CHAPTER 1

THE NATURE AND HISTORY OF EQUITY

COVERED IN THIS CHAPTER

After successfully completing this chapter, you will be able to:

- describe equity
- understand the historical background of equity
- explain the judicature system
- discuss fusion fallacies
- understand the role of equitable maxims.

CASES TO REMEMBER

Earl of Oxford's Case (1615) 1 Ch Rep 1; 21 ER 485
Walsh v Lonsdale (1882) 21 Ch D 9
Seager v Copydex (No. 1) [1967] 2 All ER 415
Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298; 197 ALR 626

STATUTES TO REMEMBER

Supreme Court Act 1970 (NSW) ss 57–62
Law Reform (Law and Equity) Act 1972 (NSW)
Civil Proceedings Act 2011 (Qld) s 7
Supreme Court Act 1935 (SA) ss 17–28
Supreme Court Civil Procedure Act 1932 (Tas) ss 10–11
Supreme Court Act 1986 (Vic) s 29
Supreme Court Act 1935 (WA) ss 24–5
Supreme Court of Judicature Act 1873 (UK) ss 24–5

OVERVIEW

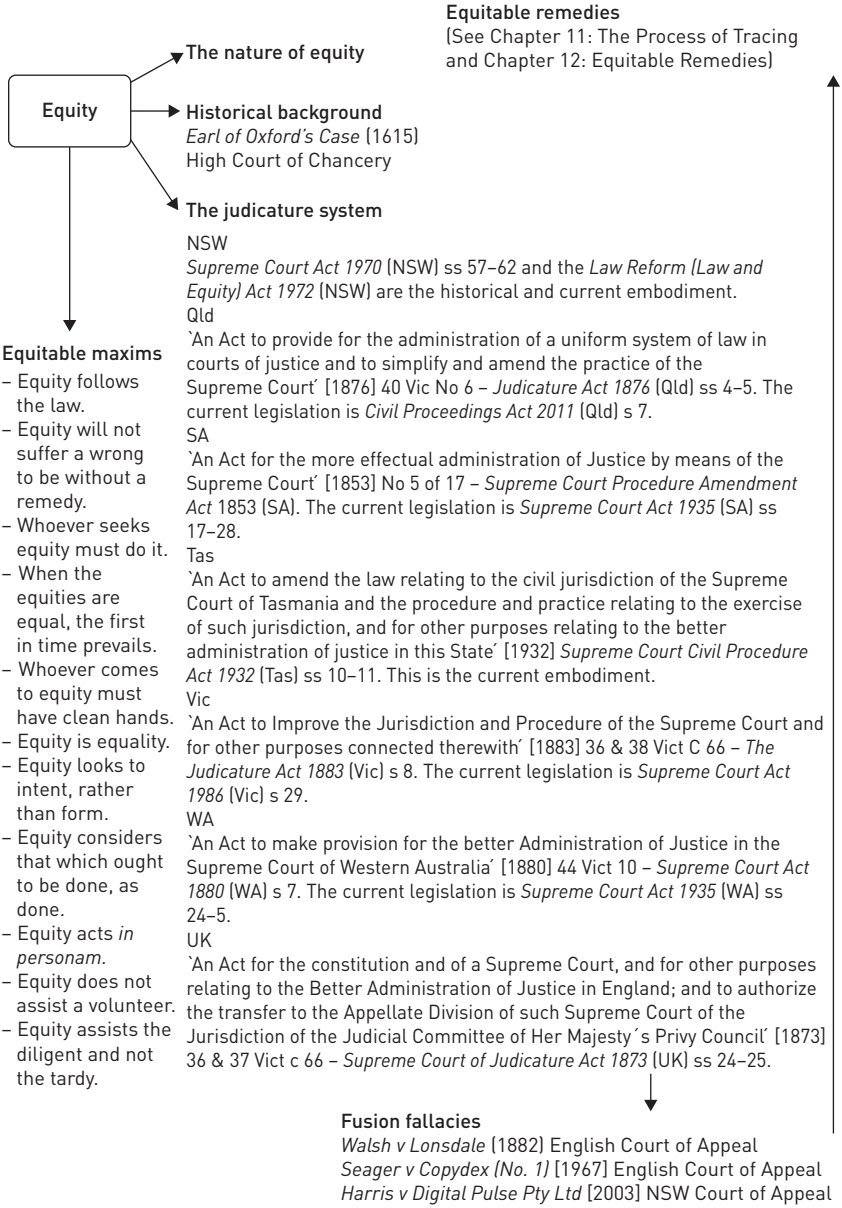
Figure 1.1 provides an overview of this chapter. The material in this chapter has been organised following the structure indicated in this figure.

