

**QUEENSLAND UNIVERSITY OF TECHNOLOGY**

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**W A LEE EQUITY LECTURE**

**EQUITY'S AUSTRALIAN ISOLATIONISM<sup>\*</sup>**

**The Hon Justice Michael Kirby AC CMG<sup>\*\*</sup>**

A VITAL SOURCE OF PRINCIPLE

It is a privilege to deliver this lecture to honour Tony Lee whom I have known for 30 years. I pay tribute to his scholarship and his teaching of the law to generations of Australian lawyers.

Like Caesar's Gaul, this lecture is divided into three parts. First, I will speak against the opinion that equity's doctrines in Australia are exclusive, isolated, closed and incapable of 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

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<sup>\*\*</sup> Justice of the High Court of Australia

will conclude with some observations on the role of the High Court of Australia and intermediate courts in deciding cases on equitable doctrine and remedies and upon the need to observe civility between courts within Australia's integrated judicature.

Strange as it may seem, there are few areas of Australian law that generate so many passions as equity.<sup>1</sup> Sir Frank Kitto, Justice of the High Court of Australia from 1950 to 1970, described equity as:<sup>2</sup>

“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”.

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".<sup>3</sup> Equity has historically been, and still is, a fruitful source of legal principle for Australian society.<sup>4</sup> The authors of the notable and opinionated

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<sup>1</sup> See, for example, A Mason, "Fusion" in S Degeling and J Edelman (eds), *Equity in Commercial Law*, Lawbook Co., Sydney, 2005, p 11.

<sup>2</sup> Foreword to the First Edition. See now RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies*, Butterworths LexisNexis, Sydney, 4<sup>th</sup> ed, 2002, p vii. (hereafter *Meagher, Gummow and Lehane*).

<sup>3</sup> F Kitto, Foreword to the First Edition, *Meagher, Gummow and Lehane*, p v.

<sup>4</sup> See M Tilbury, "Fallacy or Furphy? Fusion in a Judicature World" (2003) 26 *University of New South Wales Law Journal* 357, p 637 (hereafter Tilbury); 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

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Australian text, *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies*, attribute this fruitfulness to the fact that:<sup>5</sup>

“The fundamental notions of equity are universal applications of principle to continually recurring problems; they may develop but cannot age or wither.”

Sir Anthony Mason too has praised the enduring vitality of equity. In 1994 he commented that:<sup>6</sup>

“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.”

The vitality of equity in Australia is necessarily 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. All lawyers have responsibilities to play a part in the ongoing renewal of equity's doctrines and remedies.

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Finn (ed), *Essays in Equity*, Law Book Company, Sydney, 1985, p 242.

<sup>5</sup> Preface – Second Edition, *Meagher, Gummow and Lehane* p xv.

<sup>6</sup> A Mason, “The Place of Equity and Equitable Remedies in the Contemporary Common Law World” (1994) 110 *Law Quarterly Review* 238, p 239.

## EQUITY'S ISOLATIONISM?

*Judicature Acts and fusion?* The effect of the enactment of the *Judicature Acts 1873 – 1875*<sup>7</sup> in England, 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 an isolationist view of equity has generally prevailed.<sup>8</sup> 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”.<sup>9</sup> 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 the influential work *Meagher, Gummow and Lehane*.<sup>10</sup>

<sup>7</sup> The statutory equivalents to the *Judicature Acts* in Australia are: *Supreme Court Act 1970* (NSW), ss57-63 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 24-25.

<sup>8</sup> 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, p 65. M Tilbury, “Fallacy or Furphy? Fusion in a Judicature World” (2003) 26 *University of New South Wales Law Journal* 357, p 359; P Loughlan, “The Historical Role of the Equitable Jurisdiction” in P Parkinson (ed) *The Principles of Equity* (2<sup>nd</sup> ed, 2003, pp 21 ff.

<sup>9</sup> *Pilmer v Duke Group Limited (In Liquidation)* (2001) 207 CLR 165 at 231 [173].

<sup>10</sup> S Degeling and J Edelman, “Fusion: The Interaction of Common Law and Equity” (2004) *Australian Bar Review* 195, p 197.

The authors of that text are at constant 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:<sup>11</sup>

“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.”

Two decades ago the late John Leane challenged “those who assert that law and equity are fused” to “explain what they mean, how it happened and what follows from it”.<sup>12</sup> The current authors of the text note that Leane’s challenge “has been found, by those prepared to face up to it, to be unanswerable”.<sup>13</sup>

Professor Michael Tilbury has suggested that the most profound legacy of Meagher, Gummow and Leane’s work upon Australia’s legal imagination lies in its exposition of what they describe as the error of the

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<sup>11</sup> A Burrows, “We Do This At Common Law But That In Equity” (2002) 22 *Oxford Journal of Legal Studies* 1, p 3 (hereafter Burrows).

<sup>12</sup> J Leane, Book Review, (1987) 46 *Cambridge Law Journal* 163, p 165.

<sup>13</sup> Preface – Fourth Edition, *Meagher, Gummow and Leane* p xi. See also WMC Gummow, “Equity: Too Successful?”(2003) 77 *Australian Law Journal* 30, p 33.

“fusion fallacy”.<sup>14</sup> Thus, Meagher, Gummow and Lehane describe the “fusion fallacy” as involving:<sup>15</sup>

“[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 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.”

According to this analysis, there are two limbs to the fusion fallacy.<sup>16</sup> 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*<sup>17</sup> that an agreement of a lease is as good 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.<sup>18</sup>

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<sup>14</sup> Tilbury, p 358.

<sup>15</sup> *Meagher, Gummow and Lehane* p 54 [2-105].

<sup>16</sup> See Tilbury, pp 358ff.

<sup>17</sup> (1882) 21 Ch D 9. Cf P Sparkes, “*Walsh v Lonsdale: The Non-Fusion Fallacy*” (1988) 8 *Oxford Journal of Legal Studies* 350.

<sup>18</sup> For further examples see *Meagher, Gummow and Lehane* pp 57-74 [2-130]-[2-265].

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Illustrations of the vehemence with which the distinguished authors attack the notion of fusion include the following purple passages:<sup>19</sup>

“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.”

and:<sup>20</sup>

“[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.”

In his foreword to *Meagher, Gummow and Lehane’s Equity, Doctrines and Remedies* Sir Frank Kitto noted that the description of the fusion fallacy by the authors was “too often unthinkingly repeated”.<sup>21</sup> 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 apparently to no avail.

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<sup>19</sup> *Meagher, Gummow and Lehane* p 54 [2-105].

<sup>20</sup> *Meagher, Gummow and Lehane* p 57 [2-135].

<sup>21</sup> Foreword to the First Edition, *Meagher, Gummow and Lehane* p vii.

*The fusion debate in other common law 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”.<sup>22</sup> On the other hand Sir Frank Kitto (raised like the authors in New South Wales before any hint of statutory interference) wrote in his foreword to that the “very selection of Equity as a specific subject for study emphasises the [fusion] fallacy”.<sup>23</sup> 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.”<sup>24</sup>

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.<sup>25</sup> In *United Scientific Holdings Ltd v Burnley Borough Council* Diplock invoked Ashburner’s fluvial metaphor.<sup>26</sup> He

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<sup>22</sup> Burrows, p 2.

<sup>23</sup> Foreword to the First Edition, *Meagher, Gummow and Lehane*, p vii.

<sup>24</sup> Preface, J McGhee, *Snell’s Equity*, 31<sup>st</sup> ed, Sweet and Maxwell, London, 2005, p v. See also A Burrows, *Fusing Common Law and Equity: Remedies, Restitution and Reform*, Hochelaga Lectures 2001, Sweet & Maxwell, Hong Kong, 2002, p 3.

<sup>25</sup> JD Heydon and PL Loughlan, *Cases and Materials on Equity and Trusts*, 6<sup>th</sup> ed, Butterworths, Sydney, 2002, p 28.

<sup>26</sup> See D Browne, *Ashburner’s Principles of Equity*, 2<sup>nd</sup> ed, Butterworths, London, 1933, p 18.

stated that “the waters of the confluent streams of law and equity have surely mingled now”.<sup>27</sup> 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*”.<sup>28</sup> Meagher, Gummow and Lehane are horrified by this doctrinal barbarism. They describe it as the “low- water mark of modern English jurisprudence”<sup>29</sup>. They point out that:<sup>30</sup>

“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.”

Lord Denning can probably be described as the runner-up to Lord Diplock as chief barbarian.<sup>31</sup> In *Central London Property Trust Ltd v High Trees House Ltd* Lord Denning observed that:<sup>32</sup>

“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

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<sup>27</sup> *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 925.

<sup>28</sup> [1978] AC 904 at 924.

<sup>29</sup> Preface – Second Edition, *Meagher, Gummow and Lehane*, p xv.

<sup>30</sup> Preface – Second Edition, *Meagher, Gummow and Lehane*, p xv.

<sup>31</sup> J Martin, “Fusion, Fallacy and Confusion; A Comparative Study” (1994) *The Conveyancer and Property Lawyer* 13, p 14 (hereafter Martin).

<sup>32</sup> *Central London Property Trust Ltd v High Trees House Ltd* [1956] 1 All ER 256 at 259. See also comments in *Federal Commerce and Navigation Ltd v Molena Alpha Inc* [1978] QB 927 at 974-5; *Chief Constable of Kent v V* [1983] QB 34 at 41.

over seventy years, and the problems have to be approached in a combined sense”.

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”.<sup>33</sup> (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 return to orthodoxy in England.<sup>34</sup> She indicates that so much may 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.<sup>35</sup> Likewise, Professor Worthington suggests that most judges, practitioners and academics in the United Kingdom are committed to maintaining the “intellectual or doctrinal dualism” of equity and common law.<sup>36</sup> Francis Reynolds speculates that there may have been a more general resurgence of equity in the United Kingdom in recent times.<sup>37</sup>

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<sup>33</sup> Meagher, Gummow and Lehane, p 74 [2-275].

<sup>34</sup> Martin, p 29.

<sup>35</sup> Martin, p 29, citing *Napier and Ettrick (Lord) v Hunter* [1993] 2 WLR 42; *Tinsley v Milligan* [1993] 3 All ER 65.

<sup>36</sup> S Worthington, *Equity*, Clarendon Press, Oxford, 2003, p 18.

<sup>37</sup> F Reynolds, “Marine and other Influences on the Common Law” (2002) *Lloyd’s Maritime & Commercial Law Quarterly* 182 at 195-6.

