

# **Overlapping Claims at Common Law and in Equity – An Embarrassment of Riches?**

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*Overlapping claims at common law and in equity are an important part of the Australian legal system. Far from being something to be viewed as an anomaly and, if possible, resolved or eliminated, they reflect the historical truth that the legal system has for many centuries comprised overlapping bodies of law administered by different courts. This article seeks to explain why that phenomenon has occurred, to describe the extent to which it occurs, as well as to indicate its consequences for the ongoing development of legal principle.*

## **Introduction**

The topic addressed by this paper is overlapping claims at common law and in equity. Of course the nature and extent of overlap in the Australian legal system is more general than that topic conveys. Not merely are there overlapping *claims* at common law and in equity but also overlapping *jurisdictions*, overlapping *rules* and overlapping *remedies*.

Moreover, overlap occurs not merely between common law and equity. Historically, the overlap has been between different bodies of law, administered by different courts. The notion that there is a single unvariegated body of law, so that the same rules would, say, be applied in a local court (such as the Lord Mayor of London's Court)<sup>1</sup> as in a royal court (such as King's Bench or Common Pleas)<sup>2</sup> or an ecclesiastical court, is a modern one. “[T]he coexistence of more than one body of legal norms and systems was the normal state of affairs

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<sup>1</sup> See text at n 43 below.

<sup>2</sup> Indeed, different rules applied in King's Bench and Common Pleas: see for a familiar example D Ibbetson, “Sixteenth Century Contract Law: *Slade's Case in Context*” (1984) Ox J Leg Stud 295.

for at least 2000 years of European history, certainly since the heyday of the Roman Empire.”<sup>3</sup> Describing the formation of the western legal tradition, Harold Berman has magisterially chronicled the rise of overlapping systems of canon, feudal, manorial, mercantile, urban and royal law in the 12<sup>th</sup> and 13<sup>th</sup> centuries,<sup>4</sup> an historical truth which is both literally and figuratively a world away from the very recent notion that there is a “single common law of Australia”.<sup>5</sup> But the relative decline of bodies of law within the Australian legal system in the 21<sup>st</sup> century, aside from common law and equity, makes it natural to consider overlapping claims at common law and in equity.<sup>6</sup>

This paper is in three sections: addressing the present, the past and the future.<sup>7</sup> The first section seeks to illustrate, by reference to familiar issues in commercial law, how overlapping doctrines and remedies at common law and in equity continue to form an important part of the modern Australian legal system. The second section looks to how the majority of Australian civil litigation – decisions of inferior courts and tribunals made “according to good conscience and equity”<sup>8</sup> – derives from courts established in colonial times, and is now accommodated within the legal system. The third section looks to the future, and offers some observations as to the consequences flowing from those matters.

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<sup>3</sup> B Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30 Syd L Rev 375, 379.

<sup>4</sup> H Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983).

<sup>5</sup> This is not nearly so straightforward an idea as it may at first seem, but is outside the scope of this paper. Without attempting to be exhaustive, see *Fairfax Media Publications Pty Ltd v Bateman* [2015] NSWCA 154; 90 NSWLR 79 [146]-[154]; G Hill, “The Common Law and Federal Jurisdiction – What Exactly Does Section 80 of the *Judiciary Act* Do?” (2006) 34(1) Fed L Rev 75, 91-93; M Leeming, “*Farah* and its progeny: comity among intermediate appellate courts” (2015) 12 The Judicial Review 165, 167-171; S McLeish, “Challenges to the Survival of the Common Law” (2014) 38(2) MULR 818, 821-824; L J Priestley, “A Federal Common Law in Australia?” (1995) 6 PLR 221; L Zines, “The Common Law in Australia: Its Nature and Constitutional Significance” (2004) 32 Fed L Rev 337. A very recent example may be seen in *Rizeq v Western Australia* [2017] HCA 23 [78]-[79].

<sup>6</sup> The decline is not complete. Contrast for example *Osborne v Smith* (1960) 105 CLR 153, 158-159 (tracing the rule in probate that a person of full capacity and with an interest who chooses not to intervene in probate proceedings is bound by them to the ecclesiastical jurisdiction vested in the Supreme Court of New South Wales in 1824) with *John Alexander’s Clubs Ltd v White City Tennis Club Ltd* [2010] HCA 19; 241 CLR 1 [131]-[144] (tracing the different rule in ordinary civil proceedings to chancery practice).

<sup>7</sup> Compare Honore Daumier’s print of the three faces of King Louis-Philippe, a copy of which may be seen in the Art Gallery of New South Wales, and at <[www.artgallery.nsw.gov.au/collection/works/476.1988/](http://www.artgallery.nsw.gov.au/collection/works/476.1988/)>, accessed 18 August 2017.

<sup>8</sup> Namely, those determined in the Small Claims Division of the Local Court and by NCAT. “In the period 1 January 2015 to 31 December 2015, 82,304 civil actions were commenced (decreasing from 92,475 in 2013). 66,127 matters were filed in the Small Claims Division and 12,146 were filed in the General Division. Overall, 85,852 civil actions were finalised ... In the Small Claims Division – 97% of matters were finalised within 12 months”: Local Court of New South Wales, *Annual Review* 2015, p 16. In the 2015-2016 year, NCAT finalised 69,861 applications: *NCAT Annual Report 2015-2016*, p 7. Measured in terms of number of proceedings, these represent the large majority of litigation in New South Wales.

## The present: Overlapping claims at common law and in equity

### *A modern example*

Suppose a member of a private company enters into a deed to sell his shares, for a price to be paid in 6 months time. Before the time for settlement arises, the same parties agree to extend the time and vary the price. They do so orally, but for consideration. An “entire agreement” provision in the deed states that it may only be varied by deed. The purchaser pays the increased price, but does so stating that she only pays the difference under protest. The shares are transferred to her.

Suppose further that the purchaser now realises that the vendor has wrongly represented that the company is more valuable than it is. The purchaser wishes to rescind the contract. She has a proper basis for alleging that the vendor was either lying, or, at the least, recklessly indifferent to the truth when he told her the value of the company.

