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# Introduction

## I Why have a book on remedies?

The first question a client often has when consulting her solicitor is ‘what can I get?’ rather than ‘what cause of action do I have?’ Thus it has been said, ‘we must always remember that legal advice is, at bottom, simply advice as to the remedy likely to be available (or unavailable) to the client’.<sup>1</sup> Similarly, in *Letang v Cooper*, Diplock LJ said that ‘a cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person’.<sup>2</sup> Indeed, as Diplock LJ goes on to note, historically, remedies have come before analysis of primary rights and obligations in English law because as long as a plaintiff could make out a particular ‘form of action’ she could then obtain a remedy.<sup>3</sup> The remedy was the starting point, and lawyers worked backwards to fit within the form of action.

The law of civil remedies has frequently been described as a ‘capstone’ private law subject.<sup>4</sup> In other words, it is the culmination of a student’s knowledge of private law, and it is intended to assist all the disparate strands from previously studied private law subjects to come together. It is ‘horizontal’ rather than ‘vertical’, as it cuts across all private law categories, and integrates material from torts, contract, equity, trusts, property law and other private law causes of action. Waddams has aptly noted:

The subject [of remedies] is worthy of study because it enables illuminating parallels to be drawn that cross the boundaries between contract and tort, and between law and equity.<sup>5</sup>

<sup>1</sup> A Tettenborn, ‘Remedies: A Neglected Contribution’ [1999] Denning LJ 41, 41.    <sup>2</sup> [1965] 1 QB 232, 242–43.

<sup>3</sup> [1965] 1 QB 232, 243

<sup>4</sup> See, eg, JM Fischer, ‘Teaching Remedies Versus Learning Remedies’ (2000) 39 Brandeis LJ 575, 576; MP Allen, ‘Remedies as a Capstone Experience: How the Remedies Course Can Help Address the Challenges Facing Legal Education’ (2013) 57 Saint Louis University LJ 547.

<sup>5</sup> SM Waddams, ‘Remedies as a Legal Subject’ (1983) 3 OJLS 113, 121.

It is for this reason (as will be explained in the last section of this chapter) that we will take a generally ‘functional’ approach to the organisation of this book, grouping remedies from across different areas according to the broad functions they perform so that parallels and contrasts can be made.

The law of remedies has been growing in popularity in Australian law schools in recent decades. It is an important and deeply practical subject, as it attempts to answer the question of the redress a plaintiff may obtain in a legal action. It ‘nurture[s] and foster[s] students’ professional judgment to choose wisely between alternative remedial solutions within the range permitted by the wrongdoer’s substantive violation and the victim’s injury’.<sup>6</sup> Often the preferred cause of action for the plaintiff will depend upon the remedies available for that cause of action. It is essential for any person who practises law to have some knowledge of this. The aim of this book is to provide a road map whereby the alternative remedial solutions are set out in a clear and logical fashion. We will consider private law remedies, including remedies for tort, contract, equitable wrongdoing, and a variety of statutory remedies with a private law flavour, including remedies for breach of Schedule 2 of the *Competition and Consumer Act 2010* (Cth), otherwise known as the ‘Australian Consumer Law’. However, it should be emphasised that this book is aimed not solely at undergraduate students. It is also intended for postgraduate students, practitioners and the judiciary.

## II What is a remedy?

It has been observed that ‘remedies’ are notoriously difficult to define, leaving some writers to avoid the definition altogether because of disagreements as to an appropriate definition.<sup>7</sup> Zakrzewski has observed that the word ‘remedy’ is often used in multiple senses which overlap to different degrees.<sup>8</sup> In common parlance it is often used in the sense of healing and alleviation of pain.<sup>9</sup> In legal parlance, it is often used variously to describe an action or cause of action, a substantive right, a court order, a means of enforcing a court order and a final outcome of litigation.<sup>10</sup> Ultimately Zakrzewski defines remedies as ‘the rights immediately arising from certain judicial commands and statements which aim to redress a pre-suit grievance, usually an actual or threatened infringement of a substantive right’.<sup>11</sup>

In one sense, remedies could be said to arise primarily as a result of defendants committing civil wrongs against plaintiffs.<sup>12</sup> In other words, the defendant contravenes some legally recognised duty that he owes to the plaintiff, causing damage to the plaintiff. Thus we could say simply that a remedy is a legal response to civil wrongdoing, although, as we will see, the way in which we will ultimately define ‘remedy’ in this book is broader than this.