THE NATURE OF EQUITY

Equity is based upon the notion of 'unconscionability': that is to say, the court will intervene where an act or omission is considered to be 'against the conscience'. Parkinson has noted that there are roughly five categories of such matters:

1 the exploitation of vulnerability or weakness
2 the abuse of positions of confidence

FIGURE 1.1 The nature and history of equity



3 the insistence on rights in circumstances which are harsh or oppressive
4 the inequitable denial of obligations
5 the unjust retention of **property**

(P Parkinson, 'The Conscience of Equity' in P Parkinson (Ed.), *The Principles of Equity*, Lawbook Co., 2003, pp. 29–54 at p. 35)

Note: these categories are not fixed or closed.

French J in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd [No. 2]* (2000) 96 FCR 491 noted at 502 '[C]ircumstances of inequality do not of themselves necessarily call for the intervention of equity. It is the concept of unfair advantage being taken of serious inequality that is central to the notion of unconscionable conduct …' Inequality by itself will not invite equity's intervention. It must be established that it would be against the conscience for a court of equity not to acknowledge what has occurred between the parties.

Equitable remedies are both flexible and discretionary. Attention is focused on the relationship between the parties.

Increasingly, statutes are not just embracing but expanding equitable principles and doctrines; examples include ss 20, 21 and 22 of the Australian Consumer Law (ACL) found in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). These principles were previously expressed as ss 51AA, 51AB and 52 *Trade Practices Act 1974* (Cth). Further examples include directors' duties in ss 180–4 *Corporations Act 2001* (Cth).

HISTORICAL BACKGROUND

'Equity' refers to those principles that were initially created in the English High Court of Chancery. They were developed in response to the rigid technical procedures of the common law.

Equity might be described as softening or correcting the common law.

In the context of forming a contract, the doctrine of estoppel is an example of equity overcoming the strict common law rules regarding consideration (see Chapter 4: Undue Influence, Unconscionable Conduct and Estoppel).

Protecting positions of confidence and preventing abuse by a stronger party are further examples (see Chapter 5: Fiduciary Obligations and Confidential Information).

It was in equity that the concept of a **trust** was developed. In a trust, legal and equitable interests in property can be separated and held by different parties (see Chapter 6: The Nature of Trusts).

A recurring theme in equity is whether, after examining all of the circumstances, it would be unconscionable not to recognise certain rights, titles and interests between the parties.

In England during the thirteenth century, the common law was based on rules. Those who had difficulty in satisfying the strict requirements petitioned the Crown for dispensation. It was in the fourteenth century that a distinct body of law known as equity was developed. Given the increasing number of petitions to the Crown, they were referred to the Chancellor. At this time the Chancellor belonged to the Church.

There was no binding precedent with respect to petitions. Each case was considered on its merits. Where the application of the common law would be harsh or unjust, the Chancellor might according to his 'conscience' provide relief in equity.

Seldon famously noted:

> Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for measure we call a foot a chancellor's foot; what an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same in the chancellor's conscience.
>
> (17th cent. J Selden, Table Talk, quoted in M B Evans, RI Jack (Eds) *Sources of English Legal and Constitutional History* (Butterworths, Sydney, 1984) 223–224).

This is a comment about the development of equity being ad hoc and highly discretionary. Sir George Jessel MR in *Re Hallett's Estate; Knatchbull v Hallett* (1880) 13 Ch D 696 at 710 noted that common law, with its emphasis on rules, has existed 'from time immemorial', but equity is made up of principles created 'from time to time' by the Chancellor. Equity developed after the common law. Equity was a response to the harshness or injustice created by the common law's focus on rigid rules.

A CASE TO REMEMBER

Earl of Oxford's Case (1615) 1 Ch Rep 1; 21 ER 485

Facts: Despite the actions of the plaintiff in preventing the defendant's witness from attending court, the plaintiff was successful in obtaining a favourable judgment at common law. The defendant petitioned the Chancellor to intervene on the basis that, given the plaintiff's inappropriate conduct, the judgment should not be enforced.