Informal variation and fraudulent misrepresentation are not uncommon phenomena in commercial life and commercial litigation. But in order to analyse the legal position in each case, an appreciation of the historically overlapping rights and remedies at common law and in equity, and the extent to which the differences between them have been resolved, is essential.

The legal position is clear. In the first part of the example:

- At common law, a deed could only be varied by another deed.<sup>9</sup> But because the variation was supported by valuable consideration, it would be regarded as effective in equity (there being no applicable statutory requirement for writing).<sup>10</sup>
- The entire agreement clause makes no difference to this result.<sup>11</sup> That reflects a policy choice, whereby equity permits people by agreement for valuable consideration to vary their bargains, rather than entrenching a consensual mechanism for later variation.<sup>12</sup>

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<sup>9</sup> This reflects the difference between covenant and assumpsit, described by Windeyer J as a “relic of a very distant past”: *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432, 464.

<sup>10</sup> *Creamoata Ltd v The Rice Equalization Association Ltd* (1953) 89 CLR 286 at 306, 321 and 326; *Federal Commissioner of Taxation v Orica Ltd* [1998] HCA 33; 194 CLR 500 [114].

<sup>11</sup> Finn J analysed the position in *GEC Marconi Systems Pty Limited v BHP Information Technology Pty Ltd* [2003] FCA 50; 128 FCR 1 [217]-[218]. The law seems to have been unclear in England, although two decisions of the Court of Appeal in the last year appear to have resolved the position in the same way: *Globe Motors Inc v TRW Lucas Varsity Electric Steering Ltd* [2016] EWCA Civ 396 [95]-[113] and *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553; [2016] 3 WLR 1519 [19]-[36].

<sup>12</sup> Compare the policy choice in relation to “rule” in *Saunders v Vautier*, whereby (speaking generally) English and Australian courts give primacy to adult beneficiaries and United States courts respect the wishes of the settlor: see P Matthews, “The Comparative Importance of the Rule in *Saunders v Vautier*” (2006) 122 LQR

- The conflicting outcomes at law and in equity as to the efficacy of the oral variation are resolved by s 25(11) of the *Judicature Act 1873* (Eng) and its local counterparts.<sup>13</sup> The position in equity prevails.<sup>14</sup>

In the second part of the example, rescission is in principle available both at law and in equity for fraudulent misrepresentation.<sup>15</sup> However, in either case, the plaintiff was required to reinstate the position prior to contract, so as to achieve *restitutio in integrum*. This is a “central consideration”.<sup>16</sup> Rescission for fraudulent misrepresentation is available in much narrower circumstances at law than in equity. The principal reason for this is the requirement of *restitutio in integrum* and the limited means available at law to restore title or to account for adjustments required to achieve the “practical justice” to which Lord Blackburn referred in *Erlanger v New Sombrero Phosphate Company*.<sup>17</sup> Because common law lacks a mechanism by which the vendor could be returned to legal ownership of her shares,<sup>18</sup> rescission in the example is only available in equity.

The authoritative statement of principles – significantly, framed in terms of contrasting the position at common law with that in equity – is that of Dixon CJ, Webb, Kitto and Taylor JJ in *Alati v Kruger*:<sup>19</sup>

“The difference between the legal and the equitable rules on the subject simply was that equity, having means which the common law lacked to ascertain and provide for the adjustments necessary to be made between the parties in cases where a simple

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<sup>13</sup> 266, 282-287 and *Beck v Henley* [2014] NSWCA 201 [34].

<sup>14</sup> *Berry v Berry* [1929] 2 KB 316; see also *Hawcroft General Trading Co Pty Ltd v Hawcroft* [2017] NSWCA 91 [31]-[35].

<sup>15</sup> The position at law in the case of deeds was rendered uncertain by Lord Abinger’s decision to the contrary in *Mason v Ditchbourne and Sarson* (1835) 1 M & Rob 460; 174 ER 158. For the reasons given by D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2<sup>nd</sup> ed, Oxford University Press, 2014) 29.72-29.82, that decision should, notwithstanding its influence particularly in the United States of America, be regarded as erroneous. The issue is covered in detail by Professor Lobban in two articles: “Nineteenth century frauds in company formation: *Derry v Peek* in Context” (1996) 112 LQR 287 and “Contractual Fraud in Law and Equity, c 1750-c 1850” (1997) 17 OJLS 441. See also S Wilson, “Tort Law, Actors in the ‘Enterprise Economy’, and Articulations of Nineteenth Century Capitalism with Law: the Fraudulent Trustees Act 1857 in Context”, in T Arvind and J Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing 2013).

<sup>16</sup> *Bullabidgee Pty Ltd v McCleary* [2011] NSWCA 259; 15 BPR 29,421 [60].

<sup>17</sup> (1878) 3 App Cas 1218, 1278-9.

<sup>18</sup> The position would be different in the case of bearer shares, where legal title turns on possession, as opposed to registration.

<sup>19</sup> (1955) 94 CLR 216, 224.

handing back of property or repayment of money would not put them in as good a position as before they entered into their transaction, was able to see the possibility of restitutio in integrum, and therefore to concede the right of a defrauded party to rescind, in a much wider variety of cases than those which the common law could recognize as admitting of rescission. Of course, a rescission which the common law courts would not accept as valid cannot of its own force vest the legal title to property which had passed, but if a court of equity would treat it as effectual the equitable title to such property vests upon the rescission.”

The passage from *Alati v Kruger* emphasises the differential availability of rescission at law and in equity, because of the different rules at law and in equity. Ultimately, common law vindicated a purchaser’s disaffirmation, and held that it gave rise to other rights of action at common law (notably, an action for money had and received). Equity’s approach was quite different. It always recognised that the operative order was the order of the court, and for that reason, was able, through its powers to take accounts, to grant relief on terms, and even to require money to be paid,<sup>20</sup> to permit rescission in a wider range of circumstances. Those differences were worked out following the Judicature legislation (notably, by Viscount Haldane’s speech in *Nocton v Lord Ashburton*)<sup>21</sup> and are preserved in the 21<sup>st</sup> century legal system.

