

# CHAPTER 1

## INTRODUCTION

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Law is a form of conflict resolution created in the process of politicization and pacification of society. Contract law is a form of law that emerged with trade and the division of labour. It presupposes the freedom, equality and security of people who attract private fortunes in the marketplace in order to maximize their return expressed in money values. Law *has* forms and *is* a form as well. It is the ruling and enforced communication on normative behaviour in modern societies.<sup>1</sup>

### 1.1 THE ESSENCE OF AUSTRALIAN CONTRACT LAW

[1.05] The aim of this book is to provide readers with a concise examination of Australian contract law. This introductory chapter outlines the essence of contract law. A working definition of contract law is that contract law is the body of law that provides for the creation, performance and discharge of duties voluntarily assumed by a person in relation to another person.

[1.10] In *Commonwealth v Verwayen*<sup>2</sup> McHugh J remarked that ‘the enforcement of promises is the province of contract’.<sup>3</sup> This not only reflects the notion that contract law is concerned with the act of promising, but also captures the essence of contract law for a number of reasons.

First, there must be a *subject matter* of contract law. The law attributes significance to certain kinds of acts—in this context, people making some kind of solemn promise or undertaking to do or not to do something. Not every undertaking falls within the ambit of contract law, so

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1 U Riefner, ‘The Vikings and the Romans: Contract Law and Social Economy’, in T Wilhelmsson (ed), *Perspectives on Critical Contract Law*, Dartmouth Publishing, Aldershot, 1993, 169–209, 180. Original emphasis.  
2 (1990) 170 CLR 394.  
3 *Ibid.*, 501.

contract law must call upon some kind of ‘bright line’ rule to decide which kinds of promises are enforceable, and which are not. Australian contract law also uses various rules of recognition to decide which types of promises can be enforced by the legal system. These bright-line rules are dealt with at various points in this book.

Second, there is a class of *persons* who make promises. This is the class of legal actors known as persons. Legal personality has been extended beyond natural persons (human beings) to encompass artificial entities such as corporations.<sup>4</sup>

The third observation that flows from McHugh J’s dictum in *Commonwealth v Verwayen*<sup>5</sup> is implied by the nature of promising itself: it is a voluntary rather than an involuntary act. As Tipping J remarked in *Sinclair Horder O’Malley and Co v National Insurance Company of New Zealand Ltd*,<sup>6</sup> the law of obligations is divided into voluntary and involuntary obligations.<sup>7</sup> Contract law is the branch of law where obligations are voluntarily assumed. Building on this, promises are voluntary acts. If some promises are enforceable, it follows that voluntarily made promises can also create obligations for the promise maker (called the promisor) that are enforceable by the person to whom the promise is made (the promisee). These promises become legal acts, and are subject to the apparatus of the legal system (such as courts).

[1.15] McHugh J’s dictum in *Commonwealth v Verwayen*<sup>8</sup> encapsulates the essence of contract, but there are some circumstances outside the area of contract law in which a person will be prevented (‘estopped’) from going back on what they have said. In these cases, where there is a deficiency in promise making and enforcement under the law of contract, the courts can call upon principles in other areas of law designed to ensure the attainment of justice.<sup>9</sup>

[1.20] Examining the essence of contract law from a broader perspective, contract scholars generally agree that contract law has three legitimate functions. The first function is to specify which agreements are legally binding and which are not. The second function is to define the rights and duties (in other words, obligations) created by enforceable but otherwise ambiguous agreements. The third function is to indicate the consequences of an unexcused breach of contract.<sup>10</sup> Beyond the purely doctrinal or internal view of contract law, it is possible, by taking a broader perspective of contract law, to see other threads to the rich tapestry of contract. Collins wrote, on this theme:

The practising lawyer identifies the key function of contracts as the planning of an economic relation. The legal scholar views the rules of contract law as a particular source of private law

4 *Lee v Lee’s Air Farming* [1961] AC 12.

5 (1990) 170 CLR 394, 501.

6 [1992] 2 NZLR 706, 719.

7 An obligation is a relationship between two people, one of whom owes a duty (the debtor), with the other person being a person to whom the duty is owed (the creditor). The creditor enjoys a right against the debtor. Thus, an obligation is a double-ended bond or tie between two legal persons: see R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Juta & Co Ltd, Cape Town, 1990, 1.

8 (1990) 170 CLR 394, 501.

