



## Book Review

**Remedies** by David Wright, 2nd ed, Federation Press, Annandale, 2014, 336 pages, ISBN 978 1 86287 932 4, AU\$95.00 (paperback).

The second edition of David Wright's *Remedies* is a clear text which will be welcomed by those who take an historical approach to the organisation of remedies law, and who want an accessible description of the availability of remedies in Australian private law. In the Australian context, Wright notes at the outset that '[t]he law of remedies in Australia is extremely traditional. It is still very important to classify the primary right as common law or equitable'.<sup>1</sup> Consequently, he organises his text according to whether the primary right which gives rise to the remedy derives from common law or equity. As a result, the substantive part of the book is organised into three main sections: Part II, Compensation at Common Law; Part III, Equitable Remedies; and Part IV, Remedies Similar To Traditional Remedies.

It is always a pleasure to read a further Australian foray into Remedies law, and Wright's text is no exception. Over recent decades, private law remedies have grown in popularity in Australian law schools as a discrete topic of study for students and academics. The attention to this topic is welcome, as it is vitally important for students to be cognisant of the different remedial options available for litigants depending on which cause of action is pursued. Moreover, a comparison of different private law remedies can provide important insights into the nature of the primary right or cause of action for which such remedies are available. It is for this reason remedies is often described as a 'capstone' subject.<sup>2</sup> By looking horizontally across the causes of action at the remedies which are available, students can integrate their knowledge of disparate private law causes of action. Remedies requires students to simultaneously consider the remedies which might apply for breaches of contract, torts, breaches of trust, breaches of fiduciary duty, and statutory breaches, among other things. It is therefore a deeply practical and useful subject.

Part I, Ch 1 of Wright's text provides an introduction to remedies law in Australia. Wright sets out the common law and equity divide and establishes the remedial hierarchy which presently exists in Australian law. He also discusses primary and secondary rights, raising the issue of the extent to which primary rights and secondary rights must be coterminous. It is fair to say that English law and scholarship has taken more of a monist approach (where the right and remedy are coterminous), whereas Australian law and scholarship has tended to take a more discretionary approach, particularly where the cause of action is equitable. Wright's discussion of this issue will be of interest to remedies scholars, as Wright is well-known as a proponent of

discretionary remedialism in Australian law.<sup>3</sup> However, he is not a dualist who believes that judges can choose whatever remedy they wish regardless of the cause of action. Instead, he identifies himself as a 'moderate monist/dualist' who sees a strong (or 'sticky') but not indissoluble link between the remedy and the primary right. Thus, there is a presumptive remedy for certain causes of action, but judges can and do depart from awarding that remedy where another remedy would be more appropriate. To me, it has always seemed that this is the only approach which can explain what judges really *do* in cases. It is welcome to see a more nuanced account where 'discretionary' is not automatically equated with 'unprincipled'. As Wright himself acknowledges, unbounded discretion can be unprincipled.<sup>4</sup> However, he argues that Australian judges do not exercise unbounded discretion when awarding remedies. He appears to move further towards the dualist end of the monist/dualist spectrum in his commentary on discretion. He argues:

the objective of remedies law is not to impose a derivative layer of remedial obligations on the defendant but to authorise courts to respond in appropriate ways to the defendant's wrongdoing. In this way, remedies are theoretically distinct from legal rights. Significantly, courts pay more attention to specific facts and exercise greater discretion in granting remedies than they do in formulating substantive rules for conduct. Consequently, the equities and exigencies of particular cases may overshadow the goals of clarity and consistency in regulation of conduct.<sup>5</sup>

It appears in this discussion that Wright seeks to weaken the link between right and remedy. He argues that judicial decisions as to remedies are rightly more discretionary than judicial decisions with regard to primary rights, particularly in equity, but that this discretion is exercised in a principled manner.

Part II, Compensation at Common Law contains chapters covering Contractual Damages, Tortious Damages and Restitution (Unjust Enrichment). Part III, Equitable Remedies contains chapters covering a vast slew of remedies, including equitable compensation, Lord Cairns' Act Damages, Accounts of Profits, Rectification, Remedial Constructive Trusts, Specific Restitution, Specific Performance, Rescission, Final Injunctions and Interlocutory Injunctions. Finally, Part IV concerns Remedies Similar To Traditional Remedies and contains chapters which cover Mareva Injunctions, Anton Pillar Orders, Remedies under the Competition and Consumer Act and Declarations. The advantages of the substantive chapters are the focus on practical aspects of Australian law, the clarity of Wright's headings and writing, and the useful illustrative problems and answers at the end of each chapter which are surely appreciated by students who use the text. However, there were a number of typographical errors which should have been picked up by the publisher (in a second edition in particular).

Wright's organisation of his text is in keeping with the view of a number of

<sup>1</sup> D Wright, *Remedies*, 2nd ed, Federation Press, 2014, p 14.