The differences continue to matter. Had the purchaser been acquiring bullion instead of shares, she could have disaffirmed the contract for fraudulent misrepresentation, undertaken to return the bullion and sued for moneys had and received for the amounts already paid, and the efficacy of her rescission would have been recognised at law and in equity.

In contrast, rescission in equity, although more widely available, is the act of the court, not the party, and is subject to discretionary defences, not least of which is delay. Lord Morris giving the advice of the Privy Council in *Senanayake v Cheng* said that for rescission (in that case for innocent misrepresentation), the questions were “whether restitutio in integrum is substantially possible and whether rescission is timely and just and fair”.<sup>22</sup> In *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* the Full Court of the Federal Court overturned the rescission ordered by the primary judge of the sale of a restaurant following conduct by the vendor which amounted either to fraudulent misrepresentation or fraudulent non-disclosure. The principal reason was lengthy delay coupled with the changes in the running of the restaurant business in the two years it had been run by the (defrauded) purchaser.<sup>23</sup>

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<sup>20</sup> See *Newbigging v Adam* (1886) 34 Ch D 582, 592; *McAllister v Richmond Brewing Co (NSW) Pty Ltd* (1942) 42 SR (NSW) 187, 192; *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274, 284-6; *Maguire v Makaronis* (1997) 188 CLR 449, 467-468; *Nadinic v Drinkwater* [2017] NSWCA 114 [35]-[36].

<sup>21</sup> [1914] AC 932.

<sup>22</sup> [1966] AC 63, 83.

<sup>23</sup> (1988) 39 FCR 546. (The claim was based under statute, but was treated as amounting to fraudulent misrepresentation or fraudulent nondisclosure – see text at n 32 below.)

### **Different classes of overlaps at common law and in equity**

In the first part of the example the conflict between the different approaches at law and in equity has been resolved by the Judicature legislation. In contrast, the overlap between rescission at law and in equity for fraudulent misrepresentation in the second part of the example is one which continues to this day.

Lawyers may have a view as to whether it is better to resolve the overlapping and differentially available rules or whether they should instead be left open as alternatives. Indeed, views about such matters may be strongly held and vigorously contested. Further, there are divergent views about the effect of the Judicature legislation.<sup>24</sup> However, in litigation, unlike in academic work, litigants and courts are often confined by precedent. For example, any reformulation of the distinction between rescission at law and in equity is, so far as I can see, by dint of what was said in *Alati v Kruger*, a matter for the High Court and the High Court alone.<sup>25</sup>

### **A recurring phenomenon**

As noted above, the conflicting approaches of common law and equity were resolved in the first part of the example, but remain unresolved in the second part. However, *in both cases* it remains necessary to bear in mind the overlapping ways in which the same legal problem was addressed at law and in equity, in order to understand the law as it is. This phenomenon recurs throughout modern law. In particular, it recurs throughout modern commercial law.

In the first category, consider something as basal as the construction of clauses making time of the essence, of which Lord Romilly MR said:<sup>26</sup>

“At law, time is always of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it. This is not a doctrine of a Court of Equity ... time is held to be of the essence of the contract in equity, only in cases of direct stipulation, or of necessary implication.”

However, s 13 of the *Conveyancing Act 1919* (NSW) enacts s 25(7) of the *Judiciary Act 1873* (Eng):

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<sup>24</sup> See for example the various papers in S Degeling and J Edelman (eds), *Equity in Commercial Law* (LawBook Co, 2005).

<sup>25</sup> See *Garcia v National Australia Bank Ltd* [1998] HCA 48; 194 CLR 395, [17]; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 239 CLR 89 [163].

<sup>26</sup> *Parkin v Thorold* (1852) 16 Beav 59, 65; 51 ER 698, 701.

“Stipulations in contracts, as to time or otherwise, which would not before the commencement of this Act have been deemed to be or to have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in such court.”

That in turn gave rise to a controversy, because of the high authority that “[t]he legal construction of the contract ... is, and must be, in equity the same as in a Court of Law”;<sup>27</sup> the difference was whether equity would permit the party to terminate. The position was analysed by Mason J in *Louinder v Leis* who concluded that “the operation of s 13 converts the character of a time stipulation from essential to non-essential; it does not otherwise alter its terms or its construction”.<sup>28</sup> Two matters may be noted. First, in order to understand the meaning of s 13 of the *Conveyancing Act*, it was necessary to consider with some precision the nature of the differences between common law and equity. Secondly, Mason J was writing long after statute had resolved the conflict between common law and equity. It is of the nature of the legal system, where points are resolved only when an appropriate dispute comes before the courts, that many decades may pass before a question is properly presented for resolution. This is one reason for the inevitably historical aspect of legal analysis.

In the second category, where it remains vital to attend to the differences between law and equity, consider the effect of a mortgage of legal property. It is very difficult to explain the significance of s 111A of the *Conveyancing Act 1919* (NSW) and s 420A of the *Corporations Act 2001* (Cth) imposing obligations to take “reasonable care” and “all reasonable care” when exercising a power of sale, and even more difficult to understand the authorities, without appreciating the different ways in which a mortgage was treated at common law and in equity.<sup>29</sup> Or consider the whole of the law of penalties. It was in relation to the latter that a unanimous High Court of Australia said that “an understanding of the penalty doctrine requires more than a brief backward glance”.<sup>30</sup>

One could readily multiply examples of the ways in which common law, equity and statute overlap in modern commercial law. The legal analysis today of numerous run-of-the-mill matters of commercial law is inevitably and inextricably informed by centuries of history. After all, “the only way to grasp where we are and where we are headed is to have a sense of how we arrived at the present”.<sup>31</sup> To return to the example given at the outset of this section, one cannot begin to explain why equity will not enforce the entire agreement clause, nor

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<sup>27</sup> *Tilley v Thomas* (1867) LR 3 Ch App 61, 67 (Cairns LJ).

<sup>28</sup> (1982) 149 CLR 509, 525.

