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Civil Litigation Law

**PERSPECTIVES FROM THE EQUITY BENCH,
including Reflections on Onus of Proof¹**

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(I) INTRODUCTION

1. This paper addresses five distinct topics from the perspective of a judge of the Equity Division of the Supreme Court of New South Wales: (1) fundamental changes in the “Judicature Act system” of court administration; (2) routine imperatives of current day Equity litigation; (3) the availability of tutorials on Australian legal history, with an emphasis on a doctrinal history of Australian law; (4) the operation of the concept of “onus of proof” in equity; and (5) the nature of equity jurisprudence in Australia.

(II) THE “JUDICATURE ACT SYSTEM”: And this too shall pass away?

2. Since, at least, 1975 and probably the early 1960s, Australian jurisprudence has entertained debate about the desirability, and effect, of a Judicature Act system of court administration: that is, a system in which, without explicit fusion of common law rules and equitable principles, one judge can administer the whole of the jurisdiction of a state Supreme Court, including jurisdiction at Law and in Equity.

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3. 1975 marked publication of the first edition of Meagher, Gummow and Lehane's text, *Equity: Doctrines and Remedies*, a call to arms against the heresy of "fusion fallacy". The "fallacy" (as described in paragraphs [205] and [220] et seq) is a suggestion that legislation that "fused" the administration of two separate jurisdictions – common law and equity – effected a fusion of the principles formerly administered in separate courts. The orthodox Australian view, reinforced by the success of *Meagher Gummow and Lehane*, is that it did no such thing, and the analysis of any legal problem requires distinct consideration of, or at least conscious allowance for, first, the operation of common law rules and, secondly, the operation of equitable principles.
4. It was in the early 1960s that the New South Wales legal profession moved steadily towards its adoption of a Judicature Act system on 1 July 1972, the commencement of the *Supreme Court Act 1970 (NSW)*, as amended.
5. Critics of the study of "equity" as a separate field of study not uncommonly make much of the passage of nearly 100 years between the commencement of the Judicature Acts of 1873 and 1875 in England (generally regarded as the legislative model for the Supreme Courts of Australian states and territories charged with administration of Law and Equity in a single court system) and the commencement of such a system in New South Wales.
6. Were closer attention to be given to a critical examination of the course of development of trial by jury in NSW and the equity jurisdiction of the Supreme Court of NSW, before and after enactment of the English *Judicature Acts*, one might discern a connection that would throw light on both. Whatever course Australian law might take in future days, its perception of its own history cannot (since enactment of the *Australia Acts (Imp/Cth)* of 1986) continue to be tied to the course of development of English law.
7. This paper is predicated upon an acceptance that, for the next generation of Australian lawyers at least, the orthodox view is, and is likely to remain, that, whatever may be the contrary aspirations of "fusionists", the orthodoxy of Australian jurisprudence is that adoption of a Judicature Act system by Australian courts (including the Supreme Court of New South Wales in 1972) did not effect a fusion of common law rules and equitable principles, and that a correct analysis of legal problems may require successive consideration of common law rules and equitable principles.
8. For the practising lawyer, this follows from the High Court of Australia's emphatic rejection of Birksian jurisprudence at the heart of recent developments in English law (eg, *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at 299-302) and the Court's adherence (in cases such as *Andrews v ANZ Banking Group Limited* [2012] HCA 30; 86

ALJR 1002) to reasoning processes that consult common law rules and equitable principles in distinct steps.

9. Debate about the effect of legislation based upon the English Judicature Acts has been deprived of at least some of its heat in recent years by: first, a primacy accorded to legislation and the art of statutory interpretation as a matter of analytical process, as well as outcome; and, secondly, the triumph of case management philosophy, aided by compulsory “ADR” (alternative dispute resolution) powers conferred on the NSW Supreme Court, and implementation of those powers (principally by orders compelling parties to litigation to engage in mediation processes).
10. The unheralded outcome of court reforms, in train since the 1960s, has been, not only the transparent demise of trial by jury (the mainstay of the “common law side” of the Supreme Court of New South Wales for over a century), but also the less noticed demise of the concept of a “trial”.
11. Displacement of the traditional concept of a “trial” was noticed by Chief Justice Spigelman in one of his last public addresses as Chief Justice (JJ Spigelman, “Truth and the law” (2011) 85 ALJ 746 at 751-752 and 755-756), but it has otherwise largely escaped attention.
12. Certainly, we do notionally have “trials” – or, as they were once uniformly called in equity, “final hearings” – but they are no longer confined, as they once were, to a discrete occasion. Their edges, before and after any notional “trial”, are hedged about by directions hearings of judicial officers moving towards a managed outcome of proceedings, with written submissions and the like largely displacing oral addresses culminating in a close-following delivery of judgment.
13. At the same time, at least in civil proceedings, greater informality has been brought to the concept of “rules of evidence” – by the Evidence Act 1995 (NSW) and accompanying adjectival discretions; by a concerted judicial attack on attempts by litigants to control adversarial processes through the use of “expert” evidence; and by the enactment of the *Civil Procedure Act 2005* (NSW) as a foundation for activist “case management” policies of judicial administration.
14. Whether governments will succeed in taming “the criminal law” by widespread recognition of the imperatives of modern management remains to be seen. However, proponents of modern management principles have succeeded in raising the consciousness of a need for “case management” of civil litigation in a world of scarce resources.
15. Ongoing debates about the merits or effect of a Judicature Act system in New South Wales tend to overlook the fact that our system of court administration has evolved into something new. With our abandonment of trial by jury in civil proceedings, the administration of

the Common Law is not what it was at the time New South Wales adopted a *Judicature Act* system. Nor, consequentially, is our administration of Equity what it was.

16. Procedural changes have, perhaps as yet only subtly, opened possibilities for the development of jurisprudential thinking about “common law” and “equity”. Both systems of thought have been, and continue to be, recalibrated by primacy given to statutory interpretation and case management philosophy.