9 This concept is explored further in Chapter 7.

10 A Kronman, ‘Contract Law and Distributive Justice’ (1980) 89 *Yale LJ* 472, 472.

obligations. The socio-legal scholar perhaps considers contract law as a tool for the regulation of economic and social transactions. Finally, the judge treats contracts as creating binding rules of law between the parties, breach of which provides a justification for the imposition of state sanctions.<sup>11</sup>

Collins argues that contract expresses a central form of human association in modern society, and that contract as an organising principle of human association defines the meaning of social life.<sup>12</sup>

## 1.2 THE ARCHITECTURE OF CONTRACT LAW

[1.25] The architecture of contract law consists of those basic elements that make up the contract law superstructure under the Australian legal system. Various theoretical and practical frameworks can be employed to sketch the main contours of this architecture, but it is sufficient here to explain the key terms of contract law and identify the main legal actors involved.

At its most basic, contract law involves persons and voluntarily assumed obligations.<sup>13</sup> The contracting persons are described in various ways. The generic term is ‘parties’. It is common for parties to assume more specific labels such as ‘seller’ and ‘buyer’ in sale of goods contracts (with the terms ‘vendor’ and ‘purchaser’ being common in older legal literature and primary legal sources).

[1.30] Next, the *contents* of contracts are expressed in what are generically called *terms*. Much of contract law is concerned with determining the contents of a particular contract.<sup>14</sup> Conventionally, there are two main classes of promissory terms in a contract: essential terms (otherwise known as ‘conditions’) and inessential terms (which may be further subdivided into ‘warranties’ and ‘intermediate’ [or ‘innominate’] terms). Contractual terms are often categorised as either express terms or implied terms. This distinction is drawn because of the way these types of terms become part of any particular contract. Because contracts express voluntarily assumed obligations, the law also provides machinery for the *duration* of contract. Sometimes confusing for the novice in contract law, this is also known as the ‘term’ of the contract. The duration of any contract can be either fixed or open-ended. Contracts have a fixed term when it is possible to determine how long the contract is to last. Where the length of a contract cannot be determined, the contract is open-ended: the law then implies machinery for termination, usually by performance by both or all contracting parties, or by allowing one of the contracting parties to terminate the contract by giving reasonable notice of termination.

[1.35] A tool that can be used to explain the operation of contract law is the ‘formation–performance–discharge’ paradigm (see Figure 1.1). This tool is not so much a conceptual

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11 H Collins, *Regulating Contracts*, Oxford University Press, Oxford, 1999, 12.

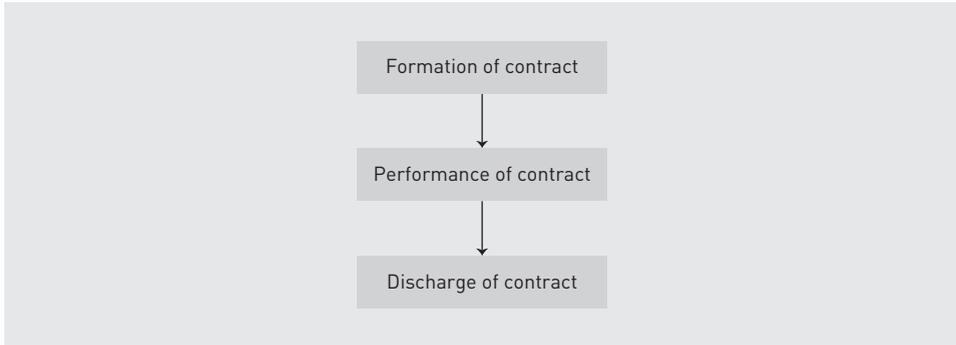
12 Ibid.

13 See [1.10] above.

14 See Chapter 9 for a discussion of the contents of a contract.

framework for contract law as a working blueprint that can be used to break contract law down into its three distinct phases. Still, it fits neatly into the architecture of contract law, and in fact it is an important part of the contract law superstructure, since it helps to order contract law.