Warming to puritan-like castigation of error, Professor Martin has pointed out that a few judges in Commonwealth countries have recently overtaken Lord Denning as the exponents of the fusion “heresy”.<sup>38</sup> In New Zealand, she suggests, the trend is 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 historical courts which, in England and later in its colonies, had first devised, nurtured and applied separate doctrines of law – such as the equitable doctrine of Chancery with its peculiar and more flexible remedies.<sup>39</sup>

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.<sup>40</sup> Of the situation in New Zealand, the present editors of *Meagher, Gummow and Lehane’s Equity, Doctrines and Remedies* remark:<sup>41</sup>

“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,

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<sup>38</sup> Martin, p 14.

<sup>39</sup> Martin, p 15.

<sup>40</sup> *Day v Mead* [1987] 2 NZLR 443 at 451; *Acquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 at 301; *Mouat v Clark Boyce* [1992] 2 NZLR 559 at 566.

<sup>41</sup> Preface – Fourth Edition, *Meagher, Gummow and Lehane’s Equity, Doctrines and Remedies*, p xi.

cause such destruction exposes the fragility of contemporary legal systems and the need for vigilant exposure and rooting out of error.”

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.<sup>42</sup>

*Other points of view in Australia:* In 2004 the New South Wales Court of Appeal was sharply divided over an issue of fusion in its decision of *Harris v Digital Pulse Pty Ltd*.<sup>43</sup> 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 reason in parallel with tort law. In other words, the court refused to accept that equity could develop and recognise a new remedy of exemplary damages.

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<sup>42</sup> Cf Alice Hogge, *God's Secret Agents*, Harper, London 2006.

<sup>43</sup> (2003) 56 NSWLR 298.

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”.<sup>44</sup> However, Justice Keith Mason, then the President of that court, made, what Dr James Edelman describes as a “compelling case” for “fusion by analogy”.<sup>45</sup>

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

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<sup>44</sup> (2003) 56 NSWLR 298 at [18] per Spigelman CJ. See also [353] – [355], [391] per Heydon JA; at [138] – [139] per Mason P.

<sup>45</sup> J Edelman, “A “Fusion Fallacy” Fallacy?” (2003) 119 *Law Quarterly Review* 375, p 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, p 67.

and, dare I say it, occasional fusion. Why should it not be so 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 as a doctrinal possibility.<sup>46</sup> 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.<sup>47</sup> Chief Justice Spigelman emerged from this encounter as a purist, obedient to the denunciation 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, past 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 indicated that:<sup>48</sup>

“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.”

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<sup>46</sup> Edelman, (2003) 119 *Law Quarterly Review* 375, p 378.

<sup>47</sup> Edelman, (2003) 119 *Law Quarterly Review* 375, p 378.

<sup>48</sup> A Mason, “Equity's Role in the Twentieth Century” (1997-8) 8 *The Kings College Law Journal* 1, p 3.

He noted that there was merit in Lord Simon of Glaisdale's prediction in *United Scientific Holdings* that:<sup>49</sup>

"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."

The opinions of the majority judges in *Harris v Digital Pulse* probably represent the orthodox 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?

### 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:<sup>50</sup>

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<sup>49</sup> A Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *The Law Quarterly Review* 238, p 240.

<sup>50</sup> R Pearce and J Stevens, *The Law of Trusts and Equitable Obligations*, 4<sup>th</sup> ed, Oxford, Oxford University Press, 2006, p 24.

“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....”

In 1879 Sir George Jessel M.R. recognised the continuing need to develop equitable principles and remedies in his reasons in *Re Hallet’s Estate*<sup>51</sup>, where 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.<sup>52</sup> Lord Denning described the formulation by Australian courts of the principle of estoppel by conduct as “the most satisfactory that [he knew]”.<sup>53</sup> Chief Justice Gleeson described the utilisation of the notion of unconscionability as a foundation for equitable relief, established in a

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<sup>51</sup> (1879) 13 Ch D 696 at 710.

<sup>52</sup> *Thompson v Palmer* (1933) 49 CLR 501; *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641. See AM Gleeson, “Australia’s contribution to the common law” (2008) 82 *Australian Law Journal* 247, p 250 (hereafter Gleeson).

<sup>53</sup> *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 QB 371.

number of cases regarding transactions where there was unconscientious use by one party of some particular disadvantage of the other, rendering them unable to make an informed assessment as to their own best interests.<sup>54</sup>

I will overcome my usual modest hesitation to mention a number of my own judicial reasons, expressing a like opinion that the categories of equity are not closed. For example, in *Pilmer v Duke Group Limited* I suggested that:<sup>55</sup>

“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.<sup>56</sup> It could scarcely be so, given that equity is itself the embodiment of judicial invention.”

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”.<sup>57</sup>

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<sup>54</sup> Gleeson, p 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.

<sup>55</sup> *Pilmer v Duke Group Limited (In Liquidation)* (2001) 207 CLR 165 at 217 [136].

<sup>56</sup> *Breen v Williams* (1994) 35 NSWLR 522 at 570 per Meagher JA; cf *Breen v Williams* (1996) 186 CLR 71 at 107 per Gaudron and McHugh JJ.

<sup>57</sup> *Pilmer v Duke Group Limited (In Liquidation)* (2001) 207 CLR 165 at 230 [170].

In *Burke v LFOT*,<sup>58</sup> 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”.<sup>59</sup> In considering whether equitable doctrine regarding contribution had advanced in the context of unequal culpability, I took into account the fact that:<sup>60</sup>

“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.”

In *ACCC v Berbatis Holdings Pty Ltd*<sup>61</sup> the High Court of Australia examined the application of section 51AA(1) of the *Trade Practices Act* 1974 (Cth). That sub-section incorporates a statutory prohibition of 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

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<sup>58</sup> (2002) 209 CLR 282.

<sup>59</sup> (2002) 209 CLR 282 at 317 [91].

<sup>60</sup> *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at 326 [121] (footnotes omitted).

<sup>61</sup> (2003) 214 CLR 51.

evolves ‘from time to time’”.<sup>62</sup> Similarly, in *Garcia v National Australia Bank Ltd*<sup>63</sup>, 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 a creative capacity.<sup>64</sup> Using the metaphor coined by Lord Denning, a question that is posed is whether equity in Australia is indeed past the age of childbearing.<sup>65</sup> Professor Tilbury has suggested that:<sup>66</sup>

“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.”

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<sup>62</sup> (2003) 214 CLR 51 at 98 [116].

<sup>63</sup> (1998) 194 CLR 395 at 434 [80].

<sup>64</sup> R Pearce and J Stevens, *The Law of Trusts and Equitable Obligations*, 4<sup>th</sup> ed, Oxford, Oxford University Press, 2006, p 24 (hereafter Pearce and Stevens).

<sup>65</sup> See R Pearce and J Stevens, *The Law of Trusts and Equitable Obligations*, 4<sup>th</sup> ed, Oxford, Oxford University Press, 2006, p 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. Cf K Mason, “Fusion: Fallacy, Future or Finished?” in S Degeling and J Edelman (eds), *Equity in Commercial Law*, Lawbook Co., Sydney, 2005, p 70; A Mason “The place of equity and equitable remedies in the contemporary common law world” (1994) 110 *Law Quarterly Review*, 247 p 239.

<sup>66</sup> M Tilbury, *Civil Remedies*, vol 1, Butterworths, Sydney, 1990, p 16 [1026].

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?

### HOSTILITY TO INVENTION AND EXPANSION

It has to be said that 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.

*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*<sup>67</sup>. Specifically, the High Court declined to accept a more modern principle. In *Garcia v National Australia Bank Ltd*<sup>68</sup> a majority of the Court affirmed the special equity that permits a married woman to contest apparent obligations under a 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 respects when she executed the suretyship agreement, accepted by the creditor without dealing directly with her.

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<sup>67</sup> (1939) 63 CLR 649 at 683.

<sup>68</sup> (1998) 194 CLR 395.

So expressed, this rule has been the subject of criticism. Some of the criticism focuses on the fact that a rule, so expressed, is inherently discriminatory, because stated in terms of particular gender and relationships rather than more conceptually.<sup>69</sup> Arguably, the principle, so expressed, presumes an inherently inferior status of married women in society.<sup>70</sup> For this reason it has been castigated as being “a product of a bygone era and no longer compatible with modern social conditions in Australia”.<sup>71</sup> Some critics describe the present rule as patronising<sup>72</sup> and “difficult to justify”.<sup>73</sup>

My reasons in *Garcia* reflected some of these sentiments. I considered that a rule, expressed as in *Yerkey v Jones*, was an

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<sup>69</sup> 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, pp 314, 326; L Aitken, “Equity, Third Party Guarantees and Wife as Guarantor: Recent English Developments” (1992) 3 *Journal of Finance Law and Practice* 261, p 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 (hereafter Williams); B Collier, “Confusion Now Hath Made This Masterpiece!: The Present Uncertainty Surrounding *Yerkey v Jones*” (1997) 25 *Australian Business Law Review* 190, pp 194-5. See also *Warburton v Whitely* (1989) NSW Conv Rep 55-453 at 58,286-7 per 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.

<sup>70</sup> S Hii, “From *Yerkey* to *Garcia*: 60 Years on and Still as Confused as Ever” (1997) 7 *Australian Property Law Journal* 47, p 48.

<sup>71</sup> B Collier, “The Rule in *Yerkey v Jones*: Fundamental Principles and Fundamental Problems” (1996) 4 *Australian Property Law Journal* 181, p 204.

<sup>72</sup> Williams, p 67.

<sup>73</sup> NC Seddon and MP Ellinghaus, *Cheshire and Fifoot’s Law of Contract*, 9<sup>th</sup> ed, Butterworths, Sydney, 2008, p 738.

“historical anachronism”,<sup>74</sup> “offensive”,<sup>75</sup> “historically and socially out of date and unfairly discriminatory”.<sup>76</sup> 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”.<sup>77</sup> 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:<sup>78</sup>

“But some things are unchanged. There is still a significant number of women in Australia in relationships which are, for many

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<sup>74</sup> (1998) 194 CLR 395 at 422.

<sup>75</sup> (1998) 194 CLR 395 at 424.

<sup>76</sup> (1998) 194 CLR 395 at 425.

<sup>77</sup> (1998) 194 CLR 395 at 403 per Gaudron, McHugh, Gummow and Hayne JJ.

