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From Private Law to Public Regulation: A New Role for Courts?

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Abstract
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Keywords
role of judiciary, contract law, public regulation, market regulation

FROM PRIVATE LAW TO PUBLIC REGULATION: A NEW ROLE FOR COURTS?

Tony Ciro & Dr Vivien Goldwasser***

The article examines the court's new public role in light of a number of recent decisions and emerging doctrines that have attempted to redefine the commercial landscape of acceptable business conduct. It is argued that new developments in doctrine have arisen in contract law principally because of the court's desire to expand its private role of corrective justice into a much larger public role involving the implementation and enforcement of public regulatory objectives. The courts, in exercising their equitable jurisdiction, have increasingly adopted an interventionist approach as a means of addressing problems relating to market abuse, market failure and declining commercial morality in modern day contracting. Paternalistic attempts at redefining acceptable standards of morality, fairness and good business ethics have been at the forefront of many of the emerging doctrines in contract law. The new public role is not without controversy. It raises a number of important issues including whether the courts have the institutional capacity, skill, expertise and information required for public regulation.

Introduction

The doctrines of good faith, estoppel, unconscionability and restraint of trade raise complex policy issues, which have aroused considerable debate amongst academic commentators[1], practitioners[2] and members of the judiciary.[3]

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1 For a small selection see J Stapleton, "Good Faith in Private Law" [1999] *Current Legal Problems* 1; P. Finn, "The Fiduciary Principle" in Youdon (ed), *Equity, Fiduciary and Trusts* (1989); Brownsword, "Two Concepts of Good Faith" (1994) 7 *Journal of Contract Law* 197; Farnsworth, "Good Faith in Contract Performance" in Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law* (1995); A. Leopold, "Estoppel: A Practical Appraisal of Recent Developments" (1991) 7 *Australian Bar Review* 47; M. Spence, "Australian Estoppel and the Protection of Reliance" (1997) 11 *Journal of Contract Law* 206.

2 R P Meagher, W M C Gummow, and J R F Lehane, *Equity: Doctrines and Remedies,* (3rd ed) (1992) pp.403-407.

3 Sir Anthony F Mason, formerly Chief Justice of the High Court of Australia, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 *Law Quarterly Review* 66; A.F. Mason, "Good Faith and Equitable Standards" (2000) 116 *Law Quarterly Review* 66; A.F. Mason, " The Place of Equity and Equitable

Attempts at providing an explanation for the recent developments in contract law have largely centred on moral concepts of fairness, policies of consumer-welfarism and principles of equity.[4] The aim of this article is to demonstrate the inadequacies of conventional moral and legal wisdom in providing a full explanation for the development of the emerging doctrines in contract law.[5] It is submitted that the court's aggressive intervention in contract law is capable of being rationalised not simply in terms of its pursuit of fairness and justice, but is symptomatic of a new public role that some courts have pursued: to regulate market behaviour in commercial dealings through active judicial intervention.[6]

Contrary to popular belief, it will be demonstrated that the new doctrines in the law of contract represent curial intervention that is both deliberate and pervasive of a new and aggressive approach to the management and influence of market behaviour in contractual dealings. Put in simple terms, equity intervenes in the bargaining process because it views the behaviour of contracting parties as unconscionable, unfair or in bad faith. Hence, as equity continues to define what is "fair" and defines the concept broadly, it justifies through its corrective justice role, its continued intervention in the economic decision-making process that is normally reserved to the contracting parties themselves.

However, not everyone agrees with the courts activist approach in contract law. Kirby J in the NSW Court of Appeal's decision in *Biotechnology Australia Pty Ltd v Pace*[7] provides an opposing assessment for curial intervention, and argues for greater market freedom:

> But the law of contract which underpins the economy, does not, even today, operate uniformly on a principle of fairness. It is the essence of

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Remedies in the Contemporary Common Law World" (1994) 110 *Law Quarterly Review* 238; The Hon. G. Brennan, "Commercial Law and Morality", (1989) 17 *MULR* 100.

4 Mason argues that the classical theory of contract founded upon principles of *laissez-faire* was openly hostile to the emergence of a good faith doctrine because it represented intervention in the bargaining process: Ibid 70.

5 M.A. Hall, "A Theory of Economic Informed Consent" (1997) 31 *Georgia Law Review* 511. Professor Hall argues that the instrumental justification for informed consent law is that individuals know better than physicians or others what best fits their personal values and therefore, following patients wishes will result in more beneficial results: Ibid 515-516.

6 The concept of "relational" contracting has its origins in the work by Macniel who viewed contractual relationships as continuous and evolving rather than as finite and discrete: Macneil I, "A Primer of Contract Planning" (1975) 48 *Southern California Law Review* 627.

7 (1988) 15 NSWLR 130.

> entrepreneurship that parties will sometimes act with selfishness. The law may legitimately insist on honesty of dealings. However I doubt that, statute or special cases apart, it does or should enforce a regime of fairness on the multitude of economic transactions governed by the law of contract. Well meaning, paternalistic interference by courts in the market place, unless authorised by statute or clear authority, transfers to the courts the economic decisions which our law, properly in my view, normally reserves to parties themselves.[8]

Notwithstanding Kirby J's endorsement of the free market, his Honour does recognise that in special cases courts have jurisdiction to intervene.[9] Indeed, Kirby J may be correct in his assessment of the court's interventionist role in contractual relationships. When the court intervenes it is transferring the economic decision-making process away from market players.[10] In much the same way that governments intervene in the macro-economic environment, influencing and moderating economic decisions and market behaviour, the courts have intervened at the micro level to alter the decision-making processes of contracting parties.

The active intervention by the courts is not accidental, nor is it co-incidental. As Kirby J notes in *Biotechnology v. Pace*[11] the interventionist approach has largely been justified as necessary to fulfil the courts paternalistic desires to achieve fairness and justice. Through its standard of fairness, equity intervenes and substitutes its meaning of what is 'fair', one which is based on the notion of avoiding deceit or oppression. The substitution has been justified because the parties who are obviously in dispute are incapable of agreeing on what is fair in the circumstances, and formally ask for the court's intervention.

When parties are in dispute, the court's primary function is to determine disputes in a fair and just manner consistent with legal and equitable principles. In dispensing their primary function in private law it would appear that some judges have encroached into a secondary role involving the regulation of market conduct and market behaviour. The secondary role consists of the courts developing a set of rules in the form of doctrine, which the courts use to signal to the market what they consider to be acceptable market behaviour. The standard that is acceptable is, of course, measured

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8 Ibid, at 132-133.

