EDITORIAL

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> The raw afternoon is rawest, and the dense fog is densest, and the muddy streets are muddiest near that leaden-headed old obstruction, appropriate ornament for the threshold of a leaden-headed old corporation, Temple Bar. And hard by Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.
>
> –Charles Dickens, *Bleak House*

Equity has come a long way since its untidy, chaotic beginnings. It had a raw, unpolished and primitive birth in the hands of the early Lord Chancellors, whose clemency was purely discretionary and based entirely on moral and canonical principle.[1] Its adolescence was shrouded in a dense fog, as successive Chancellors struggled to fashion general and consistent rules and principles, aided by the developing practice of law reporting.[2] The ambit of equitable discretion remained a constant battleground. While this dense fog would slowly clear away over centuries of development, equity emerged into adulthood muddied and stained by its long-lasting battle with the common law.[3] Needless to say, it did not emerge unscathed.[4]

Despite its troubled past, equity has become a cornerstone of modern commercial law. 'This proposition is too well established to require citation of authority.'[5] The New South Wales Supreme Court's provisional 2023 statistics report that new filings in the Equity Division (4,054) almost equalled new filings in the Common Law Civil Division (4,297) last year.[6] Far from being a threat to commercial dealings (a common early criticism, which continues to be echoed

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* Editor, Issue 47(4).

1 See John McGhee, *Snell's Equity* (Sweet & Maxwell, 31st ed, 2005) ch 1. See especially at 6–7.

2 See James Edelman, 'The Equity of the Statute' in Dennis Klimchuk, Irit Samet and Henry E Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) 352, 361–2 <https://doi.org/10.1093/oso/9780198817659.003.0018>.

3 See, eg, *Earl of Oxford's Case* (1615) 1 Ch Rep 1; 21 ER 485.

4 See Justice Sarah C Derrington, 'The 22nd W A Lee Equity Lecture: 18 November 2021, Banco Court, Supreme Court of Queensland' (2023) 42(1) *University of Queensland Law Journal* 131, 140 <https://doi.org/10.38127/uqlj.v42i1.7819>, quoting Sir Frederick Pollock (ed), *Table Talk of John Selden* (Quaritch, 1927) 43.

5 *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65, 71 (Lord Bridge).

6 Supreme Court of New South Wales, 'Provisional Statistics 2023' (Reporting and Analysis Unit, 25 January 2024) <https://supremecourt.nsw.gov.au/documents/Publications/Annual-Reviews-+-Stats/Provisional_Statistics_January_2024.pdf>.

by some),[7] the 'distinctive and flexible character' of equity has made it perfectly suited to the realm of commercial law, such that the Supreme Court's Commercial List would eventually settle in its rightful home in the Equity Division.[8]

Yet critics of equity's discretionary character have not been quick to retreat, especially in respect of its aptitude for the viciously self-interested world of modern business.[9] Certainly, Dixon CJ's admonition that '[i]ntuitive feelings for justice seem a poor substitute for a rule antecedently known, more particularly where all do not have the same intuitions' is representative of broader criticisms of the ambit of any form of judicial discretion.[10] Those criticisms, however, generally tend to overlook – or at least fail to adequately address – the force of HLA Hart's incisive analysis that our need to communicate law inherently generates a 'penumbra of doubt' in all law, from which the judge must choose.[11] So equity is here to stay; but if discretion is a monster under equity's bed, we can at least for now take comfort in knowing that the monster is probably one of the pink, fluffy, morally ambiguous kind.

That is probably quite a typical way to start a piece surveying developments in the law of equity. The 'historical' approach is one echoed across every leading text on equity, and many leading judgments and articles on equitable doctrine, of which perhaps the most conspicuous in Australia is Frank Kitto's Foreword to the first edition of *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* ('*MGL*').[12] The reason for this is self-evident: a fuller, more nuanced understanding of equity's present condition requires understanding its history and the principled foundations on which equitable doctrine has, piece by piece, been built.[13] So it was that Deane J was able to say of the constructive trust in *Muschinski v Dodds* that it is 'available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles'.[14]

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7 See PJ Millett, 'Equity's Place in the Law of Commerce' (1998) 114 (April) *Law Quarterly Review* 214, 214–15; Mark Leeming, 'The Role of Equity in 21st Century Commercial Disputes: Meeting the Needs of Any Sophisticated and Successful Legal System' (2019) 47(2) *Australian Bar Review* 137, 137–9.