<sup>78</sup> (1998) 194 CLR 395 at 403-4 per Gaudron, McHugh, Gummow and Hayne JJ.

and varied reasons, marked by disparities of economic and other power between the parties.”

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.<sup>79</sup> Rather, according to their opinion, it was “based on trust and confidence, in the ordinary sense of those words, between marriage partners”.<sup>80</sup>

The majority of the High Court recognised that the principles set out in *Yerkey v Jones* may:<sup>81</sup>

“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...”

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.

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<sup>79</sup> (1998) 194 CLR 395 at 404 per Gaudron, McHugh, Gummow and Hayne JJ.

<sup>80</sup> (1998) 194 CLR 395 at 404 per Gaudron, McHugh, Gummow and Hayne JJ.

<sup>81</sup> (1998) 194 CLR 395 at 404 per Gaudron, McHugh, Gummow and Hayne JJ.

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.<sup>82</sup> 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".<sup>83</sup>

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.<sup>84</sup> 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 rule of law, applicable to a case before them, in confined terms which 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

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<sup>82</sup> See, for example, GE Dal Pont and DRC Chalmers, *Equity and Trusts in Australia*, 3<sup>rd</sup> ed, Sydney, Lawbook Co, 2004, p 224; T Cockburn, "Garcia – A Softly Softly Approach" (2000) 4 *Flinders Journal of Law Reform* 251, p 278 (hereafter Cockburn); Hii, p 61.

<sup>83</sup> S Hepburn, "The *Yerkey* Principle and Relationships of Trust and Confidence: *Garcia v National Australia Bank*" (1997/1998) 4 *Deakin Law Review* 99, p 113.

<sup>84</sup> (1998) 194 CLR 395 at 442 [109].

rule as stated in *Yerkey v Jones*. Perhaps this was an outcome of my training 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 that faced by the particular class of married women.

*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*<sup>85</sup> 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 which 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. There is commonly a substantial risk in transactions of such a kind that, in procuring a wife to act as surety, the husband will have committed a legal or equitable

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<sup>85</sup> [1994] 1 AC 180.

wrong that entitles the wife to have the transaction set aside.<sup>86</sup> Lord Browne Wilkinson held that “the same principles are applicable to all other cases where there is an emotional relationship between cohabitees”.<sup>87</sup> The rule was thus formulated at a higher level of generality. It was not confined to women. Nor confined to marriage dependence or trust.

In *Royal Bank of Scotland v Etridge (No 2)*,<sup>88</sup> 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”.<sup>89</sup> 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”.<sup>90</sup>

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’”.<sup>91</sup> I referred to a report of the Australian Law Reform Commission that had concluded that such a rule

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<sup>86</sup> [1994] 1 AC 180 at 196.

<sup>87</sup> [1994] 1 AC 180 at 198.

<sup>88</sup> [2002] 2 AC 773.

<sup>89</sup> [2002] 2 AC 773 at 814 [87].

<sup>90</sup> [2002] 2 AC 773 at 814 [87]-[89].

<sup>91</sup> (1998) 194 CLR 395 at 421.

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”.<sup>92</sup> It was also too broad, as “it ignores ‘the diversity of the experiences of women in Australia’”.<sup>93</sup> 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 co-habiting relationship “involving emotional dependence”.<sup>94</sup> 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 subject to its rulings.

The cases since *Garcia* suggest that there has been no further attempt in Australian courts to reposition the governing equitable rule on a sounder footing.<sup>95</sup> There have been a number of cases in which the boundaries have been tested. However, intermediate courts have,

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<sup>92</sup> (1998) 194 CLR 395 at 421 quoting Australian Law Reform Commission, *Equality Before the Law: Women’s Equality*, ALRC 69, Pt II, 1994, p 249.

<sup>93</sup> (1998) 194 CLR 395 at 421-2.

<sup>94</sup> See (1998) 194 CLR 395 at 430-1 [73] and 432 [76].

<sup>95</sup> See M Brown, “Garcia – surely it’s not just about sex!” (2004) 32 *Australian Business Law Review* 254, p 258 (hereafter Brown); T Wright, “The Special Wives’ Equity and the Struggle for Women’s Equality” (2006) 31(2) *Alternative Law Journal* 66, p 66 (hereafter Wright).

perhaps unsurprisingly, been unwilling to extend the *Yerkey* principle beyond the narrow boundaries of legal husband/wife relationships stated so long ago by Justice Dixon.<sup>96</sup> 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”.<sup>97</sup> Another suggested that “it will be a brave trial judge or even appellate court judge who extends the category of case”.<sup>98</sup> If this is so – as it may well be – it represents an attitude to an equitable principle that I deprecate. It shows a needless hardening of equity’s arteries in Australia. It involves a departure from equity’s and principled concerns and purposes.

Given the uncertainty surrounding the scope of the principles in *Garcia*, it may be hoped that further guidance will one day be afforded by the High Court.<sup>99</sup> Several commentators have urged adoption of the approach taken by the House of Lords in *O’Brien* and *Etridge*.<sup>100</sup> However, in 2004 the High Court declined an opportunity to establish a broader and more principled special equity for sureties, when it

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<sup>96</sup> 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.

<sup>97</sup> E Stone, “The Distinctiveness of *Garcia*” (2002) 22 *Journal of Contract Law* 170, p 181.

<sup>98</sup> Cockburn, p 278.

<sup>99</sup> Cockburn, p 278

<sup>100</sup> See, for example, Brown, p 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.

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.*<sup>101</sup> That was a case that concerned a relationship between two brothers-in-law.<sup>102</sup>

*Reluctance to expand fiduciary obligations:* Other cases illustrate similar outcomes. In *Breen v Williams*<sup>103</sup> 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 insist on direct access to the information in the original material of the doctor's file concerning the patient. The decision 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.<sup>104</sup> 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,<sup>105</sup> all

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<sup>101</sup> (2003) 8 VR 310.

<sup>102</sup> [2004] HCA Trans 211 (18 June 2004). See Wright, p 66.

<sup>103</sup> (1996) 186 CLR 71.

<sup>104</sup> (1996) 186 CLR 71 at 92 per Dawson and Toohey JJ; at 106-7 per Gaudron and McHugh JJ.

<sup>105</sup> (1996) 186 CLR 71 at 92 per Dawson and Toohey JJ; at 107 per Gaudron and McHugh JJ.

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.<sup>106</sup>

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 as 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.<sup>107</sup>

In reaching their conclusions in *Breen* High Court Justices rejected developments in Canada upholding expansion of the categories of fiduciary relationships.<sup>108</sup> The Supreme Court of Canada has added not only the category of medical practitioner and patient<sup>109</sup> but also parent and child<sup>110</sup> and the Crown and indigenous peoples.<sup>111</sup> Non-traditional relationships have also been recognised as giving rise to

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<sup>106</sup> (1996) 186 CLR 71 at 83 per Brennan CJ; Dawson and Toohey JJ; at 108 per Gaudron and McHugh JJ; at 137 per Gummow J.

<sup>107</sup> (1996) 186 CLR 71 at 135-6.

<sup>108</sup> (1996) 186 CLR 71 at 83 per Brennan CJ; 275 per Dawson and Toohey JJ; 288-9 per Gaudron and Toohey JJ; at 130-1 per Gummow J.

<sup>109</sup> *Norberg v Wynrib* [1992] 2 SCR 226.

<sup>110</sup> *M(K) v M(H)* [1992] 3 SCR 6.

<sup>111</sup> *R v Sparrow* [1990] 1 SCR 1075.

fiduciary obligations in the United States, including majority and minority shareholders<sup>112</sup> and patients and psychiatrists.<sup>113</sup>

In the 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*.<sup>114</sup> 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.<sup>115</sup> 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.<sup>116</sup> To a large extent, in Australia

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<sup>112</sup> E.g. *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.

<sup>113</sup> *MacDonald v Clinger* (1982) 446 NYS 2d 801.

<sup>114</sup> [1992] 2 SCR 138.

<sup>115</sup> *Breen v Williams* (1994) 35 NSWLR 522 at 531, 545.

<sup>116</sup> (1996) 186 CLR 71 at 113 per Gaudron and McHugh.

equity's principles are now historical, frozen in time as if committed to a time capsule only opened rarely and just as quickly slammed shut.

Dr Hepburn has described the decision in *Breen*, not to develop equitable obligations in order to allow a patient a foundation in law for a right of access to his or her medical file, as “a particularly disappointing decision for the equitable jurisdiction”.<sup>117</sup> She indicated that:<sup>118</sup>

“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.”

She concluded that:<sup>119</sup>

“It is unfortunate that the High Court did not seize upon the opportunity to develop the equitable jurisdiction in accordance with changing social relationships.”

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

*Hostility to restitutionary remedies:* The High Court of Australia has also lately displayed a deep resistance to all-embracing theories of

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<sup>117</sup> S Hepburn, “*Breen v Williams*” (1996) 20 *Melbourne University Law Review* 1201, pp 1210-1211 (hereafter Hepburn).

<sup>118</sup> Hepburn, p 1202.

<sup>119</sup> Hepburn, p 1202.

unjust enrichment in the context of restitutionary remedies. It did this most recently in *Farah Constructions Pty Limited v Say-Dee Pty Limited*.<sup>120</sup>

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).”<sup>121</sup>

The key proponents of a law of restitution are criticised as coming from the United Kingdom.<sup>122</sup>

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”.<sup>123</sup> Accordingly, there have been a number of attempts to retain the distinctiveness of equity as a key sub-

<sup>120</sup> (2007) 230 CLR 89; See also *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 544-545 per Gummow J; and *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 82 ALJR 1037.

<sup>121</sup> Preface – Fourth Edition, *Meagher, Gummow and Lehane’s Equity, Doctrines and Remedies*, p xi.

<sup>122</sup> See, for example, writings of Peter Birks, Lord Goff of Chieveley and Gareth Jones and Andrew Burrows.

<sup>123</sup> A Mason “Equity’s Role in the Twentieth Century” (1997-8) 8 *The Kings College Law Journal* 1, p 6. See *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1986] AC 669 at 685 per Lord Goff of Chieveley.

set of binding norms in Australia and, for that reason, to fight off the attempt to reconceptualise the law in terms of remedies such as restitution.<sup>124</sup> Some judges have even refuted the existence of a doctrine of unjust enrichment, seeking to restrict the reach of that law 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.<sup>125</sup>

*Farah Constructions* was a unanimous decision of a five-member bench of the High Court of Australia. I did not participate in the determination of that appeal. 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”.<sup>126</sup>

*Barnes v Addy*,<sup>127</sup> was a leading English case concerning the liability for receipt of trust property. In that case Lord Selborne (one of

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<sup>124</sup> See C Rickett and R Grantham (eds), “Unjust Enrichment – Reason, Place and Content”, *Structure and Justification in Private Law: Essays for Peter Birks*, Hart Publishing, Portland, 2008, p 11.

