

FALLACY OR FURPHY?: FUSION IN A JUDICATURE WORLD

MICHAEL TILBURY*

*There is ... nothing more curious in legal science, hardly anything more interesting in the history of the human mind, than to trace the processes by which the two-fold fabric of English jurisprudence gradually arose.*¹

I THE FUSION FALLACY

If an Australian lawyer were asked about the significance of 1975 in the development of Australian law, he or she would no doubt point to the famous constitutional crisis that culminated, on Armistice Day of that year, in the use by the Governor-General of the 'reserve powers' to dismiss the government of the day. That event generated great legal and political controversy for many years, and 'left many unresolved problems'.² Yet, except as an issue in the now muted republican debate,³ it is not currently a matter of focus in constitutional law; nor is it part of the consciousness of young Australians. Another, less dramatic, event in 1975 has had a more profound and lasting effect on the fabric of Australian law: the publication of the first edition of *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* ('*Meagher, Gummow and Lehane*'), now in its fourth edition.⁴ Writing extra-curially, Justice Heydon has said that 'no greater legal work has been written by Australians.'⁵ The book has, indeed, been extremely influential throughout the common law world in arresting the decline of the serious study of legal doctrine, and of the unique contribution of equity jurisprudence in particular. Its great strength is its advocacy of the importance of

* Commissioner, New South Wales Law Reform Commission; Professorial Fellow, the University of Melbourne.

1 Theodore Sedgwick, *A Treatise on the Measure of Damages* (3rd ed, 1858) 7.

2 Tony Blackshield, 'Dismissal of 1975' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 212.

3 See George Winterton, *Monarchy to Republic* (1994) ch 3, especially 44–7.

4 Justice R P Meagher, Justice J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, 2002).

5 Justice J D Heydon, 'The Role of the Equity Bar in the Judicature Era' in Geoff Lindsay and Carol Webster (eds), *No Mere Mouthpiece: Servants of All, Yet of None* (2002) 71, 81.

an appreciation of the historical development of doctrine to the understanding, and shaping, of the modern legal system. And, as Spigelman CJ has recently reminded us, the method of common law systems demands that lawyers ‘acknowledge and respect the collective wisdom of our predecessors’,⁶ a comment that is, of course, as applicable in equity as it is at law.

Arguably the greatest legacy of *Meagher, Gummow and Lehane*, certainly its most renowned feature, is its exposition of the ‘fusion fallacy’, which seeks to define the relationship between law and equity in a judicature world (that is, in a common law system in which, emulating the *Judicature Act 1873* (UK), law and equity are administered in the same court). Professor Ashburner had put the orthodox view of that relationship in a celebrated dictum that ‘the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters’.⁷ *Meagher, Gummow and Lehane* takes this further by explaining how a mingling of the waters is likely to involve an unacceptable ‘fusion fallacy’, that is

the administration of a remedy, for example common law damages for breach of fiduciary duty, not previously available either at law or in equity, or the modification of principles in one branch of the jurisdiction by concepts which are imported from the other and thus are foreign, for example by holding that the existence of a duty of care in tort may be tested by asking whether the parties concerned are in fiduciary relations.⁸

The second limb of the ‘fallacy’ set out in *Meagher, Gummow and Lehane* encapsulates its most general sense and is capable of application in any area of the legal system in which relevant bodies of law and equity may influence one another. I refer to this as ‘the general limb’. The first limb is more particularised since it 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. Following Justice Priestley, I refer to this aspect of the fusion fallacy as the ‘crossover of remedies’.⁹ The ‘crossover of remedies’ is, in one sense, an illustration of the general limb of the fallacy, since it necessarily involves the importation into one jurisdiction of ‘foreign concepts’ from the other jurisdiction. But it also involves something more. If equity were merely to borrow a concept from the common law (for example, if it were to hold, by analogy to the award of exemplary damages at law, that the equitable remedies of compensation or account of profits could include an exemplary element), the result *may* simply be a modified rule of equity that could have occurred before 1873. The result can, of course, be dismissed as an aberration or hailed as a sensible development. But if exemplary damages were to be made available *as such* in support of a breach of fiduciary duty that arises only in equity, this could not be regarded simply as a development in equity (or of law) since it would have been impossible before 1873: in equity, because the court of

6 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 307 (‘Harris’).

7 D Browne, *Ashburner’s Principles of Equity* (2nd ed, 1933) 18.

8 *Meagher, Heydon and Leeming*, above n 4, [2-105].

9 Justice J L Priestley, ‘A Guide to a Comparison of Australian and United States Contract Law’ (1989) 12 *University of New South Wales Law Journal* 4, 29.

Chancery did not (in the absence of statutory authority)¹⁰ apply legal remedies; at law, because the law did not generally recognise equitable rights or make its remedies available in support of such rights.¹¹ Thus, the outcome cannot be rationalised as the product either of law or of equity. The outcome assumes – as *may* analogical developments infringing the general limb – ‘the creation by the Judicature system of a new body of law containing elements of law and equity but in character quite distinct from its components’.¹²

Australian authority supports, at least implicitly, both the general limb of the fusion fallacy¹³ and its rejection of a crossover of remedies.¹⁴ No doubt, this also reflects the weight of professional opinion, at least in New South Wales.¹⁵ Academic commentary in Australia also generally supports the orthodox position that the fusion fallacy is thought to represent.¹⁶ Commonwealth and English authority is, however, divided on the issue.¹⁷

The leading authority espousing a ‘fusion philosophy’¹⁸ is the decision in *Aquaculture Corporation v New Zealand Green Mussel Co Ltd*,¹⁹ where the New Zealand Court of Appeal held (in an apparent impermissible crossover of remedies) that monetary compensation was obtainable in response to a breach of a duty of confidence or other duty deriving historically from equity and it did not matter whether such compensation was styled ‘damages’ or not.²⁰ In reaching its decision, a majority of the Court said:

For all purposes now material, equity and common law are mingled or merged. The practicality of the matter is that in the circumstances of the dealings between the parties the law imposes a duty of confidence. For its breach a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute.²¹

And Professor Andrew Burrows, arguing for the eradication of all unnecessary distinctions between law and equity in a fused system, has recently begun the academic assault on the fusion fallacy:

10 See *Lord Cairns’ Act 1858* (UK), discussed in Meagher, Heydon and Leeming, above n 4, [23-030]–[23-105].

11 See Meagher, Heydon and Leeming, above n 4, [1-250]–[1-260].

12 Ibid [2-105].

13 See especially *Pilmer v The Duke Groups Ltd (in liq)* (2001) 207 CLR 165, 201–2 (McHugh, Gummow, Hayne and Callinan JJ); *Felton v Mulligan* (1971) 124 CLR 367, 392 (Windeyer J); *O’Rourke v Hoeven* [1974] 1 NSWLR 622, 626 (Glass JA); *G R Mailman & Assoc Pty Ltd v Wormald (Aust) Pty Ltd* (1991) 24 NSWLR 80, 99 (Meagher JA). Also consider *Riseda Nominees Pty Ltd v St Vincent’s Hospital* [1998] 2 VR 70, 77 (Callaway JA).