8 Justice PA Bergin, 'Equity and Commercial Morality' (Speech, Commercial Law Association of Australia Anniversary Conference, 31 July 2015) 9–10 [27]–[31]; Supreme Court of New South Wales, *Practice Note SC Eq 3: Commercial List and Technology and Construction List* (22 March 2023). See also Millett (n 7) 215–17.

9 See Justice Chris Maxwell and Matthew Harding, 'Private Law, Conscience and Moral Reasoning: The Role of the Judge' (2022) 46(1) *Melbourne University Law Review* 123, 131–7.

10 *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569, 572. But that is not to say that his Honour ever believed that the need for 'rule[s] antecedently known' – a clear manifestation of his advocacy for 'strict and complete legalism' – necessarily required the wholesale abolition of any range of permissible judicial choice: Michael Coper, 'Concerning Judicial Method' (2006) 30(2) *Melbourne University Law Review* 554, 556–62.

11 HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 123. See also at 124–36.

12 JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) v–vii.

13 *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460, 496 (Windeyer J), quoting *A-G (Vic) v Commonwealth* (1962) 107 CLR 529, 595 (Windeyer J).

14 (1985) 160 CLR 583, 615 ('*Muschinski*'), quoted in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 305 [9] (Spigelman CJ). See also at 304 [6]–[8], 305 [10]–[14].

An historic approach is similarly necessary to understand the current state of the *University of New South Wales Law Journal* ('*Journal*') and the Thematic component of Issue 47(4). In 1981, the *Journal*'s Editorial Board chose to publish the first 'Thematic' edition of the *Journal*. It did so because it thought that a Thematic edition would be a 'worthwhile innovation in legal scholarship' of 'cross-disciplinary' interest.[15] Thematic editions have since become a staple of the *Journal* and elsewhere. That innovation, however, is only worthwhile if it is clear to the reader why the present Thematic has been selected as one of particular interest. Therefore, rather than simply summarise the articles within, the goal of this editorial is to make those reasons clear; to broadly identify the contribution which the present Issue makes to the development of equitable principle and commercial law more broadly.[16] To the extent that this departs from the approach adopted by my predecessors, I have only the age-old excuse that it is the peculiar province of any new generation to tear down the old;[17] and to the extent that this survey, being necessarily brief, is in any way glib, I beg my philosophy professors' forgiveness.

So why, then, 'Equity, Conscience and Commercial Morality'?

The most interesting development in equitable jurisprudence in recent years has been growing recognition and discussion of equity's status as 'meta law'.[18] Conceptualising equity as 'rights about rights' has important implications for how we understand equity's intervention.[19] As much as this growing body of scholarship will continue to guide the evolution of equitable principle, the foundations for these ideas are, in fact, far from new. For instance, 'fusion' was identified by the learned authors of *MGL* as a fallacy not only, although indeed primarily, because the *Judicature Acts* did not themselves purport to fuse law and equity, but because 'at every point [equity] presupposed the existence of [the] common law'.[20] As jurists and academics around the world continue to refine equitable principle consistently with equity's historical functions, Jamie Glister and Calida Tang's, Maxen Williams', and Jack Zhou's respective articles in this Issue make important, timely contributions to this field and identify opportunities for future development. I am certain that judges faced with the unenviable task of developing the law of equity will find each of these articles indispensable in navigating the treacherous waters of judicial lawmaking. Indeed, as much as Glister and Tang's, Williams', and Zhou's articles observe that the law remains far from settled, they serve the further key function of putting citizens on notice that equity's conscience, being

15 Editorial Board, 'Foreword' (1981) 4(1) *University of New South Wales Law Journal* v.

16 For the liberty of dispensing with such a summary, I must thank Justice Ward for her erudite and fascinating comments contained within this Issue's Foreword, which summarise the articles far better than I could ever have done myself: Justice Julie Ward, 'Foreword' (2024) 47(4) *University of New South Wales Law Journal* 1061.

17 See Leo Tolstoy, *War and Peace*, tr Anthony Briggs (Penguin Books, 2005) 20–3.

18 See, eg, Henry E Smith, 'Equity as Meta-Law' (2021) 130(5) *Yale Law Journal* 1050.

19 See Ben McFarlane and Robert Stevens, 'What's Special about Equity? Rights about Rights' in Dennis Klimchuk, Irit Samet and Henry E Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) 191 <https://doi.org/10.1093/oso/9780198817659.003.0010>.