<sup>125</sup> R Grantham, “The Equitable Basis of the Law of Restitution” in S Degeling and J Edelman (eds), *Equity in Commercial Law*, Lawbook Co, Sydney, 2005, p 349; J Mcconville and M Bagaric, “The Yoking of Unconscionability and Unjust Enrichment in Australia” 2002) 7 *Deakin Law Review* 13.

<sup>126</sup> L Aitken, “Unforgiven: Some thoughts on *Farah Constructions Pty Ltd v Say-Dee*” (2007) 29 *Australian Bar Review* 195, p 209.

<sup>127</sup> (1874) LR 9 Ch App 244.

the authors of the Judicature 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*.<sup>128</sup>

For a number of decades the late Professor Peter Birks, the 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.<sup>129</sup> However, later, he later suggested a dual approach to recipient liability. He argued that, while recipient liability is a form of equitable wrongdoing, in some cases a plaintiff would be entitled to relief for unjust enrichment.<sup>130</sup> Under this approach to unjust enrichment, notice of the trust was not universally required. Liability was strict, subject to defences. Such an approach

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<sup>128</sup> (1975) 132 CLR 373 at 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*.

<sup>129</sup> P Birks, “Persistent Problems in Misdirected Money: A Quintet” (1993) *Lloyd’s Marine and Commercial Law Quarterly* 218, pp 228-9.

<sup>130</sup> P Birks and A Pretto, *Breach of Trust*, 2<sup>nd</sup> ed, Hart Publishing, Oxford, 2000, p 224.

has been accepted in common law decisions in England involving receipt of another's property.<sup>131</sup>

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”.<sup>132</sup> 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. That was held to be a consequence of liability for restitution based on the unjust enrichment of the defendants at the expense of the plaintiff.<sup>133</sup> 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 upon the defendants having notice of the trust.

On appeal to the High Court in *Farah Constructions*, the Court, in a unanimous opinion, delivered a strongly-worded rebuke to the reasoning adopted by 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 which exists alongside the first limb, the High Court's opinion rejected its

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<sup>131</sup> See eg. *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

<sup>132</sup> *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 at [234].

<sup>133</sup> [2005] NSWCA 309 at [217].

use of unjust enrichment as the basis for the establishment of recipient liability. The Court affirmed the requirement of knowledge. It considered that the Court of Appeal's approach had involved "a grave error".<sup>134</sup>

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 improper departure from "seriously considered" *obiter dicta* of the High Court in its 1975 decision in *Consul Developments*. Moreover, the *Farah Constructions* reasons ended by saying that there had been no basis for any judicial attempt to introduce such a "radical change" in the law.<sup>135</sup> The 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*.<sup>136</sup>

In *Farah Constructions* the reasons of the High Court of Australia 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

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<sup>134</sup> (2007) 230 CLR 89 at 149 [131].

<sup>135</sup> (2007) 230 CLR 89 at 155 [148].

<sup>136</sup> (2007) 230 CLR 89 at 156 [150].

way around.<sup>137</sup> The Court also referred to Justice Gummow's opinion that:<sup>138</sup>

“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.”

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 sometimes help to classify case decisions and what they stand for.

Not unexpectedly, the High Court's reasoning in *Farah Constructions* has given rise to a considerable debate in Australia. It is not my role to cast the slightest doubt on the authority of the decision

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<sup>137</sup> *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 544 [72]. Cited in *Farah Constructions Pty Limited v Say Dee Pty Ltd* (2007) 230 CLR 89 at 158 [154].

<sup>138</sup> *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 544-5 [74]. Cited in *Farah Constructions Pty Limited v Say Dee Pty Ltd* (2007) 230 CLR 89 at 156 [151].

and 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 it 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”.<sup>139</sup> They have viewed the decision in *Farah Constructions* as “something to be welcomed”.<sup>140</sup>

*Criticism of Farah Constructions:* Nonetheless, other commentators have regretted what they have suggested was a 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”.<sup>141</sup>

Central to the opinion of the High Court of Australia 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*. It simply affirmed that it was

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<sup>139</sup> (2007) 230 CLR 89 at 150 [133].

<sup>140</sup> P Ridge and J Dietrich, “Equitable Third Party Liability” (2008) 124 *Law Quarterly Review* 26, p 29 (hereafter Ridge and Dietrich). 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.

<sup>141</sup> Ridge and Dietrich, p 31.

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.<sup>142</sup> 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”.<sup>143</sup>

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:<sup>144</sup>

“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.”

Professor Robert Chambers argues that “[t]he law on those subjects is now frozen in Australia as it stood in 1975”.<sup>145</sup> Chambers considers that the law on recipient liability would be enhanced if enrichment, rather than the fact of notice, were the accepted basis of legal liability.<sup>146</sup> While Professor Chambers accepts that the decision of

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<sup>142</sup> See R Chambers, “Knowing receipt: Frozen in Australia” (2007) 2 *Journal of Equity* 40, p 41 (hereafter Chambers).

<sup>143</sup> Ridge and Dietrich, p 31.

<sup>144</sup> Chambers, p 41.

<sup>145</sup> Chambers, p 54.

<sup>146</sup> Chambers, p 49.

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”.<sup>147</sup> The earlier fate of *Breen* and *Garcia* tend 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.<sup>148</sup> Inherent in this opinion is the view that it is no longer possible in contemporary, 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, 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

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<sup>147</sup> Chambers, p 54.

<sup>148</sup> 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*, Hart Publishing, Portland, 2008, p 359 (hereafter Bryan).

enough, of itself. Other considerations pay their proper part. Especially legal principle and legal policy, rationally evaluated.<sup>149</sup>

Professor Bryan suggests, with proper respect, that “the High Court got *Farah [Constructions]* wrong”<sup>150</sup>, although he says this 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.<sup>151</sup> Professor Bryan examines recipient liability under the Torrens system and suggests that the facts in the *Farah Constructions* case had nothing to do with *Barnes v Addy*.<sup>152</sup> *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.<sup>153</sup> 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.<sup>154</sup> I call this cornucopia of scholarly opinions to notice without seeking in any way to evaluate them or to suggest that

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<sup>149</sup> *Oceanic Sun Line Special Shipping Co In v Fay* (1988) 165 CLR 197 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347.

<sup>150</sup> Bryan, p 359.

<sup>151</sup> Bryan, p 359.

<sup>152</sup> Bryan, p 340.

<sup>153</sup> 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) 175FLR 286; *Macquarie Bank v Sixty-Fourth Throne Pty Ltd* [1998] 3 VR 133.

<sup>154</sup> Bryan, p 341.

they throw any doubts upon the binding law stated for Australia by the High Court.

*Recipient liability in the United Kingdom:* Clearly, 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. They now appear to include Lord Nicholls of Birkenhead, Lord Millett, Lord Walker of Gestingthorpe and Lord Hoffman.<sup>155</sup>

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:<sup>156</sup>

“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

<sup>155</sup> *Criterion Properties Plc v Stratford UK Properties LLC* [2004] 1 WLR 1846 at [4] per Lord Nicholls (Lord Walker agreeing); *Twinsectra Ltd v Yardley* [2002] 2 AC 164 per Lord Millett; Lord Nicholls, “Knowing Receipt: The Need for a New Landmark” in WR Cornish, R Nolan, J O’Sullivan and G Virgo (eds), *Restitution: Past, Present and Future*, Hart Publishing, Oxford, 1998, p 231; Lord Walker, “Dishonesty and Unconscionable Conduct in Commercial Life: Some Reflections on Accessory Liability and Knowing Receipt” (2005) 27 *Sydney Law Review* 187;

<sup>156</sup> C Harpum, “Knowing Receipt: The Need for a New Landmark: Some Reflections” in W R Cornish, R Nolan, J O’Sullivan and G Virgo (eds), *Restitution: Past, Present and Future*, Hart Publishing, Oxford, 1998, p 249 (emphasis added). Cf D Hayton, “Case Comment: Lessons from Knowing Receipt Liability and Unjust Enrichment in Australia” (2007) 21(2) *Trust Law International* 55.

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

A recent decision by Mr Justice Collins in the English High Court<sup>157</sup> has also led another commentator to suggest that a “momentum is building towards strict liability in equity”.<sup>158</sup> Notions of “rationalising the law” or “recasting the law” upon these sacred subjects sends unpleasant 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 equitable purity are heard to mutter that things equitable have gone downhill ever since the English 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.

#### AUSTRALIAN ATTITUDES TO DEVELOPING EQUITY

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

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<sup>157</sup> *Primlake Ltd v Matthews Associates* [2006] EWHC 1227 (Ch) per.

<sup>158</sup> H Webb, “Unjust enrichment: strict liability for trust property” (2007) 151 *Solicitors Journal* 804, p 805.

development of equitable doctrine than in the more rigid and isolationist environment 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”.<sup>159</sup> The Australian resistance to “certain all-embracing theories of unjust enrichment in the context that may be described for convenience as restitutionary remedies”<sup>160</sup> and resistance to notions of “fusion” were explained by Chief Justice Gleeson as striking examples.

*Birks’s taxonomy project:* How can one explain the resistance in influential Australian legal quarters to Professor Birks’s taxonomy project?<sup>161</sup> That project was interlinked with Birks’s analysis of the law of restitution. As a significant body of law, restitution is of comparably recent origin.<sup>162</sup> In effect, the emergence of a distinct law of restitution

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<sup>159</sup> Gleeson, p 250.

<sup>160</sup> Gleeson, p 250.

<sup>161</sup> See, for example, P Birks, “Definition and Division: A Meditation on *Institutes* 3.13” in P Birks (ed), *The Classification of Obligations*, Clarendon Press, Oxford, 1997, p 1. P Birks, “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26 *University of Western Australia Law Review* 1 at 8ff; P Birks, “Misnomer” in WR Cornish, R Nolan, J O’Sullivan and G Virgo (eds), *Restitution: Past, Present and Future*, Hart Publishing, Oxford, 1998, p 1; P Birks, “The Law of Restitution at the End of an Epoch” (1999) 28 *Western Australian Law Review* 13; P Birks “Annual Miegunyah Lecture: Equity, Conscience and Unjust Enrichment” (1999) 23 *Melbourne University Law Review* 1.