14 Consider *Harris* (2003) 56 NSWLR 298.

15 Ibid 305–6 (Spigelman CJ). See also Heydon, above n 5.

16 See Patricia Loughlan, ‘The Historical Role of the Equitable Jurisdiction’ in Patrick Parkinson (ed), *The Principles of Equity* (2nd ed, 2003) 3, 21 ff.

17 See Jill Martin, ‘Fusion, Fallacy and Confusion: A Comparative Study’ [1994] *Conveyancer* 13; Julie Maxton, ‘Some Effects of the Intermingling of Common Law and Equity’ (1993) 5 *Canterbury Law Review* 299.

18 See Meagher, Heydon and Leeming, above n 4, [2-320].

19 [1990] 3 NZLR 299.

20 Ibid 301 (Cooke P, Richardson, Bisson and Hardie Boys JJ). *Confer* ibid 302 (Somers J), holding that the remedy was equitable compensation and leaving open the question whether or not the ‘features’ of equitable compensation equated with those of damages at law.

21 Ibid 301.

I fundamentally disagree with Meagher, Gummow and Leane. Indeed, my own view is that we should be doing much more than we already are to recognize unnecessary inconsistencies between common law and equity and to remove such inconsistencies, whether by judicial or legislative reform. To my way of thinking, the anti-fusion school of thought rests on an unacceptable willingness to be slaves to history and on an unacceptable implicit rejection of the need for like cases to be treated alike.²²

My purpose in writing this paper is not to survey the cases or literature dealing with the fusion fallacy but to analyse the concept itself in order to determine the place that it ought to have in the development of the common law of Australia. Two reasons require that analysis. First, the late Justice John Leane challenged, rightly, those who assert that law and equity are fused to explain what they mean, how fusion happened and what flows from it.²³ And Justice Gummow has recently pointed out that ‘explanations have been slow in coming’.²⁴ Secondly, the fusion fallacy has recently been the subject of intense judicial scrutiny in the important decision of the New South Wales Court of Appeal in *Harris v Digital Pulse Pty Ltd* (*‘Harris’*).²⁵ In breach of their contractual and fiduciary duties of loyalty, the defendants diverted projects away from the plaintiff, their employer. The trial judge found the defendants liable to pay equitable compensation or, at the election of the plaintiff, to account for profits. In addition, the trial judge made an award of exemplary damages against the defendants for their breach of fiduciary duty. By majority (Spigelman CJ and Heydon JA), the Court of Appeal reversed the trial judge’s decision, holding that there was no power to award exemplary damages for the breach of the fiduciary relationship in issue in the instant case.²⁶ The basis of the majority’s decision was that equitable relief does not pursue penal objectives,²⁷ Spigelman CJ adding that it was, in any event, inappropriate (in the case of a breach of a fiduciary relationship of the type in question in the instant case) to import such objectives by analogy from the legal remedy of damages.²⁸ In dissent, Mason P held that established legal policies, found in the ‘amplitude of equitable remedial principle’ and in analogy to tort, required the award of exemplary damages in response to this breach of the fiduciary duty.²⁹ Relevant aspects of the reasoning of the Court are considered further at appropriate points of this article.

22 Andrew Burrows, *Fusing Common Law and Equity: Remedies, Restitution and Reform* (2001) 3.

23 Justice J L R Leane, ‘Book Review: Specific Performance’ (1987) 46 *Cambridge Law Journal* 163, 165.

24 Justice W M C Gummow, ‘Equity: Too Successful?’ (2003) 77 *Australian Law Journal* 30, 33.

25 (2003) 56 NSWLR 298, 306 (Spigelman CJ), 325–9 (Mason P, dissenting), 391–2 (Heydon JA).

26 *Ibid* 304 (Spigelman CJ), 422 (Heydon JA).

27 *Ibid* 310–12 (Spigelman CJ), 360–86 (Heydon JA).

28 *Ibid* 307–10.

29 *Ibid* 337.

II A VIA MEDIA

In 1990 I argued that, while (following *Meagher Gummow and Lehane*) the judicature legislation did not authorise the substantive fusion of law and equity, neither did it prohibit such fusion. I argued further that it was likely that the fused administration of law and equity would, independently of the Acts, lead in practice to a fusion of substance, and where this occurred in appropriate cases, it should be welcomed.³⁰ This view has, generally at least, the support of Mason P in his dissenting judgment in *Harris*,³¹ of the extra curial views of Sir Anthony Mason,³² and of Professor Jill Martin.³³ Notwithstanding the force of the majority judgments in *Harris*, I remain convinced that this view is the correct one.

Consideration of the fusion fallacy in legal sources since 1990 has, however, also convinced me that the concept is much less significant than I then thought it was – notwithstanding the fundamental importance of the concept to the taxonomy of common law systems in a judicature world, an importance which common law methodology (with its sacrifice of the general to the particular) masks.³⁴ In 1990, I thought that the fusion fallacy would play a crucial role in determining the appropriate response to the pressing need for compensatory relief in cases of breaches of equitable obligations, a need that, in the light of apparent limitations on awards of what were then commonly called equitable ‘debt’³⁵ or ‘restitution’,³⁶ could seemingly only be met by resort to damages. The award of damages, a legal remedy, in support of an equitable right involves, of course, a fusion fallacy in the crossover sense because such a result would have been impossible in a pre-judicature system in which courts of law generally took no cognisance of equitable rights.³⁷ But a crossover the other way, that is, an equitable remedy in support of legal rights (for example, specific performance in response to breach of a contractual right of performance), was, and is, quite normal. In its auxiliary jurisdiction, equity has always made its remedies available in support of legal rights where the legal remedy is inadequate and where the discretionary factors operating in the case indicate the appropriateness of the equitable relief in question.³⁸

Since 1990, however, the reinvigorated (or, more accurately, reinvented) remedy of equitable compensation has filled the need for a general compensatory remedy in equity, obviating the otherwise inevitable determination of the issue whether or not (legal) damages would go in support of equitable rights and so

30 See Michael Tilbury, *Civil Remedies* (1990) vol I, [1014]–[1020].

31 (2003) 56 NSWLR 298, 328–9.