20 Heydon, Leeming and Turner (n 12) 11 [1-085], quoting FW Maitland, *Equity* (Cambridge University Press, 2nd ed 1936) 18–19. See also Heydon, Leeming and Turner (n 12) 45–7 [2-110]–[2-135], 61–4.

indeterminate for a time, may require of them greater moral deliberation (if only to avoid having their names cited in law exams for decades to come), thereby improving the moral standards of commercial conduct.[21]

There has been a great deal of debate about the proper place of conscience in equitable jurisprudence.[22] This is not the appropriate place to agitate that debate. In light of it, however, the question becomes whether – if conscience may be apt to mislead – there is any utility in exploring the idea in too much detail. For the equity practitioner the answer should be obvious enough: conscience has been described as the 'organising concept' of equity;[23] an 'animating principle'.[24] However, in my opinion we would be selling conscience short to leave the matter there and confine it to the dusty shelves of theoretical jurisprudence, or to explain it away as mere judicial expressionism.[25] Conscience is a guide of great utility for even the most stubbornly pragmatic lawyer. For one, judicial reference to a party's conscience being affected as a reason for granting or denying equitable relief raises some important questions: what does it mean for a party's conscience to be affected, and why should we speak of relief in this way?[26] There must be good reason, more than merely the historic operation of the Court of Chancery, for using such an expression. Clearly enough, conscience in this sense is not simply legal jargon for a specific level/type of knowledge;[27] as much as it may be a term of conclusion, it has not been used exclusively in cases to make conclusions of knowledge-based liability.[28] Of course, there is an attendant risk that speaking too much of 'unconscionability' or an affected conscience as the underlying or organising basis of relief ignores

21 Matthew Harding, 'Equity and the Rule of Law' (2016) 132 (April) *Law Quarterly Review* 278, 292–5.

22 See, eg, Irit Samet, 'What Conscience Can Do for Equity' (2012) 3(1) *Jurisprudence* 13 <https://doi.org/10.1080/20403313.2012.11423534>; Sinéad Agnew, 'The Meaning and Significance of Conscience in Private Law' (2018) 77(3) *Cambridge Law Journal* 479 <https://doi.org/10.1017/S0008197318000582>; Rohan Havelock, 'Conscience and Unconscionability in Modern Equity' (2015) 9(1) *Journal of Equity* 1.

23 Alastair Hudson, 'Conscience as the Organising Concept of Equity' (2016) 2(1) *Canadian Journal of Comparative and Contemporary Law* 261.

24 Ward (n 16) 1065.

25 Cf William Gummow and Aryan Mohseni, 'The Use and Misuse of Metaphors' (2024) 98(10) *Australian Law Journal* 738. See especially at 746.

26 See Ben McFarlane, 'Form and Substance in Equity' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019) 197, 204. See especially at n 38.

27 Sinéad Agnew and Ben McFarlane, 'The Paradox of the Equitable Proprietary Claim' in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law* (Hart Publishing, 2019) vol 10, 303, 310, citing Agnew (n 22) 11.

28 For example, in the context of equitable assignment for consideration: *Corin v Patton* (1990) 169 CLR 540. In *Re Diplock* [1948] 1 Ch 465, a case concerning mistaken payments made under an invalid charitable bequest, the House of Lords expressly rejected 'the suggestion that the state of the defendant's conscience depends upon his knowledge or assumed knowledge that his title … may or may not be defeasible in favour of other interested persons': at 488 (Lord Greene MR, Wrottesley and Evershed LJJ). Instead, their Lordships considered that the defendant's conscience was sufficiently affected merely by its receipt of 'something to which in truth [it] was never entitled': at 492. In yet another example, unconscionable conduct, the expression has been used in the United Kingdom to refer not to the requisite standard of knowledge but to the moral repugnancy of the impugned conduct, such that 'a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say, in a way which affects his conscience': *Multiservice Bookbinding Ltd v Marden* [1979] 1 Ch 84, 110 (Browne-Wilkinson J).

important distinctions between equitable doctrines.[29] Conscience loses its utility if it leads us back into the shapeless fog of unfettered discretion and idiosyncratic moral judgment. Its survival as a reference point in equitable jurisprudence should nevertheless remind us that it is an 'ordered principle' to be examined and applied, rather than an 'unidentified [notion] of "justice" … [or] "fair[ness]"'.[30] In their articles, Matthew Conaglen and Mark Giancaspro demonstrate its continued utility in statutory reform and judicial decision-making respectively, proving to us that as much as modern, doctrinal equity claims to have discarded its historical shackles, those shackles may well have been safety nets all along.