(III) ROUTINE IMPERATIVES OF CURRENT DAY EQUITY LITIGATION

17. This is the system of court administration which I embraced in my acceptance of an appointment to the Supreme Court of New South Wales last year.
18. The Supreme Court is an extremely happy working environment. That has been my uniform experience and, to my observation, the experience of all judges of the Equity Division and, so far as I can see, all other judges of the Court.
19. The difference between a happy life and an unhappy one for a judge (not only a judge of the Supreme Court, I might add) is the ever-present reserved judgment, and mastery of the art of delivery of an *ex tempore* judgment.
20. The work required for the preparation of a judgment acceptable to parties increases exponentially if a judgment is reserved. Expectations of detailed analyses of fact and law increase. The tolerance allowed to a careful, but “off the cuff” *ex tempore* judgment evaporates once judgment is reserved, even for a short time.
21. The imperatives of the flow of judicial business point a judge's attention to the desirability of delivering an *ex tempore* judgment wherever, prudently, an *ex tempore* judgment can be delivered.
22. Whether or not an “*ex temp*” can be delivered, the efficient disposal of court business requires judges to undertake pre-trial preparation, sometimes substantial.
23. The desirability of all but minor judgments being posted on Caselaw's website (www.caselaw.nsw.gov.au) and, in due course, made available through other publishers of legal literature (eg, www.austlii.edu.au and www.jade.barnet.com.au, and commercial publishers) requires an investment of the time – sometimes substantial time – of judges and their staff in preparing a judgment in proper form.
24. The old days of a corrected transcript of a judgment sufficing have gone. The transcript of an *ex tempore* judgment needs, at least, to be corrected and to be placed in a Caselaw format. Within the limits of

convention, and to facilitate the use that can be made of it by readers who access electronic versions, a degree of editorial work may also be required. The process is labour intensive. However satisfying the work may be, it can be unrelenting for even the most willing of willing workers.

25. Litigation lawyers need to be aware of these pressures on the administration of courts when they engage with the judiciary.
26. With that in mind, attention is here turned to nine practical topics bearing upon the way civil litigation is currently administered in the Supreme Court.
27. First, recognition has to be given to the reality that there has been a practical abolition of “general discovery” as an interlocutory process, and an increasing level of control over the use of subpoenas for the production of documents and notices to produce designed by parties to pursue something akin to general discovery.
28. These developments have been necessitated by the inability of anybody engaged in modern litigation processes – judges, court staff, parties or lawyers – to cope with the flood of discoverable material routinely available under the old system of general discovery.
29. Under that system (based on *The Compagnie Financiere et Commerciale du Pacifique v The Peruvian Guano Company* (1882) 11 QBD 55 at 62-63) there was a broad definition of the class of documents, relevant to a fact in issue, that required discovery. A document was discoverable if it was directly or indirectly relevant. It was sufficiently relevant if it would lead to a chain of inquiry which would either advance a party’s own case or damage that of an adversary.
30. This standard of relevancy became administratively unsustainable, and generally oppressive, in the modern technological age of mass documentation. The system had to change. It could not cope. Those who complain about restrictions on the availability of discovery need to accommodate that harsh reality. All participants in the litigation process need to refine their focus.
31. The days have gone when a party might bank upon a confident prediction that a demand for general discovery, or for the production of a wide range of documents, will be met without resistance. This means, in practice, that, if there is any resistance to the production of documents (say, on an informal basis), and the aid of the Court is required, an applicant for discovery or for the production of documents might be called upon to explain in detail the precise nature of the case sought to be made in the proceedings generally, the precise terms of evidence available to the applicant for proof of that case, the precise documents sought to be uncovered by compulsory court processes,

and ancillary questions about the costs of compliance with compulsory demands for disclosure of documents.

32. Whether the unavailability of general discovery in current day litigation has been rendered easier to bear (for a generation of litigation lawyers trained in it and addicted to it) by contemporaneous emphasis on mediation – an avenue for informal discovery processes – may long remain an open question, hidden in the confidentiality of the mediation process.
33. Secondly, and implicitly perhaps in any application for compulsory disclosure of documents or (*via* the administration of interrogatories) information, there is in modern litigation an increasingly strong emphasis on the need for an early identification of “the real questions in dispute” in each set of proceedings.
34. Ultimately, that must be done in most cases by the service of written submissions “before trial”, or upon interrogation of bench by bar at a directions hearing, not only by pleadings.
35. The old art of “special pleading” may have been lost to history, but that loss has been over-compensated for by the skills of modern lawyers able to obscure contentious questions in formal pleadings.
36. Some lawyers, pressed to explain obscurity in pleadings by the early service of written submissions, do their best to avoid tying their clients down, even in written submissions, waiting for opportunities to reformulate a case depending upon prevailing winds. Within limits, at least where factual disputes remain to be clarified by cross examination, this is understandable. However, in a world of paper-driven advocacy and case managed hearings, the scope for “trial by ambush” has diminished.
37. Thirdly, although the desirability of trials conducted on issues discernable on well-crafted pleadings is no less than formerly, modern emphasis on more summary means of defining “the real questions in dispute”, and upon articulation of opening statements in written submissions filed, as proceedings approach trial can result in a disconnect between the issues defined by pleadings and issues fought at trial.
38. Counsel need to be alive to the possibility that, where parties choose to disregard pleadings and to fight a case on issues chosen at trial, they might be bound by the way the case has been fought in fact: *Dare v Pulham* (1982) 148 CLR 658 at 664; *Miller v Cameron* (1936) 54 CLR 572 at 576-577. A pleading point, if it is to be taken, should be taken as soon as it becomes apparent. It should be addressed expressly; by formal objection, an application for amendment or both. Pleadings should, as far as possible, underpin all issues litigated. If need be, they

should be amended *ex post facto* to reflect the reality of the way a case has been litigated.

39. Fourthly, the dictates of persuasive advocacy require that litigants be aware of imperatives on judges to undertake “pre-trial” preparation of their own. Not uncommonly, judges have a practical dependency on the availability of a well-prepared “court book” containing, in accessible form, all material court process, pleadings, affidavits, written submissions, chronologies and lists of authorities.
40. Well articulated “Outline Submissions” filed in advance of a contested hearing can facilitate definition of the questions in dispute at the commencement of a hearing and an efficient limitation, and disposal, of objections to evidence. A careful, selective List of Authorities (with the provision of, at least, key or obscure authorities) in hard copy form can serve as a signpost to judges and opponents of the true ambit of questions in dispute. A lack of restraint in references to authority may deprive a list, or bundle, of authorities of any persuasive value.
41. Fifthly, parties and their lawyers should, at all times, remain conscious of a need for: first, a clearly identifiable application (by originating process or a notice of motion) for anything required of the Court; secondly, a clear understanding, and articulation, of “orders sought” on such an application; and, thirdly, a case theory in support of any claimed entitlement or a claim for relief.
42. Surprisingly, not all advocates have these basic concepts clearly in view. Most do, but a few do not. Some are content to advance a “non-application” by inviting the Court’s attention to particular facts or perceived problems and, expressly or implicitly, by inviting a judicial response.
43. At the end of the day, a court can only speak through judgments pronounced or orders made. Even if a judge may be inclined to find his or her own identification, and solution, of a problem as the most persuasive, there is no guarantee that an open-ended invitation to a judge to intervene will not end in tears or lead to unintended consequences.
44. Sixthly, advocates need to be judicious in the objections to evidence that they take. More than a few objections, strategically taken, invite unnecessary fatigue; particularly unnecessary if (as often happens) evidence excluded by objection is notionally let back in by an objector’s cross examination of witnesses.
45. In practice, the process of taking objections to evidence and obtaining rulings may have a close connection with processes involved in refining “the real questions in dispute” at a contested hearing, and ensuring that all participants in such a hearing (bench and bar alike) are *ad idem* about those questions, and how they are to be litigated.