9 See J. Gava, 'The Perils of Judicial Activism', (1999) 15 *Journal of Contract Law* 156, where the author describes Kirby J as a 'market individualist' for his strong support of His Honour's position that the principal role of contract law is to serve the markets: ibid, at p. 175.

10 See N Seddon, 'Australian Contract Law: Maelstrom or Measured Mutation?' (1994) 7 *Journal of Contract Law* 93.

11 (1988) 15 NSWLR 130.

against what the courts deem necessary to achieve fairness and justice, to avoid deceit and oppression, and is consistent with legal and equitable principles.

Although much of equity's approach has been justified on the basis of pursing worthy ideals premised upon concepts of fairness and morality in its primary role of dispensing justice, the courts have formulated an important secondary role of redefining and regulating acceptable market behaviour. Viewed in this manner, one can better appreciate the expanding interventionist role of the courts and in particular, equity in commercial and consumer dealings. This is similar to the role consumer credit legislation has played in promoting public regulatory goals, including market efficiency and consumer welfarism.[12] Equity has adopted a deliberate policy of regulating market behaviour by developing broad doctrines, which have as their aim the pursuit of public regulatory objectives: - fostering of fair and just social relations, promoting full and fair competition and protecting market integrity. Indeed, judicial intervention or judicial activism is not limited to the courts of equity. The active use of the restraint of trade doctrine in recent times demonstrates how common law doctrines have also been used with limited success to influence market behaviour.

The terms 'regulation' and 'market' need to be defined here. Regulation is used here as a generic term to describe a system of legal rules to govern the behaviour of its subjects. A similar use of the term was adopted by Professor Collins who correctly points out that law used as a regulatory tool is only one of many types of social regulation that also includes customs and conventions.[13] The term 'market' is another generic term used here to describe the many and varied commercial and non-commercial buyers, sellers and intermediaries involved in the sale of goods and services, including transactions involving financial services and land dealings. It is defined broadly to include almost anything of value that involves an exchange between two or more parties.

It is argued that the recent developments in good faith, estoppel and unconscionability and the inroads made with the restraint of trade doctrine are consistent with the court's interventionist role in the law of contracts.[14] The article does not seek to assert or justify whether the courts have in fact

12 I. Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State', (1995) 15 *Oxford Journal of Legal Studies* 177. Professor Ramsay argues that consumer credit regulation is distributional and the intervention has helped shape credit markets and improved market efficiency.

13 H. Collins, *Regulating Contracts,* (1990) p.7.

14 R Brownsword, 'The Philosophy of Welfarism and its Emergence in the Modern English Law of Contract' in R Brownsword, G Howells and T Wilhelmsson (eds), *Welfarism in Contract Law* (1994) p 56.

become regulators. Instead, the article provides a possible explanation of the trends that have emerged in recent contract law doctrine. The article suggests that the courts have increasingly intervened because of perceived failures in market behaviour, along with a lack of direction by the legislature and enacted legislation in specific areas. This of course raises the issue of whether the courts, in adopting a much broader public role, have the institutional capacity, information and even skill to regulate.

The paper is divided into four parts. Following the introduction, Part II examines the standard of fairness and its role in contractual dealings and equitable intervention. In Part III the article will review a number of important landmark decisions and emerging doctrines in Australia, which have been at the forefront of the court's interventionist and active role. Part IV offers some concluding remarks.

From Private to Public: The Court's New Role

Courts are very much involved with a private law making role: the adjudication of disputes in accordance with established rules and principles of fairness and justice. As Kincaid suggests, private law is concerned with making one person, the defendant, responsible for their actions vis-à-vis the plaintiff.[15] The defendant will be held liable for their misdeeds if he/she has transgressed the standards that have been imposed on them by the community, or alternatively if he/she has failed to abide by their obligations in equity or at law. However, as the courts have dispensed justice the court's private role in special cases has been elevated to an enlarged secondary function: to enforce, through active intervention, acceptable standards of market behaviour. This may be somewhat surprising to some who normally associate regulation and intervention with that of the state.

Governments intervene and regulate markets routinely. State intervention is justified on the grounds that without it widespread abuse would occur and the business cycle would be prone to larger rises and sharper falls. Through government intervention it is argued, the business cycle will be smoothed and market abuse will be controlled if not eliminated. The notions of fairness and honesty are not new in the commercial world, nor are they novel concepts for equity lawyers or the courts. Similarly, the legislature has from time to time legislated for greater 'fairness' and 'honesty' in commercial practice. The *Sale of Goods Act*[16] and the *Fair Trading Act* of the various states and the

15 P Kincaid, 'Privity and Private Justice in Contract.' (1997) 12 *Journal of Contract Law* 47, at 57.

16 See in particular the statutory implied terms in the *Sale of Goods Act* in the various states and territories: *Goods Act* 1958 (Vic); *Sale of Goods Act* 1923 (NSW); *Sale of Goods Act* 1896 (Qld); *Sale of Goods Act* 1895 (SA); *Sale of Goods*

Commonwealth *Trade Practices Act* 1974 (Cth)[17] are good examples of Parliament providing relief where conduct is deemed to be unacceptable to prevailing community standards.

As Professor Collins in his book, *Regulating Contracts* has identified, equity too has become a regulator of market behaviour. Collins argues that a 'new configuration of laws regulating contracts is evolving and …the most important string in this argument suggests that out of the collision between private law and public regulation a new style of legal discourse about contracts emerges'.[18] He describes the new regulation as a hybrid type, which retains 'many of the characteristics of private law, yet at the same time produces new capacities and evolutionary trajectories'.[19] Collins goes further to suggest that private law has 'similar effects in steering market behaviour to other types of social and economic regulation of business activity,' and argues that 'participants in markets may alter their behaviour in order to comply with private market rules'.[20] Moreover, he justifies the intervention because with it comes improved market efficiency,[21] the delivery of public goods[22] and the preservation of fairness and just social relations.[23]

It is therefore no surprise that equity has been described by the Honourable Justice Finn as the "moral policeman of the law".[24] In explaining equity's role in reshaping the morality landscape in commercial relations, Justice Finn makes the pertinent point that the "renaissance in Australia has gone well beyond contract [law]"… and the change has been impressive [but] to some distinctly alarming."[25] Moreover, Justice Finn rationalises equity's big picture role as an important and "powerful instrument both in facilitating and in constraining human action and endeavour".[26]

Indeed, the court's interventionist approach through its public regulatory role has both normative and positive theses. The positive thesis is that contract doctrine has seen a marked shift from a passive to an interventionist

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Act 1896 (Tas); *Sale of Goods Act* 1895 (WA); *Sale of Goods Act* 1954 (ACT) and *Sale of Goods Act* 1972 (NT).