<sup>6</sup> D Rendleman, ‘Remedies – The Law School Course’ (2000) 39 Brandeis LJ 535, 536.

<sup>7</sup> J Berryman, ‘The Law of Remedies: A Prospectus for Teaching and Scholarship’ (2010) 10 OUCIJ 123, 124, citing J Berryman, V Black, J Cassels, M Pratt, K Roach and S Waddams (eds), *Remedies: Cases and Materials* (5th edn, Edmond Montgomery 2006).

<sup>8</sup> R Zakrzewski, *Remedies Reclassified* (OUP 2005) 7–22. <sup>9</sup> *Ibid.*, 8–9. <sup>10</sup> *Ibid.*, 10–22.

<sup>11</sup> *Ibid.*, 2. See also S Smith, ‘Why Courts Make Orders (And What This Tells us About Damages)’ (2011) 64 CLP 51; S Smith, ‘Duties, Liabilities and Damages’ (2012) 125 Harvard LR 1727.

<sup>12</sup> For judicial expressions of this view see *Attorney-General v Blake* [2001] 1 AC 268, 284 (Lord Nicholls); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, (2001) 208 CLR 199 [60] (Gaudron J).

A remedy confers a ‘right’ in that the plaintiff has an ability to enforce a correlative ‘duty’. For example, my right as a plaintiff to receive compensatory damages for your breach of contract arises because you have a pre-existing duty to perform the contract which you have failed to meet, injuring me as a result. Thus the remedy arises because of the defendant’s pre-existing duty to the plaintiff which has been breached.

On the view of John Austin, remedies can be regarded as ‘secondary rights’, which spring from injuries or violations of ‘primary rights’ granted by law.<sup>13</sup> He said that primary rights serve the purposes of law, whereas secondary rights are conferred for the better protection and enforcement of primary rights and duties. Primary rights do not arise from wrongdoing or from violation of other rights, whereas secondary rights do. Secondary rights suppose that obedience to the law is not perfect, because otherwise there would be no injuries or violations of the law. On this view, remedies are simply a response to wrongdoing or violation of rights.

An example of the distinction between a primary right and a secondary right can be seen in contract. The primary right arising from a contract is the right for the plaintiff to obtain performance of the contract from the defendant. It exists independently of any wrong. Suppose, however, that the defendant does not perform the contract. If the plaintiff did not have a secondary right to expectation damages, just to take an example, the plaintiff’s primary right would be useless. Thus, expectation damages represent a secondary right which protects and enforces the plaintiff’s contractual right. Specific performance on the other hand is a remedy that provides the plaintiff with an effective substitute for the primary right. In fact, this distinction has been accepted in contract by Lord Diplock in the celebrated case of *Photo Production Ltd v Securicor Transport Ltd*.<sup>14</sup>

As Austin notes, there is a symbiotic relationship between the two: primary rights are of no use without the ‘teeth’ provided by secondary rights, and secondary rights cannot exist without a primary right giving rise to them. Thus, he argues, in this sense there is truth in the old maxim *ubi jus ibi remedium* (‘where there is a right there is a remedy’).

Austin concedes that the distinction between primary rights and secondary rights could be criticised, noting:

In strictness, my own terms, ‘primary and secondary rights and duties’, do not represent a logical distinction. For a primary right or duty is not of itself a right or duty, without the secondary right or duty by which it is sustained; and *e converso*.<sup>15</sup>

Nonetheless, Austin argues that it is worthwhile to draw this distinction because it gives rise to ‘clearness and compactness’.

Austin also concedes that some primary duties cannot be described without looking at the description of the corresponding injury. An example is those torts where damage is the gist of the cause of action, for example malicious falsehood, passing off and negligence. The primary duty is defined in terms of a duty not to cause harm.

<sup>13</sup> J Austin, *Lectures on Jurisprudence*, 5th edn, Robert Campbell and John Murray (eds), 1885, Lecture XLV, Vol 2, 760.

<sup>14</sup> [1980] AC 827, 848–50. For a more detailed history of other cases where Lord Diplock advanced this view, see B Dickson, ‘The Contribution of Lord Diplock to the Law of Contract’ (1989) 9 OJLS 441.