46. Sometimes, it seems that what is required is an element of trust between all players about “the real questions” and the nature and course of evidence to be adduced as going to those questions. When that trust develops, the true character of evidentiary rulings, at least in civil proceedings, may emerge in the form of two simple, basic questions. The first is: Is the evidence sought to be adduced “relevant” to a fact in issue? The second is: Is the evidence “probative” of a fact in issue?
47. It should not go unnoticed that each of these questions is predicated upon identification of “the facts in issue”.
48. Seventhly, at least in equity cases – where the nature of the business required to be conducted by the Court often involves management of property or relationship disputes that require an application of discretionary considerations rather than adjudication of contested claims of right – it is incumbent upon all parties, advocates and judge to remain vigilant in the identification of problems requiring a solution, and able to be solved, and the range of potential solutions that might lead to a just outcome or, at least, an outcome with which parties may live without undue injustice.
49. This requires a judge to exercise patience and discernment in listening to what parties have to say; not always an easy ask. It also requires advocates to remain conscious of their professional duties as officers of the Court, stridently independent in their exercise of judgment and “no mere mouthpiece” for a client or other interested party.
50. Eighthly, judges and all those who communicate with a judge need to remain conscious of limitations on the utility of emails. Email communications can facilitate the conduct of proceedings: by allowing everybody to participate in a simultaneous communication: by allowing the provision of short documentation to be relied upon in court; and by providing to court officers (usually a judge’s associate or the court registry) an electronic form of orders that must be entered in the Court’s records before judgments and orders can confidently be acted upon.
51. However, the downside of emails is that some lawyers, and more than a few self-represented litigants, imagine that they can, without prior (or, indeed, any) notice to an opponent, engage in private communications with a judge or the staff of a judge.
52. This may lead to misunderstandings and mistrust. It ordinarily does lead, at least, to inefficiency as steps have to be taken to bring all interested parties into the loop and to ensure that orderly, procedurally fair processes are followed.

53. That inefficiency is magnified if, as not uncommonly happens, a request that proceedings be re-listed pursuant to “liberty to apply” takes the form of a “non-application”. Whatever the limits of a reservation of “liberty to apply”, a party who acts upon it needs, strictly, to make or at least to foreshadow, an application. A request, or demand, for proceedings to be re-listed can rarely be acted upon responsibly by a judge, or by the staff of a judge, without the purpose of the proposed re-listing made manifest.
54. Lastly, lawyers and parties who communicate with the staff of a judge need to take care not to take out their frustrations with the litigation process or the perceived deficiencies of judicial rulings by rudeness directed to the staff of a judge. This sounds like an easy, simple rule to follow. For most people it is; but not for all people. The frailty of the human condition, and the nature of litigation, may lead to lapses by anybody. All of us – judicial officers and their staff, no less than litigants and their lawyers – need what is intended, here, to be a gentle reminder to us all of the virtue of courtesy, both in what we give and in what we receive in our communications.

(IV) AUSTRALIAN LEGAL HISTORY TUTORIALS

55. One of the joys of working within the Supreme Court of New South Wales is the presence on the Court’s staff of young lawyers, recent graduates working as tipstaves, research officers or the like. Their enthusiasm for the law and their profession of choice is refreshingly boundless. It is an important factor in keeping judges and other old hands open to new perspectives of old problems.
56. Thanks largely to the enthusiasm of these young people, the Francis Forbes Society for Australian Legal History has been able to organise, in conjunction with the Court, a series of tutorials on legal history. They have commenced within recent days. They are planned to continue throughout most of this year. They are held, after working hours, on alternate Tuesdays.
57. The emphasis of these tutorials is on working towards a “doctrinal history” of Australian law and, hopefully, publication on the websites of the Court and the Forbes Society of a “handbook” on Australian legal history.
58. Such a handbook is necessary to provide an outline of Australian legal history, including its foundations in English legal history, for those who have not been privileged to encounter it in a formal course of study. Knowledge of the past may inform an understanding of the present and lend aid to the formulation of plans for the future. This is true of problem solving in the law, as in other areas of human experience.

59. Attendance at the current series of tutorials on legal history is open to members of the Court and their staff and members and friends of the Forbes Society.
60. All going well, the tutorials may help to fill a gap in Australian legal literature, to promote understanding of importance of historical method in legal analysis, and to help the emergence of autonomous Australian jurisprudence in the wake of enactment of the *Australia Acts*.

(V) ONUS OF PROOF IN EQUITY

The Nature of the Topic

61. The concept of “onus of proof” is deeply engrained in the mindset of Australian judges and litigation lawyers of all descriptions. It is a reflection of: first, Australia’s debt to the English Common Law; and, secondly, the development in England of modern concepts of a trial, and rules of evidence, in the 18th and 19th centuries.
62. However, the meaning and operation of the concept of “onus of proof” is not as clear as may be commonly assumed.
63. For example, it is generally regarded as not applicable to the process of making correct administrative decisions. The High Court of Australia has, from time to time, made that point explicitly: eg, *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 19 [46]. Cf, A Kiralfy, *The Burden of Proof* (Professional Books, 1987), pp 10-11.
64. There are conceptual similarities between the way administrative law lawyers and equity lawyers approach problem solving. Perhaps that is because much equity work focuses on the management of property or relationships, the supervision of others making management-type decisions and, not a little, upon the application of statutory discretions. At one level, viewed functionally but governed by different objectives and cultural contexts, administrative law lawyers and equity lawyers have much in common.
65. It may be that, in terms of the nature of the jurisdiction they exercise, both have common roots with civil law systems of judicial administration, which eschew the rules of evidence that constrain a common law trial of a claim of right: MRT Macnair, *The Law of Proof in Early Modern Equity* (Duncker & Humblot, Berlin, 1999), pp 13-15².
66. The equity and administrative law jurisdictions both need to grapple with discretionary decision-making (as the writings and judgments of Paul Finn graphically demonstrate) and both differ from the historical

² The author acknowledges the assistance of Clare Langford (Research Officer of the Equity Division of the NSW Supreme Court) for this reference.

prototype of the common law lawyer, whose focus is upon the vindication of a claim of right, unattended by the discretionary relief available in equity or in modern administrative law legislation.