<sup>29</sup> See for a recent example of the confusion, *ACES Sogutlu Holdings Pty Ltd (in liq) v Commonwealth Bank of Australia* [2014] NSWCA 402; 89 NSWLR 209 [41]-[45]. The classic description was given by Jordan CJ in *Coroneo v Australian Provincial Assurance Association Ltd* (1935) 35 SR (NSW) 391, 393-395.

<sup>30</sup> *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30; 247 CLR 205 [14]. Another example may be seen in the connection drawn by Edelman J between the common injunctions issued by the Chancellor and the jurisdiction in bankruptcy to go behind a judgment: *Ramsay Health Care Australia Pty Ltd v Compton* [2017] HCA 28 at [99]-[112].

explain the differences between the remedies of rescission, without separate consideration of the positions at law and in equity.

### ***The place of statute***

Both parts of the example are simplified, and fall far short of reflecting how the dispute might in practical reality be litigated. In any real case, the purchaser would likely invoke other doctrines at general law (notably, estoppel by convention and in equity) and under statute (notably, s 18 of the Australian Consumer Law), and will rely, at least in the alternative, on statutory remedies, which are typically more broadly available.<sup>32</sup> The construction and application of statutes will in turn be informed by considerations of the position at general law. And much of “general law” in turn reflects statutory changes years or decades or centuries earlier. The interplay between judge-made law and statutes is typically intricate and iterative.<sup>33</sup>

### **The past: Historical overlapping claims**

Looking backwards, it may be seen that there is nothing new about overlapping claims in the Anglo-Australian legal system.

### ***Competition between courts***

Much work has been done studying the historical overlap of courts within the English legal system in terms of competition. There has been something of an efflorescence in recent years of such studies corresponding to the influence of the economic analysis of law, but even this is no new thing. As long ago as 1776, Adam Smith influentially observed, using language of “rivalship” which still resonates in modern competition law, that:<sup>34</sup>

“Another thing which tended to support the liberty of the people and render the proceedings in the courts very exact, was the rivalship which arose betwixt them.”

The same author wrote:<sup>35</sup>

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<sup>31</sup> B Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” (2008) 30 Syd L Rev 375, 376.

<sup>32</sup> See for example *Franklin Motors Pty Ltd v Paino* [1999] SASC 476 [24] and *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546.

<sup>33</sup> Hence for example the conference “Equity in the Age of Statutes” held at the Melbourne Law School in 2015, the papers in which are published in the September 2015 volume of the *Journal of Equity*.

<sup>34</sup> A Smith, *Lectures of Jurisprudence*, cited in T Zywicki, “The Rise and Fall of Efficiency in the Common Law: A Supply-side Analysis” 97 Northwestern U L Rev 1551, 1588 (2003).

“In consequence of such fictions, it came in many cases to depend altogether upon the parties before what court they would choose to have their cause tried; and each court endeavoured, by superior dispatch and impartiality, to draw to itself as many causes as it could.”

Although Adam Smith seems to have regarded curial competition as a good thing, much of the modern work following up those ideas is less enthusiastic.<sup>36</sup> There is also a large body of work critical of such accounts. For example, one commentator has observed that such accounts tend to underplay the length of time taken to effect changes (such as the rise of *assumpsit*) and the contemporaneous evidence that judges were hostile to change, even changes which would increase business in their courts.<sup>37</sup>

### ***The importance of local courts***

It is not possible, within the limits of this paper, to summarise this work, still less to express a view. However, one weakness in some accounts of competition is the tendency to ignore courts other than the superior courts at common law in Westminster. To do so is to ignore the majority of litigation. Most litigation has *always* taken place in inferior courts and other courts of limited jurisdiction. To take one example, William Hutton, who presided over various Courts of Requests in the late eighteenth century, wrote that over nineteen years he had determined more than one hundred thousand cases, adding, “I have had 250 in one day”.<sup>38</sup> That is not to say that these courts were the subject of universal praise; far from it. If Henry Brougham is to be believed, there was a large measure of dissatisfaction:<sup>39</sup>

“I know the judges in the Courts of Requests do good – I say they do good by comparison, better something of justice than nothing ... It happens that tradesmen, who know nothing of law, who may not have much occupation in their own business, preside in these Courts of Request, and administer justice as well as might be expected. I say it is better to have these courts and these judges than to have none.”

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<sup>35</sup> Ibid.

<sup>36</sup> See eg D Klerman, “Jurisdictional Competition and the Evolution of the Common Law: A Hypothesis” (2004) 8 AJLH 1; D Klerman, “Jurisdictional Competition and the Evolution of the Common Law: 73 U Chic L Rev 1179 (2007).

<sup>37</sup> See for example M Sechler, “Supply versus Demand for Efficient Legal Rules: Evidence from Early English “Contract” Law and the Rise of *Assumpsit*” 73 U Pitts L Rev 161 at 191 (2011) (“the great shift to *assumpsit* took close to three centuries and was resisted by the judges themselves at every stage”).

<sup>38</sup> W Hutton, *The Life of William Hutton, Written by Himself*, 1841, cited by W Winder, “The Court of Requests” (1936) 52 LQR 369, 378-9.

<sup>39</sup> *Hansard*, 1830, Vol CCIV, p 259, cited in Winder, ibid 370. See also P Polden, *A History of the County Court 1846-1971* (Cambridge University Press, 1999), 22-23; W Swain, *The Law of Contract 1670-1870* (Cambridge University Press, 2015) 22-23.

Whatever their quality, and although most of the claims decided in them were small, local courts such as the Courts of Requests formed an important aspect of commercial life. The typical commercial claim prior to the 19<sup>th</sup> century was heard and determined by a court of limited jurisdiction applying different procedural rules, and, it may be inferred, different substantive rules, from the superior courts of justice at Westminster.

These points are well illustrated by a point made by one of the masters of commercial law, Thomas Scrutton:<sup>40</sup>

“The reason why there were hardly any cases dealing with commercial matters in the Reports of the Common Law Courts is that such cases were dealt with by special Courts and under a special law. That law was an old-established law and largely based on mercantile custom.”