17 See Part V Division 1 and Division 2 of the *Trade Practices Act* 1974 (Cth) for statutory implied terms and additional statutory protection provisions in the form of s. 51 AA, s.51 AB and s.51 AC and s.52 and s.53.

18 H. Collins, op cit (n.14), p. 9.

19 Ibid, p.10.

20 Ibid, p.56.

21 Ibid, Ch.8.

22 Ibid, Ch. 13.

23 Ibid, Ch.11.

24 P.Finn, "Commerce, the Common Law and Morality," (1989) 17 *MULR* 87, 89.

25 Id.

26 Ibid, p.88.

approach.[27] The normative thesis is that the shift is justified because curial regulation imposes an acceptable standard of honesty and fair dealing that is consistent with the public policy goals of promoting market integrity and stamping out market abuse.[28]

The main problem with equity's dynamism is the constant tension in which it finds itself in deciding when it is appropriate to shift from its conventional private role to its new 'big picture' role. Part of the problem stems from the very methodology that equity has used to achieve its new position as market regulator. The main tool used by equity has been the imposition of an equitable standard of fairness, whereas markets that are driven by profit and self-interest at times do not appreciate the interference.[29]

In the case of equity, relief has been described as imprecise and discretionary were jurisdiction and relief are invoked.[30] The imprecision and discretionary nature of equity is a function of circumstances relating to the dynamic nature of the parties' expectations.[31] As expectations are initially formed at the point of dialogue, actions follow and it is the actions or inactions that the law is most interested in when it comes to granting relief.[32] Whether they arise from a contractual context or non-contractual basis equity may decide in its discretion to grant relief.[33] However, expectations are not always easily discernible. Governments and markets have developed complex statistical models and forecasts for estimation of investor and market player expectations. After centuries of statistically modelling, experts cannot agree.

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27 J Carter and A Stewart, 'Commerce and Conscience: The High Court's Developing View of Contract,' (1993) 23 *Western Australian Law Review* 49, 49-50.

28 J Raz, 'Promises in Morality and Law', (1982) 95 *Harvard Law Review* 916.

29 See Kirby J's comments in *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130 at 132-133.

30 R P Meagher, W M C Gummow and J R F Lehane, *Equity, Doctrines and Remedies,* (3rd ed, 1992) p.800.

31 R B Ferguson, 'Commercial Expectations and the Guarantee of the Law: Sales Transactions in Mid-Nineteenth Century England', in G.R. Rubin and D. Sugerman (eds.), *Law and Economy: Essays in the History of English Law 1700-1920* (1984), 192.

32 Collins suggests that a new standard of 'reasonable expectations' is finding legal expression in contract law doctrine. The principal reason for the inclusion of the new standard is that a legal system which fails to support reasonable expectations will 'inevitable undermine its contribution to the constitution of markets': H Collins, op cit (n.14), p.147.

33 See T Ciro, 'Commercial Reality v Doctrine: Restitution and Compound Interest for Void Swaps', (2002) 30(3) *ABLR* 216, for the role commercial expectations have played in the law of compound interest.

What have courts developed to overcome the challenges posed by ever changing expectations?[34]

Professor Duggan supports this assertion in a recent paper where he asks the question: is equity efficient?[35] After examining a number of equitable doctrines including promissory estoppel, Professor Duggan concludes that economic 'efficiency considerations loom large in the development and administration of equity doctrines'[36]. Indeed, it has been argued that the same considerations have played an important role in the development of the common law.[37] However, before one embarks on role of the 'big picture' regulator, one should ask whether the courts have the institutional capacity to take on such a role. Moreover, are the courts equipped to supplement and even take over the role of public regulator from government? In a recent article appropriately titled 'The Perils of Judicial Activism',[38] Gava raises the important point '…judges are appointed for their knowledge of the law and common law judges do not have the commercial knowledge or expertise to act as roving law reform commissioners for commercial law'[39]. As Gava correctly points out the courts are not 'designed to find and analyse the data required for such a task'.[40] Questions relating to the institutional capacity, skill, expertise and information gathering abilities and even constitutional concerns will remain obstacles if courts pursue the idea of becoming mini-legislators or public regulators.

Moreover, the problem with adopting fairness and justice as a unifying concept to rationalise new legal developments is that they fail to adequately define the parameters of the new doctrines because they are inherently 'fuzzy'. Problems relating to scope and implementation have been a festering sore with the doctrines of estoppel and more recently the duty of good faith. This is because what is fair depends on the circumstances of each case, which necessarily entails unique considerations on a case-by-case basis. A word of caution needs to be stated here. Although driven by paternalistic desires to achieve fairness and justice, aggressive intervention can raise difficulties in determining exactly when it is in fact justified. As intervention continues to

34 See J Gava, op cit (n.9), were the author is critical of Kirby J's assessment of business expectations pp.167-173.
35 Id.
36 Ibid, p. 636.
37 P H Rubin, 'Why is Common Law Efficient?' (1977) 6 *J. Legal Studies* 51. See also G L Priest, 'The Common Law Process and the Selection of Efficient Rules' (1977) 6 *J. Legal Studies* 65, R.A. Posner, *Economic Analysis of Law* (5th ed, 1998) ch 1.
38 J Gava, op cit (n.9).
39 Ibid, p.178.
40 Id.

broaden, so does the difficulty of articulating the precise parameters of each new doctrine.[41]

By defining what the fairness standard entails, equity is adopting a prominent public role of regulating market behaviour. Although symbolic of the standard of honesty and fairness, the concept of good faith on one level represents the advancement of a new public role for equity: to regulate the behaviour of market participants through active judicial intervention to achieve fairer and just business relations. However, on a different level the good faith doctrine has been linked with the duty of co-operation,[42] which demonstrates the courts' willingness to intervene even if the parties have formed the contract, decided its terms and fulfilled their respective obligations.

