FOR YOUR CONSIDERATION: OLD RULES, PRACTICAL BENEFIT AND A NEW APPROACH TO CONTRACTUAL VARIATION

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Dedicated to Tony, my late father. I did it Dad. Hope I made you proud.

Also dedicated to Leah, my beautiful sister in Heaven, and to my mother Joy who does so much for me. This one’s for you.
# TABLE OF CONTENTS

Abstract .............................................................................................................................. ix  
Declaration ......................................................................................................................... xi  
Acknowledgements ......................................................................................................... xiii  

Introduction ......................................................................................................................... 1  
  Context ............................................................................................................................. 3  
  Aim, Scope and Significance of the Thesis ................................................................. 9  
  Overview of the Thesis ............................................................................................... 14  

Chapter One: Consideration and the Existing Legal Duty Rule ................................ 17  
  Covenant and Debt ......................................................................................................... 19  
  Assumpsit ....................................................................................................................... 20  
  Rise and Fall of the ‘Moral’ Basis for Consideration ............................................. 22  
  19th Century Developments ...................................................................................... 23  
  The Essential Elements of Consideration ............................................................... 25  
    Benefit/Detriment ...................................................................................................... 25  
    Bargain ...................................................................................................................... 25  
  The Existing Legal Duty Rule ...................................................................................... 27  
    Duties Imposed by Law ............................................................................................. 28  
    Duties Imposed by Contract Proffered to a Third Party ......................................... 29  
    Duties Imposed by Contract Between Promisor and Promisee .......................... 30  
  The Part-Payment of Debt Principle .......................................................................... 41  
  Treatment of the Existing Legal Duty Rule .............................................................. 44  
    Common Law Countries ......................................................................................... 44  
    Civil Law Countries ............................................................................................... 52  
    International Contracts .......................................................................................... 54  
  Other Means of Enforcing Unilateral Contract Modifications ............................. 56  
  Conclusion ...................................................................................................................... 56  

Chapter Two: The Practical Benefit Principle ............................................................. 59  
  Williams v Roffey Bros & Nicholls (Contractors) Ltd .............................................. 61  
  The Meaning of ‘Practical Benefit’ in Williams v Roffey ....................................... 65  
  Judicial Method in Williams v Roffey ....................................................................... 72  
  Was the Decision in Williams v Roffey ‘Correct’? .................................................. 83  
  Conclusion ..................................................................................................................... 85  

Chapter Three: Australian and International Treatment of Practical Benefit ........ 87  
  Australian Endorsement: Musumeci v Winadell Pty Ltd ......................................... 89  
  Further Domestic Treatment of the ‘Practical Benefit’ Principle ............................. 95  
  International Reactions to Williams v Roffey ........................................................ 103  
    England ..................................................................................................................... 103  
    New Zealand ......................................................................................................... 112  
    Canada ................................................................................................................... 113  
    Singapore ............................................................................................................. 114  
  Conclusion .................................................................................................................... 115
Legislation .......................................................................................................................... 229
Articles/Books/Reports ..................................................................................................... 230
Treaties .............................................................................................................................. 237
Other Instruments ........................................................................................................... 237
Government Reports/Documents ................................................................................. 237
Speeches ......................................................................................................................... 237
Dictionaries ..................................................................................................................... 237
Theses ............................................................................................................................... 237
Digital Newspapers ........................................................................................................ 237
Websites .......................................................................................................................... 238
Other Internet Materials ............................................................................................... 238
Critical to the formation of a valid contract under Anglo-Australian law is that ‘consideration’ pass between the parties. In simple terms the consideration is whatever is given in return for a promise in order to make it legally binding, and can be regarded as the ‘price’ of the promise. Traditionally, this is in the nature of a benefit to the promisor or a detriment to the promisee. This requirement has existed since at least the 13th Century AD and has prompted the development of a number of subsidiary principles, one of which is the existing legal duty rule. This stipulates that a promise to do something that the promisor was already contractually bound to do cannot amount to good consideration.

The existing legal duty rule has caused difficulties for parties seeking to vary their agreements. With the development of increasingly complex methods of doing business and our exponentially growing reliance upon technology, contracts have increased in intricacy and lifespan and their vulnerability to changes in economic, social or other conditions has consequently been amplified. Whilst the rule does safeguard against extortion, by disentitling parties from bargaining to receive more in return for what they originally agreed to do, the case law demonstrates that it is an impediment to one-sided contractual variations which are made honestly, without impropriety, and often as a matter of convenience. The English Court of Appeal in 1989 appeared to recognise this and attempted to generate an exception to the rule – the ‘practical benefit’ principle. However, this principle has itself caused difficulties and been heavily criticised by both courts and commentators.

At a time when the Australian Government is reviewing the Australian law of contract, it is appropriate to re-examine this issue. This thesis critically analyses the existing legal duty rule and consideration requirement for variations and concludes that they are inconvenient and outmoded. It focuses upon the English Court of Appeal’s attempts to soften the rigidity of these principles and critically examines the practical benefit principle as well as the extensive body of case law addressing it. It is argued that this principle was itself not the best solution and is not a viable means of enforcing one-sided contract variations.

The thesis then recommends reforms which, it will be argued, will more efficiently fulfil the protectionist role of the existing legal duty rule without precluding one-sided variations. Alternatives are considered before it is ultimately recommended that the consideration requirement for modifications be abolished and that the normal rules of contract as well as the vitiating doctrines, particularly economic duress, act as safeguards. This suggestion for reform is intended to reemphasise the overarching theme of the thesis: that the practical benefit principle was a poor solution to the problem in Williams v Roffey and is an unsatisfactory means of satisfying the consideration requirement so as to render one-sided variations enforceable.
DECLARATION

This work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

The discussion of the case law pertaining to practical benefit in Chapters 2 and 3, as well as some of the concepts and arguments appearing in Chapters 4 and 5, featured in, or inspired parts of, the following article published in the Journal of Contract Law:


This article was predominantly based upon a paper I presented at a national conference in November 2011:


Some of the discussion which features in Chapter 6, where alternative methods of enforcing unilateral contract variations are discussed, also featured in, or inspired parts of, the following article published in the University of Western Australia Law Review:


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Signed ___________________________ Date ___________________________
I still vividly remember the day that I formally undertook the higher research journey at the University of Adelaide. The then Postgraduate Coordinator, Professor Judith Gardam, invited me into her office in the afternoon of Christmas Eve 2009 to discuss the possibility of me undertaking a PhD. I opted to enrol in a Masters by Research but midway through my candidature was encouraged to ‘upgrade’ to the Doctorate. And so it was that I dedicated the last three years to writing this thesis. It has been one of the most challenging periods of my life but, simultaneously, one of the most rewarding. There are so many people without whom this would never have been possible.

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