FIGURE 1.1 THE FORMATION–PERFORMANCE–DISCHARGE PARADIGM OF CONTRACT LAW



[1.40] The structure of this book may be viewed in terms of this paradigm. The notion of ‘formation’ includes a number of issues. First there is the mechanical operation involved in negotiating a contract: this is dealt with in Chapter 2. Next there are the essential elements of a binding contract, with the associated issue of equitable estoppel. These are discussed in Part 2 (Chapters 3–7). Once it is determined that a valid contract has been formed, two related issues arise: what terms form part of the contract, and the interpretation or significance of each of those terms. These two issues are discussed in Part 3 (Chapters 8–9). In some cases, the necessary elements are present but there is nevertheless some limitation on the parties who may rely on the contract. These circumstances include the contractual capacity of the contracting parties, requirements of writing, and privity of contract. They are dealt with in Part 4 (Chapters 10–12). A fourth bundle of issues concerns factors that, if they occur as the contract is being made, have the effect of invalidating (‘vitiating’) the contract. These factors are examined in Part 5 (Chapters 13–18).

‘Performance’ represents the fulfilment or carrying out of the promises in the contract. It also reflects ‘discharge’—or bringing to an end—of the parties’ respective rights and obligations under the contract. Most contracts are brought to an end by being performed. Performance involves issues such as the time for performance, the type of performance required, and the degree of performance actually rendered. These issues are examined in Chapter 19, in Part 6.

The balance of Part 6 (Chapters 20–22) examines the other means of discharge. Besides performance, a contract may be discharged in one of three ways: discharge by agreement, discharge by termination for breach, and discharge by frustration. Associated with termination for breach is the area of remedies. Part 7 (Chapters 23–25) looks at the remedies that are relevant in a contractual setting: damages, equitable remedies such as specific performance, injunctions and restitutionary remedies.

Statutory intervention into the common law means that this paradigm of contract law can no longer be considered in isolation, at least in relation to certain contracts. Concerns regarding the vulnerability of consumers ultimately led to the enactment by the Commonwealth Government

of the *Australian Consumer Law* (ACL), which has also been adopted by all Australian states and territories.<sup>15</sup> Accordingly a single, national law covering consumer protection and fair trading now applies both at Commonwealth and at state or territory levels. The ACL provides consumers with a range of remedies that in many cases are wider in scope and application than those they may otherwise have under the common law. The provisions of the ACL concerning statutory unfair contract terms and consumer guarantees are considered in Part 8 (Chapters 26 and 27).

The book concludes with Chapter 28—an examination of different theories, themes and ideologies of contract law.

## 1.3 COURTS AND CONTRACT LAW

[1.45] The intersection of the courts and contract law may be examined at two levels: the institutional and the operational.

[1.50] At the institutional level, the organ used by civil societies to resolve disputes is the judicial system.<sup>16</sup> In western liberal democratic thought and practice, generally there are three branches of government: legislative, executive and judicial. It is the role of the judicial branch of government to order and resolve disputes between people, whether on a public-to-public basis or on a public-to-private basis. When it comes to contracts, the courts have an integral role in resolving contract law disputes. The classical model of contract law<sup>17</sup> presupposes that the judicial process is intended to serve one or both of two important social goals. The first is that legal actors should comply with socially desired standards of behaviour. This is reinforced by the threat of penalties or sanctions, or the promise of reward. The second is that society (through the judicial system) should provide machinery for the settlement of disputes by peaceful and fair means.<sup>18</sup> Both goals give the courts a passive role throughout the contracting process: courts are involved only if the parties are unable to resolve their own difficulties, or one party seeks to bring the behaviour of another contracting party to account in some appropriate and neutral forum.

15 The ACL is Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (which is the new name for the *Trade Practices Act 1974* (Cth)), together with the regulations made under s 139G of that Act. Each state and territory jurisdiction passed amendments to its *Fair Trading Act* to enact the ACL (as contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) as a law of that jurisdiction: *Fair Trading (Australian Consumer Law) Act 1992* (ACT) s 7; *Fair Trading Act 1987* (NSW), s 28; *Consumer Affairs and Fair Trading Act* (NT), s 27; *Fair Trading Act 1989* (Qld), s 16; *Fair Trading Act 1987* (SA), s 14; *Australian Consumer Law (Tasmania) Act 2010* (Tas), s 6; *Australian Consumer Law and Fair Trading Act 2012* (Vic), s 8; *Fair Trading Act 2010* (WA), s 19. See also text at [13.305] ff.

16 Besides the court system, there is also the phenomenon of Alternative Dispute Resolution (also called dispute management). See L Boule, *Mediation: Principles, Process, Practice*, 3rd edn, Lexis Nexis, Sydney, 2011; Australian Law Reform Commission, *Review of the Adversarial System of Litigation: ADR, its Role in Federal Dispute Resolution*, Sydney, 1998.