<sup>15</sup> J Austin, *Lectures on Jurisprudence*, 5th edn, Robert Campbell and John Murray (eds), 1885, Lecture XLV, Vol 2, 760.

A second example is of a transfer made by mistake: Alan transfers money to Bertha under a mistake. Alan can generally recover the money from Bertha. Bertha commits no wrong, but Bertha is obliged to return the money to Alan, lest she be unjustly enriched. The remedial response ('restitution') is a primary right because it does not respond to a breach of duty.<sup>16</sup>

Another remedy that does not respond to a legal wrong arises where a contracting party is aggrieved because the other party insists that the contract has not come to an end. While there is no breach of duty, the first party can obtain a legal remedy.<sup>17</sup> Similarly, there is no breach of duty in testator family maintenance claims, but it is generally thought that the dependant who seeks maintenance obtains a legal remedy in response.<sup>18</sup>

Thus, Austin's definition is too narrow, as it does not cover certain court-ordered responses to events that are not based on wrongdoing but nonetheless give rise to a remedial response, such as unjust enrichment.

For Birks, 'wrongs' referred to breaches of duty including tort, breach of contract, breach of fiduciary duty and breach of confidence, which were to be contrasted with causes of action such as unjust enrichment which were 'not-wrongs'.<sup>19</sup> He argued that courts have a wider range of remedial response available for wrongs, but the remedial response for a not-wrong (such as restitution of a mistaken payment) was very limited, and courts were justified only in returning the value of the unjust enrichment.<sup>20</sup>

Many, if not most, of the remedies discussed in this book generally fall within Zakrzewski's core definition of 'remedy' as a court order replicating pre-existing rights.<sup>21</sup> However, we will also consider some remedies which do not fit within this definition, namely pre- and post-judgment remedies, which are a matter of civil procedure, and self-help remedies.<sup>22</sup> Self-help 'remedies' are perhaps not really remedies at all, but effectively involve permission from the court for a plaintiff to act in a particular way. Nonetheless, in a broader sense, they provide a means for a plaintiff to redress a grievance by allowing her to vindicate her own right and accordingly we deal with them in this book. We also deal with pre- and post-judgment orders in this book for a number of reasons: because many of the cases which deal with interlocutory injunctions are relevant to the law on final injunctions, because we think it is necessary to know about the procedural means the courts have at their disposal to ensure that remedies in the narrow sense are effective and because, pragmatically speaking, many Australian lawyers would expect to see at least some discussion of these topics in a book of this kind.

## A Monism and dualism

There are further questions which flow from the discussion above regarding the right giving rise to the remedy. As Birks notes, the range of remedial response to unjust enrichment (that is, restitution) is generally more limited than the range of remedial response to breaches of duty such as breach of contract or equitable wrongdoing. The

<sup>16</sup> M Tilbury, M Gillooly, E Bant and N Witzleb, *Remedies Commentary and Materials* (5th edn, LBC 2011) [1.20].

<sup>17</sup> *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536. See R Zakrzewski, *Remedies Reclassified* (OUP 2005) 11.

<sup>18</sup> Zakrzewski, *ibid.* <sup>19</sup> P Birks, 'Rights, Wrongs and Remedies' (2000) 20 OJLS 1, 25–36. <sup>20</sup> *Ibid.*, 28.

<sup>21</sup> R Zakrzewski, *Remedies Reclassified* (OUP 2005). <sup>22</sup> *Ibid.*, 18–21, 44–45, 47–48.

question is then whether the remedy inevitably flows from the right in question, or whether the court can choose from a range of remedies for that particular cause of action.

The traditional view, which is still the dominant English view, is the monist view. The remedy is simply a mirror of the plaintiff's cause of action and is set by the law as appropriate to the specific primary right in question. This view has been adopted by a number of theoretical strands of thought.

The other extreme is a dualist view, which says that once liability has been determined, the court can exercise its discretion to choose the most appropriate remedy in the particular case at hand. For example, once the plaintiff has proved a breach of contract, under a dualist view the court should have a discretion as to what remedy is granted, and the court can choose from a large range of potential remedies.

There is a moderate approach which involves a compromise of the monist and dualist position.<sup>23</sup> Under this theory, there is a strong but not absolute link between the primary right and the secondary right.<sup>24</sup> Thus, there is a 'default' remedy for a particular cause of action, but if circumstances require it the court can depart from that remedy. As will become evident, this is an approach favoured by the authors of this book.

