Appeal rejected the concept of ‘automatic fusion’, that is, that ‘the joint administration of two distinct bodies of law means that the doctrines of one are applicable to the other.’⁴⁷ However, Justice Keith Mason, then the President of that court, made, what Dr James Edelman describes as a ‘compelling case’ for occasional ‘fusion by analogy’.⁴⁸

This notion involved a process of development of the principles of equity consistently, and by analogy, with common law principles. Dr Edelman indicated that such a process would be entirely independent of the fused administration of common law and equity. Indeed, he suggested that it had actually begun before the enactment of the *Judicature Acts*. In addressing the specific issues that arose in *Harris*, Justice Keith Mason considered as compelling the analogy between common law torts and breaches of fiduciary duty. He saw the underlying principle affording the remedy of exemplary damages as equally underpinning the equitable remedies for breaches of fiduciary duty. Each was a rule within the one legal system. That system was obviously intended to operate harmoniously and in an integrated way. In human affairs, propinquity has a well known tendency to produce interaction and, dare I say it, occasional fusion. Why should it be different in the case of equity’s rules and remedies?

Justice Heydon’s reasons in *Harris* indicated that he considered the development of equity by analogy with the common law to be a doctrinal possibility.⁴⁹ However, he rejected the suggestion that there was any acceptable analogy between common law torts and breaches of fiduciary duty. Upon Chief Justice Spigelman’s analysis of equitable and common law rights and remedies, fusion by analogy would very rarely, if ever, be appropriate.⁵⁰ Chief Justice Spigelman emerged from this encounter as a purist, obedient to the denunciations of heresy in *Meagher, Gummow and Lehane*. Justice Heydon was not far behind.

By way of contrast, at least in recent years, another Mason – Sir Anthony Mason, former Chief Justice of Australia and a noted practitioner of equity, has expressed a view of fusion more in line with the opinion of the minority judge in *Harris*. In extrajudicial writings Sir Anthony Mason has observed:

in all the confusion generated by the debate over the effect of the Judicature Acts it has emerged that the principles of equity and common law are steadily converging into one integrated coherent body of law, that outcome being an eminently desirable and foreseeable consequence of the Judicature Acts.⁵¹

⁴⁷ Ibid [18] (Spigelman CJ). See also: [353] – [5], [391] (Heydon JA); [138] – [9] (Mason P).

⁴⁸ J Edelman, ‘A “Fusion Fallacy” Fallacy?’ (2003) 119 *Law Quarterly Review* 375, 377. See also: J Dietrich, ‘Attempting Fusion: Professor Worthington’s “Equity” and Its Integration with the Common Law’ (2005) 34 *Common Law World Review* 62, 67.

⁴⁹ Edelman, above n 48, 378.

⁵⁰ Ibid.

⁵¹ A Mason, ‘Equity’s Role in the Twentieth Century’ (1997-8) 8 *The Kings College Law Journal* 1, 3.

He noted that there was merit in Lord Simon of Glaisdale's prediction in *United Scientific Holdings* that: 'It may take time before the waters of two confluent streams are thoroughly intermixed; but a period has to come when the process is complete.'⁵²

The opinions of the majority judges in *Harris v Digital Pulse* probably represent the prevailing judicial approach in present day Australia. Equity remains a distinct source of authority in Australian law cut off from others. Is this correct? Is it necessary? Should it engender the passions that have crept into this corner of Australia law? Where lies the future?

III LIVING EQUITY

The enduring vitality of equity, as of any branch of the living law, is partially dependent upon its ability to adapt to changing circumstances in society. In their most recent text on the law of trusts and equitable obligations, Professors Robert Pearce and John Stevens point out that:

From a historical perspective one of the outstanding characteristics of equity has been its capacity to develop new rights and remedies for the benefit of plaintiffs. The need for such creativity within English law was the very reason for equity's genesis.⁵³

In 1879 Sir George Jessel MR recognised the continuing need to develop equitable principles and remedies in his reasons in *Re Hallet's Estate*.⁵⁴ He stated:

It must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time – altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them.

Occasionally, Australian courts have made important contributions to the development of equity. Another former Chief Justice of Australia, the Hon Murray Gleeson, whilst in office, noted a number of Australian decisions on estoppel in the 1930s as examples of such innovation.⁵⁵ Lord Denning described the formulation by Australian courts of the principle of estoppel by conduct as 'the most satisfactory that [he knew]'.⁵⁶ Chief Justice Gleeson described the utilisation of the notion of unconscionability as a foundation for equitable relief, established in a number of cases regarding transactions where there was unconscientious use by one party of some particular disadvantage of the other, rendering the latter unable to make an informed assessment as to their own best interests.⁵⁷

⁵² A Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' above n 7, 240.

⁵³ R Pearce and J Stevens, *The Law of Trusts and Equitable Obligations* (Oxford University Press, 4th ed, 2006) 24.

⁵⁴ (1879) 13 Ch D 696, 710.

⁵⁵ *Thompson v Palmer* (1933) 49 CLR 501; *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641. See: A M Gleeson, 'Australia's Contribution to the Common Law' (2008) 82 *Australian Law Journal* 247, 250.

⁵⁶ *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 QB 371.

⁵⁷ Gleeson, above n 55, 250. See: *Wilton v Farnworth* (1948) 76 CLR 646; *Blomley v Ryan* (1956) 99 CLR 362; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

I will overcome my usual modest hesitation to mention my own judicial reasons, expressing a like opinion that the categories of equity are not closed. In *Pilmer v Duke Group Limited* I suggested that:

Fiduciary obligations are not confined to established relationships or to exactly identical facts as those that have given rise to them in the past. Even those jurists most resistant to analogical extensions in this field accept that the list of persons owing fiduciary duties is not closed.⁵⁸ It could scarcely be so, given that equity is itself the embodiment of judicial invention.⁵⁹

In the same case I denied ‘that equitable remedies (any more than those of the common law) are chained forever to the rules and approaches of the past.’⁶⁰

In *Burke v LFOT*,⁶¹ a case that concerned the principles of equitable contribution, I remarked, with reference to authority, that ‘the notion that the categories of coordinate liability are closed has been firmly rejected.’⁶² In considering whether equitable doctrine regarding contribution now extended to unequal culpability, I took into account the fact that:

Equitable remedies, such as contribution, should be developed by the courts to meet new and modern needs. In developing equitable principles to fit the modern world, courts, including this Court, should look beyond the exposition of the principles in old cases or texts that necessarily reflect the often rigid legal environment and judicial disposition of past times. Instead, they should search for the underlying purpose of the old rule: concepts, not detail. Equitable remedies need to be fashioned to meet new and changing circumstances. Contribution is one such remedy. Our admiration of equity’s past is best expressed by being alert to assure its present operation and future relevance.⁶³

In *ACCC v Berbatis Holdings Pty Ltd*⁶⁴ the High Court examined the application of section 51AA(1) of the *Trade Practices Act 1974* (Cth). That sub-section incorporates a statutory prohibition on unconscionable conduct, as such conduct is understood in the unwritten law of Australia. In *Berbatis* I suggested that section 51AA(1) ‘has a capacity to expand and apply to new circumstances as the unwritten law evolves ‘from time to time’.⁶⁵ Similarly, in *Garcia v National Australia Bank Ltd*,⁶⁶ to which I will return, I remarked that ‘equitable principles are ... in a constant state of evolution in response to the developments of society.’