67. The historical origins of “administrative law” demonstrate that not all common law litigation involves jury-driven claims of right. Those origins can be traced to the discretionary, prerogative writs deployed by common law courts against their equity counterparts and others: EG Henderson, *Foundations of English Administrative Law : Certiorari and Mandamus in the Seventeenth Century* (Harvard UP, 1963).
68. The concept of “onus of proof” might be nevertheless thought to have its clearest application to the outcome of a jury trial (where there is a time constrained verdict, often expressed in terms of a positive or negative answer to a single question) or, at least, a trial constrained by its conduct at an appointed time and place.
69. And the “onus of proof” concept is, perhaps, less apt to a management decision made at the end of a managerial process – eg, an exercise of equity jurisdiction.

Is there a difference between Common Law and Equity?

70. Be that as it may, neither textbooks on “the law of evidence” nor textbooks on “principles of equity” routinely give any attention to whether there is a need to review the operation of the concept of “onus of proof” in the different contexts of “common law” and “equity” decision making.
71. The orthodox view, perhaps assumed to be correct rather than the subject of critical analysis, is that the one concept of “onus of proof” applies equally to common law and equity cases.
72. The fact that the analytical foci of the common law and equity traditions are different opens a possibility that, even in a *Judicature Act* system, they might, from time to time, take divergent approaches to onus of proof.
73. Procedurally, and philosophically, an essential, traditional difference between a common law action and an equitable claim is that, at common law, a plaintiff sues to establish a legal *right*; a petitioner, in equity, prays for relief in the *discretion* of the court: F Jordan, *Chapters on Equity in New South Wales* (6th ed, 1947), p 15, reprinted in *Select Legal Papers* (Legal Books, Sydney, 1983). That distinction still permeates both jurisprudential traditions, often unseen.
74. On the whole, common law claims of right focus on the time at which wrongdoing occurred. Vindication of a right by a judgment of the Court does not shift the focus from the time the cause of action arose even

if, exceptionally and so as to avoid injustice, the time of judgment can be taken as the time for assessment of damages.

75. By contrast, a claim for equitable relief focuses upon the question whether, having regard to all material circumstances as they appear at the time of decision, relief should be granted by the Court upon an exercise of discretion.
76. A grant of equitable relief (embodied in an order once described as a “decree” rather than the now universally used expressed “judgment”) is based, primarily, on the concept of an “equity” rather than a “cause of action”. Historically, the former expression expressed for an equity judge something of the concept contemplated by a common law judge in use of the latter expression: eg, *Commonwealth v Verwayen* (1990) 170 CLR 394 at 434.
77. It is still appropriate to speak of a need to identify an “equity” before equitable relief can be granted: eg, *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* (2001) 208 CLR 199 at 216 [8], 227 [45], 233 [64], 241 [91] and 259 [138]; *Friend v Brooker* (2009) 239 CLR 129 at 148 [38]. However, contemporary usage of the expression “cause of action” generally does not confine its field of operation to an exercise of common law jurisdiction.
78. Consistently with that, the expression “claim for relief” is defined in s 3 of the *Civil Procedure Act* 2005 (NSW) in terms that includes any claim (whether legal, equitable or otherwise) that is justiciable in the Supreme Court of NSW. Although rule 14.28 (1)(a) of the *Uniform Civil Procedure Rules* 200 (NSW) (which provides a rule-based jurisdiction to strike out defective pleadings) is drafted in terms that might be regarded as embracing both a common law “cause of action” and an “equitable case”, the expression “cause of action” is generally regarded these days as sufficiently broad to encompass a “common law cause of action” and (misnomer though it may be) an “equitable cause of action”.
79. As now viewed, both jurisdictions – Law and Equity - claim an entitlement to flexibility of remedy in order to avoid injustice. *Johnson v Perez* (1988) 166 CLR 351 at 355-356, 367, 371 and 380 establishes that for common law damages. *ASA Constructions Pty Limited v Iwanov* (1971) 1 NSWLR 512 at 516-519 and *Madden v Kevereski* [1983] 1 NSWLR 305 at 306F-307E illustrate it in relation to “equitable compensation”, and, more particularly, “equitable damages” awarded under the *Supreme Court Act* 1970 (NSW) s 68.
80. Unless, possibly, proceedings are fragmented by an order for the separate determination of particular questions in dispute (pursuant to an order under s 28.2 of the *Uniform Civil Procedure Rules* 2005), or unless conceptually related claims for relief against different parties are separately litigated (as contemplated by *Michael Wilson & Partners*

Limited v Nicholls (2011) 244 CLR 427 at 454-459), it is difficult to imagine a different approach to fact-finding would in practice be articulated by any judge exercising both common law and equitable jurisdiction, all else being equal.

81. Development of the concept of “onus of proof” was important in development of trial by jury. A jury was originally constituted by a committee of witnesses of fact. It evolved into a committee of adjudicators of fact based upon evidence adduced at trial: Barbara Shapiro, “Presumptions and Circumstantial Evidence in the Anglo-American Legal Tradition, 1500-1900” in RH Helmholz and WDH Sellar (ed), *The Law of Presumptions: Essays in Comparative Legal History* (Duncker and Humblot, Berlin, 2009), p 162. That necessitated development of “rules of evidence”, and spawned the publication of textbooks on the topic of evidence, governing the fact-finding process in court: Shapiro, pp 170-187.
82. By the middle of the 18th century, the English Court of Chancery had largely adopted Common Law rules of evidence: W Holdsworth, *A History of English Law* (Sweet & Maxwell, London, 3rd ed, 1944), vol 9, p 127; GW Keeton, *The Elementary Principles of Jurisprudence* (Sir Isaac Pitman & Sons, London, 2nd ed, 1949), p 432. Both Holdsworth and Keeton rely upon observations of Lord Hardwick in *Manning v Lechmere* (1737) 1 Atk 453; 26 ER 288 to ground that conclusion.
83. However, in accepting such a conclusion one needs to be conscious that “all else” is rarely “equal” where questions of practice and procedure are in play.
84. Four illustrations illustrate the point. First, different systems of pleading, and the extent to which written pleadings are the subject of debate before a judge for the identification of questions in dispute “before trial”, can profoundly affect the practical operation “at trial” of any concept of “onus of proof” in a particular case.
85. Secondly, throughout the years in which interlocutory procedures of “discovery” and “interrogatories” were available in equity proceedings, but not common law proceedings, a similar observation held good. To the extent that a plaintiff can prove a case out of the mouth of the defendant, the practical scope of the concept of “onus of proof” at a “trial” is conditioned by interlocutory processes.
86. Thirdly, concepts such as “presumptions” and “estoppels” that have in the past dwelt, and possibly still do to some extent dwell, on the border of adjectival and substantive law can affect perceptions of onus of proof quite dramatically.
87. Fourthly, cultural traditions that, not uncommonly but not necessarily, attend judicial decision-making conditioned by regular exposure to litigation of a particular type cannot ever be discounted entirely in the

world of legal practice. Judges, like others, are conditioned by experience to see in factual patterns what they are accustomed to seeing.

