

Equity and Statute: a commentary

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Dyson Heydon's magisterial survey of statutory reactions to equity, and equitable reactions to statute, demonstrates by its wealth of examples the complexity of the interrelationship between equity and statute. The first half of his survey illustrates how statutes may codify or amend or overlap with existing equitable doctrine, and, more interestingly, how statutes may facilitate the creation of equitable doctrine, or may in terms adopt or defer to existing equitable doctrine. The second half deals with the converse question: the response of equity to statute. A recurring theme in the modern cases is the choice between applying or otherwise drawing upon statute by analogy, or else concluding that there is no legitimate room for development, and hence following the law. One important truth is clear immediately. There can be no simple unifying analysis: the range of statutory modes of drafting (contrast the terse command that positively invites judicial creativity with the comprehensive code) and the legislative purposes and values they implement, not to mention the range of equitable doctrines, stand in the way of any such attempt. But that does not mean that the interplay between statute and equity is without interest or importance; far from it.¹

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¹ For recent work on this topic, see N Duxbury, *Elements of Legislation* (Cambridge University Press, 2013); S Gageler, "Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process" (2011) 37(2) *Monash University Law Review* 1; M Leeming, "Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room" (2013) 36(3) *University of New South Wales Law Journal* 1002; G Postema, "Law's System: The Necessity of System in Common Law" (2014) *New Zealand Law Review* 69; R Walker, "Developing the Common Law: How Far is Too Far?" (2013) 37(1) *Melbourne University Law Review* 232, and for a particular instance (the incorporation of fiduciary and trust principles in the regulation of superannuation and financial planning, see M Scott Donald, "Regulating for fiduciary qualities of conduct" (2013) 7

This commentary focusses upon a single example: the transplantation of unconscionability into statute. As Dyson Heydon points out, s 20(1) of the *Australian Consumer Law* provides that: “a person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.” This is sufficient for present purposes.² The basal idea is that if the norm of “unconscionability” is breached by a contract within the purview of the Act (a contract whereby work is performed, a retail lease, etc), then wide and largely discretionary statutory remedies are available.

The language of s 20(1) makes four things plain. First, as Gleeson CJ has said,³ the reference to the unwritten law confirms that the legal meaning is the legal term, not the colloquial expression; in everyday speech, “unconscionable” may be “merely an emphatic method of expressing disapproval of someone's behaviour, but its legal meaning is considerably more precise”.

Secondly, s 20(1) makes applicable the conventional legal meaning unmodified by further legislative considerations. (It may be contrasted with the New South Wales statutory formulations in say s 62B of the *Retail Leases Act 1994*, where regard may be had to an open ended list of factors,⁴ producing the result that the statutory evaluative conclusion of unconscionability bears the same name as but has different context from its judge-made law counterpart. This gives rise to “some different concept of unconscionability from that

Journal of Equity 142 at 152-166.

² Statutory proscriptions against unconscionable conduct are, of course, more elaborate. Focussing on legislation applicable in New South Wales, there is s 88F of the *Industrial Arbitration Act 1940* (NSW) and its successors, the “unjust” contract provisions in the *Contracts Review Act 1980* (NSW) (which is “An Act with respect to the judicial review of certain contracts and the grant of relief in respect of harsh, oppressive, unconscionable or unjust contracts”) and legislation based on it (such as the *Retail Leases Act 1994* (NSW)), and the federal legislation formerly known as the *Trade Practices Act 1974* now the *Competition and Consumer Act*. Some of the legislation is framed upon contracts which are “unjust” or “unfair”, but all expressly employ, directly or indirectly, “unconscionable”: for example, a contract whereby a person performs work in an industry is “unfair” if it is “harsh, unjust or unconscionable”: *Industrial Relations Act 1996* (NSW), ss 105 and 106.

³ *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at [7].

