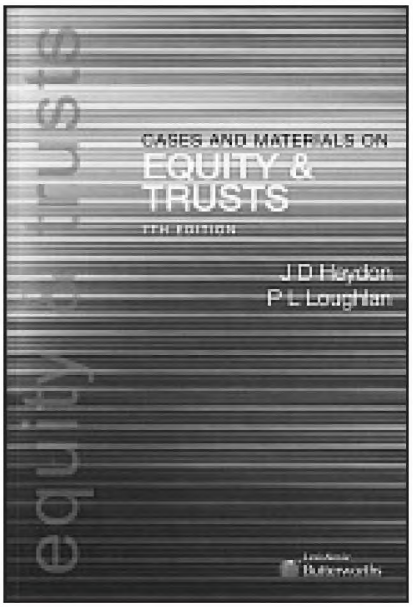
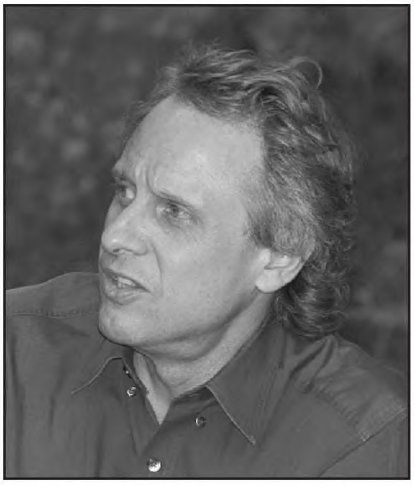
Book Review – Cases and Materials on Equity & Trusts (7th Edition), by JD Heydon and PL Loughlan

Published by Butterworths, 2007





Review by David Dalrymple, Prosecutor, Summary Prosecutions

I suspect that I would not be alone amongst journeyman Australian lawyers of my generation in finding that at least some aspects of the law of equity that seemed so arcane and impenetrable at Law School have gradually, over the years, as if by osmosis, become a bit more coherent and clear. It is perhaps similar to the phenomenon of English language literacy acquired by individuals who are unable to explain or identify the technical rules regulating grammar and syntax but are nevertheless able (in most instances correctly) to intuitively apply them.

To fully understand this area of law, you need to be a diligent student of the relevant branch of English history. You need to have some grasp of the tension between Church and Crown that developed after the middle ages, and of the social control and governance apparatus that was established in the two respective realms. You need to be able to picture in your mind's eye the power players in that stratified and unequal society, and interpret their grave and somewhat pompous language as they try to work the system as it was then. Divorced from their historical context, the legal rules and principles seem as abstruse as if they were a set of edicts from some Lord of the Rings-type alternative universe. But when the relationship between sovereign and subject and the work-in-progress nature of the contemporary court system is grasped, the legal chess games played back then begin to mirror those that take place today.

Few of us have ever had the time or inclination to comprehensively delve into and effectively absorb that history. England seems more and more distant and irrelevant to our lives as – with some trepidation - we move into the 21st century. The equity chapters in this book are a handy guide for those of us who want to be able to progress beyond a merely intuitive and ad hoc handle on the law of equity but who are not committed to gaining expert status in respect of the past history and the current nuances. The book makes the natural journey from equity law generally to the law relating to trust property, and once it has reached that area the subject matter (though dry) appears for the most part modern and relevant.

Cases and Materials On Equity & Trusts is compartmentalised into five parts: The Basic Concepts Of Equity, Grounds For Relief, Trusts and Equitable Remedies. Part one begins with the Lord Ellesmere's judgment in the Earl Of Oxford's case, which, "reveals a moral jurisprudence that was sophisticated, developed and coherent by the year 1615" and which, "also illustrates a pattern of contextual legal and moral reasoning which has persisted in the Anglo-Australian equitable jurisdiction to this day". The judgment includes the following still-compelling rationale for discretionary judicial intervention:

The Cause why there is a Chancery is to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law, which is called Summum Jus.

