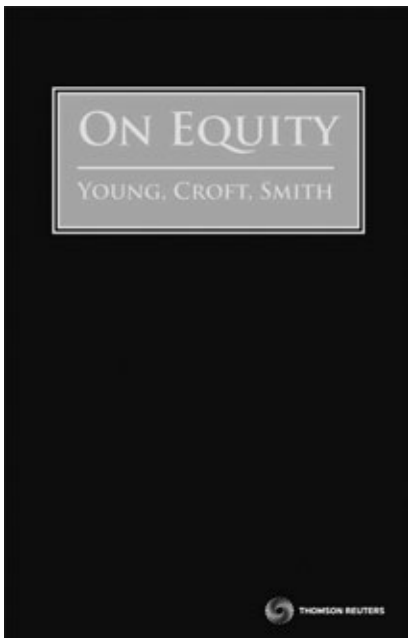


On Equity

The Hon Peter Young AO, Clyde Croft SC and Megan Smith | Thomson Reuters | 2009



On Equity opens with a statement of its aim. It is 'to provide a comprehensive, one-volume book covering the whole of the subject of 'equity''.

Given that aim, *On Equity* inevitably draws comparisons with, among others, *Meagher Gummow and Lehane: Equity Doctrines and Remedies*, Australia's seminal equity text since its first edition in 1975.

Michael Kirby recently observed that 'there are few areas of law that generate so many passions as equity'.¹ *Meagher Gummow and Lehane* evokes these passions. It particularly condemns 'fusion fallacy'. *Meagher Gummow and Lehane* created that expression as a reference, after the Judicature Act reforms, to 'the administration of a remedy, for example common law damages for breach of fiduciary duty, not previously available at law or in equity, or 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'.

The overwhelmingly prevalent view

in Australia is that the Judicature Act reforms did not fuse principles of law and principles of equity but merely allowed for their concurrent administration in the same court. The orthodoxy in *Meagher Gummow and Lehane* is particularly zealous. Those who commit a 'fusion fallacy' are said to be 'culprits' whose state of mind 'cannot lessen the evil of the offence'. The views of these culprits, if implemented, would 'wreak havoc on

'restitutionist school' (identified as those who look for unjust enrichment as the element triggering a right to relief in the case of what can loosely be described as 'unfair conduct', as opposed to 'equity traditionalists' who look to base relief on conscience). Where *Meagher Gummow and Lehane* speaks of 'proselytising members of the restitution industry (academic division)' (an extension to a phrase earlier employed by Heydon JA in *Brambles*

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the expectations of litigators and their advisers'. In the case of Lord Cooke in New Zealand, '[t]hat one man could, in a few years, cause such destruction exposes the fragility of contemporary legal systems and the need for vigilant exposure and rooting out of error'. In England, Lords Denning and Diplock were apparently latter-day 'cultural vandals'. Lord Diplock's pronouncement in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 924, 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*', is identified as the 'low water-mark of modern English jurisprudence'.

On Equity shares the orthodoxy of *Meagher Gummow and Lehane*, but generally not the ferocity of its expression. For example, in the end *On Equity* comments that argument about fusion fallacy might be described as 'much ado about nothing'. While there was no fusion, its authors accept that the dual administration of law and equity has led to increased absorption by the common law of principles that were previously only considered in equity and vice versa.

But on occasion *On Equity* makes colourful references. This includes to some in the

Holdings Ltd v Bathurst City Council (2001) 53 NSWLR 153 at 183 [93]), *On Equity* speaks of 'fundamentalist members of the restitutionist school [who] have proceeded on the basis that equity does not exist, or at least should cease to be recognised, as a discrete body of principles'. *On Equity* dismisses this as an 'idle pretence'. But generally the language in *On Equity* about the 'restitutionist school', and other topics, while often direct, is much more muted than that in *Meagher Gummow and Lehane*.

On Equity is a very useful contribution to equity literature, including for the following reasons.

First, it is relatively comprehensive. This is despite the ready acknowledgement by its authors that to provide the aimed-for comprehensive single-volume work on equity 'is really an impossible task'. Thus in the case of trusts, equitable property and equitable remedies, the authors have, they say, dealt only with the basic principles, so that the balance of the subject of equity can be treated 'fairly comprehensively'. Because of the authors' aim noted above, in many ways the structure of *On Equity* is similar to that of *Meagher Gummow and Lehane*. There are lengthy chapters on, for example, the maxims of equity, fraud (including unconscionable conduct,

undue influence and mistake), fiduciary relationships, property in equity, equitable assignments, miscellaneous equities, various remedies and equitable defences.

Secondly, *On Equity* deals with a number of substantive areas of the law which, at least in part, are not part of 'classical' equitable jurisdiction. *On Equity* commonly does so because nevertheless those parts of the law are typically administered by equity divisions of courts. These are topics not dealt with, or only dealt with lightly, by other Anglo-Australian texts. These include sections on the following:

- The protective/*parens patriae* jurisdiction – not originally part of the court's equitable jurisdiction, but historically delegated to the chancellor and so today usually exercised by the equity division of the court.
- churches – with a cross-over of various legal sources.
- probate and administration of estates – again, probate historically was an area of law separate from equity, but the probate jurisdiction today is usually exercised by the equity division of the court.

Thirdly, *On Equity* contains a useful series of historical perspectives on the development of equity.

Fourthly, *On Equity* places considerably more emphasis on the procedure of equity than do other Anglo-Australian texts.

Fifthly, and by no means least, *On Equity* is crisply written, in an accessible style and format. There is great clarity on many fundamental principles of equity.

The final chapter of *On Equity* looks at new developments and the future of equity. A large 'chunk', under the heading 'Equity in a Fast-Changing World', is an updated version of the paper presented by Lord Browne-Wilkinson in 1996.

Young, Croft and Smith then discuss the future of equity under the heading 'Whither Equity?'. That has been the title of the several papers given over the last 50 years about the future of equity. Young, Croft and Smith note four principal developments over the last 20 years. First, equity has become much more involved with commercial transactions. Secondly, there have been new developments in constructive trusts. Third, there has been a return to considering conscience as the basic principle of equity. Fourth, there has been the challenge to 'traditional equity' by 'academics of the restitutionist school ...' The authors conclude that 'equity is not beyond the age of child-bearing – she continues to produce many and varied offspring'.

Of particular interest to *Bar News* readers is *On Equity's* proposition that New South Wales 'may well be' the place for the growth of equity. The authors contend that the New South Wales Equity Bar 'is the primary producer of the judges of superior courts and its members 'think equity''. The authors concede that it is 'really foolish to attempt to predict what developments might occur'. However they cautiously predict that basic principles will continue to be observed, but will be applied to deal with new social situations.

Just as *On Equity* opens with a statement of its aim, so it closes with another statement of its aim. It has been 'to identify those basic principles [i.e. which will continue to be observed] and shear them of excrescences that came about because of social factors in the nineteenth and twentieth centuries in order that lawyers in the twenty-first century can continue the process of building upon them'.

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Endnotes

1. 'Equity's Australian Isolationism' (2008) 8 QUTLJ 444.