17 According to Atiyah, the classical model of contract law is derived from its nineteenth-century liberal antecedents, under which the law enforces bilateral executory agreements because it seeks to give effect to the acts of will or intentions of the parties to a particular contract: PS Atiyah 'Contracts, Promises and the Law of Obligations' (1978) 94 *LQR* 193, 193–4 and PS Atiyah, *Essays on Contract*, Clarendon Press, Oxford, 1986, 11–13.

18 See PS Atiyah, 'Contracts, Promises and the Law of Obligations' (1978) 94 *LQR* 193, 197 (also in PS Atiyah, *Essays on Contract*, Clarendon Press, Oxford, 1986, Chapter 2).

[1.55] At the operational level, two distinct processes work to bring about judicial intervention in contract disputes. The first is the interpretation of contracts, the second is their construction. In one American case, *Fashion Fabrics of Iowa v Retail Investors Corp*,<sup>19</sup> the Court said that interpretation ‘involves ascertaining the meaning of contractual words; construction refers to deciding their legal effect.’<sup>20</sup> As Isaacs J pointed out in the High Court case *Life Insurance Co of Australia v Phillips*,<sup>21</sup> interpreting the meaning of words is a question of fact, while their construction is a question of law. In the area of adjustment of contracts, the courts have a very limited role, and they will intervene only in very specific instances. Conventional contract theory holds that the courts will not adjust a contract between willing contracting parties on the basis that, in hindsight, the bargain appears to be unevenly weighted as regards the interests of the parties, or even grossly disadvantageous to one of them.<sup>22</sup> This rule provides a limited role for courts in contract law disputes and shows how the courts practise judicial restraint instead of judicial activism. Since this is a common law rule, it can be abrogated by statute.

[1.60] There are some well-known examples of statutory adjustment of contract by courts in the Australian legal system. One that should be mentioned is the power of courts to make orders varying contracts or arrangements that are associated with contraventions of the ACL. A second example of a judicial charter to adjust contracts concerns the powers conferred upon the courts of New South Wales under the *Contracts Review Act 1980* (NSW). Another example arises under the *National Credit Code* contained in Schedule 1 of the *National Consumer Credit Protection Act 2009* (Cth): courts adjudicating consumer credit disputes can make changes to consumer credit contracts on the ground of hardship, as well as having power to reopen unjust consumer credit transactions. It would be a mistake of legal method to assume from these specific instances of judicial adjustment of contracts that Australian courts have general jurisdiction to adjust contracts between contracting parties. But this cursory review of Australian law does show specific instances where courts are empowered to adjust certain types of contracts on the basis of criteria articulated in statutes.

## 1.4 THE DEVELOPMENT OF AUSTRALIAN CONTRACT LAW

[1.65] It is impossible to analyse the origins of Australian contract law without acknowledging its English heritage—for it is from this English legal inheritance that Australian contract law

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19 266 NW 2d 22, 25 (1978).

20 For a detailed study of the interpretation of contracts, see K Lewison, *The Interpretation of Contracts*, 2nd edn, Sweet & Maxwell, London, 1997.

21 (1925) 36 CLR 60, 78.

22 See *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 103, 135 per Kirby P. On a continuum of intervention, the attitude of the courts as expressed in these rules is closer to the judicial restraint end of the spectrum than to the activist end.

arises.<sup>23</sup> While Australian lawyers acknowledge the importance of the English legal heritage of the Australian common law, it does not follow that we should adopt a kind of cultural cringe and slavishly follow modern English law in any field of public or private law.<sup>24</sup> Cases such as *Cook v Cook*<sup>25</sup> and *Nguyen v Nguyen*<sup>26</sup> have loosened the grip of the English common law and English precedents on Australian common law. Nothing since these landmark cases has changed the view that Australian law and English law will continue to diverge, and the indications are that this gap will widen as Australian law pursues its own path and engages more intensively with other legal systems and cultures.<sup>27</sup> Although Australian lawyers and legal institutions will still consider the merits of English common law doctrines and principles, the fact remains that Australian law in general (and contract law in particular) will carve its own distinctive niche in the common law legal family as the body of Australian law develops.