We know something of the jurisdictional limits and procedural rules in such courts, because so much of the reported law is concerned with such matters. Demarcation disputes were numerous.<sup>41</sup> In the absence of anything like a complete record, and especially given the opaque determinations of juries, it is harder to determine whether the substantive law differed.<sup>42</sup> However, something of the flavour of the advantages may be seen from nineteenth century observations concerning the Lord Mayor of London’s Court,<sup>43</sup> a local court with limited jurisdiction but considerable advantages, not least of which was its mercantile-influenced procedure for foreign attachment to compel the appearance of a debtor.<sup>44</sup> In 1870, the court was described as “the best Court for the recovery of small amounts in the kingdom”.<sup>45</sup> The same note refers to no fewer than 995 foreign attachments being issued in 1869. That procedure was the source of modern garnishee provisions introduced in the superior courts at common law in the mid nineteenth century.<sup>46</sup>

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<sup>40</sup> T Scrutton, “General Survey of the History of the Law Merchant” in *Select Essays in Anglo-American Legal History* publisher 7 at 8. See also T Scrutton, *The Influence of Roman Law on the Law of England* 1885, Cambridge University Press) and B Benson, “The Spontaneous Evolution of Commercial Law” (1989) 5 *Southern Economic Journal* 644.

<sup>41</sup> R van Caenegem, *Legal History: A European Perspective* (The Hambledon Press, 1991) 119.

<sup>42</sup> It is also necessary to be conscious of the fact that notions like a “law of contract” or a “law of torts” (let alone a “law of tort”) are quite modern concepts, largely created by nineteenth century treatise writers.

<sup>43</sup> The court was popular enough for several practice books, as well as an individual entry in each of the first four editions of *Halsbury’s Laws of England*. It survived the Judicature reforms and was only abolished after incurring losses during World War I: see W Cornish et al, *Oxford History of the Laws of England* (Oxford University Press, 2010), Vol XI, 869.

<sup>44</sup> “By a foreign attachment, debts are attached for the purpose of compelling the defendant to appear and put in bail to the action”: *Chitty’s Archbold’s Practice of the Court of Queen’s Bench* (London, H Sweet, 1862) Vol 1, 700; see also *The Mayor and Aldermen of the City of London v London Joint Stock Bank* (1881) 6 App Cas 393, 394. It was indeed the process of foreign attachment which gave rise to the famous case of *The Mayor and Aldermen of the City of London v Cox* (1867) LR 2 HL 239.

<sup>45</sup> (1870) 5 LJ 508.

## *Colonial examples*

The nascent Australian legal system inherited much of the jurisdictional complexity of the English legal system. I wish to mention two important phenomena illustrating the trends towards specialisation and divergence.

### *Superior courts*

First, there were powerful forces of fission – leading to the creation of specialised practices and different substantive rules. One example may be seen in the Vice-Admiralty courts.<sup>47</sup> Another may be seen in the Supreme Court of New South Wales, a court whose jurisdiction was defined by reference to the jurisdictions of the superior courts at law and in equity at Westminster. I have elsewhere attempted to explain how a combination of Colonial Office instructions, economic conditions, and the influence of three or four individual judges led to the remarkable result in the last quarter of the nineteenth century that while Judicature legislation was being enacted in England and in every other colony on the Australian mainland, the *Equity Act 1880* (NSW) effected a fission of common law and equitable jurisdiction in the one court.<sup>48</sup>

### *Inferior courts acting according to good conscience and equity*

Secondly, just as most English litigation took place in inferior courts of limited jurisdiction, the same was true in colonial New South Wales. Courts of requests were established in New South Wales in 1824,<sup>49</sup> and later colonial legislation required them to determine matters in a summary way and “according to equity and good conscience”.<sup>50</sup> The statutory requirement

<sup>46</sup> By ss 60-67 of the *Common Law Procedure Act 1854* (17 & 18 Vict c 125), enacted in New South Wales by the *Common Law Procedure Act 1857* (20 Vic No 31), ss 27-33, following the report of the Commissioners inquiring into the reform of the common law: see *Bruton Holdings Pty Limited (in liq) v Commissioner of Taxation* [2009] HCA 32; 239 CLR 346 [24] and *Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd* [2017] NSWCA 53 [116]-[123].

<sup>47</sup> For example, the different approach to contributory negligence (the “half-damages under the both-to-blame” rule), only abolished by the Judicature Act 1873: see M Leeming, “Equity, the Judicature Acts and Restitution” (2011) 5 J of Eq 199, 211.

<sup>48</sup> M Leeming, “Fusion – Fission – Fusion: Pre-Judicature Equity Jurisdiction in New South Wales 1824 - 1972” to be published in J Goldberg, H Smith and P Turner (eds), *Equity and Law: Fusion and Fission* (Cambridge University Press, forthcoming).

<sup>49</sup> Originally pursuant to the *New South Wales Act 1823* (4 Geo IV, c 96). See despatch from Earl Bathurst to Sir Thomas Brisbane 20 January 1824 (Historical Records of Australia I, vol XI, 197). For these and their English antecedents, see W Swain, “Low Value Civil Claims in Early 19<sup>th</sup> Century Australia” [2016] Legal History 79.

<sup>50</sup> The courts were continued by the colonial *Courts of Requests Act 1829* (10 Geo IV c 3) and an amending Act of 1842 (6 Vict c 15 s 4) introduced the requirement. See *Daley v SAS Trustee Corporation* [2016] NSWCA 111; 91 NSWLR 525 [98]-[107]. See also *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26, 29–31 (Gleeson CJ and Handley JA), 40–41 (Kirby P), *Featherston v Tully* [2002] SASC 243; 83 SASR 302 [152]–

was used creatively in the colony. For example, Roger Therry referred to a defence to the claim in debt by a convict who had been given a ticket-of-leave that he was *civiliter mortuus* and therefore could not sue. While strictly correct, Therry's response was "a Court of Requests was a Court of Conscience and that such a defence as this shocked all conscience."<sup>51</sup>