Despite the continuing vitality of equity, it has been seriously questioned whether, in Australia, that body of legal doctrine retains any significant creative capacity.⁶⁷ Using the metaphor coined by Lord Denning, a question is posed as to whether equity in

⁵⁸ *Breen v Williams* (1994) 35 NSWLR 522, 570 (Meagher JA); compare with *Breen v Williams* (1996) 186 CLR 71, 107 (Gaudron and McHugh JJ).

⁵⁹ *Pilmer v Duke Group Limited (In Liquidation)* (2001) 207 CLR 165, 217 [136].

⁶⁰ *Pilmer v Duke Group Limited (In Liquidation)* (2001) 207 CLR 165, 230 [170].

⁶¹ (2002) 209 CLR 282.

⁶² *Ibid* 317 [91].

⁶³ *Burke v LFOT Pty Ltd* (2002) 209 CLR 282, 326 [121] (footnotes omitted).

⁶⁴ (2003) 214 CLR 51.

⁶⁵ *Ibid* 98 [116].

⁶⁶ (1998) 194 CLR 395, 434 [80].

⁶⁷ Pearce and Stevens, above n 53, 24.

Australia is indeed past the age of childbearing.⁶⁸ Professor Tilbury has suggested that: 'It is probably true to say that the Australian law of remedies has reached the limit of judicial invention, in the sense that new remedies ... are likely to be the progeny of statute.'⁶⁹

But why should this be so? Why have judges lost the capacity of invention when sitting in a case that raises questions of equitable doctrine? What happens when they cross the judicial corridor? When and how was this incapacity acquired?

IV HOSTILITY TO INVENTION AND EXPANSION

The High Court of Australia has shown a reluctance (some might even say a hostility) towards the invention and expansion of equitable doctrines and remedies. It has done so on a number of occasions in recent years.

A *Reluctance to Expand the Scope of Yerkey Principle*

In 1998, for example, the Court declined to extend or reconceptualise an equitable principle expressed by Justice Dixon in 1939 in *Yerkey v Jones*.⁷⁰ Specifically, the High Court declined to enunciate a broader and modern principle. In *Garcia v National Australia Bank Ltd*⁷¹ a majority of the Court affirmed the special equity that permits a married woman to contest apparent obligations under a contract of guarantee if she can show that her consent to guarantee her husband's debt to a creditor had been procured by the husband and that she had not understood its essential requirements when she executed the suretyship agreement, accepted by the creditor without dealing directly with her.

So expressed, this rule has been the subject of criticism. Some of the criticism focuses on the fact that such a rule is inherently discriminatory, because stated in terms of particular gender and relationships rather than more conceptually.⁷² Arguably, the principle, so expressed, presumes an inherently inferior status of married women in our society.⁷³ For this reason it has been criticised as being 'a product of a bygone era and

⁶⁸ See *ibid* 25; P W Young, 'Perhaps Equity is Beyond Childbearing' (2003) 77 *Australian Law Journal* 224; R Bailey-Harris, 'Equity Still Childbearing in Australia?' (1997) 113 *Law Quarterly Review* 227. Compare with K Mason, 'Fusion: Fallacy, Future or Finished?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (2005) 70. A Mason 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World', above n 7, 239.

⁶⁹ M Tilbury, *Civil Remedies*, vol 1 (Butterworths, 1990) 16 [1026].
⁷⁰ (1939) 63 CLR 649, 683.

⁷¹ (1998) 194 CLR 395.

⁷² See, for example: J O'Donovan, 'The Retreat from *Yerkey v Jones*: from Status back to Contract' (1996) 26 *University of Western Australia Law Review* 309, 314, 326; L Aitken, 'Equity, Third Party Guarantees and Wife as Guarantor: Recent English Developments' (1992) 3 *Journal of Finance Law and Practice* 261, 265; G Williams, 'Equitable Principles for the Protection of Vulnerable Guarantors: Is the Principle in *Yerkey v Jones* Still Needed?' (1994) 8 *Journal of Contract Law* 67; B Collier, 'Confusion Now Hath Made This Masterpiece!: The Present Uncertainty Surrounding *Yerkey v Jones*' (1997) 25 *Australian Business Law Review* 190, 194-5. See also: *Warburton v Whitely* (1989) NSW Conv Rep 55-453, 58,286-7 (Kirby P); *Akins v National Australia Bank* (1994) 34 NSWLR 155; *National Australia Bank v Garcia* (1995) 39 NSWLR 377; *Teachers Health Investments Pty Ltd v Wynne* (1996) ASC 56-356.

⁷³ S Hii, 'From *Yerkey* to *Garcia*: 60 Years on and Still as Confused as Ever' (1997) 7 *Australian Property Law Journal* 47, 48.

no longer compatible with modern social conditions in Australia'.⁷⁴ Some critics describe the present rule as patronising⁷⁵ and 'difficult to justify'.⁷⁶

My reasons in *Garcia* reflected some of these sentiments. I considered that a rule, expressed as in *Yerkey v Jones*, was an 'historical anachronism',⁷⁷ 'offensive',⁷⁸ 'historically and socially out of date and unfairly discriminatory'.⁷⁹ Nevertheless, the joint reasons in *Garcia* considered that the principles propounded by Justice Dixon in *Yerkey* were 'particular applications of accepted equitable principles which have as much application today as they did then'.⁸⁰ For that reason, the majority were reluctant to adapt or re-state them. They affirmed and insisted on its application, unchanged and unadapted *Yerkey v Jones* principle.

It cannot be denied that some judges in Australia treat Justice Dixon's words as holy writ, not to be questioned and certainly not varied by later, lesser, lawyers. In my view a proper respect for that great judge should include an acknowledgement that occasionally, changing social circumstances and other legal developments require adaptation of what he wrote 60, 70 or 80 years ago.

The majority in *Garcia* acknowledged that Australian society, and particularly the role of women, had changed in the previous six decades. However, they went on to state: 'But some things are unchanged. There is still a significant number of women in Australia in relationships which are, for many and varied reasons, marked by disparities of economic and other power between the parties.'⁸¹

The majority in *Garcia* also accepted that the ultimate rationale of *Yerkey v Jones* was not to be found in notions concerned with the subservience or the inferior economic position of women or their feminine vulnerability to exploitation because of any suggested emotional involvement, save to the extent that the case was concerned with actual undue influence.⁸² Rather, according to their opinion, it was 'based on trust and confidence, in the ordinary sense of those words, between marriage partners.'⁸³

The majority of the High Court recognised that the principles set out in *Yerkey v Jones* may⁸⁴ 'find application to other relationships more common now than was the case in 1939 — to long term and publicly declared relationships short of marriage between members of the same or of opposite sex ... [or] where the husband acts as surety for the wife.'

⁷⁴ B Collier, 'The Rule in *Yerkey v Jones*: Fundamental Principles and Fundamental Problems' (1996) 4 *Australian Property Law Journal* 181, 204.

⁷⁵ Williams, above n 72, 67.

⁷⁶ N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (Butterworths, 9th ed, 2008) 738.

⁷⁷ (1998) 194 CLR 395, 422.

⁷⁸ Ibid 424.

⁷⁹ Ibid 425.

⁸⁰ Ibid 403 (Gaudron, McHugh, Gummow and Hayne JJ).