The exposition that follows in Part one necessarily involves a summary of the separate equity and common law court systems and the attempted harmonisation of the two through the judicature system introduced in 1876. Part one goes on to identify the "maxims of equity," and to discuss the interplay between law and equity, in particular in the context of trusts:

The most developed equitable institution is the express trust, and this is generally understood as a proprietary institution with division between legal and equitable titles to property. But not all institutions established in the exclusive jurisdiction will be proprietary in character. Thus, whilst the

trust is the paradigm of fiduciary duties (Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41 at 68; 55 ALR 417 at 432 per Gibbs CJ) not all fiduciary relations involve proprietary rights: see Chapter 11. The recently developed equitable jurisdiction to restrain breaches of confidence concerns primarily a personal obligation of confidence, not proprietary rights: Meagher, Gummow and Lehane, paras 41-080-41-105.

Further, even in cases of express trust, the remedies of the beneficiary encompass both the personal (eg, injunction to restrain breach of trust, an account of profits improperly made, compensation for loss inflicted by acts in breach of duty) and the proprietary (eg. removal of defaulting trustees and vesting of legal title in new trustees, tracing trust assets: see Chapters 36 and 37). The debate over the modern constructive trust (see Chapter 31) has, to an extent, become one of determining when a proprietary remedy is to be attached to breach of duties arising from personal dealings between the parties not giving rise to an express or resulting trust.

This analysis provides something of a foundation for the detailed coverage of trusts and fiduciary relationships that appears later in the book.

Near the beginning of Part two (at page 114) there is a very helpful diagram headed "Dealings affecting equitable ownership" in which the potentially available pathways for assigning legal and equitable interests respectively are set out.

Near the beginning of Part four (at page 475), under the heading "the trust in modern society", there is an itemised list setting out 13 modern Australian uses of the trust as a device for ordering and preserving interests in property.

The list, of course, includes the sorts of trusts that are established all over Australia under wills or in the context of pension and superannuation arrangements, and trusts devised for a taxation minimisation or investment purpose. But there are two items in the list that have particular relevance for many Aboriginal groups and organisations in the Territory in a period when there is an increasing desire to implement arrangements long available under the *Aboriginal Land Rights (Northern Territory) Act* enabling the group or organisation to take direct control of economic or other development activities on Aboriginal land. Such groups and organisations also frequently wish to enter into funding agreements with Government agencies to provide various kinds of services, service agreements that contemplate the purchase by the service provider of government-funded capital assets. The two items in the list are:

(d) trusts of property acquired for unincorporated associations, which lack a separate legal personality and therefore cannot conveniently hold property without a trust;

(e) charitable trusts and trusts of the property of charitable foundations.

In the past, most legal entities representing Aboriginal communities or groups have usually been incorporated as associations, although there have also been some companies (both proprietary limited companies and companies limited by guarantee), and the occasional unincorporated association.

The replacement of the *Aboriginal Councils and Associations Act* by the *Corporations (Aboriginal and Torres Strait Islander) Act* and the replacement of the *Northern Territory Associations Incorporation Act* by the *Associations Act* has significantly diminished the differences between associations and companies, with a resulting loss of the community/grass roots character that formerly characterised most incorporated associations. The legal complications involved in trying to operate as an unincorporated association are significant, but some groups have been attracted to that option because of the reduced risk of interference in governance matters by statutory regulators. As a rule, leases and service provider funding agreements are only available to incorporated entities.

Regardless of the incorporation vehicle adopted, many groups or entities are finding that they need to compartmentalise and quarantine property rights in assets and income streams, especially where the constitution or charter of the entity stipulates that profit generating economic activity is for the purpose of achieving a charitable or "public benevolent" object. The best adapted legal mechanism to do this under the legal system we have inherited from England is the trust.

The rules and rationales of trust law (which of course derive from the general principles of equity covered in the earlier part of this book) apply to small and medium sized community-based groups in the same way as they do in the context of complex large corporations and superannuation funds.

I recommend this book as a good general text for any practitioners who are working with or advising Aboriginal groups or organisations in the Territory in respect of matters relating to incorporation, governance, and the establishment of economic enterprise and/or community service provision arrangements. Similar issues regarding property interest allocations may apply to many non-Indigenous NGO's and community organisations.