Another example was the Court of Claims, created in 1833 to resolve the thousands of informal titles granted in the earliest days of the colony. Professor Shaunnagh Dorsett has examined how such titles were not recognised by the Supreme Court,<sup>52</sup> but were resolved by an adjudication process by the new specialised court which made recommendations to the Governor.<sup>53</sup> The court was initially constituted by a barrister Sidney Stephen (Sir Alfred's brother), Roger Therry (who was also Commissioner of the Court of Requests) and the Surveyor-General, Thomas Mitchell (a non-lawyer).<sup>54</sup>

Thus there were, as a matter of practice, two ways to determine land title disputes: according to English law as applied in the Supreme Court, or under the more streamlined process in the Court of Claims, which was popularly known as the Commissioner's Court of Equity.<sup>55</sup> Of course, "Equity" in that sense bore a different meaning from the ordinary meaning today. It looked back to the command to adjudicate *ex aequo et bono* and courts of requests providing summary justice over the preceding centuries, and in turn, to the mediaeval law merchant.<sup>56</sup>

In the gold fields of Victoria and New South Wales, once again special legislation was enacted to resolve disputes summarily.<sup>57</sup> A later Act established a goldfields Court of Appeal, constituted by "a Chairman and two other persons who have held Miners' Rights for

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[154] (Bleby J), O H Beale, "Equity and Good Conscience" (1937) 10 ALJ 347 and N Rees, "Procedure and Evidence in 'Court Substitute Tribunals'" (2006) 28 Aust Bar Rev 41, 59–69.

<sup>51</sup> See R Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria* (2<sup>nd</sup> ed 1863, facsimile edition 1974 Royal Australian Historical Society and Sydney University Press), 318-320. Similar influences may be seen in the Supreme Court, such as in *Beale v Raine* (1829) *Dowling Select Cases* 111.

<sup>52</sup> The first such decision was *R v Cooper* [1825] NSWKR 2 (Mr Cooper occupied land at Blackwattle Bay, acquired without a deed, but marked out by an assistant surveyor which was said to "put Mr Cooper in possession, conformably to the universal practice in the Colony").

<sup>53</sup> S Dorsett, "The Court of Claims and the resolution of informal land claims in New South Wales 1833-1835" (2014) 4 Prop L Rev 5. The court operated from 1834 until 1922, although the large majority of its work was in its initial years.

<sup>54</sup> The latter two were "examples of what were (often scathingly) referred to as 'pluralists': those who held more than one government appointment": Dorsett, *ibid* 11.

<sup>55</sup> Dorsett, *ibid* 11.

<sup>56</sup> See L Trakman, "Ex Aequo et Bono: Demystifying an Ancient Concept" 8 *Chicago Journal of International Law* 621 (2008).

<sup>57</sup> Notably, the *Gold Fields Management Act 1852* (16 Vic No 43). For a comprehensive history, explaining the relative success of the system in New South Wales over that in Victoria, see J Hamilton, *Adjudication on the Gold Fields* (Federation Press 2015).

six months to be appointed by the Governor”.<sup>58</sup> If the Court of Appeal handed down a fine of more than £10, a further appeal lay to the District Court,<sup>59</sup> but the Court of Appeal was again required to act in a summary way, and was protected by a privative clause.<sup>60</sup>

It seems clear that not only was the procedure of these courts different, but the substantive law which was applied was also different.<sup>61</sup>

### ***Differing jurisdictions in the 21<sup>st</sup> century***

The requirement to determine cases “according to equity and good conscience”, or some variant of it, derived from Elizabethan courts of requests, was imported into New South Wales in the first half of the nineteenth century, but remains in force today in some of the busiest jurisdictions in New South Wales, including NCAT and the Local Court exercising its Small Claims jurisdiction.<sup>62</sup> At the federal level, constitutional considerations intrude, but this has not prevented the introduction of facilities by which disputes are resolved without the exercise of judicial power,<sup>63</sup> such as by the Financial Ombudsman Service or the Supreannuation Complaints Tribunal.<sup>64</sup>

Nor should it be thought that provisions such as these are confined to matters involving small claims, although that is their heartland. Consider what is now called the “Compensation jurisdiction” of the District Court of New South Wales,<sup>65</sup> from which appeals are limited and which is “not bound to follow strict legal precedent” and in which “a decision of the Court in

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<sup>58</sup> *Gold Fields Act 1861* (25 Vic No 4), s 30.

<sup>59</sup> *Ibid*, s 38.

<sup>60</sup> *Ibid*, s 37.

<sup>61</sup> I pass over the difficulties in distinguishing between substance and procedure: *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; 203 CLR 503 [97]-[100], [131]; *Rizeq v Western Australia* [2017] HCA 23 [83].

<sup>62</sup> See *Civil and Administrative Act 2013* (NSW), s 38(4)) and *Local Court Act 2007* (NSW), s 35(2)). See also the Workers Compensation Commission (*Workplace Injury Management and Workers Compensation Act 1998* (NSW), s 354(3)) and arbitrators to whom a dispute has been referred by a court in accordance with the *Civil Procedure Act 2005* (NSW) (see s 49(2)).

<sup>63</sup> See *Burns v Corbett; Gaynor v Burns* [2017] NSWCA 3 at [31].

<sup>64</sup> In the case of the FOS, pursuant to a dispute resolution system as prescribed pursuant to s 912A of the *Corporations Act 2001*, compliance with which is a term of an Australian Financial Services Licence. In the case of the SCT, as part of the price of being a complying superannuation trust: see *Attorney-General (Cth) v Breckler* [1999] HCA 28; 197 CLR 83.

<sup>65</sup> Formerly the “residual jurisdiction”, relabelled by item 4.1 of Sch 4 of the *Regulatory and Other Legislation (Amendments and Repeals) Act 2016* (NSW).

any matter is to be on the real merits and justice of the case".<sup>66</sup> In the exercise of this jurisdiction, the Court deals with claims worth hundreds of thousands of dollars.<sup>67</sup>

Likewise, the Dust Diseases Tribunal of New South Wales is a court of record with unlimited monetary jurisdiction and *exclusive* jurisdiction in claims for damages for those suffering from a dust-related condition which is attributable or partly attributable to a breach of duty.<sup>68</sup> That court is not subject to an "equity and good conscience" requirement, but statute has nonetheless altered the ordinary rules of merger (so that further damages may be awarded for the same tortious conduct) and *res judicata* (so that "issues of a general nature" may not be relitigated without leave, when once they have been determined, "whether or not the proceedings are between the same parties").<sup>69</sup> Those are significant departures from the ordinary incidents of civil litigation.