⁸¹ Ibid 403-4 (Gaudron, McHugh, Gummow and Hayne JJ).

⁸² Ibid 404.

⁸³ Ibid.

⁸⁴ Ibid.

However, the majority left this question open on the basis that such issues did not fall for decision in the case before them. Mr and Mrs Garcia were, after all, married so Mrs Garcia was a married woman. This notwithstanding, the failure of the Court to put the governing rule on a firmer, more modern foundation, not confined to married women's relationships, has attracted criticism.⁸⁵ Dr Samantha Hepburn observed that the failure of the High Court to explore the wisdom of restricting relief to wives 'must surely be seen as one of the major short-comings of the decision.'⁸⁶

Justice Callinan, in his separate reasons in *Garcia*, was not willing even to extend the special equity beyond the situation where a *wife* guarantees her husband's debts. He held that it would be more appropriate for the legislature, rather than the judiciary, to undertake any such development.⁸⁷ So for Justice Callinan, equity presumably washed its hands and offered no relief to domestic partners in other non married relationships.

I am sure that there are judges and other lawyers who would not feel uncomfortable stating and applying a legal rule, applicable to a case before them, in confined terms that left untouched the essential circumstances and causes of vulnerability with which the law in question was concerned. However, I certainly felt such a disquiet in applying the rule as stated in *Yerkey v Jones*. Perhaps this was an outcome of my immersion in conceptual taxonomy over 10 years in the Australian Law Reform Commission. Perhaps it was because I was (and am) a party to a long-term non-married human relationship and know of many such arrangements where the dangers of overbearing can be as large, if not larger, than those faced by the particular class of married women.

B *The Approach of the House of Lords*

It is useful to contrast the approach on a like question taken by the House of Lords shortly before *Garcia* was decided. In *Barclays Bank PLC v O'Brien*⁸⁸ the House of Lords rejected the supposed special rule of equity. Lord Browne-Wilkinson, delivering the reasons of their Lordships, formulated a different rule. It dealt with a married woman's claim. But it did so in terms that were not confined to surety-wives. His Lordship held that a wife who became a surety for her husband had a right to challenge the transaction where there has been a legal wrong on the part of the husband and the third party had either actual or constructive notice of the facts giving rise to the equity.

Thus, a creditor would be put on inquiry by a wife's offer to act as surety for her husband's debts where the transaction was, on its face, not to the financial advantage of the wife. In transactions of such a kind there is commonly a substantial risk that, in procuring a wife to act as surety, the husband will have committed a legal or equitable wrong that entitles the wife to have the transaction set aside.⁸⁹ Lord Browne Wilkinson declared that 'the same principles are applicable to all other cases where there is an emotional relationship between cohabitants.'⁹⁰ The rule was thus formulated at a higher

⁸⁵ See, for example: G E Dal Pont and D R C Chalmers, *Equity and Trusts in Australia* (Lawbook Co, 3rd ed, 2004) 224; T Cockburn, 'Garcia – A Softly Softly Approach' (2000) 4 *Flinders Journal of Law Reform* 251, 278; Hii, above n 73, 61.

⁸⁶ S Hepburn, 'The *Yerkey* Principle and Relationships of Trust and Confidence: *Garcia v National Australia Bank*' (1997/1998) 4 *Deakin Law Review* 99, 113.

⁸⁷ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 442 [109].

⁸⁸ [1994] 1 AC 180.

⁸⁹ *Ibid* 196.

⁹⁰ *Ibid* 198.

level of generality. It was not confined to women. Nor was it confined to marriage dependence or trust.

In *Royal Bank of Scotland v Etridge (No 2)*,⁹¹ which was decided after *Garcia*, the House of Lords extended the equitable principles regarding notice still further. Lord Nicholls, who delivered the leading opinion, concluded that there can be ‘no rational cut-off point, with certain types of relationship being susceptible to the *O’Brien* principle and others not.’⁹² His Lordship said that a lender was put on notice whenever he or she was aware that the relationship between a debtor and guarantor was, as he put it, ‘non-commercial’.⁹³

In *Garcia* I questioned why the High Court of Australia should, ‘in 1998, endorse a principle expressed to apply specifically to one class of citizens only, namely, ‘married women’.’⁹⁴ I referred to a report of the Australian Law Reform Commission that had concluded that such a rule was both too narrow and too broad. It was too narrow, as ‘[i]t is not based on and it inhibits a more developed understanding of the broad features of social inequality in Australia.’⁹⁵ It was also too broad, as ‘it ignores ‘the diversity of the experiences of women in Australia’.’⁹⁶ Some women of great ability, experience and independence are married. Accordingly, I proposed a gender-neutral and relationship-inclusive approach, based on a reformulation of the principle as set out by Lord Browne-Wilkinson in *Barclays Bank Plc v O’Brien*. For me the governing rule of law focussed not on the existence of a woman with a marriage licence but on a particular cohabiting relationship ‘involving emotional dependence.’⁹⁷ Rightly or wrongly, I have always considered it important for a nation’s highest court to state such a governing principle in non discriminatory terms for the guidance of courts and other decision-makers throughout Australia subject to its rulings.

The cases since *Garcia* suggest that there has been no further attempt in Australian courts to reposition the equitable rule on a sounder footing.⁹⁸ There have been a number of cases in which the boundaries have been tested. However, perhaps unsurprisingly, intermediate courts have been unwilling to extend the *Yerkey* principle beyond the narrow boundaries of legal husband/wife relationships stated so long ago by Justice Dixon.⁹⁹ One commentator has insisted that ‘the majority of cases which have attempted to apply *Garcia* have allowed the juridical basis of the special equity to become confused’.¹⁰⁰ Another suggested that ‘it will be a brave trial judge or even appellate

⁹¹ [2002] 2 AC 773.

⁹² Ibid 814 [87].

⁹³ Ibid 814 [87]-[9].

⁹⁴ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 421.

⁹⁵ Ibid quoting Australian Law Reform Commission, *Equality Before the Law: Women’s Equality*, ALRC 69, Pt II (1994) 249.

⁹⁶ *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 421-2.

⁹⁷ See: ibid 430-1 [73] and 432 [76].

⁹⁸ See: M Brown, ‘Garcia – Surely it’s Not Just About Sex!’ (2004) 32 *Australian Business Law Review* 254, 258; T Wright, ‘The Special Wives’ Equity and the Struggle for Women’s Equality’ (2006) 31(2) *Alternative Law Journal* 66, 66.

⁹⁹ See: J Pascoe, ‘Garcia Extended – Inch by Inch’ (2004) 19(7) *Australian Banking and Finance Law Bulletin* 107; J Pascoe, ‘Garcia Extended – Inch by Inch Pt 2’ (2004) 19(8) *Australian Banking and Finance Law Bulletin* 120; J Wing, ‘Garcia: a Further Extension?’ (2004) 19(9) *Australian Banking and Finance Law Bulletin* 134.

¹⁰⁰ E Stone, ‘The Distinctiveness of Garcia’ (2002) 22 *Journal of Contract Law* 170, 181.

court judge who extends the category of case.¹⁰¹ If this is so – as it may well be – it represents an attitude to an equitable principles that I deprecate. It betrays a needless hardening of equity's arteries in Australia. It involves a departure from equity's principled concerns and purposes.