32 Sir Anthony Mason, ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 *Law Quarterly Review* 238, 240–41, 243.

33 Jill Martin, *Hanbury and Martin Modern Equity* (16th ed, 2001) 22.

34 Consider, for example, the common law methodology described by Spigelman CJ in *Harris* (2003) 56 NSWLR 298, 305 308–9.

35 See *Ex parte Adamson* (1878) 8 Ch D 807, 819 (James and Baggallay LJ).

36 See *Re Dawson* [1966] 2 NSWLR 211.

37 Meagher, Heydon and Leeming, above n 4, [1-250]–[1-260].

38 See Meagher, Heydon and Leeming, above n 4, [20-030]–[20-175] (specific performance), [21-025]–[21-055] (injunctions). Confer Douglas Laycock, *The Death of the Irreparable Injury Rule* (1991).

create a crossover of remedies. I recognise that, as in *Harris*,³⁹ a crossover of remedies would also be the result of holding that exemplary damages can go in support of breaches of equitable obligations and that *Harris* does not preclude that result in respect of equitable obligations generally (as opposed to the fiduciary obligation of which the defendant was there in breach). However, the ultimate resolution of that issue is likely to depend not on fusion fallacy arguments, but on the stability of exemplary damages as a general remedy in civil law, something that, clearly, was not suitable for resolution in *Harris*' case.⁴⁰

While the emergence of equitable compensation minimises the practical relevance of the fusion fallacy as a crossover of remedies, compensation in equity also, paradoxically, holds out vast opportunities for the operation of its general limb. This is because the principles of equitable compensation are in their infancy and a possible method of developing them is by applying what appear to be the corresponding, and well developed, rules of the law of damages. I suggest, though, that even here fusion fallacy arguments are likely to be unimportant in practice. Beyond its support of the orthodox interpretation of the *Judicature Act 1873* – an interpretation that commands general support⁴¹ – the fusion fallacy is of limited use.

The reason is twofold. First, developments in the law since 1873 are generally explicable without reference to the creation of a new body of law by the judicature system.⁴² Thus equitable compensation is proving a precocious child that displays little need for the rules of law. Secondly, assuming that 'fusion' is possible independently of the legislation, the argument that this involves the creation of a new body of law based on the importation of foreign concepts fails in itself to provide any yardstick by which developments in the law can be gauged. Indeed, so far as the fusion fallacy simply asserts that, in a crossover of remedies, the development in issue would not have been possible before 1873, it is merely an interesting assertion that may be the start of an inquiry into the appropriateness of the development, but, in itself, it says nothing – certainly not enough to constitute an offence of strict liability!⁴³ Parts III and IV of this paper elaborate these points.

39 (2003) 56 NSWLR 298.

40 See *ibid* 322 (Mason P, dissenting), 422 (Heydon JA). See also *Gray v Motor Accident Commission* (1998) 196 CLR 1, 5, 12 (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122, 134–5 (Lord Slynn), 137–8 (Lord Mackay), 146–7 (cf 147–9) (Lord Hutton), 155–7 (Lord Scott, dissenting).

41 With the possible exception of some earlier foreign authorities that asserted the complete fusion of law and equity but whose sting has long since passed or never been felt in Australia: see eg *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904. See especially 924 (Lord Diplock); *Seager v Copydex Ltd* [1967] 1 WLR 923.

42 See below nn 67–77 and accompanying text.

43 See Meagher, Heydon and Leeming, above n 4, [2–105] ('the state of mind of the culprit cannot lessen the evil of the offence').

III THE JUDICATURE SYSTEM AND THE DEVELOPMENT OF THE LAW

By the date of the judicature system, two cardinal points in the theory of the relationship between law and equity were established.⁴⁴ The first was that the content of the common law provided the trigger for equitable intervention, but the purpose of that intervention was not to deny the validity of, or to change, that content. Rather, and very broadly, the purpose of intervention was to exploit, on broad grounds of conscience, the situation that arose from the existence of the rules of law. This theory, so masterfully developed by Maitland at the turn of the twentieth century,⁴⁵ views equity as a gloss on the law, equity providing rules, remedies and institutions which supplement the common law without in any way denying its substance. In Maitland's biblical analogy, '[e]quity had come not to destroy the law, but to fulfil it'.⁴⁶ It was, of course, true that law and equity would produce different outcomes in particular cases and that the equitable outcome would prevail by reason of equity's ability to act *in personam* on the conscience of the person affected, ultimately by issuing a common injunction restraining that person from enforcing their rights at law. But the two systems otherwise operated in harmony. Indeed, they would not have survived had they not done so.

The second aspect of the theory, a necessary prerequisite of the first, was that equitable intervention occurred on the basis of, and was exercised by reference to, settled principles. The Chancery lawyers had taken on board Sir John Selden's famous jibe, first published in 1689, that the standard of equity, the Chancellor's conscience, was as uncertain a measure as the size of his foot.⁴⁷ This harsh judgment was undoubtedly true of the early years of the development of the court of Chancery, of which De Lolme was to write in the eighteenth century that '[i]n our days, when such strict notions are entertained concerning the power of magistrates and judges, it can scarcely be supposed that those courts, however useful, could gain admittance'.⁴⁸ But between the Chancellorships of Lord Nottingham (1673–82) and of Lord Eldon (1801–06, 1807–27), the rules and principles of equity began to be systematised.⁴⁹ By 1768, Blackstone could write of equity's greatest creation, the trust, that

44 This theory is apparent in William Blackstone, *Commentaries on the Laws of England* (1768) vol III, ch 4, 429–41; J L De Lolme, *The Constitution of England* (1822) ch XI; Justice J Story, *Commentaries on Equity Jurisprudence* (1st English ed, 1884) ch 1.

45 F W Maitland, *Equity: A Course of Lectures* (Brunyante ed, 1947) ch II.

46 Ibid 17.

47 See Sir Frederick Pollock, *Table Talk of Sir John Selden* (1927) 43 (under the heading 'Equity').

48 De Lolme, above n 44, 122.

49 For an overview, see Sir Frederick Pollock, 'The Transformation of Equity' in Paul Vinogradoff (ed), *Essays in Legal History* (1913) ch XIV.

the trust is governed by very nearly the same rules, as would govern the estate in a court of law, if no trustee were interposed; and by a regular positive system established in the courts of equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of common law.⁵⁰

In 1818, Lord Eldon expressed the view that the doctrines of equity ‘ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case’.⁵¹ Sixteen years earlier, the eminent Lord Redesdale had confirmed that this was already the case:

There are certain principles, on which courts of equity act, which are very well settled. The cases which occur are various; but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases, as they arise, by the principles on which former cases have been decided; and may thus illustrate, or enlarge, the operation of those principles. But the principles are as fixed and certain, as the principles on which the courts of common law proceed.⁵²

