

Chapter 1: Nature of Equity

- based on the notion of 'unconscionability'
- court will intervene where act/omission is considered 'against the conscience'
- flexible and discretionary
- attention is focused on the relationship between the parties
- not about rigidly applying rules in an unfair manner
- statutes are both embracing and expanding equitable principles see *Trade Practices Act 1974 (Aus Consumer Law – Sch 2 Competition and Consumer Act 2010)* or *ss 180-184 Corporations Act 2001*)

Parkinson notes five categories:

1. exploitation of vulnerability/weakness
 2. abuse of positions of confidence
 3. insistence on rights in circumstances which are harsh/oppressive
 4. inequitable denial of obligations
 5. unjust retention of property
- Not fixed or closed – Equity should be flexible BUT is it really?
 - A circumstance of inequality will not guarantee equitable relief – need to also establish that it is against the conscience not to acknowledge what has occurred French J in *ACCC v Berbatis Holdings (2003)*

Historical Background

- principles initially created in the English High Court of Chancery
- developed in response to rigid technical procedures of the common law
- softening or correcting the common law eg: doctrine of estoppel overcoming strict common law rules re: consideration OR protecting positions of confidence/preventing abuse by stronger party
- **recurring theme:** whether, after examining all the circumstances, it would be unconscionable not to recognise certain rights, titles and interests between the parties
- in 13th century, common law rules were strict. Parties who could not satisfy these rules petitioned the Crown for dispensation and were referred to the Chancellor – usually a member of the church. No binding precedent – each case considered on its merits. Where the application of the common law was harsh/unjust the Chancellor might, according to his conscience, provide relief in equity
- Equity developed after the common law
- Equity develops in an ad hoc manner – sometimes with uncertain results – depended on the whim of the Chancellor, hence the 'length of the Chancellor's foot'
- All about doing justice in the particular circumstance