The courts have demonstrated a willingness to explore broader economic considerations to assess actual outcomes.[43] This has been the case even in the absence of a legally enforceable contract. The justification usually advanced for the curial intervention in the bargaining process has been one fashioned on the concepts of morality, fairness and acting in good faith. This is somewhat understating the true motive for the development of the new doctrines. The court's enquiry in determining whether this has been the case and is worthy of intervention is dependent upon the court's consideration of the surrounding circumstances of each case, and this becomes increasingly difficult when courts analyse commercial dealings.[44] This is because with commercial contracts parties act with entrepreneurship and will consequently act with their own self-interests in mind. This is what the private market knows best and explains why bargain theory came to dominate the law of contract. Bargain theory postulates that markets are an embodiment of continuous discrete bargains and individuals acting selfishly.[45] We have been taught by

41 M Bridge, 'Good Faith in Commercial Contracts' in R Brownsword (ed), *Good Faith in Contract: Concept and Context* (1999) 140.

42 *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607.

43 K McGuiness, 'Law and Economics - A reply to Sir Anthony Mason CJ' (1994) 1(2) Deakin Law Review 117. Professor McGuiness argues that the High Court has adopted a largely law and economics approach to judicial law making. This has been especially the case with the High Courts decision in *Walton Stores v. Maher* (1988) 164 CLR 387 (H.C): Ibid, pp.138-149.

44 It is correct to acknowledge that commercial expectations may be displaced in favour of countervailing principles and policies. Nevertheless, the aim of protecting reasonable expectations remains constant in contract law : Id. See also Reiter and Swan, 'Contracts and the Protection of Reasonable Expectations,' in *Studies in Contract Law* Reiter and Swan (eds.) (1980) at pp.6-7.

45 Professor Bernstein argues that the economic theory that underlies much of the default rules analysis needs to be modified if it is to adequately take into account the differences between 'discrete' and 'continuing' exchange and the influence of relational factors on parties drafting decisions: L Bernstein, 'Social Norms and

classical economists that if everyone acts with selfishness, resources are allocated efficiently with the least waste and loss to society.

The problem with the free market operating without any regulation is of course market abuse and market failure.[46] Markets left to their own devices are prone to fail for a variety of reasons and are open to market abuse, because the strong can use and abuse their market position at the expense of the weak and the vulnerable.[47] The prospect of market failure and market abuse justifies the intervention of the state. Governments through consumer welfare legislation aim to protect the weak and the vulnerable from the potential of abuse, and the laws also serve to help prevent markets from failing.[48]

Although government intervention has been at the forefront of macro and micro market regulation all over the world including Australia, government intervention has been at least supplemented at the micro level by intervention at the curial level. The courts have adopted a similar and deliberate strategy of intervention where they continue to substitute their own meaning of what is 'fair' and 'acceptable' to that of the market. The systematic and deliberate intervention heightens the tension between the courts very private role of determining disputes with its new public roles of market regulator and standards setter.

Indeed, this is not the first time courts have exercised their discretion to intervene and substitute new rules for those of the market. The prescriptive rules governing the validity of exclusion clauses[49] and standard form

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Default Rules Analysis' (1993) 3 Southern California Interdisciplinary Law Journal 59 at 60.

46 A M Spence, 'Monopoly, quality and regulation,' (1975) 6 (2) Bell Journal of Economics 417.

47 A Schwartz and L L Wilde, 'Intervening in markets on the basis of imperfect information: a legal and economic analysis', (1979) 127(3) *University of Pennsylvania Law Review* 630.

48 Consumer protection competition legislation has been at the forefront of much of protecting and promoting competition and consumer choice. Without legislative intervention it is doubtful that competition would have been promoted to such an extent because the 'free' market would have been hijacked by monopolies and oligopolies keen on extracting costly profits. See generally: E H Chamberlin, *The Theory of Monopolistic Competition,* (1933); D Cayne and M J Trebilcock, 'Market consideration in the formulation of consumer protection policy', (1973) 23 (4) *University of Toronto Law Journal* 396 and V P Goldberg 'Institutional change and the quasi-invisible hand,' (1974) 17 (2) *Journal of Law and Economics* 461.

49 The 'contra proferentum' rule, and the rules relating to the giving of reasonable notice, scope and location of exclusion clauses are all illustrative of prescriptive rules established by the courts to keep control over the use and validity of exclusion clauses. The principal reason for the judicial control was the perception

contracts[50] are two examples of aggressive intervention by the courts. There are of course supporters of enlarging the role and sphere of control for courts. Collins apart, Professor Knapp in the United States has more than once commented,[51] curial intervention can be justified because without equity the world would be a much less fair place to live in.[52] Knapp describes the type of legal system that would prevail in a society without equity: 'law without equity would be tyranny indeed- shapeless, unpredictable, reflecting nothing more than the judge's personal predilections'.[53] Professor Knapp further provides an insight on how the free market and contract law would behave without equity's intervention: 'But in the contract area, as we have seen, law without equity can be tyranny too: Cold and unforgiving; repay trust with betrayal; and finally-tritely but truly-adding insult to injury'.[54]

Whatever the outcomes for judicial intervention, it is clear that the courts are intervening and are becoming more active in redefining and enforcing acceptable commercial and consumer standards. The article will now review a number of important recent cases and emerging doctrines in Australia to reveal that the role and significance of equity has been elevated to that of regulator of market behaviour. The areas that have been chosen include: good faith, unconscionability, promissory estoppel and restraint of trade. They are not intended to be an exhaustive list of every area courts of equity have exercised their discretion to intervene, but are nevertheless illustrative of equity's new role.

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by the judiciary that the clauses were harsh, oppressive, unconscionable and not part of the 'consensus ad idem': *Causer v.Browne* [1952] VLR 1 and *Tilden Rent-a-Car Co. v. Clendenning* (1978) 83 Dominion Law Reports (3d) 400. See also for comment: Hasson, R. "The unconscionability business- a comment on *Tilden Rent-a-Car Co. v. Clendenning*, (1978) 3 (2) *Canadian Business Law Journal* 193.

50 See for example the House of Lords in *Macaulay v Schroeder Publishing Co Ltd* [1976] 1 WLR 1308 (HL) where the House of Lords (Lords Reid, Diplock, Simon and Kilbrandon and Viscount Dilhorne) unanimously held that a standard form contract was unenforceable because the harshness of the terms were contrary to public policy. In particular, the exclusivity of the agreement and the restrictions on the ability of the plaintiff to market his services were deemed oppressive and unfair. For comment on this case see: M.J. Trebilcock and D.N. Dewees, 'Judicial Control of standard form contracts' in P. Burrows and C.G. Veljanovski, *The Economic Approach to Law* (1981).