Thus, by the date of the judicature system equity was as much a system of law as the common law on which its existence was dependent – even allowing for a residuum of discretion in the formulation and operation of the rules of equity. Sir George Jessel MR put the matter bluntly in 1878: ‘This Court, as I have often said, is not a Court of conscience, but a Court of Law’.⁵³

By 1873, there were, then, two bodies of law operating in harmony but administered in separate courts. There was no need to resolve any general conflict between law and equity, but there were disadvantages, largely of a procedural nature, that resulted from the administration of law and equity in separate courts.⁵⁴ The judicature system, the culmination of the great procedural reforms of the nineteenth century,⁵⁵ aimed to overcome these disadvantages by providing for one court to administer both systems of law. The fundamental purpose of the legislation was to ensure the avoidance of a multiplicity of proceedings,⁵⁶ now expressed in judicature legislation in some such way as the following:

50 William Blackstone, *Commentaries on the Laws of England* (1768) Vol III, 439–40.

51 *Gee v Pritchard* (1818) 2 Swans 402, 414; 32 ER 670, 674.

52 *Bond v Hopkins* (1802) 1 Sch & Lefr 413, 428–9.

53 *In Re National Funds Assurance Co* (1878) 10 ChD 118, 128.

54 Meagher, Heydon and Leeming, above n 4, [1-220]–[1-275].

55 For an overview, see A H Manchester, *A Modern Legal History of England and Wales 1750–1950* (1980) ch 6.

56 See *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286, 306–7 (Barwick CJ and Jacobs J); *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 191 (Mason and Deane JJ); *Manchester Sheffield & Lincolnshire Railway Co v Brooks* (1877) 2 ExD 243, 246–7 (Kelly CB); *McGowan v Middleton* (1883) 11 QBD 464, 468 (Brett MR); *Searle v Choat* (1884) 25 ChD 723, 727 (Cotton LJ). But the popular vision of litigants being ‘bandied about’ between courts of law and courts of equity in pre-judicature times must be grossly exaggerated unless a plethora of unrepresented litigants or a monopoly of bad legal advice and representation (or some combination of both) is imagined.

The Court shall grant, either absolutely or on terms, all such remedies as any party may appear to be entitled to in respect of any legal or equitable claim brought forward in the proceedings so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided.⁵⁷

One way of achieving this objective was to ensure that the new High Court of Justice created by the legislation, to which the jurisdictions of the Courts of Law and of Equity were now transferred, would apply the rules of law and the rules of equity concurrently in all cases.⁵⁸ The major obstacle standing in the way of this before the legislation was the refusal of the common law courts generally to recognise equitable rights, titles and defences.⁵⁹ The simple solution, required by the legislation, was to demand such recognition from the new High Court.⁶⁰ Legislative provisions requiring this recognition were sufficient to resolve most of the problems of the relationship between law and equity that would arise from concurrent administration. The two bodies of law would continue to exist side by side, the equitable outcome in any case guaranteed by the fact that the court was required to recognise and apply the rules of equity. There was no longer a need for the common injunction, which the legislation abolished.⁶¹

Of course, it was inevitable in the course of a development that had spanned many centuries that some differences had arisen in the substance of the rules of law and of equity. Those differences could be tolerated while law and equity were administered in separate courts, but, with the fusion of the administration of the two systems, a uniform solution was required. The legislation itself provides particular solutions to some of these differences.⁶² It also provides a general solution for cases that it does not cover specifically. That general solution, embodied in s 25(11) of the *Judicature Act 1873* (UK), is that if there is any conflict or variance between the rules of law and the rules of equity in respect of the same matter, the rules of equity are to prevail. The scope for the operation of this provision is limited since the theory of the relationship between law and equity generally ensured that there was no conflict or variance between the rules of law and the rules of equity *in respect of the same matter*.⁶³ A conflict of this nature assumes that the rules in question identify the same facts as relevant and the same cause of action or claim as arising (including the same remedy).

Apart from the particular substantive changes it effects and those that may be effected by the application of s 25(11), the judicature system has nothing further to say about the relationship between law and equity, although it no doubt assumes that the two systems will remain conceptually distinct. *Harris*,⁶⁴ which involved, at least potentially, a crossover of remedies since a common law

57 *Supreme Court Act 1970* (NSW) s 63.

58 See *Supreme Court Act 1970* (NSW) s 57.

59 Meagher, Heydon and Leeming, above n 4, [1-250]–[1-260].

60 For example, *Supreme Court Act 1970* (NSW) ss 58–60, 62.

61 For example, *Supreme Court Act 1970* (NSW) s 61.

62 Meagher, Heydon and Leeming, above n 4, [2-040]–[2-050].

63 *Ibid* [2-060].

64 (2003) 56 NSWLR 298.

remedy (exemplary damages) would go in support of an equitable right (a breach of fiduciary duty), affirms this. Justice Heydon explained:

[T]o reason that while in the past, while the common law was administered in common law courts and equity in its own courts, common law courts awarded exemplary damages and equity courts did not, the fact that the two systems are now administered in the one court entails the conclusion that the common law remedy of exemplary damages is available for equitable wrongs is to fall into a crude fusion fallacy. The conclusion arrived at could only be justified if there was some particular provision in the legislation effecting the administration of the two systems in a single court compelling it.⁶⁵

In his dissenting judgment, Mason P accepts that the judicature legislation would not support this result.⁶⁶

This does not mean, however, that an exemplary monetary award (as opposed to exemplary damages as such)⁶⁷ is unavailable in support of the fiduciary duty breached in this case. The breach of the equitable obligation gave rise either to equitable compensation or, at the plaintiff's election, to an account of profits. It is arguable that equitable awards of compensation or an account of profits can, in appropriate cases, contain an exemplary element.⁶⁸ That argument may be found in the very nature of certain fiduciary duties. Justice Gummow has written, extra-curially, that 'there is a strong deterrent element in the formulation of the duties imposed on fiduciaries ... *In principle*, there would seem to be no reason why this concept of deterrence should not also play a part in compensation cases'.⁶⁹ The same may be said of account of profits cases. The question is whether this in-principle argument allows the deterrent element underlying liability to be translated into an exemplary award in equity in cases involving a breach of fiduciary duty such as that in issue in *Harris*' case. Justice Heydon, with whom Spigelman CJ generally agreed, answers this question in the negative, essentially because equitable remedies do not contain an express or muted punitive element,⁷⁰ equity and penalty being strangers.⁷¹ In contrast, Mason P would concede such a punitive element in appropriate cases (including the instant case) because, in principle, equity strives for a remedial adequacy that is not, and cannot be, limited to compensation.⁷²

Justice Mason acknowledges that his conclusion involves a novelty, in the sense that the exemplary remedy is applied for the first time in support of an

65 Ibid 402–3.

66 Ibid 326, 328.

67 The 'conclusion' to which Heydon JA refers, *ibid* 402–3, refers only to the 'common law remedy of exemplary damages'.