88. This last point can be illustrated by observations made in *Calverley v Green* (1984) 155 CLR 242.
89. There, Murphy J at 264 (picking up on his earlier observations in *Actors & Announcers Equity Association of Australia v Fontana Films Pty Limited* (1982) 150 CLR 169 at 213-215) said:

“Presumptions arise from common experience If common experience is that when one fact exists, another fact also exists, the law sensibly operates on the basis that if the first is proved, the second is presumed. It is a process of standardised inference. As standards of behaviour alter, so should presumptions, otherwise the rationale for presumptions is lost, and instead of assisting the evaluation of evidence, they may detract from it. There is no justification for maintaining a presumption that if one fact is proved, then another exists, if common experience is to the contrary”.

90. Dean J (at 155 CLR 267) might be read as having genuflected in the same direction when he wrote the following:

*“... The ‘presumption of advancement’, is not, if viewed in isolation, strictly a presumption at all. It is simply that there are certain relationships in which equity infers that any benefit which was provided for one party at the cost of the other has been so provided by way of ‘advancement’ with the result that the prima facie position remains that the equitable interest is presumed to follow the legal interest and to be at home with the legal title or, in the words of Dixon CJ, McTiernan, Fullagar and Windeyer JJ in *Martin v Martin* (1959) 110 CLR 297 at 303, that there is an ‘absence of any reason for assuming that a trust arose’. ‘The child or wife has the legal title. The fact of his being a child or wife of the purchaser prevents any equitable presumption from arising’ (110 CLR at 304) (quoting Ashburner’s Principles of Equity, 2nd ed, (1933), p 110n)”*

Established patterns of “Onus of Proof”

91. Where a court is called upon to exercise jurisdiction long recognised as falling within the realm of “common law” or “equity” there may be established patterns of the incidence of onus of proof. One graphic illustration of that is found in a contested application for a grant of probate in solemn form.
92. Another, liable to emerge in any class of case but with a common law flavour, is found in cases concerning the characterisation of an

advance of money or proof of its repayment: *Coshott v Sakic* (1998) 44 NSWLR 667 at 671D-G. The burden of proving the fact that an advance of money was made by way of loan rather than by way of gift is on the plaintiff: *Heydon v Perpetual Executors Trustees and Agency Co (WA) Limited* (1930) 45 CLR 111 at 113. On the other hand, if there is no issue that the original payment to the defendant was a loan, the defendant bears the onus of proving repayment: *Young v Queensland Trustees Limited* (1956) 99 CLR 560 at 569-570.

93. There are far fewer bright lines when the relief sought is confined to a claim for a declaration, the historical provenance of which is not exclusively that of the common law, equity or legislation: *Blanch v British American Tobacco Australia Services Limited* (2005) 62 NSWLR 653, following *Massoud v NRMA Insurance Limited* (1995) 8 ANZ Insurance Cases 61-257 (75,873), extracted at 62 NSWLR 657-662 especially at 660. The incidence of the onus of proof in such a case may, in the abstract, reside with the claimant for relief but, fundamentally, it depends upon the terms of the declaration sought, the nature of the right sought to be declared and the availability of any relevant presumptions.
94. What some minds prefer to treat as mere questions of fact in a particular case, other minds prefer to analyse in terms of legal principles of general application and varying degrees of authority.
95. That orthodox view of the concept of “onus of proof” (that it is essentially the same at Common Law and in Equity) is probably grounded upon the following propositions, which can be seen reflected in Australian texts on the law of evidence, old and new (JF Stephen, *A Digest of the Law of Evidence* (NSW edition, by HG Shaw, 1909), pp 126-131; JD Heydon, *Cross on Evidence* (9th ed, 2013), ch 4):
 - (a) First, “he who alleges must prove”. The onus of proof is generally, intuitively, thought by most people to be borne by a party who makes an assertion (particularly, as the field of operation of the concept of “proof”, an assertion of “fact”) requiring a decision in a world of imperfect knowledge.
 - (b) Secondly, if knowledge of a disputed fact is peculiarly within the knowledge of a particular party, most people, intuitively, incline to the view that fairness requires that that party bear the onus of proof, one way or the other, referable to adjudication on that disputed fact.
 - (c) Thirdly, at the end of the day, the location of the onus of proof is generally determined:
 - (i) by reference to applicable statute law, if any;

- (ii) by reference to authoritative judicial precedents, if any; and
 - (iii) otherwise, by reference to considerations of fairness, informed by judicial experience and the nature of the questions to be decided, and the facts to be ascertained, in a particular case.
96. This approach derives much, if not all, from the writings of Wigmore (JH Wigmore, *Evidence in Trials at Common Law* (Little Brown & Co, 3rd ed, 1940), volume 9, Book II), a US lawyer whose jurisprudence has been embraced around the common law world, including Australia.
97. There are, in practice, substantial qualifications on this general approach, particularly (one might think) in the realm of equity jurisprudence or decision making in any area of life where, functionally, there is a public interest element that trumps any private, adversarial interest of particular parties.
98. Examples of public interest litigation that come to mind are cases involving the *parens patriae* jurisdiction and the supervisory, disciplinary jurisdiction that the Supreme Court exercises over lawyers who are officers of the Court *Law Society of NSW v Weaver* [1977] 1 NSWLR 67 at 73D; *Weaver v Law Society of NSW* (1979) 142 CLR 201 at 207).
99. Qualifications affecting the orthodox “one size fits all” approach to onus of proof at Law and in Equity often find foundations in the following:
- (a) Rebuttable presumptions, regularly operative in equity (eg, presumption of resulting trust, presumption of advancement, presumption of undue influence) but also found in the administration of the law generally (eg, presumption of sanity).
 - (b) Concepts of estoppel, an area of ongoing debate even though the idea that an estoppel operates as a “rule of evidence”, rather than as a substantive law principle, appears largely to have receded from view.
 - (c) Special rules that apply in jurisdictional areas generally thought of as part of the “equity jurisdiction”, but which have historical foundations in other, specialist jurisdictions. Two common examples come to mind. The first is the law of Probate, derived from “ecclesiastical law” and, through canon law, influenced by Roman law: *Tobin v Ezekiel* [2012] NSWCA 285; *Re Eger; Heilprine v Eger* (Powell J, 4 February 1985) BC8500997; *Butterworths’ Succession Law and Practice* (NW) para [13,001]; *Ridge v Rowden; Estate of Dowling* (Santow J, 10 April 1996) BC 9601342;