51 C.L.Knapp, 'Enforcing The Contract To Bargain,' (1969) 44 *New York University Law Review* 673.

52 C.L. Knapp, 'Rescuing Reliance: The Perils of Promissory Estoppel,' (1998) 49 *Hastings Law Journal* 1191 at 1134.

53 Id.

54 Id.

The Big Picture Response: Interventionist Doctrine

(a) Good Faith

In the New South Wales Court of Appeal decision in *Renard Constructions Pty Ltd v. Minister For Public Works*[55] Priestley J.A. considered that there was a strong case to introduce a duty founded upon good faith[56] within Australian doctrinal law. The duty had been accepted more formally within the United States[57], Canada[58], the United Kingdom[59] and the European Union[60] through the enactment of statutory codes, which have embraced the concept of good faith in the performance and enforcement of commercial contracts. In *Renard Constructions*, the contract in question contained a clause which authorised the principal to take control of the work and payment(s), or to cancel the contract if the contractor failed to comply with any covenant, condition or stipulation in the Contract, including any direction given by the principal. Priestley J.A., along with Handley J.A. agreed, held that a duty of good faith and reasonableness would be implied into the exercise of the clause.

In introducing the duty of good faith within the confines of contract law Priestley J.A. commented:

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55 (1992) 26 N.S.W.L.R. 234

56 The term 'good faith' has been notoriously difficult to define. The criticism has been made that 'good faith' is an obscure and uncertain concept and perhaps even circuitous if one defines the concept as no more than an excluder of 'bad faith'. See the following articles for on-going debate concerning the meaning of good faith: E P Belobaba, 'Good Faith in Canadian Contract Law', in Law Society of Upper Canada, Commercial Law: Recent Developments and Emerging Trends, (1985) 73; Professor Farnsworth, *The Concept of Good Faith in American Law*, Centre di Studi e Ricerche di Diritto Comparate e Straniero, Rome, (1993); Professor Farnsworth, 'Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code' (1963) 30 U. Chicago L.R. 666.

57 Section 1-203 of the United States Uniform Commercial Code which provides: 'Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement'. Section 1-201(19) defines "good faith" as including: 'honesty in fact in the conduct or transaction concerned'.

58 Section 205 of the Canadian Restatement of Contracts, Second provides: 'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement'.

59 Unfair Contract Terms Act (1977) UK. In particular, see section 3 of the Act which applies a test of reasonableness to all standard form contracts and section 6, which applies the test of reasonableness to exclusions of liability for breach of implied terms in sales of goods between businesses.

60 1993 Directive on Unfair Terms in Consumer Contracts: 93/13EEC, 5 April 1993. For an excellent discussion of this directive and comparisons between Europe and the UK see: Hugh Collins, 'Good Faith in European Contract Law', (1994) 14 Oxford Journal of Legal Studies 229.

> The result is that people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations.[61]

His Honour's judgment reveals the central basis justifying the emerging doctrine of good faith. Driven by the principle of fairness, the doctrine accords with the expectations of the community. His Honour was presumably directing his remarks to the business community. Business people demand trust, decency and honesty to conduct their commercial affairs. A doctrine which reflects these fundamental principles is wholly consistent with the commercial realities of good business practice.

Indeed, the alignment between the doctrine of good faith and commercial reality was noted by the Ontario Law Reform Commission which stated:

> …while good faith is not yet an openly recognized contract law doctrine, it is very much a factor in everyday contractual transactions. To the extent that the common law of contracts, as interpreted and developed by our Courts, reflects this reality, it is accurate to state that good faith is a part of our law of contracts. In this vein, a great many well-established concepts in contract law reflect a concern for good faith, fair dealing and the protection of reasonable expectations, creating a legal behavioural baseline.[62]

In a recent article, Sir Anthony Mason[63], suggested that the classical view of contract law was in a state of decline[64] and the good faith doctrine had made substantial inroads into doctrinal law.[65] This has been especially the case within the areas of contract performance and enforcement, the developing law of restitution and the principles of equity. Mason suggests that the doctrine of good faith is the common thread for the recent developments in doctrinal law. Estoppel, the law of unconscionable bargains, unjust enrichment and restitution and the fiduciary principle[66] can all be linked to the doctrine of

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61 (1992) 26 N.S.W.L.R. 234 at 268.

62 Ontario Law Reform Commission, *Report on the Amendment of the Law of Contract* (1987) at 166.

63 Mason, op cit (n.1).

64 The demise of classical doctrine had been foreshadowed by Professor Atiyah in his book, *The Rise and Fall of Freedom of Contract* (1979).

65 Mason, op cit (n.1).

66 See the Supreme Court of NSW decision in *Hungry Jack's Pty Ltd v Burger King Corporation & Ors* [1999] NSWSC 1029. The Court implied a duty to act in good

good faith. If the learned author is correct in suggesting that the duty to act in good faith is responsible for the recent change in doctrinal law, the following two conclusions can be stated. First, the commercial practices and principles founded upon trust, decency and honesty have found a powerful conduit in the form of good faith to promote change in classical doctrinal law. Second, the changes in doctrinal law are justified because they reflect public policy objectives, namely the promotion and fostering of good commercial morality and good business ethics.

In *Hughes Aircraft Systems International v. Airservices Australia*[67] Finn J held that a duty of good faith and fair dealing should be implied by law in all contracts. Similarly, the New South Wales Court of Appeal in the recent decision in *Alactel Australia Ltd v. Scarcella*[68] followed the earlier decision in *Renard Constructions* and held that a duty of good faith and fair dealing should be implied in the contract for a lease. Finn J's remarks in the Federal Court decision of *Hughes Aircraft Systems International v. Airservices Australia*[69] are important in suggesting a major shift-taking place within doctrinal law. In commenting on the tender process of an air traffic system contract, Finn J concluded that the concept of good faith and fair dealing was 'a major organising idea in Australian law'.[70] As an important organising principle, good faith has made substantial inroads into the adversarial nature of classical contract law. Good faith, like so many other recent examples of doctrinal change, illustrates the fundamental shift between law in theory and commercial practice.[71] This is because doctrine is now more receptive to the principles of commercial expectations, which are found to be sometimes missing in modern day business dealings.[72]

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faith between a franchisor and franchisee, a recognised fiduciary category and found that this duty had been breached by the American franchisor, Burger King Corporation.

67 1997) 146 A.L.R. 1.

68 (1998) 44 N.S.W.L.R. 349.

69 146 ALR 1.