<sup>162</sup> R Grantham, “The Equitable Basis of the Law of Restitution” in S Degeling and J Edelman (eds), *Equity in Commercial Law*, Lawbook

requires a reconsideration of much of our previously established private law.<sup>163</sup> For critics, this is the essential vice. Yet Birks focussed much of his attention on developing a new taxonomy for the law of obligations. His efforts, at least in England, basically set the intellectual agenda for this debate.<sup>164</sup>

Birks's project considered organisational and structural issues, and the relationships between various branches of private law. As a result, private law academics were obliged to reconsider their entire field of study as an intricate system that should make sense as a whole, rather than as simply separate and often unconnected principles and decisional rules. Birks's work challenged long-standing notions about the form, substance and object of aspects of English private law. Because Australia has inherited, and applied, much of that law as its own, the debate over Birks's new taxonomy is of importance for Australian legal thinking, including by way of re-imagining the contours of the law of obligations where this could be justified, freed from the historical accidents of the old case law and ancient legal classifications.

Birks's taxonomical project developed the "map of the law" from that substantially introduced into English law by 18th-century writers,

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Co, Sydney, 2005, p 349. See American Law Institute, *Restatement of the Law of Restitution*, 1937; R Goff and G Jones, *The Law of Restitution*, Sweet & Maxwell, London, 1966.

<sup>163</sup> C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks*, Hart Publishing, Portland, 2008, pp 9-10 (hereafter Rickett and Grantham).

<sup>164</sup> Rickett and Grantham, p 9.

notably Blackstone. Birks proposed that the law of obligations could be re-divided into four “causative events”. His classification starts with a categorisation of common law obligations into contract, tort, unjust enrichment and other causative events. He then incorporates equitable obligations, so that *all* obligations can be divided into the categories of consent, wrongs, unjust enrichment and “others”, irrespective of their jurisdictional and historical origins.

According to Birks, such causative events give rise to rights which pursue goals that can be categorised as restitution, compensation, punishment and “other goals”.<sup>165</sup>

Professor Birks was critical of the idea of discretionary remedialism, that is, that in responding to a particular cause of action, courts may choose from a variety of potential remedies at their discretion.<sup>166</sup> On the other hand, some “fusionists” are positively in favour of such an approach. Birks considered that remedial discretion was damaging to the rule of law. His opinion (which is a familiar and by no means novel one) was that a relationship existed between causative

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<sup>165</sup> P Birks, *Unjust Enrichment*, 2<sup>nd</sup> ed, Oxford University Press, Oxford, 2004, p 24. Cf P Birks, “The Law of Restitution at the End of an Epoch” (1999) 28 *Western Australian Law Review* 13, 17 and P Birks, “The Law of Unjust Enrichment: A Millennial Resolution” (1999) *Singapore Journal of Legal Studies* 318, p 322, in which Birks also includes “perfection” as a goal.

<sup>166</sup> See, for example, P Birks, “Three Kinds of Objections to Discretionary Remedialism” (2000) 29 *Western Australian Law Review* 1; P Birks, “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26 *University of Western Australia Law Review* 1; P Birks, “The Law of Restitution at the End of an Epoch” (1999) 28 *Western Australian Law Review* 13.

events and remedies, whereby particular causative events give rise to concomitant, defined remedies. For Birks, as for others, the tyranny of judicial discretions remains a tyranny notwithstanding the earnest and dutiful decision-makers empowered to deploy the discretions.

A further interesting aspect of Birks's taxonomy project was his desire to eliminate the particular forms of "remedy" from the analytical terminology of the law.<sup>167</sup> Birks argued that, in legal vocabulary, the "slippery"<sup>168</sup> term "remedy" is used in a range of senses, usually to describe the law's response to the events that generate liability. Such responses may also reflect "rights". Birks preferred the use of the term "right" instead of "remedy". The description of such responses as "remedies" implied that the law was solely responsive to events that are "wrongs". However, events that do not entail some sort of wrong can also sometimes give rise to legal liability.

Unsurprisingly, given its extremely broad sweep and its challenge to long-standing legal thinking, Birks's taxonomic project has been hotly contested.<sup>169</sup> The basic assumption underlying such a reclassification,

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<sup>167</sup> P Birks, "Rights, Wrongs, and Remedies" (2000) 20 *Oxford Journal of Legal Studies* 1. See also M Tilbury, "Remedy as Right" in C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks*, Hart Publishing, Portland, 2008, p 421.

<sup>168</sup> P Birks, "Three Kinds of Objections to Discretionary Remedialism" (2000) 29 *Western Australian Law Review* 1, p 1.

<sup>169</sup> Rickett and Grantham, p 9. For various criticisms see, for example, D Wright, "Wrong and Remedy: A Sticky Relationship" (2001) *Singapore Journal of Legal Studies* 300; M Bryan, Review of WR Cornish, R Nolan, J O'Sullivan and G Virgo (eds), *Restitution: Past, Present and Future*, Hart Publishing, Oxford, 1998 in (1999) 21 *Adelaide Law Review* 151, p 154; G Samuel, "English Private Law:

that the law of obligations is capable of systematic and internally coherent organisation, has been disputed.<sup>170</sup> One commentator, for example, indicates that Birks's "hard and fast" taxonomy is "doomed to failure".<sup>171</sup> Professors Rickett and Grantham conclude that "only time and further debate will tell whether or not the Birksian taxonomy was ultimately correct".<sup>172</sup> Nevertheless, even the critics, operating in the environment of academic life, generally acknowledge the legitimacy of Birks's questioning; the force of some of his criticisms of the present law; the power of his intellect; and the fact that "the real and lasting value of the Birksian taxonomy lies in the attention it has brought to issues of structure and organization in [the] common law".<sup>173</sup>

Birks's work has been challenged at the more specific level of where and how the taxonomy he adopts draws the boundaries between different areas of private law.<sup>174</sup> Debate is particularly fierce in two fields. The first relates to the relationship between property law and unjust enrichment. The second concerns the place of equity given the clearly fusionist consequences of Birks's taxonomy.

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Old and New Thinking in the Taxonomy Debate" (2004) 24 *Oxford Journal of Legal Studies* 335; J Dietrich, "What is "Lawyering"? The Challenge of Taxonomy" (2006) 65 *Cambridge Law Journal* 549.

<sup>170</sup> Rickett and Grantham, p 9.

<sup>171</sup> D Wright, "Wrong and Remedy: A Sticky Relationship" (2001) *Singapore Journal of Legal Studies* 300, p 323.

<sup>172</sup> Rickett and Grantham, p 9.

<sup>173</sup> Rickett and Grantham, p 9.

<sup>174</sup> Rickett and Grantham, p 10 (Footnotes omitted)

Ultimately, Professor Birks's taxonomy favouring unjust enrichment appears to have no place for a category called "equity". For Birks, equity is simply an historical development that is now to be shed. It is not a holy grail to be preserved, worshipped and sustained unaltered by lawyers at all costs. As Grantham and Rickett observe:<sup>175</sup>

"Particularly in Australia, where equity survived as a separate jurisdiction longer than anywhere else in the common law world, the commitment to the preservation of equity as a discrete body of law runs very deep and at times has produced a vitriolic rejection not only of Birks's taxonomy, but also of a law of unjust enrichment."

The decision of the High Court of Australia in *Farah Constructions* is apparently one such example of this rejection.

Birks has been described as "the leading modern fusionist".<sup>176</sup> For fusionists, Birks's taxonomical work presents "a model for principled decision-making in a system in which the administration of common law and equity [are] combined".<sup>177</sup> But for the many equity lawyers in Australia (including some who have become judges) Birks presents at once an emotional challenge; an intellectual call to an end game they dread; and a new taxonomy that threatens to deal their beloved

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<sup>175</sup> Rickett and Grantham, p 11.

<sup>176</sup> J Edelman and S Degeling, "Fusion: The interaction of common law and equity" (2004) 25 *Australian Bar Review* 195, p 201(hereafter Edelman and Degeling).

<sup>177</sup> Edelman and Degeling, p 202.

classifications (or some of them) out of the game altogether. For such lawyers, this is intolerable. Hence the passion and vehemence of the debates.

Yet, in the long run, does the greater good of the law owe equity lawyers, or anyone else, a living? In a fast-changing global legal, technological and social environment, are any historical categories (even those as important as the doctrines of equity) completely immune from reconfiguration?

*Equity – beyond childbearing?:* A discussion of attitudes towards the development of equity's doctrines and remedies in the United Kingdom would be incomplete without a further reference to Lord Denning MR, the most forceful exponent of the creativity of equity doctrine in the latter part of the 20th century.<sup>178</sup>

In 1975, in *Eves v Eves*,<sup>179</sup> Lord Denning stated quite bluntly that “[e]quity is not past the age of child bearing”. Meagher, Gummow and Lehane are highly critical of this opinion. They suggest that, throughout his long judicial career, Lord Denning “engaged in” what they call a “manufacture of novel equitable doctrines designed to further his attitude

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<sup>178</sup> See R Pearce and J Stevens, *The Law of Trusts and Equitable Obligations*, 4<sup>th</sup> ed, Oxford, Oxford University Press, 2006, p 25 (hereafter Pearce and Stevens). and *Halsbury's Laws of England*, 4<sup>th</sup> ed reissue, vol 16(2) “Easements to Estoppel”, LexisNexis UK, London, 2003, p 158, fn 5.

<sup>179</sup> [1975] 3 All ER 768 at 771; [1975]1 WLR 1338 at 1341 (CA).

to the merits of particular cases”.<sup>180</sup> Lord Denning is accused of utilising the creative features of equity “to justify new rights and remedies to meet social needs and perceived injustices”.<sup>181</sup> Lord Denning’s alleged “inventions” include his idea that mere licensees have equitable estates in land,<sup>182</sup> a right to work exists which is protected in equity.<sup>183</sup> The critics point out (with much apparent relief) that many of Lord Denning’s inventions have been rejected by other courts.