Issue: Equity responding to the harshness of the common law.

Decision: The Chancellor, Lord Ellesmere, noted the difficulty of the common law's rules applying to every situation and awarded an injunction. This decision challenged the power of the common law courts, and Lord Chief Justice Sir Edward Coke of the King's Bench responded by declaring that the defendant acted unlawfully by petitioning the Chancellor. Ultimately the matter was resolved when the King, James I, issued a decree stating that where a party had a good argument in equity, they would not be left to languish at common law.

The role of equity was established by the decision in the *Earl of Oxford's Case*, yet disputes regarding the arbitrary nature of equity continued. Charles Dickens, in his novel *Bleak House*, provides an accurate portrayal of the difficulties experienced in the Court of Chancery.

At this time equity occupied a separate jurisdiction to the common law. Effectively there was one court for equity and another for the common law. If proceedings were commenced in one court, and it was later discovered that they should have been brought in the other, the whole matter would need to start afresh. There was no power to transfer a suit. The same problems occurred with remedies. At common law the only remedy available was damages for compensation based on set rules involving proximity and mitigation. It was not possible to receive an account of profits for a breach of a fiduciary duty.

Prior to the judicature system, the relationship between law and equity had the following features:

- The common law did not recognise equitable titles and interests.
- Equity had no power to award damages.
- The common law courts could not provide interlocutory relief.
- The common law lacked the ability to make declarations or injunctions or to make an order for specific performance.

  These arrangements are often considered with respect to the following jurisdictions:
- exclusive: equitable interests would be enforceable in equity
- concurrent: one set of facts may give rise to both common law and equitable principles
- auxiliary: equity provided assistance when enforcing a common law right through process of discovery.

THE JUDICATURE SYSTEM

Between 1873 and 1875 the United Kingdom Parliament enacted several laws regarding the interaction of equity and the common law.

The *Supreme Court of Judicature Act 1873* (UK) with the long title 'An Act for the constitution and of a Supreme Court, and for other purposes relating to the Better Administration of Justice in England; and to authorize the transfer to the Appellate Division of such Supreme Court of the Jurisdiction of the Judicial Committee of Her Majesty's Privy Council' [1873] 36 & 37 Vict c 66—ss 24–5 provided:

- Where there was a conflict or inconsistency between equity and the common law, equity would prevail.
- There would be one court to administer both common law and equitable principles.

The judicature system has been adopted across Australia. As the following chronological list indicates, the first Australian jurisdiction to do so was South Australia in 1853, which predates the United Kingdom. See G Taylor 'South Australia's Judicature Act reforms of 1853: The First Attempt to Fuse Law and Equity in the British Empire' 22 (1) *Journal of Legal History* (2001) 54. New South Wales was the last Australian jurisdiction to make the necessary changes in 1970.

SOUTH AUSTRALIA

> 'An Act for the more effectual administration of Justice by means of the Supreme Court' [1853] No 5 of 17 (*Supreme Court Procedure Amendment Act 1853*).

The current legislation is expressed in 'An Act to Consolidate and amend certain Acts relating to the Supreme Court' [1935] *Supreme Court Act 1935* (SA) ss 17–28.

QUEENSLAND

> 'An Act to provide for the administration of a uniform system of law in courts of justice and to simplify and amend the practice of the Supreme Court' (1876) 40 Vic No 6 – *Judicature Act 1876* (Qld) ss 4–5.

The current legislation is embodied in *Civil Proceedings Act 2011* (Qld) s 7.

WESTERN AUSTRALIA

> 'An Act to make provision for the better Administration of Justice in the Supreme Court of Western Australia' [1880] 44 Vict 10 – *Supreme Court Act 1935* (WA) s 7.

The current legislation is expressed in *Supreme Court Act 1935* (WA) ss 24–5.

VICTORIA

> 'An Act to Improve the Jurisdiction and Procedure of the Supreme Court and for other purposes connected therewith' [1883] 36 & 38 Vict C 66 – *The Judicature Act 1883* (Vic) s 8.

The current legislation is the *Supreme Court Act 1986* (Vic) s 29.