Given the uncertainty surrounding the exact scope of the principles in *Garcia*, it may be hoped that further guidance will one day be afforded by the High Court.¹⁰² Several commentators have urged adoption of the approach taken by the House of Lords in *O'Brien* and *Etridge*.¹⁰³ However, in 2004 the High Court declined an opportunity to establish a broader and more principled special equity for sureties, when it dismissed an application for special leave to appeal from the decision of the Victorian Court of Appeal in *Kranz & Anor v National Australia Bank Ltd*.¹⁰⁴ That was a case that concerned a relationship between two brothers-in-law.¹⁰⁵

C *Reluctance to Expand Fiduciary Obligations*

Other cases illustrate similar outcomes. In *Breen v Williams*¹⁰⁶ the High Court upheld a decision of the majority of the New South Wales Court of Appeal rejecting the expansion of fiduciary obligations in the context of a doctor/patient relationship.

The case was concerned with whether a patient could demand direct access to the information in the original material of the doctor's file that concerned the patient. The decision thus involved consideration of the ambit and character of fiduciary duties. The majority of the Court of Appeal had held that the relationship between a medical practitioner and patient did not, without more, create fiduciary obligations.¹⁰⁷ It was not one of the traditional, recognised categories. While some members of the High Court of Australia considered that particular aspects of the medical practitioner/patient could sometimes be fiduciary in nature,¹⁰⁸ all members of the Court held that there was no fiduciary duty on the part of a doctor to give a patient access to records created by the doctor.¹⁰⁹

In *Breen*, Justice Gummow, by then a Justice of the High Court, held that the doctor/patient relationship *might* constitute a fiduciary one. However, he concluded that the patient's claim failed in that case because the patient had not satisfied the second step of the two-fold test for determining the existence and scope of a fiduciary duty, that is, by demonstrating the extent and nature of the obligations in the particular case.¹¹⁰

¹⁰¹ Cockburn, above n 85, 278.

¹⁰² Ibid.

¹⁰³ See, for example: Brown, above n 98, 267; A Field, 'Etridge's Case: a Prescription to Revisit *Yerkey, Garcia* and the Married Woman's Equity?' (2002) 76(7) *Law Institute Journal* 51.

¹⁰⁴ (2003) 8 VR 310.

¹⁰⁵ [2004] HCA Trans 211 (18 June 2004). See: Wright, above n 98, 66.

¹⁰⁶ (1996) 186 CLR 71.

¹⁰⁷ Ibid 92 (Dawson and Toohey JJ); 106-7 (Gaudron and McHugh JJ).

¹⁰⁸ Ibid 92 (Dawson and Toohey JJ); 107 (Gaudron and McHugh JJ).

¹⁰⁹ Ibid 83 (Brennan CJ, Dawson and Toohey JJ); 108 (Gaudron and McHugh JJ); 137 (Gummow J).

¹¹⁰ Ibid 135-6.

In reaching their conclusions in *Breen* the High Court Justices rejected developments in Canada upholding expansion of the categories of fiduciary relationships.¹¹¹ The Supreme Court of Canada has added not only the category of medical practitioner and patient¹¹² but also parent and child¹¹³ and the Crown and indigenous peoples.¹¹⁴ Non-traditional relationships have also been recognised as giving rise to fiduciary obligations in the United States of America, including majority and minority shareholders¹¹⁵ and patients and psychiatrists.¹¹⁶

In the New South Wales Court of Appeal in *Breen v Williams* I dissented from the majority's decision. My reasons relied on the then recent decision of the Supreme Court of Canada in *McInerney v MacDonald*.¹¹⁷ That case had concluded that a medical practitioner and a patient were involved in a fiduciary relationship for the purpose of the law of fiduciary obligations.¹¹⁸ By way of contrast, the decision of the High Court of Australia in *Breen*, stands for the proposition that great caution has to be exercised by Australian courts in relying upon Canadian and United States authorities concerning the ambit of the extension of *per se* fiduciary relationships or the factual circumstances in any such relationships that are said to combine to impose fiduciary obligations.

The decision in *Breen* offers a further illustration of the general disinclination of Australian law to enlarge equitable obligations beyond proprietary interests into the more indeterminate field of personal rights and obligations. It upholds the principle that fiduciary obligations are proscriptive and not prescriptive.¹¹⁹ To a large extent, in Australia equity's principles increasingly appear historical: frozen in time as if committed to a time capsule, opened rarely and just as quickly slammed shut.

Dr Hepburn has described the decision in *Breen*, not to develop equitable obligations in that case to allow a patient a legal basis for a right of access to his or her medical file, as 'a particularly disappointing decision for the equitable jurisdiction.'¹²⁰ She indicated that:

With respect, there is no reason why such obligations should not be extended to provide greater protection to the changing dynamic of the doctor-patient relationship, particularly in cases where a patient is vulnerable, heavily reliant upon a doctor and in particular need of information contained within the medical file.¹²¹

She concluded that: 'It is unfortunate that the High Court did not seize upon the opportunity to develop the equitable jurisdiction in accordance with changing social relationships.'¹²²

¹¹¹ Ibid 83 (Brennan CJ); 275 (Dawson and Toohey JJ); 288-9 (Gaudron and Toohey JJ); 130-1 (Gummow J).

¹¹² *Norberg v Wynrib* [1992] 2 SCR 226.

¹¹³ *M (K) v M (H)* [1992] 3 SCR 6.

¹¹⁴ *R v Sparrow* [1990] 1 SCR 1075.

¹¹⁵ For example: *Pepper v Litton* (1939) 308 US 295; *Southern Pacific Co v Bogert* (1919) 250 US 483; *Zahn v Transamerica Corporation* (1947) 162 F 2d 36.

¹¹⁶ *MacDonald v Clinger* (1982) 446 NYS 2d 801.

¹¹⁷ [1992] 2 SCR 138.

¹¹⁸ *Breen v Williams* (1994) 35 NSWLR 522, 531, 545.

¹¹⁹ *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh).

¹²⁰ S Hepburn, '*Breen v Williams*' (1996) 20 *Melbourne University Law Review* 1201, 1210-11.

¹²¹ Ibid 1202.

¹²² Ibid.

Breen states the law that Australian courts must apply. However, it does not foreclose discussion of the majority opinion or the narrow approach that appears to lie behind it.

D *Hostility to Restitutionary Remedies*

The High Court of Australia has also displayed a deep resistance to all-embracing theories of unjust enrichment in the context of restitutionary remedies. It did this most recently in *Farah Constructions Pty Limited v Say-Dee Pty Limited*.¹²³

In the current edition of *Meagher, Gummow and Lehane Equity, Doctrines and Remedies* the editors state that 'the new challenge [to equity] has come from proselytising members of the restitutionary industry (academic division).'¹²⁴

The main proponents of a law of restitution are criticised as coming from the United Kingdom.¹²⁵

Sir Anthony Mason has explained that 'a law of restitution may be seen as a threat to equity because it may entail the submergence of the separate identity of equity in a new body of restitutionary principle and a distortion of equitable principles.'¹²⁶ Accordingly, a number of attempts have been made to defend the distinctiveness of equity as a key sub-set of binding norms in Australia and, for that reason, to fight off any attempt to reconceptualise the law in terms of remedies such as restitution.¹²⁷ Some judges have even refuted the existence of a doctrine of unjust enrichment, seeking to restrict the reach of that notion to claims at common law and to re-characterise the underlying basis of restitution law in more equitable terms, such as by reference to unconscientiousness.¹²⁸

Farah Constructions was a unanimous decision of five members of the High Court of Australia. I did not participate in the decision. It binds me as it does everyone else in Australia. It seems fair to suggest that the High Court in that case was rather antagonistic towards the introduction of restitutionary remedies, at least in relation to the unauthorised receipt of trust property in issue in those proceedings. The decision has been described as a substantial rebuff for the 'restitution industry'.¹²⁹

¹²³ (2007) 230 CLR 89. See also: *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 544-5 (Gummow J); and *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 82 ALJR 1037. In the field of contract law concerning waiver, compare *Agricultural and Rural Finance Pty Limited v Gardiner* [2008] HCA 57 [137].