<sup>2</sup> J M Fischer, 'Teaching Remedies Versus Learning Remedies' (2000) 39 *Brandeis LJ* 575 at 576; M P Allen, 'Remedies as a Capstone Experience: How the Remedies Course Can Help Address the Challenges Facing Legal Education' (2013) 57 *Saint Louis ULJ* 547.

<sup>3</sup> See especially, D Wright, *The Remedial Constructive Trust*, Butterworths, 1998. See also D Wright, 'The Statutory Trust, the Remedial Constructive Trust and Remedial Flexibility' (1999) 14 *JCL* 221; D Wright, 'Professor Birks and the Demise of the Remedial Constructive Trust' [1999] *Restitution LR* 128; D Wright, 'Wrong and Remedy: A Sticky Relationship' [2001] *Singapore Jnl of Legal Studies* 300; D Wright, 'Discretion with Common Law Remedies' (2002) 23 *Adel LR* 243.

<sup>4</sup> Wright, above n 1, p 9.

<sup>5</sup> *Ibid*, p 11.

prominent judges hailing from New South Wales who emphasise the importance of being aware of the historical origins of remedies and the origins in common law and equity.<sup>6</sup> This view has become the predominant Australian view over the last 20 years, in large part because of the influence of those very judges. While it is vitally important to have regard to the historical origins of various remedies because of the way in which history has shaped both rights and remedies in Australian law, organising an analysis of remedies on that basis makes it more difficult to compare remedies. So in Wright's book, contractual damages and tortious damages are placed in Part II, and equitable compensation is placed in Part III. Specific performance and final injunctions are also placed in Part III quite apart from the considerations of contract and tort damages and from each other (rescission is interleaved between specific performance and final injunctions). Restitutionary remedies are placed in Part II, and rescission is placed in Part III. The placement of Restitution with 'Compensation at Common Law' seems unintuitive. A better title for Part II might have been 'Common Law Remedies', as restitution is not strictly speaking compensatory: it looks not only to the plaintiff's loss but to the defendant's unjust gain at the plaintiff's expense.

A different approach is to structure an analysis of remedies around the functions those remedies play. For example, under such an organisation, tort damages, contract damages, damages under the Australian Consumer Law and equitable compensation would all be placed together, as they all have the function of compensating the plaintiff for loss caused by the defendant's breach. Stephen Waddams has famously noted:

The subject [of remedies] is worthy of study because it enables illuminating parallels to be drawn that cross the boundaries between contract and tort, and between law and equity.<sup>7</sup>

The advantage of looking at remedies in a functional manner is that the reorganisation can allow us to see more easily the illuminating parallels of which Waddams speaks, and also highlights the important differences. It is for this reason that many (although not all) other Australian texts choose to organise their analyses functionally.<sup>8</sup> Wright's method of organisation is more historically accurate, and in keeping with current judicial thought, but it makes it more difficult to appreciate the similarities and differences between remedies which may perform functions which resemble one another.

Nonetheless, I appreciated the insight Wright's text gave me into another

means of organisation. His text made me consider the inclusions and omissions I have made in my own mental categorisation. I would not, for example, view rectification as a remedy per se (although Wright's categorisation of it as a remedy is entirely in keeping with the approach of *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies*).<sup>9</sup> I tend to see rectification as an instance of the court refining and particularising the primary right rather than as a secondary response to the primary right, and I do not teach it in my remedies course. By the same token, I enjoy teaching my students about 'self-help remedies' such as recaption and abatement, but as I acknowledge to my students, these are not strictly speaking remedies at all, as they do not involve a judicial order. I concede that such 'remedies' can be more properly thought of as the court giving the plaintiff permission to act in a particular way.

Wright is to be commended for his focus on the Australian law of remedies as it presently stands, and on the clear and practical way in which he explains current doctrine in a concise manner.

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<sup>6</sup> Particularly the various authors of *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies*. Past authors of this text include the late Lehane J (former Federal Court judge), Gummow J (former Federal Court and High Court judge) and the late Meagher JA (former judge of the NSW Court of Appeal). Present authors include Heydon J (former judge of the NSW Court of Appeal and High Court) and now Leeming JA (present judge of the NSW Court of Appeal). This text has just been published in a fifth edition: J Heydon, M Leeming and P Turner, *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies*, 5th ed, Lexis Nexis, 2015.

<sup>7</sup> S M Waddams, 'Remedies as a Legal Subject' (1983) 3 *Oxford Jnl of Legal Studies* 113 at 121.

<sup>8</sup> See, eg, M Tilbury, *Civil Remedies*, vols 1 and 2, Butterworths, 1990; M Tilbury, M Gillooly, E Bant and N Witzleb, *Remedies: Commentary and Materials*, 5th ed, LBC, 2011; K Barnett and S Harder, *Remedies in Australian Private Law*, CUP, 2014. Cf W Covell, K Lupton and J Forder, *Principles of Remedies*, 5th ed, LexisNexis, 2012.

<sup>9</sup> J Heydon, M Leeming and P Turner, *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies*, 5th ed, Lexis Nexis, 2015.