Butterworths' Practice, para [13,045]; A Kiralfy, *The Burden of Proof*, pp 2-3 and 129-136. The second is the Protective jurisdiction – derived from the Crown's *parens patriae* jurisdiction over children, and its jurisdiction over the mentally ill: *Roberts v Balanco* (1987) 8 NSWLR 436 at 440-441; *Re Victoria* (2002) 29 Fam LR 157 at 159[11].

100. This list of qualifications is not exhaustive. It could, one suspects, be expanded by an exploration of the existence, utility and history of “legal fictions” in the administration of justice.
101. The tendency of mind in every generation is probably to imagine that legal fictions are to be found only in history, not in everyday life. The reality may be, however, that our perceptions of fictions are limited by current cultural norms and undue confidence in the universality of the rationality of our own thought processes.
102. Attempts to define the meaning of “legal fiction” can encounter the difficulty that “law” is an abstract idea and differences between “law” and “fact” are not always clear. Moreover, lines between “legal fictions” and “presumptions” may be blurred, at least to the extent that a “presumption” has a field of operation more embedded in “law” than “fact” than Murphy J would have had it: eg, LL Fuller, *Legal Fictions* (Stanford University Press, 1967), ch 1.

The Role of “Presumptions” and “Estoppel”

103. Differences in approach to the concept of “onus of proof” in different areas of legal practice may be masked by reference to established patterns of “presumptions” or developments in “the law of estoppel”, once (but no longer) firmly grounded in the law of evidence.
104. It is not the purpose of this paper to advocate any change in the approach taken by Australian courts to the concept of “onus of proof”.
105. The more modest object of the paper is to examine the concept – to hold it up to view – from different perspectives in the hope that, by doing so, a better understanding of the nature and ambit of the Equity jurisdiction in Australia might emerge.
106. There is nothing novel in the concepts of “onus of proof”, “presumptions” and “estoppels” being bracketed together. The “New South Wales edition” of Stephen’s *A Digest of the Law of Evidence*, published in 1909, did just that. Part III (entitled “Production and Effect of Evidence”) included successive chapters on “Burden of Proof” (chapter 13) and “On Presumptions and Estoppels” (chapter 14). The latest Australian edition of *Cross on Evidence* (9th ed, 2013), in successive chapters, deals with “Estoppels:” (chapter 3) and “The Burden of Proof and Presumptions” (chapter 4).

107. The operation of either an estoppel or a presumption may directly, or indirectly, bear upon onus of proof. If a party is estopped from relying upon a particular fact or case, or confronted by a presumption of any description, the nature of adversarial litigation is necessarily affected. The nature and scope of the issues to be litigated affect the evidence relevant to, and probative of, a fact in issue.
108. Not uncommonly, rulings on evidence (and satisfaction about proof, or absence of proof, of a contested fact) are governed by both: (a) perceptions of problems to be solved; and (b) definition of the legal standards to be applied to facts found.
109. Concepts of “estoppel” and “presumptions” have work to do here.
110. **The Law of Estoppel.** By convention – so far as any convention may exist – “estoppels” are analysed by reference to “estoppel by record”, “estoppel by deed” and “estoppel by conduct” (also, and more traditionally, known as “estoppel *in pais*”), based upon Sir Edward Coke’s classification in his *Commentary upon Littleton*. That work was written in about 1628. Many editions have been published since that time. The 18th edition, corrected, was published in 1823. It has two virtues. First, it was reprinted by Law Book Exchange Limited in 1999. Secondly, and more importantly, it was the current edition on 25 July 1828, the date appointed for the reception of English law in New South Wales by 9 Geo. IV c 83 (Imp), named the *Australian Courts Act 1828* (Imp) by the *Short Titles` Act 1896* (Imp). The relevant passage is found in volume 2, pp 352a 352b.
111. The expression “estoppel by record” is, perhaps, best understood these days as embracing concepts of *res judicata* (cause of action estoppel) and issue estoppel: *Blair v Curran* (1939) 62 CLR 464 at 531-533. Related concepts, routinely referred to these days, are: first, the elaboration of *Henderson v Henderson* (1943) 3 Hare 100; 67 ER 313 in *Port of Melbourne Authority v Anshun Pty Limited* (1981) 147 CLR 589; and, secondly, the concept of abuse of process developed by reference to *Reichel v Magrath* (1889) 14 App Cas 665 in *Haines v Australian Broadcasting Corporation* (1995) 43 NSWLR 404 at 410B, *Rippon v Chilcotin Pty Limited* (2001) 53 NSWLR 198 and other cases.
112. “Estoppel by deed” is distinguished by the special significance given to deeds in Australian law (*Labracon Pty Limited v Cuturich* [2013] NSWSC 97), although (as illustrated by *Manton v Parabolic Pty Limited* (1985) 2 NSWLR 361 at 366-369) the concept of “a deed” may be broader than commonly thought.
113. In Australian jurisprudence, most controversy attaches to Coke’s third category (which, I suspect, is best understood simply as a residual category after allowing for the other two).