For example, Lord Denning attempted to introduce an equitable interest, enforceable against third parties, for deserted wives, so as to permit a woman abandoned by her husband to remain in occupation of their matrimonial home.<sup>184</sup> It is true that such an interest was initially rejected by the House of Lords.<sup>185</sup> However, not all that long after the doctrines of resulting and constructive trusts were extended by the House of Lords to provide proprietary entitlements to shared property in the context of married and cohabiting couples.<sup>186</sup> Later still, the United

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<sup>180</sup> *Meagher, Gummow and Lehane’s Equity, Doctrines and Remedies*, p 87 [3-030].

<sup>181</sup> Pearce and Stevens, p 25.

<sup>182</sup> *Errington v Errington* [1952] 1 KB 290; [1952] 1 All ER 149; see also *Chandler v Kerley* [1978] 2 All ER 942; [1978] 1 WLR 693. Rejected by Court of Appeal in *Ashburn Anstalt v Arnold* [1989] Ch 1.

<sup>183</sup> *Nagle v Feilden* [1966] 2 QB 633; [1966] 1 All ER 689.

<sup>184</sup> *Bendall v McWhirter* [1952] 2 QB 466; [1952] 1 All ER 1307.

<sup>185</sup> *National Provincial Bank v Ainsworth* [1965] AC 1175.

<sup>186</sup> *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886.

Kingdom Parliament enacted a statutory right permitting spouses to remain in occupation of their matrimonial home.<sup>187</sup>

Another relatively recent invention was the Mareva injunction<sup>188</sup> and the Anton Piller order.<sup>189</sup> Lord Denning was instrumental in the creation of these distinctive injunctive orders. Provocatively, in the face of his sceptics and critics, he described them as “the greatest piece of judicial law reform in my time”.<sup>190</sup> And indeed, these remedies have been widely accepted. They have been accepted by courts in Australia and elsewhere in the English-speaking world.<sup>191</sup>

Utility can therefore sometimes trump suspected heresy and sustained denunciation by equity’s traditionalists. Such orders prevent a

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<sup>187</sup> *Matrimonial Homes Act* 1967 (UK) subsequently amended and later replaced by the *Matrimonial Homes Act* 1983.

<sup>188</sup> See *Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282; [1975] 1 WLR 1093 and *Mareva Compania Naviera SA v International Bulk Carriers SA* [1980] 1 All ER 213. See also *Supreme Court Act* 1981 (UK), s 37(3) and *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 482-483 [142].

<sup>189</sup> See *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55; [1976] 1 All ER 779.

<sup>190</sup> A Denning, *The Due Process of Law*, Butterworths, London, 1980, p 134; A Denning, *The Closing Chapter*, Butterworths, London, 1983, p 225.

<sup>191</sup> For Mareva injunctions see *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380; *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435. For Anton Piller orders see, for example, *Long v Specifier Publications Pty Ltd* (1998) 44 NSWLR 545; *Warman International Ltd v Envirotech Australia Pty Ltd* (1986) 11 FCR 478; 67 ALR 253; 6 IPR 578; [1986] AIPC 90-314; [1986] ATPR 40-714.

defendant from disposing of assets to avoid meeting a potential court judgment against that person's interests, and to prevent a defendant destroying material evidence. Novel such orders may have been. Challenging to historical taxonomies they undoubtedly were. Yet greatly valuable they have proved in advancing and protecting just and lawful outcomes to cases before the courts. Abolishing such remedies simply because they were new or ahistorical would now be completely intolerable. It will not happen. Occasionally, it seems, even equity's purists must adapt.

Particularly relevant to the issue of whether equity is still capable of producing new doctrines and remedies was Lord Denning's attempt to introduce a "new model" constructive trust, based upon United States restitutionary principles. Under this proposed innovation, equity would have been entitled to formulate and impose a trust "whenever justice and good conscience" demanded it.<sup>192</sup> At first, this trust was comprehensively rejected by the English courts.<sup>193</sup> The key objection was the inherent uncertainty of the notion, that would allegedly render it inconsistent with orthodox equitable principles.<sup>194</sup>

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<sup>192</sup> *Hussey v Palmer* [1972] 1 WLR 1286 at 1290; [1972] 3 All ER 744 at 747.

<sup>193</sup> See, for example, *Burns v Burns* [1984] Ch 317; *Grant v Edwards* [1986] Ch 638.

<sup>194</sup> See, for example, *Grant v Edwards* [1986] Ch 638 (CA).

Nevertheless, in the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,<sup>195</sup> Lord Browne-Wilkinson indicated that a “remedial constructive trust”, which had features similar to the new model constructive trust, could possibly be adopted into English law in the future.<sup>196</sup> The Court of Appeal rejected any suggestion that the remedial constructive trust should be adopted.<sup>197</sup> Despite this, Pearce and Stevens have maintained that “the willingness of Lord Browne-Wilkinson to anticipate the ability of equity to incorporate such a remedy into English law is a strong reminder that equity’s potential for childbearing has not yet passed”.<sup>198</sup> However, in the fourth edition of *Halsbury’s Laws of England*, the editor wrote that “[i]t is doubtful whether it is any longer open to equity to invent new principles”.<sup>199</sup> No convincing authority was cited to support such a sweeping assertion. Perhaps its writer had spent a holiday in Australia.

While Lord Denning’s “new model” constructive trust was at first rejected by Australian courts,<sup>200</sup> those courts have now adopted a remedial constructive trust for Australia.<sup>201</sup> Sir Anthony Mason indicates

<sup>195</sup> [1996] 2 All ER 961.

<sup>196</sup> [1996] 2 All ER 961 at 999.

<sup>197</sup> See *Re Polly Peck International plc (in administration) (No 2)* [1998] 3 All ER 812 (CA).

<sup>198</sup> Pearce and Stevens, p 31.

<sup>199</sup> *Halsbury’s Laws of England*, 4<sup>th</sup> ed reissue, vol 16(2) “Easements to Estoppel”, LexisNexis UK, London, 2003, p 158 [405].

<sup>200</sup> *Muschinski v Dodds* (1985) 160 CLR 583 at 615 per Deane J; *Allen v Snyder* [1977] 2 NSWLR 685 at 701 per Samuels JA.

<sup>201</sup> See *Baumgartner v Baumgartner* (1987) 164 CLR 137.

that “some may consider that [Lord Denning’s] model was a shorthand version of the constructive trust which we have recognised”, whilst acknowledging his view that Australia has not so far accepted the “new model” constructive trust with all the elements of Denning’s flexibility and concomitant uncertainty.<sup>202</sup>

*Orthodoxy and development of equitable remedies:* There can be no doubt that English courts are generally reluctant to “invent” new equitable rights and remedies. In this sense they too have generally followed a course quite similar to Australian courts, although perhaps not 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”.<sup>203</sup> Sir Anthony Mason has pointed out that modern English judicial pronouncements are as replete with expressions of judicial concern about trespassing into the territory of the legislature as similar concerns expressed in Australian cases.<sup>204</sup>

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<sup>202</sup> A Mason, “The Place of Equity and Equitable Remedies in the Contemporary Common Law World” (1994) 110 *Law Quarterly Review* 238, pp 249-250. Cf R Pearce and J Stevens, *The Law of Trusts and Equitable Obligations*, 4<sup>th</sup> ed, Oxford University Press, Oxford, 2006, pp 287.

<sup>203</sup> R Pearce and J Stevens, *The Law of Trusts and Equitable Obligations*, 4<sup>th</sup> ed, Oxford University Press, Oxford, 2006, pp 26-7.

<sup>204</sup> A Mason, “Equity’s Role in the Twentieth Century” (1997-8) 8 *The Kings College Law Journal* 1, p 6.

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:<sup>205</sup>

"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."

This warning represents the orthodox view concerning the development of equity in the United Kingdom.<sup>206</sup> The view that it expresses 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:<sup>207</sup>

"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."

### REASONS FOR EQUITY TO GROW

Such warnings are well given. The cautions have both a constitutional and doctrinal support. Nevertheless, equity, like the

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<sup>205</sup> *Cowcher v Cowcher* [1972] 1 WLR 425 at 430; [1972] 1 All ER 943 at 948.

<sup>206</sup> *Halsbury's Laws of England, Halsbury's Laws of England*, 4<sup>th</sup> ed reissue, vol 16(2) "Easements to Estoppel", LexisNexis UK, London, 2003, p 158, fn 5.

<sup>207</sup> [1977] 2 NSWLR 685 at 689.

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:<sup>208</sup>

“Unless legislation requires a different approach, equity and equitable remedies respond to changing times, different social and economic relationships and altered community expectations.”

This is a point that I have repeated in a number of cases.<sup>209</sup> 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. 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”.<sup>210</sup> Who can seriously deny that this is the case?

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<sup>208</sup> *Pilmer v Duke Group Limited (In Liquidation)* (2001) 207 CLR 165 at 217 [136]; cf *Harriton v Stephens* (2006) 226 CLR 52 at 95 [139].

<sup>209</sup> See eg. *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 434 [80]; *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at 326 [121].

<sup>210</sup> [1977] 2 NSWLR 685 at 689.

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:<sup>211</sup>

“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.”

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.

#### DOCTRINE AND INTERMEDIATE APPELLATE COURTS

To ensure that equitable doctrines evolve to meet new and modern needs intermediate appellate courts in Australia, as courts elsewhere, have to play their proper part in contributing to such developments. The role of intermediate appellate courts in the

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<sup>211</sup> Pearce and Stevens, p 28.

development of the law has been an issue that has arisen in a number of Australian cases. For more than a decade I presided in an intermediate court within the Australian judicial hierarchy. Now for nearly 13 years I have participated in the High Court. These experiences have taught me the important, complementary yet sometimes different roles that such courts fulfil, and are expected to play, in contributing to the living law.

In *Farah Constructions* the High Court's unanimous opinion stated that it had been inappropriate for the intermediate appellate court to attempt to develop the law "in the face of long-established [English] authority and seriously considered *dicta* of a majority of this Court".<sup>212</sup> Intermediate appellate courts were warned not to "depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation [or non-statutory law]...unless they are convinced that the interpretation is plainly wrong".<sup>213</sup> In response to these observations Professor Robert Chambers suggested that the stated instruction was "of a most unusual kind" because it did "not tell lower courts how the law should develop, but only that they are not allowed to participate in that development".<sup>214</sup>

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<sup>212</sup> (2007) 230 CLR 89 at 151 [134].

<sup>213</sup> (2007) 230 CLR 89 at 151-2 [135].

<sup>214</sup> R Chambers, "Knowing receipt: Frozen in Australia" (2007) 2 *Journal of Equity* 40, p 54.