## B Sources of remedies in Australia

Even if one is a monist, one's view of which remedy is appropriate for a particular cause of action depends on one's view of the broader scheme of how causes of action should be organised. Traditionally, private law has been viewed as being divided into categories such as 'contract', 'tort', 'breach of trust', 'breach of confidence' and so forth, and the appropriate remedies are seen to flow from that categorisation. As will be discussed below, if one chooses to categorise causes of action in a different way, then the appropriate remedies will change accordingly.

The three sources of legal remedies in Australia are common law, equity and statute. There is a division between the remedies available for common law and equitable causes of action. Common law and equity start from different 'default' positions. The 'default' remedy for a common law breach of duty is generally compensatory damages. If compensatory damages are inappropriate, the court may award specific relief, but other more controversial remedies such as gain-based relief and punitive damages are available only, if at all, in limited circumstances when compensatory damages are inadequate and specific relief is no longer available. Common law wrongs include breach of contract and torts such as negligence, trespass to land, trespass to goods, conversion and deceit.

By contrast, the 'default' remedy for equitable wrongdoing is generally either specific relief or gain-based relief. Although compensatory relief is now available in equity, it is said to be subject to different rules regarding the attribution of responsibility compared to common law damages. Equitable wrongs include breach of trust, breach of fiduciary duty and breach of confidence. Equitable remedies are always subject to discretionary considerations and thus, in that sense, equitable remedies are

<sup>23</sup> D Wright, *Remedies* (Federation Press 2010) 8–10.

<sup>24</sup> See, eg, P Gewirtz, 'Remedies and Resistance' (1983) 92 Yale LJ 585; K Cooper-Stephenson, 'Principle and Pragmatism in the Law of Remedies' in J Berryman (ed), *Remedies: Issues and Perspectives* (Carswell 1991) 1; K Barker, 'Rescuing Remedialism in Unjust Enrichment: Why Remedies are Right' (1998) 57 Camb LJ 301, 323.

more ‘dualist’ in nature than common law remedies because the court has more choice of what remedy to award and upon what conditions to do so.

Although the common law and equity have differences in the way in which they operate, they are also similar because the causes of action and the remedies arise from ‘judge-made law’. Another source of law which cannot be ignored by lawyers is statute, which is enacted by Parliament rather than developed by judges. Statute law has had a massive impact on private law,<sup>25</sup> including remedies.

Statute has now been enacted to deal with a variety of wrongs and remedies in Australia. Pivotal, the *Competition and Consumer Act 2010* (Cth) (‘CCA’) has been enacted to cover, inter alia, misleading and deceptive conduct. The remedial structure of this regime is quite different to that of the common law. Mason P described the remedial scheme under the predecessor to the CCA (the *Trade Practices Act 1974* (Cth)) as a ‘remedial smorgasbord’ according to which a judge could look at the variety of remedies on offer and choose which was best for the particular case.<sup>26</sup> This ‘smorgasbord’ approach is quite different to the approach traditionally taken in common law and equity. It remains unclear to what extent statutory remedies should be developed by analogy with common law remedies or, conversely, the extent to which common law remedies should be developed by analogy with statute. Clearly statutory remedies are highly ‘dualist’ in nature (even more so than equitable remedies).

Statute has also been used by courts to traverse the common law/equitable remedy divide. The *Chancery Amendment Act 1858* (UK) (Lord Cairns’ Act) allows damages in lieu of specific relief to be used by courts as a means of awarding arguably gain-based remedies for common law wrongs,<sup>27</sup> and compensatory damages in equity.<sup>28</sup>

## C Other ways of organising private law causes of action – the unjust enrichment school of thought

Birks, a prominent unjust enrichment scholar, was a monist because he considered that certain causative events triggered a particular remedy. He famously said, ‘[t]he secondary obligation to pay compensatory damages is . . . the same thing as the right looked at from the other end’.<sup>29</sup> In other words, the remedy reflects the right, and the right reflects the remedy. However, he suggested that private law causes of action should be conceived of in a different fashion to the traditional categorisation of private law into ‘contract’, ‘tort’, and so on. He and other scholars drew on Roman law and English law to devise a taxonomy which sought to link the ‘trigger’ for the cause of action with the appropriate remedy. Birks distinguished four different categories:

- 1 wrongs;
- 2 consent;
- 3 unjust enrichment; and
- 4 other.