Legal anthropology throws some light on the development of contract as a legal institution.<sup>28</sup> A famous observation made by Maine says that contractual obligations are characteristic of modern societies, and that as societies develop, they entail a movement from *status to contract*.<sup>29</sup> The sociologist Durkheim<sup>30</sup> and others further refined Maine's theory until it was challenged by legal anthropologists—beginning with Redfield in 1950—on the basis of new ethnographic data.<sup>31</sup> Thus, contrary to Maine's theory of legal evolution and development, some societies have developed in such a way that contract can precede status. Legal anthropology points out that contract law takes the elements of social structures and assesses how they interact with the notion of contractual obligations in societies.

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23 For an historical survey of contract law, see OW Holmes Jr, *The Common Law*, Little, Brown and Co, Boston, 1881, 247–8; SJ Stoljar, *The History of Contract at Common Law*, Australian National University Press, Canberra, 1975; AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*, Clarendon Press, Oxford, 1975; J Gordley, *The Philosophical Origins of Modern Contract Doctrine*, Clarendon Press, Oxford, 1991. For a more general study on the development of contract law from an English perspective, see PS Atiyah, *The Law of Contract*, 4th edn, Clarendon Press, Oxford, 1989, Chapter 1, as well as PS Atiyah, *The Rise and Fall of Freedom of Contract*, Clarendon Press, Oxford, 1979.

24 For a review and analysis of the cultural cringe in contract law, see MP Ellinghaus, 'Towards an Australian Contract Law', in MP Ellinghaus, AJ Bradbrook and AJ Duggan (eds), *The Emergence of Australian Law*, Butterworths, Sydney, 1988, 44–69, especially at 46–53.

25 (1986) 162 CLR 376.

26 (1990) 169 CLR 245.

27 A related development is the passage of the Australia Acts 1986 legislative package by the United Kingdom, Commonwealth and state parliaments. This has 'repatriated' legislative competence over Australia's legislative affairs to Australia and her states. For a detailed study, see B O'Brien, 'The Australia Acts', in MP Ellinghaus, AJ Bradbrook and AJ Duggan (eds), *The Emergence of Australian Law*, Butterworths, Sydney, 1988, 337–54.

28 Legal anthropology is the discipline devoted to the study of the discourse, practices, values and beliefs which all societies consider essential to their operation and reproduction: see N Rouland, *Legal Anthropology*, trans PG Planel, The Athlone Press, London, 1994, s 1.

29 See H Maine, *Ancient Law: Its Connection with the Early History of Society and its Relations to Modern Society*, John Murray, London, 1861, reprinted Dorset Press, 1986, 141.

30 See S Lukes and A Scull (eds), *Durkheim and the Law*, Martin Robertson, Oxford, 1983; A Hunt, *The Sociological Movement in Law*, Macmillan, London, 1978, 85–8.

31 See N Rouland, *Legal Anthropology*, trans PG Planel, The Athlone Press, London, 1994, ss 131 and 132.

[1.70] Translating these concerns to the Australian legal environment, in particular the pre-white settlement dating from 1788, Ellinghaus then argues that the Aboriginal people did in fact have a conception of contract in 1788. They traded many articles across the Australian continent, and established great trading routes across the Australian landmass. The evidence cited by Ellinghaus goes further, demonstrating that not only goods, but also services and rights, were traded between Aboriginal groups.<sup>32</sup> Ellinghaus argues that modern Australian contract law needs to integrate its Aboriginal antecedents because our civilisation cannot come to maturity without the complete integration of its indigenous components.<sup>33</sup>

[1.75] A convenient starting point for tracing the development of contract law in Australia<sup>34</sup> is the writ system employed by the common law in medieval England. The system was based on a limited number of causes of action recognised by the common law. Each cause of action was represented by a form of writ for pleading the relevant case. If the wording of a particular writ could accommodate the circumstances that arose in a particular case, the plaintiff was entitled to a remedy.

This system originally did not include a writ for a cause of action similar to a modern allegation of breach of contract. There was a writ of covenant (for breach of an obligation contained in a document under seal), but it did not suit many cases of breach of promise. There was also a writ of debt, but this had a number of limitations, including a requirement that work had been fully performed, or that, where money had been lent, the sum in dispute was an agreed amount. These limitations also made this writ unsuitable for cases involving an informal exchange of promises.