TASMANIA

> 'An Act to amend the law relating to the civil jurisdiction of the Supreme Court of Tasmania and the procedure and practice relating to the exercise of such jurisdiction, and for other purposes relating to the better administration of justice in this State' [1932] – *Supreme Court Civil Procedure Act 1932* (Tas) ss 10–11.

This is the current version.

NEW SOUTH WALES

The Supreme Court Act 1970 (NSW) ss 57–62 and *Law Reform (Law and Equity) Act 1972* (NSW) embody the Judicature System.

LAW AND EQUITY IN AUSTRALIA

Legal history enables the gap in time between the first and last Australian jurisdictions to adopt the judicature system to be explained. The following is a brief outline.

SOUTH AUSTRALIA

Understanding why South Australia was the first Australian jurisdiction to enact legislation is related to it being the only colony not to accept convicts. The following events for South Australia need careful attention.

> 'An Act to empower His majesty to erect South Australia into a British Province or Provinces and to provide for the Colonisation and Government thereof' [1834] 4 & 5 Wm IV c 95 (*South Australia Colonisation Act 1834*).

The Colony of South Australia was established with its own legislature.

> 'An Act for the establishment of a Court to be called the Supreme Court of the Province of South Australia' 7 Wm IV No 5 (1837).

The Supreme Court of South Australia was established.

> 'An Act for the more effectual administration of Justice by means of the Supreme Court' [1853] No 5 of 17 (*Supreme Court Procedure Amendment Act 1853*).

This legislation was significant and in many respects predated English legislation which embodied the judicature system. See G Taylor 'South Australia's Judicature Act reforms of 1853: The First Attempt to Fuse Law and Equity in the British Empire' 22 (1) *Journal of Legal History* (2001) 54.

QUEENSLAND

Events in Queensland that led to the judicature system being adopted include the following:

> 'An Act to Provide for the better Administration of Justice in the District of Moreton Bay' [1857] 20 Vic No. 25 [11 March 1857] (Moreton Bay Supreme Court Act of 1857).

The Supreme Court at Brisbane was established and a resident judge was to be appointed. This development was similar to Port Phillip (Victoria).

> 'An Act to Amend the Constitution of the Supreme Court of Queensland and to provide for the Better Administration of Justice' [1861] 25 Vic No 13 [7 August 1861] (Supreme Court Constitution Amendment Act of 1861).

This statute formerly conferred the name of the Supreme Court of Queensland and clarified jurisdiction.

'An Act to Consolidate and Amend the laws relating to Proceedings in Equity' [1867] 31 Vict No 18 [28 December 1867] (Equity Act of 1867).

This legislation gave the court powers with respect to examination of defendants, evidence, contempt and declaratory relief.

'An Act to Consolidate and Amend the Laws relating to the Supreme Court' [1867] 31 Vict No 23 [28 December 1867] (Supreme Court Act of 1867).

Amended the 1861 Act so that the Supreme Court had both common law and general jurisdiction.

'An Act to Amend the Practice and Course of Procedure of the Supreme Court of Queensland in Equity and for other purposes' [1873] 37 Vict No 3 [15 July 1873] (Equity Procedure Act of 1873).

Trustees given the power to invest trust property.

'An act to provide for the administration of a uniform system of law in courts of justice and to simplify and amend the practice of the Supreme Court' (1876) 40 Vic No 6 (*Judicature Act 1876*) ss 4–5.

This legislation was in effect the Queensland Judicature Act.

WESTERN AUSTRALIA

Circumstances in Western Australia had a similar development to that of Queensland.

'An Act to provide until the Thirty-First Day of December One Thousand eight Hundred and Thirty Four, for the Government of His Majesty's Settlements in Western Australia, on the Western Coast of New Holland' [1829] 10 Geo IV c 22 (*Government of Western Australia Act 1830*).

A local three-man legislative council was established in Western Australia.

'An Act for Establishing a Court of Civil Judicature' [1832] 2 Will IV No 1 (10 February 1832).

Established a civil court with the same jurisdiction as the courts at Westminster.

'An Act to Amend an Act intituled "An Act for establishing a Court of Civil Judicature"' [1836] 6 Will IV N 1.

Amended the civil court.