<sup>25</sup> A Burrows, ‘The Relationship between Common Law and Statute in the Law of Obligations’ (2012) 128 LQR 232.

<sup>26</sup> *Akron Securities Ltd v Iliffe* (1997) 143 ALR 457, 469.

<sup>27</sup> *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798. Some have argued that the ‘reasonable fee award’ in *Wrotham Park* is compensatory, not gain-based: see Ch 16 III A 1 a.

<sup>28</sup> *Giller v Procopets* [2008] VSCA 236, (2008) 24 VR 1.

<sup>29</sup> P Birks, ‘Definition and Division: A Meditation on *Institutes* 3.13’ in P Birks (ed), *The Classification of Obligations* (Clarendon 1997) 24.

He placed tort and equitable wrongs in the category of ‘wrongs’ and contract and trusts in the category of ‘consent’. This taxonomy cuts across common law and equity.

Birks argued that ‘like cases should be treated alike’. It follows from Birks’ analysis that wrongs in tort and equity should be analogised rather than distinguished because they have the same ‘trigger’ (namely wrongdoing), and the different historical origins of the two sets of wrongs should be de-emphasised. For example, if exemplary damages are awarded for a tortious wrong, it follows as a matter of coherence that exemplary damages should also be available for equitable wrongdoing because the two have the same trigger (wrongdoing). To take another example, if an account of profits is available for breach of trust, it should also be available for breach of contract because each arises by consent. Indeed, Burrows has argued for a greater coherence between common law and equitable remedies on precisely this basis.<sup>30</sup> As will be discussed in greater detail on the section on fusion fallacy, this argument has not found favour with some Australian judges and academics because of their emphasis on the historical divide between common law and equity.

Birks and other unjust enrichment scholars tend to be chary of the notion of discretion in the award of remedies. They favour monist certainty over a dualist approach. The fear with a dualist view is that if wrong is not intrinsically linked to remedy, then it will be difficult for parties to predict what remedy they will get, because it is up to the judge’s discretion. If discretion is unbounded, it undermines the rule of law because it means that like cases are not treated alike (Birks’ notion of ‘palm tree justice’).<sup>31</sup>

Indeed, even in equity, there is an awareness of the ills of unbounded discretion. Lord Mansfield said:

Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule not by humour; it must not be arbitrary, vague and fanciful, but legal and regular.<sup>32</sup>

Grant Hammond has argued that a dualist approach is preferable because it gives rise to a greater ability for a court to choose a just remedy, and he outlines a series of considerations which a court must take into account when making a choice between remedies.<sup>33</sup> Other scholars, too, have argued that discretion in the granting of remedies is not necessarily problematic and have questioned the resistance of unjust enrichment scholars towards the notion.<sup>34</sup>

Undue rigidity in remedial options could produce injustice but, similarly, unbounded flexibility could also produce injustice. Consequently, the best solution is a moderate compromise between the monist and the dualist approach: to acknowledge that for many causes of action (even statutory causes of action) there is a ‘default’ remedy which is often the first remedy of choice, but to acknowledge that courts may

<sup>30</sup> A Burrows, ‘We Do This at Common Law But That in Equity’ (2002) 22 OJLS 1.

<sup>31</sup> P Birks, ‘Three Kinds of Objection to Discretionary Remedialism’ (2000) 29 UWALR 1.

<sup>32</sup> *R v Wilkes* (1770) 4 Burr Rep 2527, 2539; 98 ER 327, 334.

<sup>33</sup> G Hammond, ‘Rethinking Remedies: The Changing Nature of the Conception of the Relationship Between Legal and Equitable Remedies’ in J Berryman (ed), *Remedies: Issues and Perspectives* (Carswell 1991) ch 4.

<sup>34</sup> S Evans, ‘Defending Discretionary Remedialism’ (2001) 23 Syd L Rev 463; P Loughlan, ‘No Right to the Remedy? An Analysis of Judicial Discretion in the Imposition of Equitable Remedies’ (1990) 17 MULR 132; D Jensen, ‘The Rights and Wrongs of Discretionary Remedialism’ [2003] Sing J Leg Stud 178; K Barker, ‘Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right’ (1998) 57 Camb LJ 301.



depart from this remedy and award other remedies if certain specified conditions are made out and it is more appropriate in the circumstances.