Of the High Court decision in *Farah Constructions*, Justice Robert French, then a Judge of the Federal Court of Australia, now newly elevated as the Chief Justice of Australia, remarked that:<sup>215</sup>

“It follows, so it seems, at least on this High Court’s watch, that if, for historical reasons, there is an absence of coherent or satisfactory principle or policy explaining and informing a particular area of the common law, it may be a hazardous exercise for intermediate appellate and trial courts, to supply that absence.”

Associate Professor Lee Aitken likewise concluded that the High Court instruction on this issue in *Farah Constructions* presented a “large jurisprudential problem of the ‘judicial time-warp’”.<sup>216</sup> He stated that:<sup>217</sup>

“The tectonic plates of the law shift, and influences from the courts and academic writers of other countries begin to percolate amongst the cognoscenti. But the ... ‘filtering’ mechanism which is the Common Law does not throw up an adequate vehicle for a reappraisal of a topic upon which the Supreme Tribunal might have spoken some 20, 30 or 50 years ago ... Hence the temptation to which the Court of Appeal is always exposed to seize the opportunity and remould the law.”

Aitken further warned that “at the level of the highest appellate court the distinction between *ratio* and *dicta* may well disappear to vanishing point”.<sup>218</sup>

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<sup>215</sup> RS French, “Dolores Umbridge and policy as legal magic” (2008) 82 *Australian Law Journal* 322, p 324.

<sup>216</sup> L Aitken, “Unforgiven: Some thoughts on *Farah Constructions Pty Ltd v Say-Dee*” (2007) 29 *Australian Bar Review* 195, p 196 (hereafter Aitken).

<sup>217</sup> Aitken, p 196.

<sup>218</sup> Aitken, p 197. See comment of Young CJ in Eq. book review D Ong *Trust Laws of Australia* (2008) 82 ALJ 349.

The approach of the High Court to the role of intermediate courts stated in *Farah Constructions* can be contrasted with the encouragement that was given by the Court, in Sir Anthony Mason's time, in the 1990 decision in *Nguyen v Nguyen*.<sup>219</sup> There, the High Court clearly recognised the role that the intermediate appellate courts must play in the development of Australian decisional law. Given that appeals to the High Court are now uniformly only by special leave (or in some cases leave) and given that there is no legislation that authorises "leap-frog" appeals to by-pass intermediate courts of appeal (as in the United Kingdom), the High Court said in *Nguyen* that:<sup>220</sup>

"[I]t would seem inappropriate that the appeal courts of the Supreme Courts and of the Federal Court should regard themselves as strictly bound by their own previous decisions. In cases where an appeal is not available or is not taken to this court, rigid adherence to precedent is likely on occasions to perpetuate error without, as experience has shown, significantly increasing the corresponding advantage of certainty."

In *Garcia* the New South Wales Court of Appeal had sought to restate for new times and social circumstances the rule in *Yerkey v Jones* whilst remaining faithful to the central purpose and tenets of that decision. Its restatement was criticised by the majority in the High Court. However, in my reasons in *Garcia* I applied the approach adopted in *Nguyen*. I stated that:<sup>221</sup>

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<sup>219</sup> (1990) 169 CLR 245.

<sup>220</sup> (1990) 169 CLR 245 at 269-270 per Dawson, Toohey and McHugh JJ; Brennan J and Deane J agreeing at 250 and 251.

<sup>221</sup> (1998) 194 CLR 395 at 418 [59].

“While Courts of Appeal and Full Courts throughout Australia may be expected to pay close attention to the opinions on legal principle of individual justices of [the High Court], particularly where they are part of a majority on a given issue, those courts are not bound in law by such observations or by obiter dicta or analysis that is not essential to the holding of the court sustaining its orders. We should not seek to impose a precedential straight-jacket at a time when, because of social and other changes, refinement and development of legal principle is often more important than it was in the past.”

The plurality joint reasons in *Garcia* emphasised that “it is for [the High Court] alone to determine whether one of its previous decisions is to be departed from or overruled”.<sup>222</sup>

The High Court’s divided views on the role of intermediate appellate courts are reflected in those courts themselves, as in *Harris v Digital Pulse*. In that case Justice Mason, President of the Court of Appeal, citing *Nguyen*, maintained that:<sup>223</sup>

“[I]t is (within the constraints of the judicial method) open for an intermediate appellate court to recognise the legitimacy of a novel step in legal development, so long as it is not foreclosed by High Court authority”.

On the other hand, Justice Heydon, then a judge of the Court of Appeal, indicated that what individual judges did in the constitutional and forensic conditions in 1879, when *Re Hallet’s Estate* was decided, “is not

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<sup>222</sup> (1998) 194 CLR 395 at 403 [17] per Gaudron, McHugh, Gummow and Hayne JJ.

<sup>223</sup> (2003) 56 NSWLR 298 at 340 [218].

a sound guide to what modern Australian courts, at least at levels below the High Court, can do”<sup>224</sup> in the development of equity. Justice Heydon stated:<sup>225</sup>

“For courts below the High Court to act in the manner of the single judges sitting in Chancery who made modern equity is to invite the spread of a wilderness of single instances, a proliferation of discordant and idiosyncratic opinions, and ultimately an anarchic “system” operating according to the forms, but not the realities, of law.”

*Application of narrow view:* At least in recent times, until the edicts of *Garcia* and *Farah Constructions*, the view that intermediate appellate courts in Australia had a substantive and important role in developing the law was acknowledged and applied in a number of cases. Thus, it was applied frequently by me in my earlier judicial life.

In *Halabi v Westpac Banking Corporation*, a case decided before *Nguyen v Nguyen*, the members of the New South Wales Court of Appeal, including myself, discussed at some length the authority of an intermediate appellate court to declare obsolete a legal principle whose basis in social circumstances has disappeared and whose function could be subsumed in a later, more general, principle.<sup>226</sup> Justice McHugh and I considered that the intermediate court was permitted to declare that the felony-tort rule was no longer the law of New South Wales, being

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<sup>224</sup> (2003) 56 NSWLR 298 at 419 [457] per Heydon JA.

<sup>225</sup> (2003) 56 NSWLR 298 at 419 [458].

<sup>226</sup> (1989) 17 NSWLR 26.

superseded by, and re-expressed in, the more general discretion by then available to the courts, recognised by the High Court of Australia, to stay a civil action against a person who faces outstanding criminal proceedings in respect of the same matter.<sup>227</sup>

After *Garcia*, and especially since *Farah Constructions*, there is obviously a shrinkage in the intermediate courts' self image. Occasionally, the former rule, as stated in *Nguyen v Nguyen*, has been given effect. Thus the New South Wales Court of Appeal applied that view in *Tzaidas v Child*.<sup>228</sup> The Court held that its earlier decision in *FAI General Insurance Co Ltd v Jarvis*,<sup>229</sup> which had held that section 54 of the *Insurance Contracts Act 1984* (Cth) was irrelevant to the granting of leave to commence a proceeding against the insurer of a hospital under section 6(4) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), should be reconsidered and not followed. Among the reasons given for not following the decision was the fact that "the pressures on the High Court increase the need for this court to reconsider the decision and redirect the path of the law".<sup>230</sup>

However, in Western Australia, courts had taken a more restrictive approach towards the role of intermediate appellate courts in the

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<sup>227</sup> (1989) 17 NSWLR 26 at 39 per Kirby P; at 51 per McHugh JA.

<sup>228</sup> (2004) 208 ALR 651; (2004) 13 ANZ Ins Cas 61-617; [2004] NSWCA 252.

<sup>229</sup> (1999) 46 NSWLR 1.

<sup>230</sup> (2004) 208 ALR 651 at 659 [34]; (2004) 13 ANZ Ins Cas 61-617 at 77,475; [2004] NSWCA 252 per Giles JA.

development of law<sup>231</sup> – a point noted by the High Court in *Nguyen v Nguyen*.<sup>232</sup> Even so, *Nguyen v Nguyen* was applied in Western Australia, at least before *Garcia* and *Farah Constructions*. In *Archer v Howell*,<sup>233</sup> Chief Justice Malcolm of Western Australia indicated that, whether the view expressed in *Transport Trading* was still binding was “at least doubtful”.<sup>234</sup> Accordingly Chief Justice Malcolm favoured overturning a prior decision of his court in *Hoffman v Musk*,<sup>235</sup> concerning the interpretation of a provision of the *Legal Practitioners Act* 1893 (WA). Later, in *Craig v Troy*<sup>236</sup> Chief Justice Malcolm declined to follow a majority decision of the Full Court of the Supreme Court of Western Australia in *Arthur Young v WA Chip & Pulp Co*,<sup>237</sup> preferring the dissenting reasons in that case of Chief Justice Burt regarding damages for negligent advice provided by accountants.<sup>238</sup>

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<sup>231</sup> *Transport Trading & Agency Co (WA) Ltd v Smith* (1906) 8 WALR 33.

<sup>232</sup> (1990) 169 CLR 245 at 269-270 per Dawson, Toohey and McHugh JJ.

<sup>233</sup> (1992) 7 WAR 33.

<sup>234</sup> (1992) 7 WAR 33 at 45.

<sup>235</sup> Unreported, Supreme Court, WA, Full Court, Library No 8325, 20 June 1990.

<sup>236</sup> (1997) 16 WAR 96.

<sup>237</sup> [1989] WAR 100.

<sup>238</sup> Further cases which have applied this aspect of the decision in *Nguyen v Nguyen* include *Avco Financial Services Ltd v Abschinski* [1994] 2 VR 659; [1994] ASC 56-256; *Schwerin v City of Sale* [1997] 2 VR 219 at 231; *Mai* (1992) 26 NSWLR 371 at 380-1; 60 ACrimR 49 at 58; *Moran* (1991) 52 ACrimR 440 at 442; *R v Salih* (2005) 160 ACrimR 310; *Re Shire of Swan; Ex parte Saracen Properties Pty Ltd* (1999) 105 LGERA 343; [1999] WASCA 135.

*The High Court cannot develop the law alone:* My view on this topic has never changed. It remains important for Australia's intermediate appellate courts to continue to play a proper and active role in the development of Australia's legal doctrines, including those of equity. The objective fact is that the High Court is not able to undertake that task alone.