My point here is that we should not be too quick to dismiss normative standards simply because they are characteristically broad and contested. In any case, 'conscience' illuminates the manner in which 'conventional ethical rules or principles' inform and mould the law.[31] The High Court's continued use of academic writing to develop the law and protect it from subversion by new forms of wrongdoing is an obvious example.[32] In the policy sphere, the growing demand over the past few decades for 'corporate social responsibility' has in fact worked so well that it has led some businesses to use the appearance of morality and ethical conduct as a marketing stratagem, and so is now in need of further regulation.[33] All this involves a constant discourse between Parliament, the courts and the public aimed at ensuring Australian law appropriately reflects the moral standards of the society it regulates. There has been an understandable fear that drawing too heavily on moral philosophy may obfuscate disagreements amongst the public as to morality's demands, but the mere presence of disagreement does not itself provide a sufficient reason to avoid considerations of morality altogether.[34] In this sense, Jordan Tutton and Vivienne Brand, and Duncan Wallace in their respective articles reveal that moral standards and normative arguments continue to provide a fertile garden-bed from which lawmakers and academics can readily harvest in assessing the effectiveness of past law reform and the promise of future reforms.

While broad generalisations are typically unhelpful, I think it is right to say that while we live, we all hope to live as best we can. It is naturally part of law's function in society to facilitate this. Even in doing wrong (and indeed, when we see others do wrong) we habitually conclude that there must be some reason for that wrongdoing; some gain which the wrongdoer hopes to achieve, so that the wrong might be worthwhile.[35] Even though the law can prohibit moral wrongdoing, it

29 Havelock (n 22) 19–27.

30 *Muschinski* (n 14) 616 (Deane J).

31 JE Penner, 'Equity, Justice, and Conscience: Suitors Behaving Badly?' in Dennis Klimchuk, Irit Samet and Henry E Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) 52, 70–1 <https://doi.org/10.1093/oso/9780198817659.003.0004>.

32 See, eg, *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2024) 98 ALJR 1021, 1067–70 [236]–[248] (Edelman J).

33 'Greenwashing', *Senate Standing Committee on Environment and Communications* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Greenwashing>.

34 Irit Samet, *Equity: Conscience Goes to Market* (Oxford University Press, 2018) app.

35 St Augustine, *Confessions*, tr Garry Wills (Penguin Books, 2008) bk 2.

cannot do all the work that morality requires of us, nor should it, for mere obedience to law is secondary in virtue to virtue for its own sake.[36] Each of us must choose at least something to pursue, be it virtue or something else, rather than stumble through our lives in self-imposed blindness or moral apathy.

That brings me to why I even took up this task in the first place. For law students, and editors especially, the position of Issue Editor is like a holy grail laced with poison. The work is relentless and demanding. There were times it felt horribly inane. One editor, dear to my heart, even suggested that the many stages of editing through which an Issue Editor must travel are best compared to the levels of Hell in Dantes' *Inferno*.[37] But, through this position, I was given a special chance to promote discussion in an area that I found fascinating yet somewhat under-appreciated: the place of normative reasoning in equity and commercial law. Indeed, when I started as the Issue Editor for Issue 47(4) there were few others on the Editorial Board who shared my passion for equity and even now that remains true. Legal research in this area is certainly not as politically impactful or contested as it is in others, namely public law and criminal law,[38] nor is it usually easy to see any connection between commercial litigation and social justice.[39] Further, there appears to be a collective fear amongst law students that explicit use of normative, moral concepts in commercial law will be looked down on with disdain, or at the very least suggest naivety. I hope, therefore, that this Issue will be read not only by judges and senior practitioners, but by young graduates and students alike, and that each will take from the articles within a greater appreciation for the principled development of commercial law.

The development of the law is a habitually slow process and one which necessitates countless, often thankless hours of study and research which academics, both Australian and worldwide, invest for the greater good of our society. My boundless thanks go to the 13 authors of this Issue's 10 articles, without whom there would be no Issue 47(4) at all. That is an obvious truism, but one which, somewhat ironically, bears great utility in stating. Thank you for entrusting the *Journal* with your work and graciously yielding to the often-confusing demands of the *Australian Guide to Legal Citation*. Thank you also to our anonymous peer reviewers, who continue to shine a light for our Executive Committee through the dark crevasses

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36 See Aristotle, *Nicomachean Ethics*, tr Roger Crisp (Cambridge University Press, 2004) bk 5. Some have even argued that there is no prima facie moral obligation to obey the law at all: see, eg, Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, rev ed, 2011) ch 12.

37 *Poi s'ascose nel foco che gli affina*
Quando fiam uti chelidon—O swallow swallow
Le Prince d'Aquitaine à la tour abolie
These fragments I have shored against my ruins
Why then Ile fit you. Hieronymo's mad againe.

