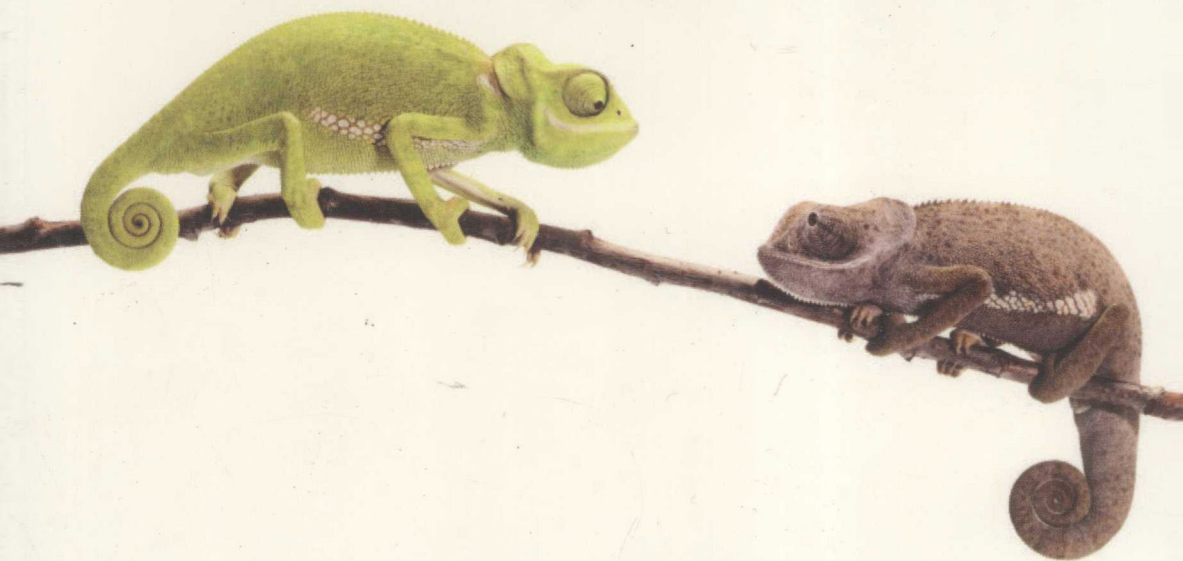


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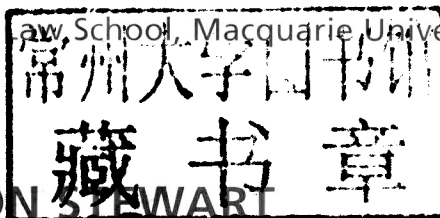
PRINCIPLES OF AUSTRALIAN EQUITY AND TRUSTS

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PRINCIPLES OF AUSTRALIAN EQUITY AND TRUSTS

PREFACE

In the early 1970s, observant users at the University of Sydney law library, upon entering a place to which, to quote an old Serbian proverb, ‘even the king must walk’, would have noticed a graffiti item which boldly declared:

They say crime doesn’t pay — that’s why I’m studying equity.

The few, if any, who took this advice seriously, would have found precious few Australian books in that law library dealing with the subject that would ‘pay’ as promised. More than likely they would have pored over established English texts such as *Hanbury* or *Pettit*. *Jacobs*, as it has always been known, the first edition of which was published in 1958, would have been a partial exception in so far as trusts were concerned. So too with *Spry’s Equitable Remedies*, first published in 1971. Sir Frederick Jordan’s masterly *Chapters in Equity*, correctly described by Sir Anthony Mason as ‘for many decades the most authoritative exposition of equity in New South Wales’,¹ could have been consulted, but it would not have been of much assistance to students, such as one of the authors of this book (Radan), who were then trying to come to grips with the series of lectures they had survived that dissected the 10 speeches given by their Lordships in the then recent cases of *Pettitt v Pettitt*² and *Gissing v Gissing*.³

However, the winds of change were brewing. Three members of what the current Chief Justice of New South Wales has referred to as ‘an international bastion of evangelical equity scholarship [in New South Wales]’⁴ were busy writing the first edition of what has, since its publication in 1975, almost universally been known as *Meagher, Gummow & Lehane*.⁵ This blockbuster of a book saw off its established English counterparts in much the same way that Lillee and Thompson saw off their English counterparts in that year’s glorious summer of cricket.

Now in its fourth edition, *Meagher, Gummow & Lehane* is a deeply learned and scholarly treatise which, in highly opinionated terms, asserts the view that equity’s doctrines and remedies are, and should remain, distinct and separate from those of the common law. It has relentlessly opposed any suggestion that the legislative fusion of the formerly

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1. Sir Anthony Mason, ‘Supreme Court of New South Wales: Opening of Law Term Judges’ Dinner’ (2008) 82 *Australian Law Journal* 839 at 839.
 2. [1970] AC 777.
 3. [1971] AC 886.
 4. JJ Spigelman, ‘Lord Mansfield and the Culture of Improvement’ (2008) 82 *Australian Law Journal* 764 at 766.
 5. R P Meagher, W M G Gummow & J R F Lehane, *Equity, Doctrines and Remedies*, Butterworths, Sydney, 1975. The second and third editions were published in 1983 and 1992 respectively. The fourth edition by R P Meagher, J D Heydon and M J Leeming was published in 2002.

separate courts of common law and equity mandated, or at least facilitated, the fusion of the principles of equity and the common law.