70 Ibid., at 37.

71 See the recent decision of the New South Wales Supreme Court in *Aiton Australia Pty Ltd v. Transfield Pty Ltd* [1999] NSWSC 996. According to Einstein J the concept of good faith can be defined as having both 'a subjective sense (requiring honesty in fact) and an objective sense (requiring compliance with standards of fair dealing)'.

72 See the recent article by Peter Cane and Jane Stapelton, 'Good Faith in Private Law' [1999] *Current Legal Problems* 1, at 5-7 where the authors state: 'Across all the contexts in which the good faith idea is deployed I believe we can identify and enunciate a conceptual common denominator…The principle of good faith restrains the deliberate pursuit of self-interest where this is judged unconscionable…Such unconscionable conduct may be constituted either by: (a) the person being dishonest; (b) the person conducting himself contrary to his

The use of the good faith doctrine in regulating the behaviour of powerful franchisors[73] was also evident in the case of *Burger King Corporation v Hungry Jacks Pty Ltd.*[74] It will be recalled that the court, both at first instance and later on appeal, held that the franchisor had not acted in good faith vis-à-vis the franchisee. Instead the courts found that the franchisor had abused its dominant position for an extraneous purpose.[75] According to the NSW Court of Appeal, the franchisor was acting under a 'deliberate plan to prevent [the franchisee] expanding' its Australian operations. The plan was simple but effective because it was designed to hand over the Australian operations to the franchisor who was interested in operating and expanding outlets under the Burger King Brand instead of Hungry Jacks Australia. The court concluded that intervention was warranted here and found that Burger King had breached an implied duty of good faith, which precluded the franchisor from exercising its discretion capriciously.[76]

Indeed, the use of market power in an illegitimate manner was the primary concern of the court in the *Hungry Jack's* case. The equitable response to the flagrant abuse of power was strong but measured intervention in the form of the good faith doctrine.[77] There is also an important public message[78] the court intends to send to all franchisors and parties who are in a superior bargaining position: do not abuse your market power or act in a capricious manner.[79] This is very much a public message of deterrence designed to maintain market integrity with franchise ventures.[80] Consider the situation if equity had not intervened in the *Hungry Jack's* case: Burger King would be in a dominant position and have the ability to abuse its market power by restricting or hampering supply of its products, marketing and support to its franchisees. This would have been a disastrous outcome for all franchisees

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word/undertaking in the sense of contradict; or (c) the person exploiting a position of dominance or power over a person who is vulnerable relative to him…'.

73 See also *Far Horizons Pty Ltd v McDonald's Australia Ltd* [2000] VSC 310.

74 [2001] NSWCA 187.

75 Ibid, para 185.

76 P Heffey, J Paterson and A Robertson, *Principles of Contract Law* (2002) pp.266-267.

77 See Brownsword, 'Two Concepts of Good Faith' (1994) 7 *Journal of Contract Law* 197.

78 In Heffey, Paterson and Robertson op cit (n.70), the authors make the point that the courts may be concerned with a broad notion of community benefit that is consistent with a wide cross-section of society: Ibid, p.269.

79 See also *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Garry Rogers Motors (Aust) Pty Ltd Subaru (Aust) Pty Ltd* [1999] WASC 39; *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611.

80 Hadfield, 'Problematic Relations: Franchising and the Law of Incomplete Contracts' (1990) 42 *Stanford Law Review* 927.

and consumers because it would have signalled possible widespread abuse across many sectors of the economy.

The development and use of the good faith doctrine in Australia at least was possibly a reflection at the time of a lack of specific legislation governing franchise agreements. Franchises were in the most states in the past self-regulated within a franchise code of conduct framework. In the absence of the heavy hand of legislation, the courts formed the view that they should lead the way and fill the apparent void. This of course raises the following questions: (1) Do the courts have sufficient capacity and skill to regulate market behaviour? (2) Is the good faith doctrine the most appropriate vehicle to regulate for market failure? (3) Does the good faith doctrine provide sufficient legal certainty and enough bright light to act as a clear signal to regulate market conduct?

It is submitted that on all three issues the good faith doctrine fails. In a recent article by Paterson, [81] the author observes that there are at least two different approaches to interpreting good faith,[82] and at least five alternate meanings that can be attributed to its meaning. Good faith has been described as requiring: honesty and fairness in business dealings,[83] a standard of reasonable conduct,[84] a duty of co-operation,[85] a duty of reasonableness[86] and even breach of contract.[87] The fuzziness of the concept does not stop there. It is not entirely clear whether good faith is in fact part of contract law, or whether it is an equitable or common law doctrine.[88] In a recent case in *Royal Botanic Gardens and Domain Trust v South Sydney Council,*[89] the High Court had the opportunity to examine the issue but instead decided to leave the

81 J Paterson, 'Good Faith in Commercial Contracts? A Franchising Case Study' (2001) *ABLR* 270 at 273-278.

82 Paterson observes that good faith can interpreted either as a standard of conduct required by the contract or by prevailing community standards however they are defined.

83 *Renard Constructions (ME) Pty Ltd v Minister for Public Works Hughes Aircraft Systems* (1992) 26 NSWLR 234 and s.205 United States Second Restatement of Contracts.

84 Id, see in particular *Renard Constructions.*

85 For a duty of co-operation in Australian law see *Butt v McDonald* (1896) 7 QLJ 68 at 70-1; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607. See also E.Peden, 'Cooperation' in English Contract Law-To Construe or Imply?" (2000) 16 *JCL* 56.

86 See *Renard Constructions* op cit (n.83).

87 *Hungry Jack's v Burger King* [2001] NSWCA 167; *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* [2000] FCA 1365.

88 J Carter and A. Stewart, 'Interpretation, Good Faith and the True Meaning of Contracts: The Royal Botanic Decision' (2002) 18 *Journal of Contract Law* 182.