⁴ “(a) the relative strengths of the bargaining positions of the lessor and the lessee, and (b) whether, as a result of conduct engaged in by the lessor, the lessee was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the lessor, and (c) whether the lessee was able to understand any documents relating to the lease, and (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the lessee or a person acting on behalf of the lessee by the lessor or a person acting on behalf of the lessor in relation to the lease, and (e) the amount for which, and the circumstances under which, the lessee could have acquired an identical or equivalent lease from a person other than the lessor, and (f) the extent to which the lessors conduct towards the lessee was consistent with the lessor’s conduct in similar transactions between the lessor and other like lessees, and (g) the requirements of any applicable industry code, and (h) the requirements of any other industry code, if the lessee acted on the reasonable belief that the lessor would comply with that code, and (i) the extent to which the lessor unreasonably failed to disclose to the lessee: (i) any intended conduct of the lessor that might affect the interests of the lessee, and (ii) any risks to the lessee arising from the lessor’s intended conduct (being risks that the lessor should have foreseen would not be apparent to the lessee), and (j) the extent to which the lessor was willing to negotiate the terms and conditions of any lease with the lessee, and (k) the extent to which the lessor and the lessee acted in good faith.”

established under the general law”:⁵ a new statutory amalgam.)

Thirdly, because it is a *federal* statute, a plaintiff who invokes it may approach different courts (that is, federal courts), and even if the claim is adjudicated by a State or Territory court, that court will be exercising federal jurisdiction. That in turn may give rise to a different choice of law analysis,⁶ and may even give rise to different avenues of appeal.⁷

Fourthly, s 20(1) recognises in terms that the legal meaning of “unconscionability” is ambulatory (“from time to time”), and so is apt to rise and fall in light of developments in judge-made law. All words change meaning from time to time; the (apocryphal) praise of St Paul’s Cathedral as “awful, artificial and amusing” is an example.⁸ Whatever the state of equitable doctrine be at the relevant time, it is picked up, federalised, and used to define a federal norm of conduct contravention of which engages a power to award a range of statutory remedies which in terms go (considerably) beyond what is available at general law.⁹

That is a lot of work for 25 words to do! It immediately emphasises something long-familiar about the process of statutory construction: the legal meaning of a statute is impossible to ascertain without first understanding the legal context in which it was enacted. This is trite, and ancient. Sir Edward Coke said that “To know what the common law was is the very lock and key to set open the windows of the statute”.¹⁰ Or, as Joel Prentiss Bishop put it in 1882,¹¹

“A new statutory provision, cast into a body of written and unwritten laws, is not altogether unlike a drop of coloring matter to a pail of water. ... In every case, [a statute] is a thread of woof woven into a warp which before existed. It is never to be contemplated as a thing alone, but always as a part of a harmonious whole. ... obviously no statute can be understood except by him who understands the prior law.”

Plainly enough, if s 20(1) were enacted in the United Kingdom, it would have a different

⁵ *Canon Australia Pty Ltd v Patton* (2007) 244 ALR 759 at [4] (Basten JA).

⁶ See *Blunden v Commonwealth* (2003) 218 CLR 330, *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at [8] and *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at [33].

⁷ See M Leeming, *Authority to Decide* (Federation Press, 2012), p 85.

⁸ By which was meant awe-inspiring, highly artistic and thought-provoking: see A Scalia and B Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2012), p 78.

⁹ How those remedies apply – whether by analogy with principles of judge-made law, or despite those principles – is a large question, not unrelated to but not addressed by this paper.

¹⁰ E Coke, 2 *Inst* 301.

¹¹ J P Bishop, *Commentaries on the Written Laws and their Interpretation* (Boston, Little Brown and Company, 1882), p 4.

operation, which would be different again from its operation in the United States of America. Some of the divergences between those three common law jurisdictions are readily appreciated. The statements of regret made by Sir Peter Millett (as his Lordship then was) and Lord Hobhouse tend to confirm that a narrower approach to unconscientious conduct obtains than in Australia:¹²

“We have substituted an inappropriate bright line rule for a proper investigation of the facts and have failed the vulnerable in the process. The Australians are turning to the jurisdiction to relieve against harsh and unconscionable bargains as an alternative, and there is much merit in this approach.”