The meaning of the statutory words "according to equity and good conscience" is highly dependent on context, as Gleeson CJ and Handley JA observed in *Qantas Airways Ltd v Gubbins*.<sup>70</sup> It has also varied over time. The modern trend is that such words do not authorise decision making other than in accordance with law. Thus, in *Sue v Hill*, the High Court stated that a similar provision in respect of the Court of Disputed Returns did not "exonerate the court from the application of substantive rules of law".<sup>71</sup> That may be contrasted with earlier decisions holding that such courts were not "courts at law or in equity",<sup>72</sup> evidence that different substantive rules were applied in them,<sup>73</sup> their composition including non-lawyers and the (usual) absence of a right of appeal.

## The future

Whatever the *reason* for the multiplicity of overlapping claims, remedies and jurisdictions, there is no denying the existence of the phenomenon, over many centuries. Lord Goff once observed, not without a measure of understatement, "The common law is not antipathetic to concurrent liability."<sup>74</sup> That carries with it a number of consequences for practice and development of the legal system today.

<sup>66</sup> *District Court Act 1973* (NSW), s 142J(1)(a) and (b). See *Daley v SAS Trustee Corporation* [2016] NSWCA 111; 91 NSWLR 525 [92]-[107].

<sup>67</sup> See for example *Workers Compensation (Dust Diseases) Authority v Cunha* [2017] NSWCA 111.

<sup>68</sup> *Dust Diseases Tribunal Act 1989* (NSW), ss 10, 11.

<sup>69</sup> *Dust Diseases Tribunal Act 1989* (NSW), ss 11A, 25B.

<sup>70</sup> (1992) 28 NSWLR 26 at 30 ("are not terms of art and have no fixed legal meaning independent of the statutory context in which they are found").

<sup>71</sup> *Sue v Hill* [1999] HCA 30; 199 CLR 462 [42].

<sup>72</sup> See O H Beale, "Equity and Good Conscience" (1937) 10 ALJ 349.

<sup>73</sup> For examples, see W Winder, "The Court of Requests" (1936) 52 LQR 369, 389-390.

First, there is limited scope for a submission to the effect that: “The only way I can be found liable is X; X is not made out; therefore I win.” That was in substance the syllogism rejected in *Barclays Bank Ltd v Quistclose Investments Ltd*, to the effect that a loan transaction, giving rise to a legal action for debt, necessarily excluded the implication of any trust (“It was said that ‘a transaction may attract one action or the other, it could not admit of both’”).<sup>75</sup> Lord Wilberforce said:<sup>76</sup>

“I should be surprised if an argument of this kind – so conceptualist in character – had ever been accepted.”

Three appellate examples within the last year are *Fistar v Riverwood Legion and Community Club Ltd*,<sup>77</sup> *Great Investments Ltd v Warner*<sup>78</sup> and *Perera v Genworth Financial Mortgage Insurance Pty Ltd*.<sup>79</sup>

Secondly, this rejection of conceptualism is one aspect of the High Court of Australia’s antipathy to the mode of reasoning whose premise is a high level principle from which is derived a low level rule of decision. As was said in a slightly different equitable context, “generalisations may mislead”.<sup>80</sup>

Thirdly, when it comes to the question of altering substantive rules or principles of law, the most influential and effective submissions and academic commentary will tend to have regard to the nuances in the legal system within which the new rule or principle must fit, as well as to the historical background, either with a view to justifying the status quo or explaining why the variation which is in one party’s interest should be preferred.<sup>81</sup>

Fourthly, the Latin antecedent of much of the statutory language considered in the previous section is “*ex aequo et bono*”. A great deal has been written about those words, and their provenance and influence, when used by Lord Mansfield in *Moses v Macferlan*<sup>82</sup> and picked

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<sup>74</sup> *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 193.

<sup>75</sup> [1970] AC 567, 581.

<sup>76</sup> Ibid.

<sup>77</sup> [2016] NSWCA 81; 91 NSWLR 732 [50]-[51].

<sup>78</sup> [2016] FCAFC 85; 243 FCR 516 [54]-[55].

<sup>79</sup> [2017] NSWCA 19 [44]-[45].

<sup>80</sup> *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15; 212 CLR 484 [36].

<sup>81</sup> See the “modest and constrained role” of courts in reformulating existing legal rules and principles to which French CJ, Kiefel, Bell and Keane JJ referred in *D’Arcy v Myriad Genetics Inc* [2015] HCA 35; 258 CLR 334 at [26] and contrast, by way of recent example, *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd* [2017] FCAFC 74 [82] (“The architectural brutalism of that submission contains its flaw.”)

<sup>82</sup> See for example K Mason, J Carter and G Tolhurst, *Mason and Carter’s Restitution Law in Australia* (3<sup>rd</sup> ed 2016), 20-29, W Swain, *Moses v Macferlan* in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of*

up by Blackstone in 1768.<sup>83</sup> It is to be recalled that Macferlan sued Moses in the local Court of Conscience for the County of Middlesex to recover on some notes, contrary to his written agreement. Rather than enjoining that action, Moses pleaded the later agreement by way of defence, to which the Court declined to have regard “thinking that they had no power to judge of it”.<sup>84</sup> Moses paid the judgment which issued, and then commenced proceedings in the King’s Bench before Lord Mansfield and a jury to recover the £6 he had paid. The judge’s note of Moses’ lawyer’s evidence at *nisi prius* was “Smith: I attended the Court of Conscience, 2d Court. I offered the agreement. They would not receive it.”<sup>85</sup> The jury gave a verdict of £6 in his favour,<sup>86</sup> subject to a question reserved for the opinion of the court en banc. That in turn gave rise to the famous decision.<sup>87</sup>

An Act of 1750 authorised the county court in Middlesex, in suits where the debt or damages did not exceed 40 shillings “to proceed in a summary Way, and from time to time to make such Order or Decree, Orders or Decrees, as shall seem to them, or the major Part of them so assembled, to be just and agreeable, to Equity and Good Conscience”.<sup>88</sup> No appeal lay, and the court was protected by a privative clause, which was regarded as effective to prevent certiorari.