114. There is some suggestion in judgments of the High Court of Australia that there is a “unified doctrine” of estoppel by conduct: *Legione v Hateley* (1983) 152 CLR 406 at 430-437, *Foran v Wight* (1989) 168 CLR 385 at 411-412 and 435, and *Commonwealth v Verwayen* (1990) 70 CLR 394 at 411 and 440. That suggestion has been resisted by other judges operating at the same level: eg, *Giumelli v Giumelli* (1999) 196 CLR 101 at 112-113 [7].
115. Perhaps this is one of those debates in the law that is destined forever to attract interest, but never to be resolved because life seems to carry on without necessity of a resolution.
116. For Australian lawyers, the best foundational statements of the nature and scope of estoppel by conduct remain the judgments of Dixon J in *Thompson v Palmer* (1933) 49 CLR 507 at 547, *Newbon v City Mutual Life Assurance Society Limited* (1935) 52 CLR 723 at 734-735 and *Grundt v Great Boulder Pty Goldmines Limited* (1937) 59 CLR 641 at 674-677. In terms of practical advocacy, the current good root of title for New South Wales lawyers contemplating this topic is *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483, though reference back to Dixon’s analysis is a prudent precaution in all cases.
117. The importance of such an approach is underscored by the fact that two of our main equity reference books, in their more comprehensive treatment of the topic of estoppels, highlight that the law is in a “state of flux” or, at least, bedevilled by a lack of clarity about terminology and the historical origins of particular concepts of estoppel: Meagher Gummow & Lehane, *Equity: Doctrines and Remedies* (4th ed, 2002), ch 17; Young, Croft and Smith, *On Equity* (2009), ch 12.
118. What is, at least, clear, is that, insofar as estoppel by conduct has common law origins it originated as a “rule of evidence” (*Greer v Kettle* [1938] AC 156 at 171); changes in trial process affected the common law’s formulation of the concept (W Holdsworth, *A History of English Law* (3rd ed, London, 1944), volume 9, pp 144-146); that reformulation drew upon longer established equitable principles; and, throughout the 20th century, legal writers with different perceptions of the relative roles of Law, Equity, Taxonomy and the Law of Contract (including the importance of “consideration” in contract law) have treated “the law of estoppel” as a battlefield for divergent perspectives.
119. How Australian law is developed in this area may define, and be defined by, our thinking about the “law of civil obligations” more generally. Even the idea that there is a generic “law of civil obligations” needs at times to be approached with care.
120. **Presumptions.** For those who cherish neatness in conceptual analysis, “the law of presumptions” is no less shambolic than “the law of estoppel” appears to some to be. Treatment of the topic in *Cross on Evidence* (9th Australian edition, 2013) commences, at paragraph

[7235], with a disclaimer of “a sense of hopelessness” qualified by an acknowledgement of “extraordinary perplexity” in extra-judicial discussion of presumptions.

121. This area of the law is probably more empirical than many other areas, and dictated by experience in particular jurisdictions; the purpose or purposes served by each jurisdiction; and considerations of fairness in exercise of each particular jurisdiction.
122. This may be illustrated by reference to a “presumption of sanity” which might reasonably be thought to be of general application. In *Murphy v Doman* (2003) 58 NSWLR 51 at 58 [36] Handley JA said that that presumption “applies unless and until the contrary is proved” and he described it, in modern terms, as “a presumption that a person of full age is capable of managing his or her affairs”. That description was given to it in the course of consideration of the mental capacity of a party to participate in proceedings as a self-represented litigant.
123. Recognition of the “presumption” in any particular case is likely, fairly quickly, to focus attention on the different tests applicable in different jurisdictional areas, whether found in legislation or under the general law.
124. Whatever our training, most Australian lawyers probably still take as a point of reference the criminal law standard of insanity developed from *M’Naghten’s Case* (1843) 10 Cl & Fin 200 at 210; 8 ER 718 at 722. If pursued, that line of inquiry, might cause reflection on the difference between a finding of “not guilty by reason of insanity” and a finding that an accused person is fit to stand trial: *R v Mailes* (2001) 53 NSWLR 251 at 278-279.
125. The mind of a probate lawyer will drift, fairly quickly, to *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-565 as the classic statement of the nature and degree of mental capacity required for the making of a valid will.
126. An Australian lawyer charged with assessing the validity of an *inter vivos* transaction will turn to *Gibbons v Wright* (1954) 91 CLR 423 at 437-438 for the classic statement of the nature and degree of mental capacity to effect such a transaction. There will be found, sensibly enough, a statement that everything depends upon the particular transaction; each party to a transaction requires “such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation” in it.
127. In the growth area of disputes about the validity, and operation, of Enduring Powers of Attorney, reference will be made to the judgment of Barrett J in *Szozda v Szozda* [2010] 804 at [31]-[41].

128. These references collectively demonstrate that, “presumptions” may be used not merely to indicate where an onus of proof may lie but also to cast light on what, precisely, is to be “proved”. In many cases, the second function is more important than the first, even if the first is given a higher profile by reason of its reduction to a pithy, manageable, analytical label.
129. Passing over the law of probate (which is full of “presumptions” instructive about process, appearances and realities attaching to the making of a will), an equity lawyer is bound to have at least passing familiarity with a “presumption of resulting trust”, a “presumption of advancement” and a “presumption of undue influence”. The first and second focus attention on the intention of a party alleged to have disposed of property, and relationships on either side of a transaction said to constitute a disposal of property. The latter concept focuses greater attention on the existence of particular types of relationship, and consideration of how power, trust, reliance and dependency may play out in the assessment of whether a particular act is voluntary.
130. In approaching a “presumption of undue influence” one needs to bear in mind that there is a different presumption bearing that name to be found in probate cases as distinct from equity cases: Young, Croft and Smith, *On Equity* (2009), paras [5.330]-[5.520]. And in the Equity jurisdiction, one needs to bear in mind that the presumption might operate, not merely because of established relationships such as parent and child, lawyer and client, clergy and parishioner; but because of evidence, in the particular case, of one party’s dependency on another and the presence of a relationship of influence: *Johnson v Buttress* (1936) 56 CLR 113.
131. In these cases, as in those relating to the “presumption of sanity”, presumptions serve more than an evidentiary function. They direct attention to legal tests that have to be applied to the facts of a particular case in order to ensure due application of legal principles.
132. It might never be possible, or even desirable, to bring conceptual, logical consistency to either “the law of estoppel” or “the law of presumptions”. However, the life of the law might depend on constant inquiry about such possibilities.

The Civil Standard of Proof

133. The areas of practical operation of these qualifications on the concept of “onus of proof” are sufficiently extensive to call into question a simple, formal assertion that the concept of “onus of proof” is the same in Equity as it is at Law.
134. Whether a similar conclusion would be available on a consideration of the “standard of proof” in the two jurisdictions must be left for another day. However, as *Brigginshaw v Brigginshaw* (1938) 60

CLR 336 demonstrates and its statutory embodiment in s 140 of the *Evidence Act 1995* (NSW) confirms, the common law standard of proof in civil proceedings (“on the balance of probabilities”) has been adapted to jurisdictions other than the common law. This has been done by an acknowledgement that the degree of satisfaction required by the civil standard may vary with the seriousness of the fact to be proved. And recognition that the process of proving a fact is not a mechanical one constrained by mathematical calculations.