### III The common law and equity divide in Australia

Before moving on to the taxonomical approach this book will take towards remedies, it is necessary to deal with a taxonomical issue which is raised by the historical division between common law and equity, and the way in which this is viewed in Australian law. Although equitable remedies are available for both breach of equitable obligations (the ‘exclusive’ jurisdiction of equity) and for breach of common law obligations (the ‘auxiliary’ jurisdiction of equity), they are usually available in the latter case only where the default remedy (usually compensatory damages) is ‘inadequate’. The equitable remedy which is usually awarded instead of common law compensatory damages is specific relief. Australian courts have become more willing to award specific relief in the form of specific performance or an injunction in support of a common law right.<sup>35</sup> While specific relief is still said to be exceptional in common law contexts, for some common law wrongs such as the tort of trespass, courts award an injunction in preference to damages because it is easier and better to prevent the wrongdoing than to measure the damage arising from it. Moreover, there is an increasing tendency to award specific relief simply where justice requires it.<sup>36</sup>

Restitution, disgorgement and punitive remedies have become increasingly available for common law wrongs in other common law jurisdictions such as England and Wales,<sup>37</sup> Canada<sup>38</sup> and the United States.<sup>39</sup> As will be discussed, Australian law has been less enthusiastic in doing so for reasons which relate to the continued adherence to the historical division between common law and equity.

#### A Fusion fallacy

The resistance of the Australian judiciary towards unjust enrichment scholarship comes from a perception that some of the suggestions of the unjust enrichment scholarship commit the sin of ‘fusion fallacy’, or a failure to pay attention to the historical origins of remedies.<sup>40</sup> Historically, equity and common law were entirely different jurisdictions administered by different courts. The UK Judicature Acts (*Judicature Act 1873* and *Judicature Act 1875*) ‘fused’ common law and equity such that a single judge could administer both. The Judicature Acts were mirrored in Australia, but it is worth noting that New South Wales did so only in the

<sup>35</sup> See Chs 10 and 11. <sup>36</sup> *Ibid.*

<sup>37</sup> See, eg, account of profits for breach of contract: *Attorney-General v Blake* [2001] 1 AC 268.

<sup>38</sup> See, eg, account of profits for breach of contract: *Bank of America Canada v Mutual Trust Co* [2002] SCC 43, [2002] 2 SCR 601 [25]; *Amertek Inc v Canadian Commercial Corp* (2003) 229 DLR (4th) 419, 467 (O’Driscoll J) (on appeal held that there was no collateral contract: (2005) 256 DLR (4th) 287); *Montreal Trust Co v Williston Wildcatters Corp* [2004] SKCA 116, (2004) 243 DLR (4th) 317 [122]. See, eg, punitive damages for breach of contract: *Vorvis v Insurance Corporation of British Columbia* [1989] 1 SCR 1085; *Royal Bank of Canada v W Got & Associates Electric Ltd* [1999] 3 SCR 408; *Whiten v Pilot Insurance Co* [2002] SCC 18, [2002] 1 SCR 595.

<sup>39</sup> See, eg, account of profits for breach of contract: American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011) §39; account of profits for tort: *Edwards v Lee’s Administrator*, 96 SW 2d 1028 (Ky Ct App, 1936) and perhaps *Ohwell v Nye & Nissen*, 173 P 2d 652 (Wash 1946).

<sup>40</sup> Principally RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (4th edn, Butterworths 2002) 54.



1970s.<sup>41</sup> Thus, it comes as no surprise to learn that the staunchest supporters of the historical divide between common law and equity emanate from the New South Wales Equity Bar where fusion is a comparatively recent phenomenon.

Fusion fallacy is described as involving:

the 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 were in fiduciary relationships.<sup>42</sup>

Fusion fallacy is condemned in no uncertain terms by the authors of *Meagher, Gummow and Lehane's Equity*:

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.

...

[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.<sup>43</sup>

There are two limbs to the fusion fallacy. The first limb 'asserts only that remedies from the one jurisdiction cannot go in support of rights in the other jurisdiction where that was impossible before the fusion of the administration of law and equity'.<sup>44</sup> This might include, for example, the grant of common law damages in support of an equitable right such as breach of confidence.<sup>45</sup> It is less problematic when equitable remedies are granted in support of common law rights as equity has always had an auxiliary aspect.