68 If so, the question could arise whether the exemplary element is parasitic or not: see *ibid* 421–2 (Heydon JA).

69 Justice W M C Gummow, 'Compensation for Breach of Fiduciary Duty' in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 57, 79 (emphasis added).

70 *Harris* (2003) 56 NSWLR 298, 365–86, 406–22. Justice Heydon also held that exemplary awards were impermissible as they involved the creation of new criminal sanctions by judges (386–391), but Spigelman CJ differed on this (303), as did Mason P in dissent (341).

71 See *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 302 (Somers J). See also *Bailey v Namol Pty Ltd* (1994) 53 FCR 102, 113 (Burchett, Gummow and O'Loughlin JJ).

72 *Harris* (2003) 56 NSWLR 298, 322–5, 337–9.

equitable obligation, at least in New South Wales.⁷³ Nevertheless, his Honour regards the conclusion as justified because, among other reasons, 'it represents a legitimate development of Equity's inherent or exclusive jurisdiction'.⁷⁴ Meagher, Heydon and Leeming point out that 'it can scarcely be suggested' that the rules of law and equity have remained fixed since 1873.⁷⁵ And to the extent that developments in equity are explicable as transformations in equitable jurisprudence, no question of any fusion fallacy or of the effects of the *Judicature Act* arises. Given the historical and continuing vitality of equity in Australian law,⁷⁶ as well as its possible resurgence in English law,⁷⁷ this point has the potential for reducing significantly the scope for the operation in practice of fusion fallacy arguments.

IV FUSION INDEPENDENTLY OF THE LEGISLATION

Notwithstanding the different results reached in their judgments in *Harris*,⁷⁸ the approaches of Heydon JA and Mason P are, to this point, consistent. They both agree that the judicature legislation does not itself permit the award of exemplary damages for breach of a fiduciary duty. They also agree that equity could, in principle, support such an exemplary award, though they disagree on whether it does do so, at least in relation to the facts of the instant case. Beyond this, their approaches differ. The difference is highlighted in the last sentence of the passage from Justice Heydon's judgment quoted above where his Honour says that the result contended for, namely the award of exemplary damages in support of the breach of an equitable obligation, could only be supported if there were legislation specifically providing for this result.⁷⁹ With respect – and independently of any fusion fallacy argument – this is simply a non-sequitur. Neither the *Judicature Act* nor any other legislation prohibits the fusion of law and equity. And, unless one assumes without discussion that the 'fusion fallacy' must be taken as gospel truth, there is no *a priori* reason why equity could not, by analogy, adopt the legal remedy of exemplary damages. Indeed, it was, amongst other reasons, the analogy between the action for breach of fiduciary duty in issue in *Harris*' case and corresponding liability in tort that persuaded Mason P to uphold the trial judge's award of exemplary damages.⁸⁰ Here Spigelman CJ⁸¹ and Heydon JA disagreed,⁸² holding that, at least in a case such

73 Ibid 339–41.

74 Ibid 340.

75 Meagher, Heydon and Leeming, above n 4, [2–105].

76 On which see Mason, above n 32. See also *Harris* (2003) 56 NSWLR 298, 307 (Spigelman CJ).

77 See Francis Reynolds, 'Maritime and Other Influences on the Common Law' [2002] *Lloyds Maritime and Commercial Law Quarterly* 182, 195–6.

78 (2003) 56 NSWLR 298.

79 Above n 65 and accompanying text. See also J D Heydon and P L McLoughlan, *Cases and Materials on Equity and Trusts* (6th ed, 2002) [1.18].

80 *Harris* (2003) 56 NSWLR 298, 335–9.

81 Ibid 306, 308, stressing that the analogy had been drawn at too high a level of generality in this case.

82 Ibid 391–2, 422.

as this,⁸³ the courts lack the power to award exemplary damages, which could not be imported into equity by analogy from the common law.

But these are conclusions. Both in relation to the facts of the instant decision and so far as they embrace fusion fallacy arguments more generally, they rest upon the following inter-related considerations:

- the scope of the courts' power;
- the appropriateness of borrowing 'foreign' concepts; and
- the generation of uncertainty in the law.

A The Courts' Power

The conclusion that the courts lack power to reach a conclusion that involves a fusion fallacy can mean one of two things. First, it may mean that the courts have no 'jurisdiction' to determine such an issue. This could not be correct. The court clearly has the power, for example, to determine the question whether or not exemplary damages are available for breach of fiduciary duty. That question relates either to an issue at law (the scope of exemplary damages) or an issue in equity (broadly, the scope of equitable jurisdiction). In this context, talk of the 'power' of the court is simply, as Mason P pointed out in his dissenting judgment in *Harris*, a 'false issue'.⁸⁴ The Courts in New South Wales have, for example, possessed this power since 1823.⁸⁵

Secondly, it may mean that the courts lack the power to make such a determination in the absence of statutory authority. The basis of this view must be that the function of a court of general jurisdiction, invested at its establishment with the powers of the courts of common law and the court of Chancery, is to apply the established rules of law, equity and statute. If all non-statutory law in our legal system derives from common law or equity, which (it is agreed) are not merged by judicature legislation, such non-statutory rules must, by definition, be rules of law or rules of equity. There is simply no other possibility. As Patricia Loughlan writes:

In principle, any result in a case should be explicable either by reference to rules of law *exclusively* or by reference to principles of equity *exclusively*. But where the result can only be explained by reference to some mixture of both, then it is arguable that an error has been made.⁸⁶

On this view a fusion of law and equity is impossible. The two systems are doomed to eternal separation.⁸⁷

But the conclusion is, with respect, unsupportable. The argument that statutory authorisation is required for fusion must itself be based on the view that it is beyond the judicial function to fashion a common law of Australia that fuses the rules of law and equity in such a way that transcends, rather than preserves, their boundaries. Such fusion would result in rules whose jurisdictional origins were

83 Ibid 310 (Spigelman CJ), 422 (Heydon JA).

84 Ibid 321.

85 Ibid.

86 Loughlan, above n 16, 22 (emphasis added).

87 See *Harris* [2003] NSWCA 10, 326 (Mason P, dissenting).

unimportant and which were now free to develop without reference to any jurisdictional restraints that may have operated on that development before 1873. In this respect, it is tempting to regard the fusion fallacy argument as a manifestation of proper judicial restraint, a judicial denial of a 'radical law reform brief'.⁸⁸ Yet even the strongest supporters of judicial restraint recognise that the Dixonian aspiration of 'strict and complete legalism'⁸⁹ was never intended to preclude the development of the law to meet new needs through the extension, modification or restriction of existing principle.⁹⁰