¹²⁴ Preface – Fourth Edition, Meagher, Heydon and Leeming, above n 5, p xi.

¹²⁵ See, for example, writings of Peter Birks, Lord Goff of Chieveley and Gareth Jones and Andrew Burrows.

¹²⁶ A Mason 'Equity's Role in the Twentieth Century', above n 51, 6. See: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1986] AC 669, 685 (Lord Goff of Chieveley).

¹²⁷ See: C Rickett and R Grantham, 'Unjust Enrichment – Reason, Place and Content' in C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (2008) 11.

¹²⁸ R Grantham, 'The Equitable Basis of the Law of Restitution' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (2005) 349; J Mcconville and M Bagaric, 'The Yoking of Unconscionability and Unjust Enrichment in Australia' (2002) 7 *Deakin Law Review* 13.

¹²⁹ L Aitken, 'Unforgiven: Some thoughts on *Farah Constructions Pty Ltd v Say-Dee*' (2007) 29 *Australian Bar Review* 195, 209.

*Barnes v Addy*¹³⁰ concerned the liability for receipt of trust property. In that case Lord Selborne (one of the authors of the *Judicature Act* reforms) laid down the equitable principle that those who receive trust property are liable as recipients only where they have notice of the trust when they receive the property. This is generally known as the ‘first limb’ of *Barnes v Addy*. This principle was accepted by the High Court of Australia in *obiter dicta* in *Consul Development Pty Ltd v DPC Estates Pty Ltd*.¹³¹

For a number of decades the late Professor Peter Birks, Regius Professor of Civil Law at the University of Oxford (and a chief proponent of an enlarged law of restitution), advocated an alternative approach to recipient liability based on distinctive unjust enrichment principles, not only notice as such. Birks initially proposed that a claim arising out of a knowing receipt of funds the subject of a trust was always a claim lying in unjust enrichment.¹³² However, later, he later suggested a dual approach to recipient liability. He argued that, whilst recipient liability is a form of equitable wrongdoing, in some cases a plaintiff would be entitled to relief for unjust enrichment.¹³³ Under this approach to unjust enrichment, notice of the trust was not universally required. Liability was strict, subject to defences. Such an approach has been accepted in common law decisions in England involving receipt of another’s property.¹³⁴

In *Farah Constructions* the New South Wales Court of Appeal decided, as it was put, that there was no reason ‘why the proverbial bullet should not be bitten’.¹³⁵ In explaining its reasoning and conclusions, the Court followed the restitutionary approach proposed by Birks. The judges held that a constructive trust ought to be imposed on the property held by the defendants. They held that this was a consequence of liability for restitution based on the unjust enrichment of the defendants at the expense of the plaintiff.¹³⁶ Contrary to the principle expressed in the first limb of *Barnes v Addy*, the Court of Appeal concluded that such liability ought to be strict. It was subject to defences. It was not dependent on the defendants having notice of the trust.

On appeal in *Farah Constructions*, the High Court delivered a strongly-worded rebuke to the Court of Appeal. Whether the Court of Appeal was to be treated as ‘abandoning’ the notice test expressed in the first limb of *Barnes v Addy* or as recognising a ‘new avenue’ of recovery existing alongside the first limb, the High Court’s opinion rejected its use of unjust enrichment as the basis for establishing recipient liability. The Court affirmed the requirement of knowledge. It considered that the Court of Appeal’s approach had involved ‘a grave error’.¹³⁷

The Court of Appeal’s decision was also regarded as ‘unjust’ on the basis that the classification of restitutionary liability had not been clearly raised by the parties. More significantly, it was deemed to have ‘caused great confusion’ among trial judges as there had been an erroneous departure from ‘seriously considered’ *obiter dicta* of the

¹³⁰ (1874) LR 9 Ch App 244.

¹³¹ (1975) 132 CLR 373, 412. The High Court did not there clarify what ‘notice’ or ‘knowledge’ means for the purpose of imposing liability under the first limb of *Barnes v Addy*.

¹³² P Birks, ‘Persistent Problems in Misdirected Money: A Quintet’ (1993) *Lloyd’s Marine and Commercial Law Quarterly* 218, 228-9.

¹³³ P Birks and A Pretto, *Breach of Trust* (Hart Publishing, 2nd ed, 2000) 224.

¹³⁴ See for example: *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

¹³⁵ *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309, [234].

¹³⁶ *Ibid* [217].

¹³⁷ *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* (2007) 230 CLR 89, 149 [131].

High Court in its 1975 decision in *Consul Developments*. Moreover, the *Farah Constructions* reasons ended by saying that there had been no basis for a judicial attempt to introduce such a 'radical change' in the law.¹³⁸ The High Court affirmed that, in Australia, unjust enrichment depends on the existence of a 'qualifying or vitiating factor' falling into some particular category,' such as mistake, duress or illegality, none of which could be proved in *Farah Constructions*.¹³⁹

The reasons of the High Court of Australia in *Farah Constructions* quoted with approval the opinion expressed by Justice Gummow in *Roxborough v Rothmans of Pall Mall Australia Ltd* that, in a system based on case law, theory derives from judicial decisions, not the other way around.¹⁴⁰ The Court also referred to Justice Gummow's opinion that:

Unless ... unjust enrichment is seen as a concept rather than a definitive legal principle, substance and dynamism may be restricted by dogma. In turn, the dogma will tend to generate new fictions in order to retain support for its thesis. It also may distort well settled principles in other fields, including those respecting equitable doctrine and remedies, so that they answer the newly mandated order of things ... There is support in Australasian legal scholarship for considerable scepticism respecting any all-embracing theory in this field, with the treatment of the disparate as no more than species of the one newly discovered genus.¹⁴¹

Whilst historically, theory is undoubtedly derived from cases, as time goes by it is not surprising that in societies with a large body of judge-made law, later judges and scholars will attempt to reduce the wilderness of single case instances. They will endeavour to explain and expound a new principle to which the particular cases seem to be moving. Thus cases can lead to new principles. Emerging principle can then sometimes help to re-classify case decisions, and what they stand for and what underpins them.

Not unexpectedly, the High Court's reasoning in *Farah Constructions* has given rise to a considerable debate. It is not my role to cast the slightest doubt on the authority of the decision or its binding force. Nevertheless, cases of such a kind inevitably attract a lot of interest and attention, not only in the so-called academic industry. It is not therefore inappropriate for me to remark on this and to call to notice some of the main themes. Some commentators have welcomed the disapproval, at the highest judicial level, of the assumption that a strict liability unjust enrichment claim is conceptually and normatively preferable to knowledge-based liability in cases of recipient liability so as to be virtually 'foreordained and ... inevitably correct'.¹⁴² They have viewed the decision in *Farah Constructions* as 'something to be welcomed'.¹⁴³

¹³⁸ Ibid 155 [148].