The second limb is more general, and involves the alteration of principles in common law by equity or vice versa. This question was canvassed in *Harris v Digital Pulse Pty Ltd*<sup>46</sup> in respect of the availability of exemplary damages in equity. Exemplary damages are discussed in Chapter 14. For now it suffices to note that courts sometimes award damages to punish a defendant for contumelious disregard of the plaintiff's right, often where a particularly egregious tort has been committed.<sup>47</sup> However, they have not been awarded in equity. The availability of exemplary damages is not a simple 'crossover of remedies' question because exemplary damages are generally seen as parasitic on other awards – thus the question is really whether the common law concept of exemplary damages is appropriate to equitable money awards. In *Harris v Digital*

<sup>41</sup> *Supreme Court Act 1933 (ACT)*, ss 25–32; *Supreme Court Act 1970 (NSW)*, ss 57–63; *Law Reform (Law and Equity) Act 1972 (NSW)*, s 5; *Civil Proceedings Act 2011 (Qld)*, s 7; *Supreme Court Act 1935 (SA)*, ss 20–28; *Supreme Court Civil Procedure Act 1932 (Tas)*, ss 10–11; *Supreme Court Act 1986 (Vic)*, s 29; *Supreme Court Act 1935 (WA)*, ss 24–25.

<sup>42</sup> RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th edn, Butterworths 2002) 54.

<sup>43</sup> *Ibid*, 54, 57.

<sup>44</sup> M Tilbury, 'Fallacy or Furphy? Fusion in a Judicature World' (2003) 26 UNSWLJ 357, 358–59.

<sup>45</sup> *Seager v Copydex* [1967] 1 WLR 923. <sup>46</sup> [2003] NSWCA 10, (2003) 56 NSWLR 298.

<sup>47</sup> See, eg, *Gray v Motor Accident Commission* (1998) 196 CLR 1.

*Pulse*, a majority of the New South Wales Court of Appeal decided that exemplary damages should not be available for breach of fiduciary duty.<sup>48</sup>

## B Unjust enrichment scholars breaking down the common law and equitable divide

As noted earlier, unjust enrichment scholarship organises private law remedies in a different manner to the way in which they have traditionally been organised. One of the consequences of this reorganisation is that common law and equitable remedies are placed in the same category (for example, on some analyses, both the action for money had and received and the resulting trust arise to prevent unjust enrichment).

Burrows has strongly argued that common law and equity should not operate side by side in an inconsistent manner and that there *should* be some fusion between common law and equity in order to make it more coherent (notwithstanding that this was not the historical intention of the Judicature Acts).<sup>49</sup> Burrows posits that it is legitimate for courts to reason from common law to equity or vice versa, and that this is the best way for the law to develop. He identifies three categories where common law and equity mix:

- 1 where common law and equity labels are useful;
- 2 where common law and equity coexist coherently, but there is nothing to be gained by adherence to the common law and equitable labels for different doctrines; and
- 3 where common law and equity do not coexist coherently. Burrows argues that in these instances, a change in the law is needed to make equitable and common law doctrines coherent.

His particular focus is on monetary remedies for civil causes of action, and the stark differences between the common law and equity in that regard. He argues that (1) common law and equitable wrongs (such as breach of fiduciary duty) should all be treated as wrongs; (2) the rules on attributing responsibility (factual causation and scope of liability) should generally be the same in common law and equity; (3) it should be recognised that the common law also allows for restitution for wrongs; (4) punitive damages should be available across the board for contumelious common law and equitable wrongs; (5) in exceptional circumstances, damages should be available across common law and equity for anticipated wrongs; and (6) the discretionary equitable defences and the common law defences should be rationalised.

## C Australian reception of unjust enrichment scholarship

In an Australian context, restitutionary theory has not presently been embraced by many judges.<sup>50</sup> For example, in *Roxborough v Rothmans of Pall Mall Australia Ltd*, Gummow J said:

Considerations such as these, together with practical experience, suggest caution in judicial acceptance of any all-embracing theory of restitutionary rights and remedies founded upon

<sup>48</sup> See discussion in Ch 14 II B 4.

<sup>49</sup> A Burrows, 'We Do This at Common Law But That in Equity' (2002) 22 OJLS 1.

<sup>50</sup> Keith Mason, former President of the New South Wales Court of Appeal, is a prominent exception, and one of the authors of K Mason, JW Carter and G Tolhurst, *Restitution Law in Australia* (2nd edn, LexisNexis 2008).