Whatever general view is taken of the scope of the legitimate judicial development of the law,⁹¹ there is, I suggest, nothing inherent in the assimilation of the rules of common law and equity that suggests that the process is inimical to the judicial function, particularly in such areas of 'lawyers' law' as were in issue in *Harris*.⁹² After all, the common law has been here before. As is well known, its very origin involved the fusion and synthesis of the various customs prevailing in the pre-conquest kingdoms of England. Under Lord Mansfield, it successfully absorbed the law merchant. Before the judicature system, law borrowed from equity⁹³ and equity generally followed the law.⁹⁴ But the common law always knew where to draw the line. The medieval English lawyers rejected a reception of Roman law, just as their modern successors in Australia are rejecting the indiscriminate importation of the principle of unjust enrichment. In short, the common law is something of an expert in fusion. Against this background, the fusion fallacy argument itself begins to look like a manifestation of a strong activism against change.

B Foreign Concepts

The general limb of the fusion fallacy outlaws the modification of principles in one branch of the jurisdiction by concepts imported from the other because those concepts are 'foreign'. This is the most substantial argument in favour of the fusion fallacy. It has, I suggest, two branches:

- first, the danger that fusion will result in unlike cases being treated alike; and

88 Meagher, Heydon and Leeming, above n 4, [2-320].

89 Sir Owen Dixon, 'Upon Taking the Oath of Office as Chief Justice' in Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (1965) 245, 247; (1952) 85 CLR xi, xiv.

90 Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (1965) 151, 158-9. And see Justice J D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110, 115-16.

91 There is an enormous literature, of which the most recent judicial contributions are: Chief Justice J Doyle, 'Judicial Law Making - Is Honesty the Best Policy?' (1995) 17 *Adelaide Law Review* 161; Justice M Kirby, 'Judicial Activism' (1997) 16 *Australian Bar Review* 10; Justice Ronald Sackville, 'Continuity and Judicial Creativity - Some Observations' (1997) 20 *University of New South Wales Law Journal* 145; Justice M McHugh, 'The Judicial Method' (1997) 73 *Australian Law Journal* 37; Justice J D Heydon, above n 90.

92 (2003) NSWLR 298.

93 See Meagher, Heydon and Leeming, above n 4, [1-205].

94 *Ibid* [3-035]-[3-045].

- secondly, and more generally, the failure to recognise inherent distinctions between law and equity.

1 *Treating Like Cases Alike*

To the anti-fusionist, the different treatment of cases at law and in equity arises simply because the situations in which each applies are unique, differing either factually or in terms of the legal rules or analyses generated by those facts. On this view, although fact situations may, superficially, appear to raise the same issues whether the case is brought at law or in equity, this will not, on careful examination turn out to be the case. This explains why s 25(11) of the *Judicature Act 1873* is of such limited application: there are few variations in the rules of law and equity in respect of the same matter.⁹⁵

It may come as something of a surprise, then, to realise that fusionists regard the possibility of like cases being treated alike as a strong argument in favour of fusion. For Professor Burrows, for example, ‘to support fusion seems self-evident, resting, as it does, on not being slaves to history and on recognising the importance of coherence in the law and of “like cases being treated alike”’.⁹⁶ For the fusionist, this result comes about as follows. In the course of the joint administration of law and equity, cases that seem similar in all relevant respects (but without raising ‘the same matter’ in a cause-of-action sense so as to bring s 25(11) of the *Judicature Act 1873* into action), give rise to different outcomes depending on whether the case is brought at law or in equity. For example, an action framed at law may also, on the same facts, give rise to a claim in equity. If the claim were brought in equity, compound interest would be recoverable on the award; at law only simple interest is recoverable. The question may now arise whether or not compound interest should be awarded at law. In such a case, the principled development of the law may require the law’s adoption of the equitable rule.⁹⁷ It is also conceivable that the principled development of the law may require equity’s acceptance of the common law, as happened in the law of penalties where the absence of need to invoke the equitable jurisdiction resulted in the equitable doctrine withering on the vine.⁹⁸ More generally, the solution in one jurisdiction may become so comprehensive that legal and equitable doctrine coalesces around a particular result, whether or not that result is reached by the mingling of the concepts of law and equity. An example may be the potential of equitable or promissory estoppel to encompass all other estoppels.⁹⁹

95 See n 63 and accompanying text.

96 Andrew Burrows, ‘We Do This At Common Law But That in Equity’ (2002) 22 *Oxford Journal of Legal Studies* 1, 4.

97 *Contra Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 717–18 (Lord Brown Wilkinson), 718–19 (Lord Slynn), 739–41 (Lord Lloyd). But see 696–7 (Lord Goff, dissenting).

98 *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 191 (Mason and Deane JJ).

99 See especially *Commonwealth v Verwayen* (1990) 170 CLR 394 (Mason CJ and Deane J). *Confer Giumelli v Giumelli* (1999) 196 CLR 101, 112 (Gleeson CJ, McHugh, Gummow and Callinan JJ); *Republic of India v India Steamship Co Ltd (No 2)* [1998] AC 878, 914 (Lord Steyn).

Results such as these are supported by the strong emphasis that Australian law places on the coherence of legal doctrine. In his dissenting judgment in *Harris*, Mason P pointed out that Australian law requires this coherence in a number of ways.¹⁰⁰ First, it does not encourage the proliferation of categories and exceptions in which 'the reasoning and outcomes in the cases become increasingly detached from the rationale supporting the cause of action.'¹⁰¹ For example, unlike English law, Australian law never limited the recovery of exemplary damages by reference to the plaintiff's cause of action,¹⁰² but rather chose to focus on the defendant's egregious conduct, the underlying rationale for the recovery of such damages.¹⁰³ Secondly, the law may require that one field of law defer to another in an area of potential overlap. For example, where the plaintiff has a claim both in negligence and in defamation, the solution required by the law of defamation will generally prevail since it will more appropriately balance the competing interests of the parties.¹⁰⁴ Thirdly, the legal system has a general preference for doctrinal and conceptual fit to historical fit.¹⁰⁵ To this may be added that the promotion of rivalry or competition of principles, rather than their unity, will not be encouraged.¹⁰⁶ The possible development of an 'overarching principle' of estoppel is an illustration of these last two points.¹⁰⁷

Both the fusionist and anti-fusionist concern to treat like cases alike are represented in the judgments in *Harris*.¹⁰⁸ In his dissenting judgment, Mason P justified the availability of exemplary damages in equity by reference to the rationale of the remedy (which his Honour identified as punishment, deterrence and vindication).¹⁰⁹ That rationale cannot defend a restriction that would limit the award of exemplary damages to cases in tort. Adopting the example of the trial judge, his Honour then said that

100 (2003) 56 NSWLR 298, 335.