It is speculation, but one plausible reason for the relative Australian innovativeness may be the familiarity gained by exposure to statutory formulations and modifications of unconscionability, which have been present in State and federal legislation now for more than seven decades, coupled with the process of seeking coherence within the legal system.¹³

Unconscionability is even more expansive in at least some States in the United States of America. Again, why that is so is deeply interesting, albeit insufficiently analysed; it is possible that further work might tend to enhance an understanding of why aspects of those two federal legal systems are in fact only deceptively similar. For present purposes, I wish to note only that the broad doctrine of unconscionability enunciated by the Supreme Court of California has prompted an interesting and illustrative conflict between equity and a statute which *prima facie expressly* deferred to it.

AT&T Mobility LLC v Concepcion concerned a federal law which makes agreements to arbitrate “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁴ One might think that that would preserve “generally applicable contract defences, such as fraud, duress, or unconscionability”, and indeed the Supreme Court had so held.¹⁵ However, in very large measure contract defences, such as unconscionability, are the product of the judge-made law of the States, which differ from State to State (it follows that the same federal law will have different practical

¹² See P Millett, “Equity’s Place in the World of Commerce” (1998) 114 *LQR* 214 at 220, and *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449 at [115].

¹³ Gerald Postema (following Jeremy Waldron) uses the language of “systematicity” to describe this aspect (or something akin to this aspect) of a legal system: see G Postema, “Law’s System: The Necessity of System in Common Law” (2014) *New Zealand Law Review* forthcoming (available at SSRN: <http://ssrn.com/abstract=2324438>) at 9-10.

¹⁴ 131 S Ct 1740 (2011).

¹⁵ *Doctor’s Associates, Inc v Casarotto* 517 US 681 at 687 (1996).

operation throughout the same country).¹⁶

The California Supreme Court ruled that a class action waiver in consumer contracts was, at least in many circumstances, *per se* unconscionable.¹⁷ Accordingly, the question arose whether unconscionability in its broad Californian formulation was available under the federal statute to invalidate an arbitration agreement. Scalia J for a majority in the United States Supreme Court held that the Californian doctrine of unconscionability “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the [Federal Arbitration Act]”, and was for that reason pre-empted by federal law. That is to say, the very law which subjects itself to “unconscionability” as formulated by State courts was held, by bare majority¹⁸ to displace “unconscionability” in its Californian formulation.

It is not the burden of this paper to defend or criticise the outcome. My point is that even where statute expressly defers to judge-made law, there may nonetheless continue to be cases where it overrides it. That reflects the normative complexity of the legal system, involving “the interaction between the rules of law, principles of equity, requirements of statute and between legal, equitable and statutory remedies”;¹⁹ the interaction is even more complex than a superficial reading of Dyson Heydon’s various categories might suggest.

Then there are statutes and statutes. One drafting approach is detailed and prescriptive, seen in (say) the Australian corporations and taxation regimes. That technique is common in modern Australian statutes (it suffices to contrast size of the annual statute books of five decades ago with today’s), but the complaint that that technique is doomed, without judicial interpretation, to catch all conduct intended to be caught is far from new. Neil Duxbury quotes Montaigne complaining about Justinian’s edict against the publication of “interpretations, or rather perversions, of the laws”²⁰ in the introduction to the *Digest*, as follows:²¹

¹⁶ Australian federal examples are rarer, but one is the selective “roll-back” of federal corporations law pursuant to s 5F of the *Corporations Act 2001* (Cth): see *Loo v Director of Public Prosecutions* (2005) 15 VR 665.

¹⁷ “[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then ... the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’ Under these circumstances, such waivers are unconscionable under California law and should not be enforced” *Discover Bank v Superior Court*, 113 P 3d 1100 at 1110 (2005).