¹³⁹ Ibid 156 [150].

¹⁴⁰ *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 544 [72]. Cited in *Farah Constructions Pty Limited v Say Dee Pty Ltd* (2007) 230 CLR 89, 158 [154].

¹⁴¹ *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 544-5 [74]. Cited in *Farah Constructions Pty Limited v Say Dee Pty Ltd* (2007) 230 CLR 89, 156 [151].

¹⁴² *Farah Constructions Pty Limited v Say Dee Pty Ltd* (2007) 230 CLR 89, 150 [133].

¹⁴³ P Ridge and J Dietrich, 'Equitable Third Party Liability' (2008) 124 *Law Quarterly Review* 26, 29. See also: P Ridge and J Dietrich, "'The Receipt of What?': Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment' (2007) 31 *Melbourne University Law Review* 47.

E *Criticism of Farah Constructions*

Nonetheless, commentators have regretted what they suggest was the lack of detailed analysis of the normative issues surrounding the correct scope of ‘*equitable* wrong-based liability for third parties to breach of trust or fiduciary duty.’¹⁴⁴

Central to the opinion of the High Court in *Farah Constructions* was reasoning based on decisional precedent. The Court did not indicate whether it approved of, and endorsed, the *obiter dicta* earlier stated in *Consul Development* although by inference it did so. It simply affirmed that it was incorrect for a court, lower in the Australian judicial hierarchy, not to follow it. This aspect of the decision has been said to leave the Australian law on knowing receipt in a kind of intellectual limbo.¹⁴⁵ Thus, Pauline Ridge and Joachim Dietrich assert that, in the longer term, ‘a principled and normative analysis, which builds upon precedent in an acceptable way, is required.’¹⁴⁶

One commentator has submitted that, ‘by requiring lower courts to adhere to *obiter dicta* expressed in 1975,’ the High Court has ‘swept aside several decades of legal development’. This, it is claimed, renders Australian law:

now out of step with the law as it currently stands in most other common law jurisdictions. In an era of global investment, it does not pay to stand out as a jurisdiction perceived as having less protection for trust assets and weaker responses to money laundering and similar activities.¹⁴⁷

Professor Robert Chambers argues that ‘[t]he law on those subjects is now frozen in Australia as it stood in 1975.’¹⁴⁸ Professor Chambers considers that the law on recipient liability would be enhanced if an occasion of unjust enrichment, rather than the fact of notice, were the accepted basis of legal liability.¹⁴⁹ While Professor Chambers accepts that the decision of the Court of Appeal could not be sustained on its own reasoning, given the absence of receipt of trust property in the case, he expresses the opinion that ‘[s]adly, [the Court of Appeal’s decision] was overturned with such vengeance that it is hard to imagine any Australian court exploring these issues ever again.’¹⁵⁰ The earlier fate of *Breen* and *Garcia* tends to reinforce this assessment.

In contrast to Professor Chambers, Professor Michael Bryan expresses his opinion that *Farah Constructions* will turn out not to be the last word on the issue of the basis of recipient liability of trust property and that Peter Birks’s views may yet be vindicated in Australia.¹⁵¹ Inherent in this opinion is the view that it is no longer possible in contemporary Australia, even for the High Court, to silence serious intellectual debate on important questions of legal doctrine by the language of rebuke and command. In a rational legal order, to be lasting in its operation, a judicial command must today draw its strength from demonstrated argument – with due attention to overseas authority,

¹⁴⁴ Ridge and Dietrich, ‘Equitable Third Party Liability’, above n 143, 31.

¹⁴⁵ See: R Chambers, ‘Knowing Receipt: Frozen in Australia’ (2007) 2 *Journal of Equity* 40, 41.

¹⁴⁶ Ridge and Dietrich, ‘Equitable Third Party Liability’, above n 143, 31.

¹⁴⁷ Chambers, above n 145, 41.

¹⁴⁸ *Ibid* 54.

¹⁴⁹ *Ibid* 49.

¹⁵⁰ *Ibid* 54.

¹⁵¹ M Bryan, ‘Recipient Liability under the Torrens System: Some Category Errors’ in C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (2008) 359.

scholarly writings and considerations of legal principle and legal policy. In the trinity of influences that help shape the law, legal authority is not alone enough. In the long run even a command by the High Court is not enough, of itself. Other considerations pay their proper part: especially legal principle and legal policy, rationally evaluated.¹⁵²

Professor Bryan suggests, with proper respect, that 'the High Court got *Farah [Constructions]* wrong',¹⁵³ although he rests his conclusion on different grounds. Rather than simply disagreeing about the proper basis of recipient liability, he argues that the real objection to the decision in *Farah Constructions* is that it overlooks particular elements of the law of equitable title.¹⁵⁴ Professor Bryan examines recipient liability under the Torrens system of land title and suggests that the facts in the *Farah Constructions* case had nothing to do with *Barnes v Addy*.¹⁵⁵ *Farah Constructions*, he argues, is simply the most recent in a line of Australian cases that have misunderstood claims to the recovery of specific property as *Barnes v Addy* cases.¹⁵⁶ He contends that property rights should be enforced as property rights and the enforcement of property rights should not be dressed up as equitable doctrines which serve other purposes.¹⁵⁷ I call this cornucopia of scholarly opinions to notice without seeking to evaluate them or to suggest that they throw any doubts upon the binding law stated for Australia by the High Court.

F Recipient Liability in the United Kingdom

There has been greater acceptance in the United Kingdom of the unjust enrichment approach to recipient liability, reflected both in judicial *obiter dicta* and in extra-judicial writings. Adherents to the new approach have now expanded beyond the 'heretical' Lords Diplock, Denning and Cooke. Exponents now appear to include Lord Nicholls of Birkenhead, Lord Millett, Lord Walker of Gestingthorpe and Lord Hoffman.¹⁵⁸

Commenting on an article by Lord Nicholls advocating strict liability for unlawful receipt of trust property, Mr Charles Harpum, a Law Commissioner of England and Wales at the time, stated that:

I have no doubt that, if an appropriate case were to come before the House of Lords or Privy Council, the opportunity would be taken to *rationalise the law*, given its unsatisfactory state. Furthermore, it would be very surprising if that rationalisation did

¹⁵² *Oceanic Sun Line Special Shipping Co In v Fay* (1988) 165 CLR 197, 252; *Northern Territory v Mengel* (1995) 185 CLR 307, 347.

¹⁵³ Bryan, above n 151, 359.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.* 340.

¹⁵⁶ Including: *Koorootang Nominees Pty Ltd v Australian and New Zealand Banking Group Ltd* [1998] 3 VR 16; *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) 175 FLR 286; *Macquarie Bank v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133.

¹⁵⁷ Bryan, above n 151, 341.