Part of the reason for Moses endorsing four *several* promissory notes for 30 shillings each, was the jurisdictional limit of the Court of Conscience.<sup>89</sup> Further, Lord Mansfield’s famous list of unjust factors, which includes money paid for mistake, for a consideration which happens to fail, etc, commences with the words “It lies only for money which, *ex aequo et bono*, the defendant ought to refund”. It was in that form that the principle was picked up by Blackstone and, for example, Isaacs J in *Sargood Brothers v Commonwealth*.<sup>90</sup> Cardozo J said of this in *Atlantic Coast Line Railroad Co v Florida* that:<sup>91</sup>

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*Restitution* (Hart, 2006), 26-28; W Swain, “Unjust Enrichment and the Role of Legal History in England and Australia” (2013) 36 UNSWLJ 1030, 1044-46.

<sup>83</sup> Chapter 9, Book III, *Commentaries on the Laws of England*.

<sup>84</sup> (1760) 2 Burr 1005, 1006; 97 ER 676, 676.

<sup>85</sup> J Oldman, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (University of North Carolina Press, Chapel Hill and London, 1992) 259.

<sup>86</sup> Some things never change. Moses was also awarded costs of an additional £22: see Oldman, *ibid*, citing PRO/KB 139/97/fol 6b.

<sup>87</sup> See *Roxborough v Rothmans of Pall Mall* [2001] HCA 68; 208 CLR 516 [76]-[84].

<sup>88</sup> 23 Geo II c 33, s 1.

<sup>89</sup> (1760) 2 Burr 1005 at 1005; 97 ER 676 at 676.

<sup>90</sup> (1910) 11 CLR 258, 303.

<sup>91</sup> 295 US 301, 309 (1935).

"The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it."

It is tempting to think that at least one influence upon Lord Mansfield was the obligation upon the court whose judgment had given rise to the claim to act in accordance with equity and good conscience. In *Silk v Rennett*, four years later, he explained that the "Court of Conscience has a mixed jurisdiction, as well equitable as legal: they proceed *secundum aequum et bonum.*"<sup>92</sup> Especially bearing in mind that no appeal lay and the court was not susceptible to certiorari, Lord Mansfield's language is capable of being read as a suggestion that the statute according to which the courts of requests operated required those courts to take a less restrictive approach than they did.

Fifthly, the legal system is complex. It is replete with conflicting principles. The complexity occurs in all areas; without for a moment attempting to be exhaustive, consider Karl Llewellyn's famous listing of pairs of duelling canons of statutory construction,<sup>93</sup> the daily exercise of equitable discretion by reference to maxims which reflect different underlying principles and values,<sup>94</sup> and, in criminal law, the ever-present tension between finality, the *autrefois* defences and rights of appeal.<sup>95</sup> Further, even if judge-made law were a rational and connected whole, "not even the wildest optimist could say the same for our body of statute law", as Viscount Radcliffe once put it.<sup>96</sup> The interaction of statute, common law and equity adds significantly to the complexity of the legal system, as does federalism. None of that is to deny that there are underlying themes and principles, but even so Professor Simpson's words, although directed to England, are at least equally true of the Australian legal system:<sup>97</sup>

"We must start by recognizing what common sense suggests, which is that the common law is more like a muddle than a system, and that it would be difficult to conceive of a less systematic body of law."

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<sup>92</sup> (1764) 3 Burr 1583; 97 ER 993, cited by W Swain, *Moses v Macferlan* in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart, 2006), at 25.

<sup>93</sup> K Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons of About How Statutes are to be Construed" 3 Vand L Rev 395 (1950).

<sup>94</sup> See W Gummow, "Equity – Too Successful?" in M Cope (ed), *Interpreting Principles of Equity* (Federation Press, 2014) 57, 71.

<sup>95</sup> See A M Gleeson, "Finality" [2013] (Winter) Bar News 33, 34-37 and *Kentwell v The Queen* [2014] HCA 37; 252 CLR 601.

<sup>96</sup> C Radcliffe, "The Place of Law Courts in Society" in *Not in Feather Beds* (1968) 29. He added "The statutes as a whole do not share any common legal principles; often it is hard enough to find any general legal conception that prevails even in a single statute." See also R French, "Trusts and Statutes" (2015) 39 MULR 629.

<sup>97</sup> A W B Simpson, *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press, 1987) 359 at 381.

The modern world is not simple. Even if it were, simple rules are not necessarily just. There is much to be said for that complexity permitting the legal system to serve the essentially contradictory needs of modern society: to provide a high measure of certainty as to the resolution of legal disputes, while at the same time accommodating the change which is inevitably necessary. On this view, overlapping claims within the Australian legal system are not so much an embarrassment of riches, but rather a fortuitous consequence of history which provide a valuable and supple resource for future developments. Indeed, they represent an aspect of a conception of the whole body of law moving forward in time, in an ongoing process, which is a defining feature of the Western legal tradition.<sup>98</sup>

Harold Berman also suggested that “the coexistence and competition of diverse autonomous legal systems and diverse autonomous jurisdictions within a given political community helped to make possible the supremacy of law within that community”.<sup>99</sup> It is not possible in this paper to do justice to the evidence and arguments marshalled by Berman in support of his claim that jurisdictional overlap and limits tend against rule by force. But if overlapping and competing jurisdictions have tended to favour the rule of law in earlier centuries, there is no reason to doubt that they would continue to enhance the rule of law in the 21<sup>st</sup> century.

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<sup>98</sup> H Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) 203.

<sup>99</sup> H Berman, *Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition* (Harvard University Press, 2006) 5.