TS Eliot, 'The Waste Land' in TS Eliot, *Collected Poems: 1909–1962* (Harcourt, Brace & World, 1963) 51, pt V ll 428–32 (emphasis in original).

38 See the recently published Thematic Issue entitled 'Developments in Rights, Freedoms and Accountability': (2024) 47(2) *University of New South Wales Law Journal* 343. I look forward to reading Issue 48(2)'s Thematic, entitled 'Dynamics of Power within Criminal Law'.

39 But see Sir Gerrard Brennan, 'Commercial Law and Morality' (1989) 17 *Melbourne University Law Review* 100.

of peer review. Though I cannot, for obvious reasons, identify any – let alone all – of them, so much the greater is my admiration for their charity in giving their time to ensure that we publish only articles of the highest quality, knowing that their contributions would be lost to history.

This Issue also contains the work of two other persons of note. Thank you to the Honourable Justice Julie Ward, President of the New South Wales Court of Appeal, for composing the Foreword which introduces this Issue. It truly is a work of art, and much like the first violin's concert A which precipitates the orchestra's performance, it harmonises and unifies the articles within. We are blessed to have such an eminent legal mind contribute to this Issue and I thank her Honour in advance for delivering the keynote address at this Issue's launch. Thank you also to Claudia Mills for her illustration which bookmarks the Foreword and the Thematic component. It is no easy task to produce an illustration suitable for a concept so broad and nebulous as 'Equity, Conscience and Commercial Morality'. Even more difficult is capturing, in that illustration, the essence of a court which has not existed for over a century and of which only a handful of sketches remain. I could not have asked for a better artist and hope that her work will be a springboard for a long and successful career. Thanks also go to Kerry Cooke, our typesetter, and John Hewitt, our cover designer, for putting the final touches on this Issue.

Thank you to our premier sponsors Allens, Corrs Chambers Westgarth, Herbert Smith Freehills and King & Wood Mallesons for their ongoing support of the *Journal*'s work, and especially to KWM for generously hosting Issue 47(4)'s launch.

The *Journal* would be nothing without the continuous support of the UNSW Faculty of Law & Justice. We are truly undeserving of the praise lavished on us by the Faculty's Dean, Professor Andrew Lynch, and I am ever grateful to him for his continuous encouragement of the *Journal*. Likewise, our Faculty Advisers Professors Rosalind Dixon and Gary Edmond deserve my endless thanks for their patient guidance, without which the *Journal* could never function.

There will be errors in the citations in this Issue. *Errare humanum est*, though I take full responsibility for these errors. Pedantry is, in most circumstances, quite an undesirable trait, though I have been all the more fortunate to have been surrounded by pedants of the highest calibre in editing this Issue. Our Editorial Board's tireless work exemplifies the wisdom that '[t]wo are better than one, because they have a good return for their labor'.[40] To each and every one of you: thank you, from the bottom of my heart, for your sacrifices in making this Issue truly perfect and for fixing my mistakes at every turn.

Every adventure in life is, of course, better with friends. To the Executive Committees of 2023–25, I could not have asked for better friends to travel with. Thank you not only for your constant support and wisdom, but for our late-night therapy sessions which kept me going through difficult times. Words are too poor a substitute for the joy I feel when I think of each of you. Wherever you go, and whatever you do, you have my every confidence and admiration.

40 *The Holy Bible*, Ecclesiastes 4:9–12 (New International Version).

The ultimate thanks for this Issue belong to Isabel Lu. It was only that chance encounter at Central Station, on a cold winter's morning, and your headstrong belief in me that set me on this journey. This Issue is a testament to the enormous impact that words of kindness, however trivial they might feel at the time, have on our lives. I will never forget that.

I confess it is difficult to know where to end. Thankfully, this is an old problem. I am well-advised to take the approach of Nanki-Poo in *The Mikado*, and simply declare that, given '[this editorial] is as good as [finished], practically, [it] is [finished], and if [it] is [finished], why not say so?'[41] Lord Neuberger has cheekily suggested that this line is in fact a reference to the decision in *Walsh v Lonsdale*, which evoked the maxim 'equity treat[s] as done that which ought to be done'.[42] So I can now profess, with little guilt: '*Iamque opus exegi*, *Deo gratias*'.[43]

41 WS Gilbert and Arthur Sullivan, *The Mikado* (1885) Act II 37.

42 Lord Neuberger, 'Swindlers (Including the Master of the Rolls?) Not Wanted: Bentham and Justice Reform' (Bentham Lecture, UCL Bentham Association, 2 March 2011) [39]–[40], though this may be somewhat apocryphal.

43 *Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* (2008) 39 WAR 1, 909 [9762] (Owen J).