¹⁵⁸ *Criterion Properties Plc v Stratford UK Properties LLC* [2004] 1 WLR 1846, [4] (Lord Nicholls) (Lord Walker agreeing); *Twinsectra Ltd v Yardley* [2002] 2 AC 164 (Lord Millett); Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in W R Cornish et al (eds), *Restitution: Past, Present and Future* (1998) 231; Lord Walker, 'Dishonesty and Unconscionable Conduct in Commercial Life: Some Reflections on Accessory Liability and Knowing Receipt' (2005) 27 *Sydney Law Review* 187.

not involve the kind of *recasting of the law* according to first principles that has been advocated by Lord Nicholls.¹⁵⁹

A recent decision by Mr Justice Collins in the English High Court¹⁶⁰ has also led another commentator to suggest that a ‘momentum is building towards strict liability in equity’.¹⁶¹ Notions of ‘rationalising the law’ or ‘recasting the law’ upon these sacred subjects sends shivers down the spines of some Australian equity purists. Despair over English adherence to basic equitable categories is never far from the Antipodean critics’ minds. Darkly, defenders of doctrinal purity are heard to mutter that things equitable have gone downhill in England ever since the United Kingdom joined the European Community (now Union) and came under the baleful influence of the Europeans’ endless quest for conceptual thinking in the place of the established historical categories and decisional taxonomies of the English legal tradition.

V AUSTRALIAN ATTITUDES TO DEVELOPING EQUITY

A *Australian Caution with Theory*

A comparison of the Australian and English approaches regarding the *Yerkey* principle, the *Breen* decision and recipient liability issue dealt with in *Farah Constructions* illustrates some of the instances where there has been greater apparent flexibility in English approaches to the development of equitable doctrine than in the more rigid approach of Australian law.

In remarks made shortly before his retirement, Chief Justice Gleeson observed that ‘current Australian doctrine [regarding equity] reflects a certain caution in accepting some general theories that have been more popular elsewhere.’¹⁶² The Australian resistance to ‘certain all-embracing theories of unjust enrichment in the context that may be described for convenience as restitutionary remedies’¹⁶³ and resistance to notions of ‘fusion’ were explained by Chief Justice Gleeson as striking examples.

B *Orthodoxy and Development of Equitable Remedies*

As a general statement English courts have lately also been reluctant to ‘invent’ new equitable rights and remedies. In this sense they have ordinarily followed a course quite similar to Australian courts, although perhaps not on quite so narrow and straight a path. Underlying this reluctance is the argument that, in the current age, such developments are best left to Parliament. Concern is also expressed regarding the resulting dangers of uncertainty and open-ended judicial discretion or ‘palm tree justice’.¹⁶⁴ Sir Anthony Mason has pointed out that modern English judicial pronouncements are as replete with

¹⁵⁹ C Harpum, ‘Knowing Receipt: The Need for a New Landmark: Some Reflections’ in W R Cornish et al (eds), *Restitution: Past, Present and Future* (1998) 249 (emphasis added). Compare with D Hayton, ‘Case Comment: Lessons from Knowing Receipt Liability and Unjust Enrichment in Australia’ (2007) 21(2) *Trust Law International* 55.

¹⁶⁰ *Primlake Ltd v Matthews Associates* [2006] EWHC 1227 (Ch).

¹⁶¹ H Webb, ‘Unjust Enrichment: Strict Liability for Trust Property’ (2007) 151 *Solicitors Journal* 804, 805.

¹⁶² Gleeson, above n 55, 250.

¹⁶³ *Ibid.*

¹⁶⁴ Pearce and Stevens, above n 53, 26-7.

expressions of judicial concern about trespassing into the territory of the legislature as similar concerns expressed in the Australian cases.¹⁶⁵

In 1972 in *Cowcher v Cowcher* Mr Justice Bagnall echoed Lord Denning's sentiment that equity was not past the age of childbearing. However, he added a warning that: 'its progeny must be legitimate – by precedent out of principle. It is well that this should be so; otherwise, no lawyer could safely advise on his client's title and every quarrel would lead to a law suit.'¹⁶⁶

This warning constitutes the orthodox view concerning the development of equity in the United Kingdom.¹⁶⁷ Such a view has also proved influential in Australia. In the 1977 decision of *Allen v Snyder*, Justice Harold Glass of the New South Wales Court of Appeal administered a similar warning that:

It is essential that new rules should be related to fundamental doctrine. If the foundations of accepted doctrine be submerged under new principles, without regard to the interaction between the two, there will be high uncertainty as to the state of the law, both old and new.¹⁶⁸

VI REASONS FOR EQUITY TO GROW

A *Stability v Adaptability*

Warnings of this kind are well given. The cautions have both constitutional and doctrinal support. Nevertheless, equity, like the common law, is judge-made law. Inevitably, it advances with judicial understandings of society, society's needs and developments and the circumstances presented by the particular case. Within these constraints, equitable remedies may, in my view, be developed by courts to meet modern needs. In *Pilmer v Duke Group Limited* I said: 'Unless legislation requires a different approach, equity and equitable remedies respond to changing times, different social and economic relationships and altered community expectations.'¹⁶⁹

This is a point that I have repeated in several cases.¹⁷⁰ In truth, it is no more than a statement of the obvious so far as any body of judge-made law is concerned. Conceptually and functionally, equity is not now different in its basic character from the common law. True, it often deals with valuable and complex property interests. This feature of equity may warrant particular hesitation in finding new categories and novel classifications derived 'by precedent out of principle'. However, in *Allen v Snyder* in 1977 Justice Glass stated that it was inevitable that judge-made law, such as equity, 'would alter to meet the changing conditions of society' as '[t]hat is the way it has always evolved.'¹⁷¹ Who can seriously deny that this is the case?

¹⁶⁵ Mason, 'Equity's Role in the Twentieth Century', above n 51, 6.

¹⁶⁶ *Cowcher v Cowcher* [1972] 1 WLR 425, 430; [1972] 1 All ER 943, 948.

¹⁶⁷ LexisNexis, *Halsbury's Laws of England*, vol 16(2) Easements to Estoppel 158, fn 5.

¹⁶⁸ [1977] 2 NSWLR 685, 689.

¹⁶⁹ *Pilmer v Duke Group Limited (In Liquidation)* (2001) 207 CLR 165, 217 [136]; compare with *Harriton v Stephens* (2006) 226 CLR 52, 95 [139].

¹⁷⁰ See for example: *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 434 [80]; *Burke v LFOT Pty Ltd* (2002) 209 CLR 282, 326 [121].

¹⁷¹ [1977] 2 NSWLR 685, 689.

B *Ineffectiveness of Parliamentary Reform*

Professors Pearce and Stevens argue that the development of equitable rights and remedies is an essential part of the broader process of legal development. They explain:

The law is a coherent and dynamic whole, subject to constant re-evaluation and adjustment, sometimes cumulating in the birth of new principles and doctrines. Equity has made a tremendous contribution to this whole and the continuous process of remoulding equitable rights and remedies should be seen as an essential part of this overall process of legal development.¹⁷²

Leaving all such developments to Parliament does not work. Not to be too blunt about it, legislatures generally have not the time, the interest or the expertise to make adjustments to such detailed matters of law. The courts still have a role. Expressions of reality such as these may be uncongenial to those who see themselves as the guardians of the doctrinal purity of equity's traditional rules and remedies. But viewing their stewardship functionally (against the background of earlier developments of the common law) it seems most unlikely that equity's Australian isolationism will prevail forever over the practical dynamic of legal evolution to meet changing needs.