¹⁸ Breyer, Ginsberg, Sotomayor and Kagan JJ dissented.

¹⁹ *Bankstown City Council v Alamo Holdings Pty Ltd* (2005) 223 CLR 660 at [27].

²⁰ *Alias autem legum interpretations, immo magis persiones eos iactare non concedimus.*

²¹ N Duxbury, *Elements of Legislation* (Cambridge University Press, 2013), 136, citing M de Montaigne, *The*

For legislators to try “to rein in the authority of the judges” by drafting statutes which seek to deal with every likely instantiation of a particular legal problem is futile, moreover, because “[t]he multiplicity of our human inventions will never attain the diversity of our cases.”

On the other hand, some important statutes, perhaps especially in the United States, are very concise. The *Sherman Act* is perhaps the best known, but perhaps the most extreme example is the vast body of judge-made law stemming from s 10(b) of the *Securities Exchange Act* 1934²² and rule 10b-5 made under that section.²³ Most of the law regulating insider trading is judge-made law based on that sparse language, and the succeeding eight decades have seen the rise and fall of competing theories, based either on the idea that there is a breach of trust or fiduciary obligation by the trader, or else a “misappropriation” of information. Hence for example decisions such as *Chiarell* and *Dirks*,²⁴ holding that there was no contravention in the absence of (respectively) a breach of a relationship of trust and confidence owed to those with whom the employee traded, and trading for the employee’s personal benefit. However, more recent decisions have relied on a “misappropriation” theory.²⁵

There is very substantial scope for developing judge-made law where the statutory language is sparse – indeed, in a real sense, such language reflects a legislative purpose that that occur. It is striking that the uncompromising common law notions of “device, scheme or artifice to defraud”, “untrue statement of a material fact” and “engage in any act, practice or course of business which operates ... as a fraud or deceit upon any person” in federal laws have given rise to a body of law based very largely on *equitable* notions – of liability based on breach of an employee’s fiduciary duty to his or her employer, and breach of confidence. It might well be of interest to survey the extent to which sparse statutory language has been filled by equitable, as opposed to common law, principles of judge-made law.

Complete Essays (Penguin, 2003), 1208-1210.

²² “It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange ... b. To use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”

²³ “It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”

²⁴ *US v Chiarell* 445 US 222 (1980); *Dirks v SEC* 463 US 646 (1983).

²⁵ See *Carpenter v US* 484 US 19 (1987) and *US v O’Hagan* 521 US 642 (1997), and see R Baxt, A Black and P Hanrahan, *Securities and Financial Services Law* (LexisNexis, 8th ed, 2012) at 690-692.

Those considerations lead to a large question: is there anything special about the relationship between *equity* and statute, as opposed to other bodies of judge-made law, notably common law and statute? There is scant scope in this comment to address that in detail, but the following is offered. First, it is of course one thing to construe a statutory text, and quite another to read a court's reasons for judgment and extract principle from them. In part this is the familiar difference between the general and the particular:²⁶

Case law usually sets out reasons for the solution of a problem in a particular way, while statutory provisions tend to stipulate how a problem is to be negotiated in general terms.

Neil Duxbury reminds us that judicial opinions are almost always authorial (indeed, they are said to be “written”) and “challenge the reader to follow and assess reasoned argument”, whereas statutes (which are invariably “drafted”) often comprise a series of definitions and commands, not necessarily in a sensible order.²⁷ Hence the force of the familiar (and often ignored) command that a court's reasons for judgment are not to be read as if they were a statute. That is *particularly* inappropriate in the case of equity. For example, a recurring theme in the equitable notion of unconscionability is the inability to circumscribe the circumstances in which it could be invoked. An illustration is Fullagar J's statement in *Blomley v Ryan* that the circumstances “are of great variety and can hardly be satisfactorily classified”²⁸ and, as Kitto J's dissent in the same case illustrates, the divergent views which may be held of a “serious disadvantage” sufficiently evident to the stronger party that it is unconscientious to take advantage of it. In short, as Lord Walker has emphasised, equitable principle often requires a broad evaluative judgment after careful scrutiny of the facts,²⁹ and the fact that the decision-maker has invariably been a judge (as opposed to a common law jury) capable of granting relief which is discretionary and which may be on terms, is something quite different from a common law rule. Those principles may nonetheless be transplanted into statute, but to do so is quite different than, say, amending a common law rule that contributory negligence is a complete defence.