Over the past 20 years the High Court has handed down fully reasoned decisions in an average of 66 cases each year. In some years, there were as few as 42 cases decided (1996). The highest number was 81 cases in 2005. *Farah Constructions* marked the first time in 30 years in which the High Court had examined, and sought to clarify, the liability of third parties under equitable principles governing breach of trust or fiduciary duty.<sup>239</sup> This is reason enough why intermediate appellate courts in Australia should not be limited by a constricting precedential rule extending beyond the application of the binding *ratio decidendi* of a High Court decision. As I was taught the law of binding precedent, it never extended into obedience towards *obiter dicta* of the High Court. As I explained in *Garcia*:<sup>240</sup>

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<sup>239</sup> Ridge and Dietrich, p 26.

<sup>240</sup> At (1998) 194 CLR 395 at 418 [58]. See also my comments in M Kirby, "Judicial Activism" (1997) 27 *University of Western Australia Law Review* 1, p 17; M Kirby, "Sir Anthony Mason Lecture 1996: AF Mason – From *Trigwell* to *Teoh*" (1996) 20 *Melbourne University Law Review* 1087, p 1096.

“Given the relatively small number of cases about the general law which this court can accept, it would be unreasonable and undesirable to extend the ambit of dutiful obedience beyond the holdings of the court to everything said by majority justices in every decision.”

While he was a judge in the New South Wales Court of Appeal, Justice Michael McHugh (who was later a party to the plurality reasons in *Garcia*) recognised that the High Court could only perform *part* of the judicial renewal of the law. Most of that work had to be shared with intermediate appellate courts. Justice McHugh indicated that “[l]arge areas of common law and equity remain open to development by the lower courts”.<sup>241</sup> He stated that if desirable changes in the law were left exclusively to the legislature or High Court:<sup>242</sup>

“A significant part of New South Wales law would be the subject of outdated rules and principles for lengthy periods. The work load of the High Court and its obligation to give preference to constitutional cases make it impossible for that court to carry the burden of making necessary changes in the law of New South Wales.”

On that occasion Justice McHugh argued that “the interests of the High Court are best served by the intermediate appellate courts in Australia adopting an expansive ‘law making’ role”.<sup>243</sup> I entirely agree with that opinion. Nothing has happened to warrant its abandonment.

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<sup>241</sup> M McHugh, “Law Making in an Intermediate Appellate Court: The New South Wales Court of Appeal” (1986-88) 11 *Sydney Law Review* 183, p 188 (hereafter McHugh).

<sup>242</sup> McHugh, p 188.

<sup>243</sup> McHugh, p 188.

The new edicts in *Garcia* and *Farah Constructions* should be revoked or reformulated more modestly and realistically. They are functionally unsound, legally unwarranted and ahistorical. We should restore the orthodox doctrine. As a matter of law, only the *ratio decidendi* of a higher court decision is binding on courts lower in the judicial hierarchy. In Australia we need to return to that clear and limited legal principle and to avoid overreaching hierarchical judicial commands.

Upon his retirement as President of the New South Wales Court of Appeal, Justice Keith Mason expressed the hope that the High Court would “keep other appellate Courts in Australia in the loop”.<sup>244</sup> He suggested that the High Court had departed from its earlier approach in a way that would have the effect of “shutting off much of the oxygen of fresh ideas that would otherwise compete for acceptance in the free market”.<sup>245</sup> He warned that:<sup>246</sup>

“If lower courts are excluded from venturing contributions that may push the odd envelope, then the law will be the poorer for it.”

With these observations I agree. They represent nothing more than I have said in many cases, as indeed my predecessors had done. For long this was the established orthodoxy in Australia. That orthodoxy

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<sup>244</sup> President Mason’s Retirement Speech (2008) 82 ALJ 768 at 769.

<sup>245</sup> K Mason, Farewell Speech, (2008) 82 ALJ 768 at 769.

<sup>246</sup> K Mason, Farewell Speech, (2008) 82 ALJ 768 at 769; cf N O’Byrne and C Young “A view from outside the vortex on Keith Mason’s retirement speech and the Australian doctrine of judicial precedent” (2008) 82 ALJ 771.

should in my view be restored. The principle is especially true of equity. If intermediate appellate courts and also trial courts are denied any significant role in the development of equitable doctrines, it is increasingly likely that equity will lose its relevance. This is so because the High Court will not have the opportunities and occasions to adapt equitable doctrines and remedies to keep up with the changing needs of Australian society. That is not a fate for the law that an ultimate national court should welcome, let alone produce.

### CIVILITY AND COURTESY

I also agree with the views, lately expressed in the judiciary, calling for civility in criticisms voiced by courts higher in the judicature about decisions and reasons subject to their scrutiny and correction.<sup>247</sup> Civility is required given that the judges of intermediate and trial courts do not have an opportunity to respond to criticism of their decisions or to point to the mistakes, misunderstandings or unfairness in any sharp criticism expressed by the highest court. It is one thing for judges to be critical of each other's opinions in the one court. There they are professional equals. They can (and some do) answer back. It is quite different when the sting is directed at courts or judges lower in the

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<sup>247</sup> R Sackville, "Three issues Facing the Australian Judiciary" (2008) 20(3) *Judicial Officers' Bulletin* 17, pp 18-19; K Martin "Throwing Stones: Cost/benefit analysis of judges being offensive to each other" (2008) 82 *Australian Law Journal* 260, p 261; A Hemming, "Roads and Traffic Authority of New South Wales v Dederer: 20/20 Hindsight or an Accident Waiting to Happen?" (2007) 14 *James Cook Uni L Review* 51 at 56 (describing criticisms of the Court of Appeal's reasons as "peppered with barbed missiles").

hierarchy who do not enjoy the same opportunities or rights, but may thereafter harbour grievances, some of which will be warranted.

Magistrate Daphne Kok made an important point in the connection in an address at the Judicial Conference of Australia Symposium in October 2007:<sup>248</sup>

“Whilst ever the appeal process involves comments about judges by judges, the overt relationships and attitudes between various courts inevitably impact upon the public perception of the entire system of justice. People may be very happy the appellate process affords them clear (or sometimes less clear) remedy against error below, but they do not benefit from the erosion of respect for generally competent and hardworking members of any court.”

### CONCLUSIONS: A TEMPERED 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 are such differences a reflection on the scholars and teachers who express differing views.

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<sup>248</sup> D Kok, “Relationships Between Courts – How Appealing?” Paper presented at the Eleventh Colloquium of the Judicial Conference of Australia, Sydney, 6 October 2007 <http://www.jca.asn.au/attachments/2007-DaphneKok.doc>, accessed on 1 August 2008.

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, exceptions, excisions and new developments. So much is shown by the history of the 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 improvement.

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.

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 cadre of specialist legal practitioners with their own internal system of appeal. 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<sup>249</sup>, 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

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<sup>249</sup> RS French, "The Equitable Geist in the Machinery of Administrative Justice" (2003) 39 *Australian Institute of Administrative Law Forum* 1; Geraint Thomas, *Thomas on Powers* (London, Sweet & Maxwell, 1998, 20-21; JJ Spigelman, "Foundations of Administrative Law: Toward General Principles of Constitutional Law" (1999) 58 *Australian Journal of Public Administration* 3.

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.<sup>250</sup> 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.

This impediment has sometimes had very large and probably unexpected consequences. One of them may be witnessed in the differing developments that have occurred respectively in Canada and Australia, two settler societies of Britain, concerning the extent to which the Crown owes a fiduciary duty to the indigenous peoples of the country. Whereas in Canada, reasoning by analogy from other more

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<sup>250</sup> Cf *Law Reform (Law and Equity) Act 1972 (NSW)* s 6.

confined and propertied relationships, a doctrine was fashioned that accepted that the Crown owed the indigenous peoples fiduciary obligations, such adaptation of equitable doctrine has not yet been accepted in Australia.<sup>251</sup> Had it happened, the earlier injustices to the traditional property interests of indigenous communities in Australia might have been more quickly repaired. These are not, therefore, purely theoretical questions. They are questions of large legal and social import.<sup>252</sup>

It is ironic that the development of the equitable idea of “trusteeship”, as a type of fiduciary relationship, was advanced by Dr HV Evatt as Australia’s Attorney-General and Minister for External Affairs and representative to the San Francisco Conference of the United Nations in 1945. The League of Nations *Covenant* had instituted the concept of a “mandate” for the former colonies of the defeated Central Powers in the Great War. However, Evatt, on behalf of the Australian delegation, was the first to propound a new principle of “trusteeship”; ie “that the main purpose of administration is the welfare and advancement of peoples of dependent territories”.<sup>253</sup>

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<sup>251</sup> *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29 at [69] fn 53 referring to *Guerin v The Queen* [1984] 2SCR 335 at 348-349, 376, 382, 392. See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58-63.

<sup>252</sup> *Griffiths v Minister for Lands (NT)* (2008) 82 ALJR 899 at 918 [100]-[101], 919 [106].

<sup>253</sup> HV Evatt, “Statement on Trusteeship” in Evatt Collection cited C Shiel *Moving in the Open Daylight – Doc Evatt, An Australian at the United Nations* (to be published by Evatt Foundation, 2008)

If Evatt, a past Justice of the High Court of Australia, could successfully propose the adoption of an equitable notion derived ultimately from the law of England, and perceive its extension, by a process of reasoning, logic and analogy to new but similar relationships of dependency, one might have thought that later Australian judges and lawyers would have felt equally able to conceive a similar idea within domestic jurisdiction for other and much more confined relationship of vulnerability.

The Trusteeship Council of the United Nations was dissolved in 1994 with the independence of the last colonial possessions accepted as trusteeships (which had included up to 1975 the former German mandated and the trusteeship territory of New Guinea.<sup>254</sup>) It is a tragedy that more Australian lawyers did not have the legal ability and imagination of Evatt in his prime. It should not be a matter of pride for judges or anyone else in the law to boast that nothing changes and that nothing should change.

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. We in Australia, as others of

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<sup>254</sup> cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Ame* (2005) 222 CLR 439 at 467 [65].

our legal tradition earlier, must recognise the need to discard equity's isolationism. The doctrines and remedies of equity are part of 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 also 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 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. As Darwin taught, living things that do not evolve have a horrible tendency to die off quite quickly. As every lawyer knows, it is a fiction to 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 genius of our law. We should cherish it and not deny its place.

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.

**QUEENSLAND UNIVERSITY OF TECHNOLOGY**

**BRISBANE, 19 NOVEMBER 2008**

**W A LEE EQUITY LECTURE**

**EQUITY'S AUSTRALIAN ISOLATIONISM**

**The Hon Justice Michael Kirby AC CMG**