VII CONCLUSIONS: A TEMPERED PASSION

A *A Natural and Proper Passion*

The fact that there are differing opinions about the capacity and appropriateness of development in the doctrines of equity and the remedies that equity affords, is no reflection on the competent and hard-working judges who hold differing views in that respect. Still less do such differences constitute an adverse reflection on the scholars and teachers who express differing views.

The existence of diversity of opinion, even upon matters so specialised and esoteric as this, is simply a feature of the intellectual freedom to debate and explore our differences. With a high measure of civic freedom, comes freedom of the mind. It reaches into every nook and cranny of our law. No branch of law is so sacrosanct that it denies qualifications or postulated exceptions, excisions and new developments. So much is shown by the history of our law, stretching back, as it does, over nearly a millennium. Duty to obey exists. But, equally, so do the right and privilege to criticise and to suggest, and sometimes to effect, improvements.

In a sense the strong passions that are engendered in Australia about the development and reformulation of equitable doctrine represent a tribute brought to the table by highly knowledgeable lawyers who cherish the important, ameliorating role that equity's doctrines and its remedies have played over the centuries. Because equity is often concerned with the incidents of property rights, there is a natural and proper anxiety on the part of knowledgeable practitioners about any unthinking tinkering with long settled rules that give the shape of certainty to the important investment decisions of citizens and promise predictability to the expression and affirmation of their legal expectations.

¹⁷² Pearce and Stevens, above n 53, 28.

B *Consequences of Institutional Integration*

Nevertheless, as a body of judge-made law, it can hardly be expected that equitable doctrines and remedies in Australia, like the laws of the Medes and Persians, will be immutable: impervious to change and resistant to the impact of global social, technological and other developments. It was simpler to keep equitable doctrines pure and unchanged when they were expressed and applied by entirely separate equity courts, peopled substantially by a *cardre* of specialist legal practitioners with their own internal system of appeals. Once the *Judicature Acts* terminated equity's isolationism in Britain, it was inevitable that equity's doctrines and remedies in England's colonies would be influenced by legal developments and by thinking happening in other fields. Just as equity's doctrines profoundly influenced the early ideas of English administrative and public law,¹⁷³ so the impact of the common law, public law and later statutory law inevitably affected the perception of equitable principles by new generations of lawyers happy to integrate and reconcile those principles within what they rightly perceived as the one legal system meant to operate harmoniously.

Moreover, after the English *Judicature Acts*, appeals in equity cases were taken not to a separate Court of Chancery Appeals but to a generalist Court of Appeal and then to a generalist final court in the House of Lords, it was inevitable (and I should think beneficial) that the generalist appellate judges would bring to bear on their decisions in equity cases, reasoning that they derived from their experience in other areas of the law with which, perhaps, they were more familiar. Over time, that great engine of legal development in our tradition, reasoning by analogy, was bound to play a part in the re-expression and evolution of equitable principles. We should not be surprised that this development took place in England, and in most of the colonies where English law brought equity as part of its precious heritage.

If in Australia the process of harmonisation has taken longer, this was doubtless because of the delay (particularly in New South Wales) in adopting the principles of the *Judicature Acts* and in enacting legislative instructions to the courts, where applicable, to reconcile the great traditions of the common law and equity law.¹⁷⁴ It is not for equity lawyers, or anyone else, to defy such statutory instructions. Nor for them to set out to frustrate the whole-hearted achievement inherent in this change. Yet, to some extent, that is what has happened in Australia. Loyalty to, and appreciation for, equity has become, on occasion, an impediment to proper harmonisation and rationalisation of the whole body of the law. It is an impediment that is simply wrong in legal principle.

C *Lessons from this Review*

Loyalty and affection towards a speciality within the law, with which a practitioner or a judge may have become familiar in the golden years of youth, are understandable emotions. Equity's exceptionalism in Australia can therefore be comprehended, on a psychological and intellectual level. But there are, I suggest, a few central lessons from the review that I have attempted in this lecture.

¹⁷³ R S French, 'The Equitable Geist in the Machinery of Administrative Justice' (2003) 39 *Australian Institute of Administrative Law Forum* 1; G Thomas, *Thomas on Powers* (Sweet & Maxwell, 1998) 20-1; JJ Spigelman, 'Foundations of Administrative Law: Toward General Principles of Constitutional Law' (1999) 58 *Australian Journal of Public Administration* 3.

¹⁷⁴ Compare with *Law Reform (Law and Equity) Act 1972* (NSW) s 6.

We in Australia, as others of our legal tradition earlier, must recognise the need to discard equity's isolationism. The doctrines and remedies of equity are part of what is now a great world-wide legal tradition. Moreover, within our own jurisdiction, those doctrines and remedies must now be harmonious with other parts of the law, including statute and common law. They must be developed and adapted as befits any body of judge-made law. The problems which, in earlier centuries, equity sprang up to remedy continue to present themselves in new guises. The instance of fiduciary duties to indigenous peoples (and, perhaps, by doctors to patients) are simply illustrations of the need to retain a lawyerly capacity to keep the doctrines and remedies of equity alive and bright in the current age with its distinctive challenges and global features.

We also need to recognise candidly that equity is not beyond child-bearing. Whilst it is true that the progeny should normally be legitimate, rigidity in this regard needs to be relaxed in an age where illegitimacy of human offspring is no longer the crime or the shame it once was. There remain new tasks for equitable doctrine and remedies to address, including in harmony with the other legal rules of common and statute law that move in the same orbit. The development of *Mareva* and *Anton Piller* orders shows that innovation can occur.

The apparent antagonism to the suggested updating of old principles (as in *Breen* and *Garcia* in the High Court) reveals a hostility to evolution that we need to overcome. We can all learn from the English Church's recent apology for the insults which the purist 19th century parsons poured on Charles Darwin's head when he first propounded his theory of evolution by natural selection. As Darwin taught, living things that do not evolve have a horrible tendency to die off, sometimes quite quickly. As every lawyer knows, it is a fiction to assert that we can leave all developments in the law to Parliament. In matters of such detail, Parliament is usually uninterested. It will usually do nothing. Judge-made adaptability is part of the very genius of our law. We should cherish it and not deny its place. It conduces to just outcomes.

Nor should we over-extend the commands of obedience to the rulings of our highest courts. Both from a viewpoint of orthodox precedential doctrine and from the perspective of functional participation in legal renewal, it is simply impossible to leave all re-expressions of judge-made law to a final court. That is a formula for inaction. To exhibit our respect for equity's distinctive contribution to the law, by imposing such a straight-jacket on judicial institutions, would evince a blind infatuation that loves its object too dearly so that it kills its capacity to live freely in a new and different age.

Those Australian lawyers who love equity the most will seek to preserve and adapt the essence of its doctrines. They will listen with respect to scholars who propose new formulations. They will remain open in their minds to deriving new remedies, by analogy, based on equity's history and past creativity.

If they do this, equity's isolationism in Australia will gradually fade with the passing of the strong personalities who have been its chief advocates. The development of equity's doctrines and remedies by analogy to their essential principles will be restored. Disagreements will remain, but they will be moderated. Civility in judicial discourse will prevail. These are the dreams that I have of equity's doctrines and remedies in the future. Not the dead hand of a past, frozen and unchanging. But a living contributor to a

just and innovative legal system for the Australian people in the present and for all the years to come.