'An Ordinance to provide for the more effectual Administration of Justice by establishing a Supreme Court' [1861] 24 Vict No 15 (*Supreme Court Ordinance Act 1861*).

The Supreme Court of Western Australia was established with common law and equitable jurisdiction.

> 'An Act to make provision for the better Administration of Justice in the Supreme Court of Western Australia' [1880] 44 Vict 10 (*Supreme Court Act 1880* s 7).

This statute was the Western Australian version of the *Judicature Act* (UK).

VICTORIA

Victoria also followed in a similar fashion to that of Queensland and Western Australia

> 'An Act for the more effectual administration of justice in New South Wales and its Dependencies' [1840] 4 Vict No 22 (*Administration of Justice Act 1840*).

Appointment of the first resident Supreme Court Judge for the Supreme Court of New South Wales at Port Phillip (now Melbourne). Common Law and Equitable jurisdiction established. Appeals to be heard at Sydney.

> 'An act to make provision for the better administration of Justice in the Colony of Victoria' [1852] 15 Vict No. 10 (*Supreme Court of Victoria Act 1852*).

Supreme Court of Victoria established with the same common law and equitable jurisdiction as the courts at Westminster.

> 'An Act to Improve the Jurisdiction and Procedure of the Supreme Court and for other purposes connected therewith' [1883] 36 & 38 Vict C 66 (the *Judicature Act 1883*) s 8.

This was the equivalent *Judicature Act* in Victoria.

TASMANIA

Developments in Tasmania included the following:

> 'An Act to provide, until the First Day of July One thousand eight hundred and twenty-seven, and until the End of the next Session of Parliament, for the better Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof and for other Purposes relating thereto' [1823] 4 Geo IV c 96 (*New South Wales Act 1823*). *Third Charter of Justice for New South Wales, Letters Patent 13 October 1823.*

Van Diemen's Land (now Tasmania) separated from the colony of New South Wales and a legislative council was established. The legislation established the Supreme Court of Van Diemen's Land as a superior court of record, appointed the first Chief Justice and other officers. Powers regarding succession laws were invested but there was no clear statement regarding equitable jurisdiction.

> 'An Act for the administration of justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof, and for other purposes relating thereto' [1828] 9 Geo IV c 83 (*Australian Courts Act 1828*).

This statute overcame concerns about court's legitimacy and provided that new laws enacted by the English Parliament did not apply unless they were specifically stated to operate in the particular jurisdiction. Reception day was 25 July 1828.

> 'An Act to remove Doubts respecting the Administration of Justice in certain Cases before a single Judge of the Supreme Court and for other Purposes relating thereto' [1844] 7 Vict No. 10 (the *Administration of Justice Act 1844*) and 'An Act to facilitate the Administration of Justice in the Supreme Court' [1856] 19 Vict No. 23 (the *Administration of Justice Act 1856*).

This legislation clarified the role of judges to sit together.

> 'An Act to amend the law relating to the civil jurisdiction of the Supreme Court of Tasmania and the procedure and practice relating to the exercise of such jurisdiction, and for other purposes relating to the better administration of justice in this State' [1932] *Supreme Court Civil Procedure Act 1932* ss 10–11.

Tasmania enacted the Judicature System.

NEW SOUTH WALES

Explaining why New South Wales was the last Australian jurisdiction to enact legislation is related to the establishment of the Supreme Court and the reception of English law. The following five steps need careful analysis.

> 'An Act to enable His Majesty to Establish a Court of Criminal Judicature on the Eastern Coast of New South Wales and the Points Adjacent' [1787] 22 Geo III c 2 (*New South Wales Charter of Justice) Letters Patent 2 April 1787.*

Referred to as the *First Charter of Justice*, it enabled the first courts to be established with civil and criminal jurisdiction by Letters Patent. There was no distinction between common law and equity.

> *Letters Patent to establish Courts of Civil Judicature in New South Wales* 2 April 1814.

The *Second Charter of Justice* abolished the earlier court of civil jurisdiction, and replaced it with the first superior court of the Colony of New South Wales. Doubts were raised as to the legitimacy of this activity and this led to the legislation in 1823.

> 'An Act to provide, until the First Day of July One thousand eight hundred and twenty-seven, and until the End of the next Session of Parliament, for the better Administration of Justice in New South Wales and Van Diemen's Land, and for