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

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A thesis submitted for the degree of Doctor of Philosophy

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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.

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ABSTRACT

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*:

> Mark Giancaspro, 'Practical Benefit: An English Anomaly or a Growing Force in Contract Law?' (2013) 30(1) *Journal of Contract Law* 12.

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

> Mark Giancaspro, 'Practical Benefit: An English Anomaly or a Growing Force in Contract Law?' (Paper presented at the Advanced Contract Law Conference, Adelaide, 11 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*:

> Mark Giancaspro, 'The Rules for Contractual Renegotiation: A Call for Change' (2014) 37(2) *University of Western Australia Law Review* 1.

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