89 (2002) 168 ALR 289.

matter for re-examination at a later stage. Nevertheless, Kirby J commented that he felt there was no need for further judicial intervention in the commercial context.[90] Kirby J was also of the view that good faith duty 'appears to conflict with fundamental notions of caveat emptor that are inherent in common law conceptions of economic freedom'.[91]

(b) Unconscionability

Unconscionability has long been an important element in many causes of action, such as undue influence[92], economic duress, unjust enrichment[93] and estoppel. Since the High Court's decision in *Amadio,*[94] however, unconscionability has become an increasingly significant interventionist tool[95] used to set aside contracts:

> There has been a very striking increase in reported cases where courts have set aside transactions which would previously very likely have been enforced. This has come about through a very interesting combination of judicial development of the common law and of legislation dealing with unconscionable contracts.[96]

Indeed, systematic intervention[97] using the doctrine of unconscionability appears to be the preferred choice for the courts of equity when it comes to settling disputes involving "sexually transmitted debt".[98] The extension of equity's doctrine and reach has been evident in High Court Appeals that have

90 See also the disparaging comments of Callinan J: Ibid at 327.
91 Ibid, at 312.
92 D Capper, 'Undue Influence and Unconscionability: a Rationalisation' (1998) 114 *LQR* 479.
93 M Chen-Wishart, *Unconscionable Bargains* (1989).
94 *Commercial Bank v Amadio* (1983) 151 CLR 447.
95 N.Bamforth, 'Unconscionability as a Vitiating Factor' [1995] *L.M.C.L.Q.* 538.
96 J W Carter and D J Harland, Cases and Materials on Contract Law in Australia (1998) p 489.
97 J Getzler, 'Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention,' (1990) 16(2) *Monash ULR* 299. Writing in 1989, Getzler makes the comment: 'It is submitted that new and more cogent doctrines should be developed to justify intervention in cases where an outcome is perceived to be unfair, and yet unconscionability according to definite principle is absent. The scope of the unconscionability concept should not be expanded so far as to deprive it of meaning': Ibid, at p. 323.
98 N Howell, 'Sexually Transmitted Debt: A Feminist Analysis of Laws Regulating Guarantors and Co-borrwers' (1994) 4 *Australian Feminist Law Journal* 93.

included: *Garcia v. National Australia Bank,*[99] *Louth v Diprose*[100] and more recently in *Bridgewater v Leahy*.[101]

In each of these cases the aggrieved party was successful in achieving the desired outcome: to have their signature on the contract set aside.[102] Not only were signatures on contracts set aside, but entire conveyances were set aside on the basis that the aggrieved party had been taken advantage of in an unconscionable manner. In the case of *Louth v Diprose,* a solicitor who was said to be under a special disability at the time of gifting considerable amounts of money intended for the purchase of a house in his partner's name was provided with equitable relief.[103]

It is no wonder that commentators have had some difficulty in deciding what is meant by the concept of "unconscionability," or be entirely sure what the elements are of the doctrine.[104] Carter and Harland attempt to give some substance to the concept by suggesting that the best way to understand the concept is to appreciate that certain factors or combination of factors may lead the court to conclude that the contract is so 'unfair' that to enforce it would be 'unconscionable'.[105] This appears to suggest that when you get stuck trying to rationalise the true reason for equity's intervention you simply go back to equity's standard of 'fairness'. In short, a circuitous argument: equity will intervene when conduct is 'unfair,' and equity will determine what is 'fair'.[106]

It is submitted that equity's real motive for the intervention is similar to its ambitious public objective currently being pursued with the good faith doctrine. The objective with the unconscionable doctrine is to protect the weak and the vulnerable from exploitation by the informed and the powerful. The doctrine effectively represents another 'market integrity' measure where

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99 (1996) 39 NSWLR 577.

100 (1992) 67 ALJR 95.

101 (1998) 194 CLR 457.

102 S M Waddams, 'Unconscionability in Contracts' (1976) 39 *Modern Law Review* 369

103 This prompted one commentator to suggest that the High Court has established a 'solicitors in love' category as a new type of unconscionable conduct: T. Cockburn, 'Solicitors in Love: A New Category of Unconcionability?' (1995) 25 *Queensland Law Society Journal* 291. See also: R.J. Mooney, 'Hands Across the Water: The Continuing Convergence of American and Australian Contract Law' (2000) 23(1) *UNSWLJ* 1 at 32-33.

104 See for example: V Goldwasser and T Ciro, 'Standards of Behaviour in Commercial Contracting' (2002) 30(5) *Australian Business Law Review* 369 at 382 and P Parkinson, 'The Notion of Unconscionability', *The Laws of Australia* Vol 35.5, para 1.

105 Carter and Harland, op cit (n .68) p 489.

106 J Beatson, 'Unconscionability: Placebo or Pill?' (1981) 1 *Oxford Journal of Legal Studies* 426.

equity attempts to protect certain sectors of the community that have a special disability, however broad its meaning,[107] from possible exploitation by the ruthless and the manipulative.[108] The supporters of the doctrine argue that no-one wanting to live in a society that has a degree of compassion could object to judicial intervention of this nature, especially if it arises in the context of commercial relations. Consider the situation with no equitable intervention, and described by Professor Knapp: a legal system that would be cold, ruthless and unforgiving.[109]

This is not the only objective being promoted by the doctrine. We described unconscionability as a market integrity doctrine because it represents a safety valve that guides, monitors and regulates market practices and social relations. By protecting the weak and vulnerable equity is saving the market from the worst excesses of profit and greed. Equity is protecting the weak and vulnerable from market overkill and decadent behaviour.[110] Consider again a world without the doctrine: conduct that is unconscionable would go unpunished, individuals with a special disability would have no recourse, and social relations would be that much poorer.

Although the aims of the doctrine may in fact be noble it remains unclear whether courts are in the best position of pursuing such public objectives. After all, unconscionability as a principle of law, is not entirely well understood by the legal community, and is too fuzzy for the business community to become an effective regulatory tool. The concept of a 'special disability' had almost been rendered meaningless as the boundaries continued to widen.[111] This is why modifications to the doctrine were made by the legislature when enacting the revised version of the doctrine in ss.51AB and 51 AC of the *Trade Practices Act* 1974 (Cth).

(c) Promissory Estoppel

One of the fundamental features of classical contract law was its insistence that the criterion for the legal enforceability of a promise was that it should be supported by consideration. Known as the bargain theory of contract, it requires an element of reciprocity in the exchange, with each party contributing 'a material share',[112] thereby excluding from the purview of the

107 The categories have been enlarged since the High Court's decision in *Bloomley v Ryan* (1956) 99 CLR 362.

108 A H Hudson, 'Mental Incapacity in Property and Contract Law' [1984] *Conv.* 32; A H Hudson, 'Mental Incapacity Revisited' [1986] Conv. 178.

109 C L Knapp, op cit (n.46) above.

110 H Beale, 'Inequality of Bargaining Power' (1986) 6 *Oxford Journal of Legal Studies* 123.

111 *Louth v. Diprose* (1992) 175 CLR 621; *Bridgewater v. Leahy* (1998) 194 CLR 457.