135. This important insight is reinforced by an appreciation that, in a world governed by experience and not merely logic, different jurisdictions may be exercised differently because of differences in traditions or cultural norms associated with particular jurisdictions or because of the functional purpose served by different types of jurisdictions.
136. Oliver Wendell Holmes’ common law orientation led him comfortably, in his classic work, *The Common Law* (Little Brown & Co, Boston, 1881) at page 301, to embrace the idea that it is open to a contracting party to perform or breach a contract at its option, provided it accepts an obligation to pay damages as the price of a breach. An equity lawyer may shrink from acceptance of that approach because of a predisposition, perhaps evolved from the ecclesiastical origins of English equity, to insist that promises be performed: *Zhu v Treasurer of NSW* (2004) 218 CLR 530 at 574-575 [128]; *Tabcorp Holdings Limited v Bowen Investments Pty Limited* (2009) 236 CLR 272 at 285-286 [13]. This is one illustration of a difference in cultural norms.
137. Another may be observed in the historical tendency of common lawyers to insist upon contracts being enforced according to their terms and the predisposition of equity lawyers to relieve parties from contracts when, within established lines of authority, their protective instincts are engaged. These cultural norms sometimes, but not all the time, find expression in substantive law principles. At other times they find expression in the way judges, trained in one tradition or the other, exercise the jurisdiction they are called upon to exercise.

(VI) THE NATURE OF EQUITY JURISPRUDENCE IN AUSTRALIA :
Imperatives of Legal History

138. With the passage of the *Australia Acts*, 1986 (Imp/Cth) and growing disparities between English and Australian law, as England drifts towards or toys with, Europe, it may become increasingly untenable for Australians to define their equity jurisprudence by reference to historical antecedents defined by:
 - (a) principles applied in England, by England’s Lord Chancellor or Courts of Chancery no longer extant; and

- (b) decision-making procedures in the Court of Chancery which have for decades been applied in the administration of justice across all jurisdictions and under pressure of modern-day imperatives, abandoned in favour of other procedural norms.
139. Classically, equity lawyers disclaim Aristotle's association of the word "equity" with broad notions of fairness and justice. That is, not uncommonly, necessary to ensure that equitable principles can serve the functions required of a legal standard, without dissipating into a secular form of pantheism. Rigorous maintenance of discipline in this department might be necessary to ensure the integrity of equity as a workable system of thought.
140. However, equity lawyers also tend, classically, to suggest that "equity" as it is known to them professionally, cannot be defined otherwise than by reference to its historical antecedents or a grab bag of particular examples.
141. A classic example of this is found in the first of FW Maitland's course of lectures published under the title of *Equity* (Cambridge University Press, 1st ed, 1909; 2nd ed, revised, 1936):

"I intend to speak of Equity as an existing body of rules administered by our courts of justice. But for reasons which you will easily understand a brief historical prelude seems necessary. For suppose that we ask the question – What is Equity? We can only answer it by giving some short account of certain courts of justice which were abolished over thirty years ago. In the year 1875 we might have said 'Equity is that body of rules which is administered only by those Courts which are known as Courts of Equity'. The definition of course would not have been very satisfactory, but now-a-days we are cut off even from this unsatisfactory definition. We have no longer any courts which are merely courts of equity. Thus we are driven to say that Equity now is that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity.

This, you may well say, is but a poor thing to call a definition. Equity is a certain portion of our existing substantive law, and yet in order that we may describe this portion and mark it off from other portions we have still to make reference to courts that are no longer in existence. Still I fear that nothing better than this is possible. The only alternative would be to make a list of the equitable rules and say that Equity consists of those rules. This, I say, would be the only alternative, for if we were to enquire what it is that all these rules have in common and what

it is that marks them off from all other rules administered by our courts, we should by way of answer find nothing but this, that these rules were until lately administered, and administered only, by our courts of equity.

Therefore for the mere purpose of understanding the present state of our law, some history becomes necessary. I will try to tell the main story in a few words but you should read it at large in the books that I have just mentioned – Story, Lewin, Ashburner, Strahan, Holdsworth – or in other books such as Spence’s Equitable Jurisdiction.”

142. An unacknowledged source for these views could be Blackstone’s *Commentaries*. He was unpersuaded that the English Courts of Common Law of his day (in the late 18th century) needed the external stimulus of the Court of Chancery to do justice between parties (*Commentaries*, ch 4 and 27), but he recognised that the two types of court had different “modes of administering justice”. They differed, he said, in their mode of proof, their mode of trial, and their mode of relief.
143. A challenge for the current generation of equity lawyers in Australia may be to explore whether, despite doubts like those of Maitland and Blackstone, equity can be explained or elaborated without more than a passing reference to English legal history or deference to courts and procedural norms no longer of this world.
144. That challenge can be met, I believe, from the deep wells of jurisprudence we have in Australian caselaw, dealing with local solutions to local problems. Ultimately all law (like all politics) is “local”.
145. The natural starting place for any current day review of Australian jurisprudence is in the *Commonwealth Law Reports*. However, across boundaries of time and space more than a few highly respected equity lawyers other than High Court judges, can be identified. In New South Wales, Sir Frederick Jordan is a safe bet for nomination to that prize - as would be, I suggest, the likes of John Kearney and Denis Needham whose company we can no longer enjoy except in the elegance of their judgments.
146. Functionally, equity is adaptable to time and place as it serves the purpose of addressing gaps or deficiencies in the general law. Its operation can expand, or contract, to meet the exigencies of time and place, although not effectively without close, careful, critical consideration.
147. Recognising that that is the nature of the beast with which we must deal, there can be less angst than is sometimes experienced in

recognition of divergences between Australian and foreign jurisdictions with a common jurisprudential heritage.

148. Upon our consideration of equitable principles, recognition needs to be given to the core values of equity jurisprudence and the functional purpose of principles of equity that may be called in aid in the identification, and solution, of problems that confront lawyers practising in Australia.

(VII) CONCLUSION

149. An appreciation of those different traditions, and the imperatives of different types of jurisdiction judges are routinely called upon to exercise, have been, and are likely to remain, important factors in the administration of justice. They are no less important in the ongoing development of Australian law as an autonomous system of jurisprudence.
150. A more comprehensive study of the operation of the concept of “onus of proof” in the context of Equity cases could provide new insights into the character of Australian jurisprudence, not limited to the realm of equity.

Justice G. C. Lindsay

5 April 2013