Secondly, to return to statutory unconscionability in Australia, is a different approach to be

²⁶ N Duxbury, *Elements of Legislation* (Cambridge University Press, 2013), 59.

²⁷ *Ibid.* I have referred elsewhere to “the focus on ideas and analogies and themes in judge-made law [being] far more attractive than the relentless verbalism of statutes”: M Leeming, “Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room” (2013) 36(3) *University of New South Wales Law Journal* 1002 at 1003.

²⁸ (1956) 99 CLR 362 at 405.

²⁹ See R Walker, “Equity and Human Rights” in P Turner (ed), *Equity and Administration* (Cambridge University Press, 2016), 380.

taken when the supple language of equity is transplanted to a statute. Courts are accustomed to identifying necessary and sufficient elements within statutory formulations; does the same approach hold when statute incorporates an equitable principle? In New South Wales, Spigelman CJ once sought to distinguish between what was unconscionable and what was merely unfair or unjust, and held, for some years quite influentially,³⁰ that “unconscionability is a concept which requires a high level of moral obloquy”.³¹ But more recently, courts have returned to the text of the statute, as opposed to explanatory glosses upon it:³²

“[T]o treat the word “unconscionable” as having some larger meaning, derived from ordinary language, and then to seek to confine it by such concepts as high moral obloquy is to risk substituting for the statutory term language of no greater precision in an attempt to impose limits without which the Court may wander from well-trodden paths without clear criteria or guidance. That approach should not be adopted unless the statute clearly so requires.”

Finally, it is hard to think of a more influential statutory incorporation of equitable doctrine than the modern appeal, which reflects the rehearing in chancery. Sir George Jessel MR explained in *Re St Nazaire Company* that the right of rehearing was in the nature of an appeal, and transferred to the Court of Appeal, which thereafter applied that process to all proceedings, common law, equitable, ecclesiastical and admiralty.³³ As Thesiger J said in the same case, “nothing can be clearer than that there was nothing analogous to that in the Common Law Courts”.³⁴ Hence, as Dixon, Mason and Jacobs JJ explained, “the jurisdiction and the power of the new Court of Appeal were conferred upon it in terms derived from Chancery”.³⁵ That appellate jurisdiction has, more than most other things, affected the legal systems of the United Kingdom and Australia, creating the familiar coherent bodies of law which in large measure we take for granted in the 21st century.

³⁰ See for example *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* (2011) 34 VR 536, at [90]-[91] and [96]; *Violet Homes Loans Pty Ltd v Schmidt* (2013) 300 ALR 770 at [58]; *Canon Australia Pty Ltd v Patton* (2007) 244 ALR 759 at [41]-[43] but cf at [4].

³¹ *Attorney General of NSW v World Best Holdings Ltd* (2005) 63 NSWLR 557 at [121].

³² *Director of Consumer Affairs Victoria v Scully* [2013] VSCA 292; 303 ALR 168 at [45]; *Canon Australia Pty Ltd v Patton* [2007] NSWCA 246; 244 ALR 759 at [4]; *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [41]; see the discussion by Sackville AJA in *PT Ltd v Spuds Surf Chatswood Pty Ltd* [2013] NSWCA 446 at [99]-[106].

³³ (1879) 12 Ch D 88 at 98.

³⁴ (1879) 12 Ch D 88 at 101.

³⁵ *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 108-109; *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619-620 and 625-628.