Chapter 3

Participatory Liability and the Hallmarks of an 'Australian Equity'

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I was fortunate to be taught equity by Paul Finn at the Australian National University during the period in which Sir Anthony Mason and Sir William Deane of the High Court of Australia were leading a renaissance in equitable doctrine and remedy. An enduring lesson from this experience was that in order to make sense of doctrinal complexity, it is necessary not only to immerse oneself in that complexity so as to understand it, but then to stand back in order to see the broad themes, principles and policies at play. In doing so, it may be the case that fluidity of principle, rather than fixed formulae, emerges as a more accurate characteristic of the relevant law. This essay concerns that process of explaining and applying the law. It is about judicial method in relation to equitable doctrine and remedy, and specifically, the judicial method championed by Paul Finn. The essay describes and critically evaluates this judicial method by reference to the doctrines and remedies concerning third party participants in equitable wrongdoing ('participatory liability') and, particularly, the influential judgment of the Full Federal Court in *Grimaldi v Chameleon Mining NL (No 2)* (*Grimaldi*) of which Justice Finn was the primary author.[1]

The essay first describes the Australian framework for determining participatory liability, the leading High Court cases, and the facts and issues in *Grimaldi*, and shows that the Australian law is in need of further clarification and reform. The essay then describes, in the context of equitable doctrine, two key features of the judicial method espoused by Paul Finn in his extra-judicial writings. They are referred to here (although not by Finn) as 'hallmarks', that is, distinctive features denoting excellence. The essay considers the embodiment of the two hallmarks in the Full Federal Court's judgment in *Grimaldi* with respect to participatory liability. Paul Finn has drawn extensively upon the jurisprudence of the High Court to illustrate

1 (2012) 200 FCR 296 (Finn, Stone and Perram JJ).