[1.80] Another writ recognised by the common law was that of trespass. Under this writ, a plaintiff could plead that the defendant had wrongly done something (described as *mis-feasance*), such as wrongly (in the sense of poorly) mending a hole in the road. With the application of a little ingenuity, this writ came to be used to plead that the defendant had wrongly *failed* to do something (called *non-feasance*), such as wrongly failing to mend a hole in the road. Specifically, it was adapted to plead that the defendant had wrongly failed to perform a promise. This new form of writ became known as a writ of *assumpsit*—based on the defendant's assumption of an obligation.<sup>35</sup>

[1.85] An element of the pleading of *assumpsit* was the 'consideration'—the motive behind the defendant's promise.<sup>36</sup> Consideration was little more than a matter of evidence, and it was so easily demonstrated that disreputable plaintiffs often fraudulently claimed against hapless,

32 MP Ellinghaus, 'Towards an Australian Contract Law', in MP Ellinghaus, AJ Bradbrook and AJ Duggan (eds), *The Emergence of Australian Law*, Butterworths, Sydney, 1988, 44–69, especially at 54–63.

33 *Ibid.*, especially at 65–9.

34 More detailed accounts of the historical development of contract law in Australia may be found in DW Greig and JLR Davis, *Law of Contract*, Law Book Co, Sydney, 1987, Chapter 1; N Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 7th edn, Butterworths, Sydney, 1997, Chapter 26.

35 See *Slade's case* (1602) 4 Co Rep 91; 76 ER 1072.

36 AWB Simpson, *A History of the Common Law of Contract*, Clarendon Press, Oxford, 1975, 321.

usually illiterate defendants with whom they may have had little if any prior dealing—a practice that ultimately led to the passing of the *Statute of Frauds* in 1677.<sup>37</sup>

By the late sixteenth century it was recognised that either advantage to the promisor or disadvantage to the promisee could amount to good consideration. But viewing consideration only in terms of the reason for the promise meant that moral obligations or ‘ties of conscience’ were sufficient for the purpose.<sup>38</sup> This remained so, until the notion was finally rejected in the early nineteenth century.<sup>39</sup>

In time, consideration was viewed as more than just an essential aspect of pleading the plaintiff’s claim; it began to be seen as an essential element of a binding contract. To be enforceable, a promise had to be either made under seal or supported by consideration that was regarded as having value in the eyes of the law.<sup>40</sup> At approximately the same time, the emphasis changed: instead of focusing on a promise, contract law began to focus on an *agreement*—in the sense of an exchange of promises. Also, improvements in communications and the growing tendency to conduct business dealings by correspondence that occurred around the beginning of the nineteenth century led the courts to recognise that contracts could be formed by means of an offer that was later accepted.<sup>41</sup> With the Industrial Revolution and the emergence of free enterprise in the nineteenth century, contract law came to be regarded as a law of bargains: something for something.

[1.90] The next major development in Australian contract law did not occur until the High Court’s decision in *Waltons Stores (Interstate) Ltd v Maher* in 1988.<sup>42</sup> Until this time, the body of law known as equity had ameliorated some harsh consequences of the need to show consideration at common law by applying a doctrine of fairness known as promissory estoppel. This doctrine applied where a party to a contract had promised the other party that certain rights under the contract would not be enforced, and that other party had relied on the promise, changing his or her position because of it.<sup>43</sup> In such a case, equity prevented the promisor from reneging on the promise, even though no consideration had been provided for it. But the doctrine was subject to an important limitation—it could only be used as a defence when a promisor attempted to exercise the right in question. No action lay against the promisor for breach of his or her promise. In other words, promissory estoppel was regarded as a ‘shield but not a sword’.<sup>44</sup> This was due to fears that to do so would be tantamount to enforcing a promise not supported by consideration.<sup>45</sup>

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37 See [11.05].

38 See for example *Hawkes v Saunders* (1782) 1 Cowp 289; 98 ER 1091.

39 *Eastwood v Kenyon* (1840) 11 A&E 438; 113 ER 482.

40 *Rann v Hughes* (1778) 7 Term Reps 350n; 101 ER 1014n.

41 *Huddleston v Briscoe* (1805) 11 Ves Jr 583; 32 ER 1215; *Adams v Lindsell* (1818) 1 B&Ald 681; 106 ER 250.

42 (1988) 164 CLR 387. See Chapter 7.

43 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

44 See [7.25].

45 *Combe v Combe* [1951] 2 KB 215, 220.