101 *Tame v State of New South Wales* (2002) 76 ALJR 1348, 1381 (Gummow and Kirby JJ).

102 See especially *Broome v Cassell & Co Ltd* [1972] AC 1027, overruled in this respect in *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122.

103 *Gray v Motor Accident Commission* (1998) 196 CLR 1, 6, 9 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

104 See *Tame v State of New South Wales* (2002) 76 ALJR 1348. See especially 1369–70 (McHugh J).

105 See *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 447 (Deane J).

106 Ibid. See also *Hill v Van Erp* (1997) 188 CLR 159, 231 (Gummow J, citing Francis Reynolds, 'Contract and Tort: The View From the Contract Side of the Fence' (1993) 5 *Canterbury Law Review* 280, 281).

107 See above n 99.

108 (2003) 56 NSWLR 298.

109 Ibid 335–6. This reflects the decision in *Lamb v Cotogno* (1987) 164 CLR 1 and is consistent with the view of the majority of the Privy Council, on appeal from New Zealand, in *A v Bottrill* [2003] 1 AC 449, 457 per Lords Nicholls, Hope and Roger, though there is much to be said for the dissenting view of Lords Hutton and Millett (at 466) that the rationale of exemplary damages is limited to punishment: see Michael Tilbury, 'Reconstructing Damages' (2003) 27 *Melbourne University Law Review* (forthcoming).

it is ... absurd to think that a plaintiff whose life savings were stolen by a solicitor would have any different sense of outrage depending upon whether the defendant was sued at common law for deceit or in equity for breach of fiduciary duty ... Assuming the plaintiff is able to establish the breach of fiduciary duty plus the additional elements of conscious wrongdoing necessary to trigger an award of exemplary damages, a disinterested observer would be bemused to learn that the law would say that exemplary damages should be withheld, whereas they would have been awarded if the identical facts were established had the case been pleaded in tort.¹¹⁰

Justice Heydon's response to this is:

A client who sues in deceit certainly has an opportunity of obtaining exemplary damages, but also:

- carries a burden of proof which is pitched, in a practical sense, higher than if the action were only for breach of fiduciary duty;
- may face more onerous tests for breach, causation and remoteness than if the action were only for breach of fiduciary duty;
- stimulates more bitter opposition from the defendant, since defeat will carry for the solicitor a real risk of being struck off the roll, and since solicitors may be more willing to face whatever odium attaches to settling a claim for breach of fiduciary duty than they are to face the certain odium attaching to settling, and thereby making some admissions about the possible merits of, a deceit claim;
- ensures, if the action succeeds, that the solicitor will lose whatever insurance cover exists.

It is not irrational to maintain the existence of different remedies for different causes of action having different threshold requirements and different purposes. The resulting differences are not necessarily 'anomalous'.¹¹¹

Justice Heydon's reasons for distinguishing between the claim in tort and for breach of fiduciary duty involve pragmatic considerations and particular concerns of principle, while Justice Mason's focuses more broadly on the principled development of the law in the light of the claim. Both approaches are relevant and need to be taken into account in determining how the law should be stated. And while it may seem that in any such accounting Justice Mason's approach, with its emphasis on principle, is bound to win, this is not necessarily so. Principle must, of course, always be tempered by pragmatism. Further, the appeal to principle may in itself be problematic. Chief Justice Spigelman has pointed out a difficulty inherent in Justice Mason's approach: it may draw an analogy at too high a level of generality. Not only does this run the risk of overlooking relevant points of distinction,¹¹² it also begs the question whether the analogy should be to tort or to contract.¹¹³ And if to contract, then the result in *Harris* would require the denial of exemplary damages, since (unlike in tort) exemplary damages are irrecoverable in contract.¹¹⁴

110 *Harris* (2003) 56 NSWLR 298, 335–6.

111 *Ibid* 404.

112 Consider also *Republic of India v India Steamship Co Ltd (No 2)* [1998] AC 878, 914 (Lord Steyn).

113 *Harris* (2003) 56 NSWLR 298, 307–10. See 333–5 for Justice Mason's answer.

114 See *Gray v Motor Accident Commission* (1998) 196 CLR 1, 6 (Gleeson CJ, McHugh, Gummow and Hayne JJ). *Contra Whiten v Pilot Insurance Co* [2002] 1 SCR 595. With respect, it is difficult to follow Justice Heydon's argument in *Harris* (2003) 56 NSWLR 298, 362 that the unavailability of exemplary damages for breach of contract shows that the law is not anomalous.

Thus, the question whether or not fact situations are similar and what (if any) analogies are appropriate in any case involves the exercise of judgment in each case.¹¹⁵ This inherently difficult exercise calls into play the very fabric of common law methodology. What the approaches of Spigelman CJ and Mason P in *Harris* indicate is that the fusion fallacy assertion is not determinative of these enquiries, but that the principled development of the law may require the drawing of analogies between law and equity to facilitate ‘discriminating and at times partial adoption’.¹¹⁶ The situation created by the judicature legislation is no warrant for the preservation of unnecessary distinctions.

2 *The Distinction between Law and Equity and the Limits of Fusion*

The assertion that the bodies of common law and equity are foreign, or that they are conceptually distinct, must ultimately rest on the assumption that there is something inherent in their very natures that means that any fusion of the two is misconceived, if not impossible. At first glance, this seems difficult to establish because, as we have seen, equity is essentially and simply a body of law that is a gloss on the common law, with which it operates in harmony.¹¹⁷ However, there are at least two general situations in which it is possible to identify characteristics of equitable rules or principles that indicate a likely distinction between analogous cases at law and that, therefore, suggest limits to the fusion of law and equity.

The first is where a marked element of discretion is discernible in the identification and application of the equitable principles or rules in question. In *Harris*, Spigelman CJ pointed to one reason why punitive monetary awards may be inappropriate in equity. A punitive award ‘involves the imposition of a burden on one party for purposes unrelated to the relationship between the parties’.¹¹⁸ In contrast, the award of a monetary amount in equity is ‘inherently susceptible to variation’¹¹⁹ since it requires the location of the balance of justice between the parties, especially in relation to the determination of just allowances and of the rate of interest.¹²⁰ While this may be stated too widely,¹²¹ Chief Justice Spigelman’s view points to the fact that there may, at least in some respects, be greater flexibility in the assessment of awards in equity than there is at law. Thus, while just allowances may be dealt with in the flexible manner suggested by Spigelman CJ in the equitable remedy of account of profits cases, they may be

115 This, of course, includes the level of generality at which it is appropriate to draw analogy. In *Harris* (2003) 56 NSWLR 298, 305, Spigelman CJ regarded as inconsistent with common law method ‘the identification of a principle at a high level of abstraction, from which is derived a rule of particular application’. But this may be too wide. It would, for example, question the legitimacy of the methodology involved in the identification of the neighbour principle: see *Donoghue v Stevenson* [1932] AC 562, 580–1 (Lord Atkin).