Meagher, Gummow & Lehane has become for equity purists what the 12 volumes of *The Fundamentals*, first published from 1910–1915, are for conservative evangelical Christians. Even for those who do not subscribe to the school of ‘evangelical equity scholarship’, *Meagher, Gummow & Lehane* is an important work, and no serious Australian scholar or practitioner in the field can ignore it. The same can be said of *Jacobs*, which, since its second edition, published in 1967, has been written by one or more of the authors, from time to time, of *Meagher, Gummow & Lehane*.

This, however, is not to say that *Meagher, Gummow & Lehane* and the school of ‘evangelical equity scholarship’ from which it emerged do not have their critics. Thus, Wilson, writing in 2004, said:

The most recent edition of *Meagher, Gummow and Lehane’s* has adopted an almost religious tone, devoting itself to the ‘rooting out of error’ and the repulse of ‘cultural vandals’ with suitably Jesuitical fervour ... [Its] authors are conservatives in a field whose history provides few firm foundations for an assertion that ‘it was ever thus’.⁶

The ‘cultural vandals’ to whom Wilson refers are those who reject *Meagher, Gummow & Lehane’s* views on the relationship between common law and equity and suggest that a fusion of their principles is, and should be, taking place. The manner in which they are attacked in *Meagher, Gummow & Lehane* has also drawn criticism. Thus, Justice Michael Kirby (as he then was), after referring to its various ‘purple passages’, observed:

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.⁷

In the decades since the appearance of *Meagher, Gummow & Lehane*, Australian scholarship in equity has flourished in terms of general equity texts, specialist monographs and articles. The field now also has its own specialist journal — *The Journal of Equity*. The present volume is but a modest contribution to this array of work. Although we stand apart from the school of ‘evangelical equity scholarship’, we acknowledge its influence and importance. Nor, in our view, are we doctrinal rascals (even though, admittedly, some passages of this text were written with a wry smile). Nevertheless, we do acknowledge the significance of scholarship that is less evangelical in inspiration and less fervent in tone. We hope that we have been fair to both approaches.

The research and writing of this book has been an arduous, but rewarding, experience. However, its completion was not solely the result of our efforts. Indeed, it is hardly likely that it would ever have seen the light of day but for the support and encouragement of our families, friends and colleagues.

First, and foremost, we must acknowledge the love, support, encouragement and, most of all, the understanding of our wives, Sybil Radan and Nerida Stewart, and our

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6. Peter Wilson, ‘Unconscionability and Fairness in Australian Equitable Jurisprudence’ (2004) 11 *Australian Property Law Journal* 1 at 3.
 7. Hon Justice Michael Kirby, ‘Equity’s Australian Isolationism’ (2008) 8 *Queensland University of Technology Law & Justice Journal* 444 at 449.

children, Rade, Andrija and Aleksandra Radan and Maxwell, Hannah, Beth, Angus and Eadie Stewart. Over the last few years, this book has been as much a part of their lives as it has been a part of ours. It is to them that it is dedicated.

In a variety of ways, a number of our friends and colleagues generously provided their time and expertise in assisting us to complete the book's manuscript, thereby making it much better than it would otherwise have been. We thus express our heartfelt thanks to Fiona Burns, Ros Croucher, Bryan Horrigan, Patricia Lane, Andrew Lynch, Keith Mason, Shae McCrystal, Nicola McGarrity, Tim Paine, Patrick Parkinson, Joellen Riley, Greg Tolhurst and Ilija Vickovich. We also acknowledge the valuable research assistance provided to us by Zoe Hutchinson, Rowan Platt and Andrija Radan.

At LexisNexis we wish, in particular, to thank Kate Hickey, Elise Carney, Annabel Adair, Jocelyn Holmes and Geraldine MacLurcan for their support and understanding, as well as efficiency in turning a manuscript into a book.

Although this book is a collaborative effort that reflects a considerable degree of discussion and analysis of its contents, each of us did, nevertheless, take the lead in writing individual chapters. Furthermore, its writing was informed by the experiences we both have benefited from in academia and private practice. For the record, Peter took responsibility for writing Chapters 1–7, 10–14, 22–27 and 30–31,⁸ and Cameron did the same for Chapters 8–9, 15–21 and 28–29.

This book is based upon materials available to us in Sydney to the end of October 2009.

Peter Radan
Cameron Stewart
17 November 2009

8. Some of these chapters, or parts thereof, were also written for, and published as part of, his contribution to P Radan & J Gooley, *Principles of Australian Contract Law*, 2nd ed, LexisNexis Butterworths, Sydney, 2010.

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