In 1988, the High Court reappraised the doctrine. It held that the doctrine was based on equitable notions of unconscionability. Looked at that way, there was no real distinction between unconscionability associated with a broken promise not to insist upon a right and unconscionability associated with a broken promise to create a right.<sup>46</sup> The doctrine—now called ‘equitable estoppel’—could therefore be relied upon as a cause of action, and not merely as a defence—a sword as well as a shield. But the case did not uproot the rules of consideration, because the remedy of equitable estoppel had to be proportionate to the unconscionability to be avoided. In most cases, this is more likely to be compensation for wasted expenditure rather than making good the promise. In some cases, however, it will be necessary to enforce the promise.<sup>47</sup>

[1.95] Equitable estoppel is only one example of the way equitable notions of unconscionability have encroached on contract law. Unconscionability reflects equity’s concern to avoid unfairness or injustice in the circumstances surrounding the formation of a contract. It can also be seen in the law’s treatment of contracts entered into where a party is incapacitated by intoxication or mental impairment,<sup>48</sup> unilateral mistake,<sup>49</sup> or material disadvantage exploited by a stronger party.<sup>50</sup> In New South Wales, unconscionability is also the subject of a general statutory prohibition against contracts that operate unfairly or oppressively.<sup>51</sup> Such general statutory prohibition has not been replicated in other states or territories.

However, there has been statutory intervention in specific areas such as consumer contracts and credit transactions. Legislation such as the ACL, which applies as both a law of the Commonwealth and a law of the states and territories, and the *National Credit Code*, represent statutory intervention into the kinds of contracts that routinely involve a substantial imbalance in bargaining power. These statutes operate by, for example, providing remedies for misleading or deceptive conduct, implying enforceable rights or obligations in consumer contracts, declaring void any terms in consumer contracts that may be deemed to be ‘unfair’, or prescribing contract formalities that benefit consumers.

[1.97] In May 2012 the then Labor Federal Government issued a discussion paper to explore the scope for reforming contract law in Australia.<sup>52</sup> The government identified a number of drivers for reform, including the increasingly complex landscape of common law, equitable and restitutionary principles, as well as various Commonwealth, state and territory legislation, that may govern contractual relations in this country. It expressed a desire to improve certainty, simplify the law and remove unnecessarily technical rules, harmonise differences that continue to

46 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 425–6. See further [7.25].

47 See [7.225].

48 See [10.160].

49 See [14.290].

50 See [17.05].

51 See *Contracts Review Act 1980* (NSW).

52 Attorney-General’s Department (Cth), *Improving Australia’s Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law* (2012), available at [www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/DiscussionpaperImprovingAustraliaslawandjusticeframework](http://www.ag.gov.au/Consultations/Documents/ReviewofAustraliancontractlaw/DiscussionpaperImprovingAustraliaslawandjusticeframework) AdiscussionpaperexploringthescopeforreformingAustraliancontractlaw.pdf.

exist in contract law around Australia due to continuing differences in state and territory statutes, support innovation and maximise participation in the digital economy, and internationalise the law to facilitate cross-border trade and investment.<sup>53</sup> In relation to internationalisation, it was noted that Australia's largest, second-largest and fourth-largest trading partners (China, Japan and South Korea respectively) have systems of law which differ significantly from Australia's English-heritage common law system. The contract law in Australia's third-largest trading partner, the United States, has also diverged from its origins in the English common law.<sup>54</sup> These differences in legal systems may result in increased risks and costs and lost opportunities. It has also been noted that there have been ongoing attempts to harmonise law within the European Union and that failure to take cognisance of those changes may also result in lost opportunity.<sup>55</sup>

The government did not see reform as requiring an 'all or nothing' approach. Instead, options identified for reform include:

- *restatement*, which would entail making only minimal changes to the substance of the law while expressing the law in a single text to increase its accessibility, either in a fashion similar to a non-binding American-style restatement or a binding codification;
- *simplification*, which would involve changing the law to eliminate unnecessary complexity without attempting a general overhaul; and
- *full-scale reform*, which would mean making significant changes to the substance of contract law.<sup>56</sup>

This issue lost impetus with the 2013 Federal election resulting in a change of government. In any event, not everyone is of the view that any form of codification of Australian contract law is necessary, desirable or possible.<sup>57</sup>

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53 Ibid, 3–6.

54 Ibid, 11–14.

55 Ibid, 16–17.

56 Ibid, 18–19.

57 Warren Swain, 'Contract Codification in Australia: Is it Necessary, Desirable and Possible?' (2014) 36 *Sydney Law Review* 131.