116 *Harris* (2003) 56 NSWLR 298, 325 (Mason P, dissenting).

117 Above nn 44–63 and accompanying text.

118 *Harris* (2003) 56 NSWLR 298, 311.

119 *Ibid* 310.

120 *Ibid* 310–11.

121 See *ibid* 324–5 (Mason P, dissenting).

subject to the all-or-nothing approach of causation in the common law action for money had and received.¹²²

Secondly, although equity as a gloss on the common law has no predetermined subject matter, its central institution, the trust, as well as the principles associated with trust law, may, of their nature, suggest a different approach to the solution of problems than that adopted in analogous cases at common law. For example, the assessment of equitable compensation may well require disregard of any limitations (such as remoteness) that apply to the assessment of common law damages, simply because the equitable duty breached demands, in the circumstances, a more stringent standard of conduct from the defendant than would be required in a corresponding action in tort or for breach of contract.¹²³ Thus, speaking of possible analogies between the assessment of compensation for breach of an express trust and common law damages, the High Court (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ) has recently said that ‘there must be a real question whether the unique foundation and goals of equity, which has the institution of the trust at its heart, warrant any assimilation ... with the measure of compensatory damages in tort and contract’.¹²⁴

The trust-like basis of much of the substance of equity, as well as the discretionary nature of many equitable rules and principles, may suggest that the scope for fusing law and equity is extremely limited. This, however, overlooks not only the nature of the common law (where, as *Harris* demonstrates, obligations in tort can resemble equitable obligations and whose many indeterminate rules make it impossible to assert an equitable monopoly on discretion),¹²⁵ but also the evolving nature of our perception of the similarity of rules and institutions. Concurrent administration, the manner of presenting legal arguments and issues, to say nothing of changing social realities – all affect the extent to which we now regard cases as relevantly similar, and this may entail a very different perception to that held, for example, in 1873. In the same way, developments in constitutional law, in federal jurisdiction, in the regulation of inter-State relationships and in the common law of Australia, have heightened our understanding of the unique features of conflict of laws within the Australian federation, making it inappropriate to categorise non-forum jurisdictions or laws as ‘foreign’,¹²⁶ regardless of how accurate such a view seemed in a different age.¹²⁷

122 Consider *In re Sims* [1934] Ch 1, 33 (Romer LJ).

123 See, generally, Charles E F Rickett, ‘Equitable Compensation: Towards a Blueprint?’ (2003) 25 *Sydney Law Review* 31.

124 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 77 ALJR 895, 902.

125 Even allowing for variations in the use of the term ‘discretion’: see, generally, David Wright, ‘Discretion with Common Law Remedies’ (2002) 23 *Adelaide Law Review* 243.

126 For example, *Chaff and Hay Acquisition Committee v J A Hemphill and Sons Pty Ltd* (1947) 74 CLR 162, 170 (Williams J).

127 See Michael Tilbury, Gary Davis and Brian Opeskin, *Conflict of Laws in Australia* (2002) 517.

C Uncertainty

The anti-fusionists argue that the fusion of law and equity will generate great confusion in the law that will prove costly to litigants.¹²⁸ This is because, cut free of its moorings in law and equity, the 'new law' will be free to develop in whatever fashion the courts choose to take it, but without any obvious rudders to guide it. There is some truth in this so far as the fusionist argument is simply that law and equity has been fused. But the principled and piecemeal fusion that is a much more likely development of the law will take place incrementally, against the background of the existing law. This will cause no more uncertainty than any other principled development of the law. Indeed, it could obviate the uncertainty that could arise from an unprincipled refusal to develop the law by removing unnecessary distinctions.

V THE FUSION FURPHY

The historical dialogue between law and equity necessarily entered a different phase when the institutional separation of law and equity came to an end. In a judicature world in which courts administer the rules of law and of equity concurrently, the awareness of the origins of those rules will gradually fade as the issues arising from the period of institutional separation seem increasingly irrelevant. To the extent to which the rules operate in harmony, no issue will arise. Thus, legal and equitable estates will remain and it will not matter that they bear their historical labels. But to the extent to which rules derived from diverse origins give differing results in apparently similar situations, the pressure for integration, assimilation or fusion of the rules of law and equity will be intense and natural.

The fusion fallacy raises two arguments in opposition to fusion. First, so far as a 'crossover of remedies' is involved, the result would have been impossible before 1873. Secondly, and generally, the importation of concepts from one jurisdiction to another is inappropriate because the concepts are 'foreign' to each other. These arguments are inconclusive in themselves: the first because it begs the question 'so what?'; the second because the current structure of legal doctrine, as well as today's social realities, may mean that the concepts are now actually far from foreign. In Professor Laycock's words:

The one thing we may be sure of is that the legal or equitable origin of the feature does not motivate the decision. Equity is fully accepted; legal and equitable features compete on a level playing field, largely commingled and sometimes indistinguishable. The argument about law and equity is over; now we argue about what the rules ought to be on grounds that are substantive, political or jurisprudential.¹²⁹

The fusion fallacy nevertheless serves the singularly important function of alerting us to the danger of assuming too readily that cases are alike, both in

¹²⁸ Meagher, Heydon and Leeming, above n 4, [2-230].

¹²⁹ Douglas Laycock, 'The Triumph of Equity' (1993) 56 *Law and Contemporary Problems* 54, 81.

terms of their factual circumstances and in the application of the legal doctrines to which those circumstances give rise. While this danger is present in our dealings with all legal rules, the nature of equitable doctrines and principles suggests some real limitations that make a general ‘fusion agenda’ inappropriate. Rather, the principled development of the law requires the application of the traditional method of the common law with its emphasis on incremental development through analogical reasoning, both inductive and deductive. To that development, I fear, with Stevenson J in *Canson Enterprises Ltd v Boughton*, that ‘talk of fusing law and equity only results in confusing and confounding the law’.¹³⁰ Whether that talk is pro-fusionist or anti-fusionist, it is misleading and a distraction from the real issues – in short, a furphy!

¹³⁰ (1991) 85 DLR (4th) 129, 165.