112 N C Seddon and M P Ellinghaus , *Cheshire & Fifoot's Law of Contract* (7th Australian ed, 1997) 138.

law purely gratuitous promises. In other words, by calling for the enforcement of promises supported by consideration, the idea behind the theory is that the consideration flowing from each party induces the other's promise or performance. Consideration was so much a hallmark of the common law that it has been said to denote 'its fundamental attitude to contract.'[113]

Increasingly, however, claims founded upon promissory estoppel, or non-bargained detrimental reliance, have been recognised as a legitimate alternative basis for contract-related liability.[114] One of the earliest US cases to establish a so-called general theory of promissory estoppel is *Ricketts v Scothorn* 77 NW 365 (Neb 1898). In that case a grandfather promised his grand-daughter $2,000, hoping she would then leave work. Relying on that promise, she did leave her work temporarily, but the grandfather's executor later refused to pay. The Nebraska Supreme Court enforced the promise, on the basis that it would have been grossly inequitable to permit the promisor (or his executor) to renege purely on the basis that traditional consideration for the promise was absent. The landmark decision in the UK is of course *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130. In that case, the plaintiff in 1937 leased a block of flats in London to the defendant for 2500 pounds per year. In 1940, the plaintiff agreed to reduce the rent to 1250 pounds because the defendant was unable to rent many of the flats due to the Second World War. By 1945 however the flats were fully let again, and the plaintiff claimed he was entitled to return to the original agreement and payment of the full rent again. Denning LJ upheld the claim. There was no contract preventing this. The plaintiff did not, however, attempt to claim the back rent. If it had, Denning LJ would have rejected the claim. In his Lordship's opinion, equity would stop the owner from reneging on its promise and thus the plaintiff would be estopped from claiming the back rent.

Despite uncertain beginnings, when promissory estoppel in this country was a narrow, defensive doctrine confined largely to those situations when a person in a pre-existing contractual relationship represented that they would not enforce their strict contractual rights, the doctrine of promissory estoppel has now been clearly accepted by the High Court of Australia. Recent decisions of the Court have modernised and clarified the operation of promissory estoppel, and expanded the doctrine into the area of pre-contractual relations.[115]

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113 Ibid 139. Carter & Harland state that none of the traditional theories can be said to provide a satisfactory explanation for what constitutes a contract. The bargain theory is too exclusive since it is confined to contracts for consideration and , even within the common law, excludes at least some contracts by deed: JW Carter & DJ Harland, *Cases and Materials on Contract Law in Australia,* (1998) p. 8.

114 R J Mooney, "Hands Across The Water: The Continuing Convergence of American and Australian Contract Law" (2000) 23(1) *UNSW Law Journal* 14, 19.

115 Ibid, p.19.

The most significant commercial case dealing with promissory estoppel is *Walton's Stores (Interstate) Ltd v Maher*.[116] Maher owned a major commercial site with a building on it. He entered into negotiations with a prospective tenant, Walton's Stores, a retailing chain, with a view to leasing the land to Walton's, tearing down the old building and erecting a new building to Walton's specifications. Walton's promised to lease the site and led the owner to understand that the contract would proceed, then changed its mind, but failed to notify the owner even as he demolished the existing structure and rebuilt to the tenant's specifications. A majority of the High Court found for the owner, on the basis that Walton's should be estopped from denying the implied *promise* that it *would* enter into a lease. Two clear limitations were placed on the ambit of the doctrine. First, the requirement that the promisee's detrimental reliance occur with the promisor's knowledge. This was amply satisfied because Walton's did indeed have knowledge of the demolition and rebuilding works. Secondly the doctrine would only be invoked when a promisor's refusal to perform was unconscionable. This element was also satisfied, the Court concluding that Walton's had acted unconscionably in having failed to notify the owner of its change of mind.[117]

The doctrine of promissory estoppel has been reaffirmed in numerous cases since,[118] with courts less inclined to adhere to traditional dogma such as consideration.[119] Rather, judges are increasingly mindful of the dictates of fairness and the substantive commercial realities underpinning business relationships.[120] In the context of ongoing business relationships adjustments of the existing contractual relationship occur in numerous ways and when disputes arise, the issue is: which governs, the original planning or the adjusted planning? Supporters of promissory estoppel argue that the doctrine of consideration pervades much thinking on the subject but is an

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116 (1988) 164 CLR 387.

117 Professor Mooney anticipates that the element of unconscionability will eventually disappear from promissory estoppel in Australia: Mooney, op cit (n. 51), 24.

118 For example, *Commonwealth v Verwayen* (1990) 170 CLR 394; and *Metropolitan Transit Authority v Waverley Transit Pty Ltd* [1991] 1 VR 181.

119 The 'decline' of consideration has led some commentators to suggest the 'death' of contract. See in particular G. Gilmore, *The Death of Contract,* (1974). Gilmore argued that tort doctrine was gradually absorbing the bargain theory of contract. He also suggested that the bargain theory was being 'swallowed up' by reliance, restitution and other fairness principles: Ibid 72-3, 77-84. Hillman, on the other hand, argues that the bargain theory of contract is important even though it shares the spotlight with other theories of obligation and with other fairness principles: Hillman, above (n 43), 115.

120 M Spence, 'Australian Estoppel and the Protection of Reliance' (1997) 11 *Journal of Contract Law* 203. Spence argues that estoppel represents a new moral duty to ensure the reliability of induced assumptions: Id.

unsatisfactory tool.[121] Because parties frequently fail to plan transactions meticulously and cannot foresee all contingencies even when they do plan, the courts must have at their disposal more flexible tools of analysis. Promissory estoppel is one such tool and is 'crucial in assessing the range of potential legal obligations arising from social relations.'[122]

However, like all other doctrine, promissory estoppel is not without its shortcomings. Promissory estoppel is not an entirely straightforward concept to understand or apply in practice. The doctrine has elements, and the elements need to be satisfied before the doctrine can come into play. Is the doctrine reliance based or expectations based? How much material detriment does one need to prove? The first question was examined in some detail by the High Court in *Giumelli* and *Verwayen.* The materiality point, although rarely addressed by lawyers, is also problematic and deserves further analysis and elaboration. Accountants will know that the Australian Accounting Standards Board (AASB) have an entire accounting standard devoted to the materiality issue.[123] The AASB have significant resources and expertise devoted to such issues. In comparison, it would appear the courts have relatively few resources, time and expertise to devote to such "material" issues.

The High Court's recent decision in *Giumelli v. Giumelli*[124] reaffirms the Court's approach that estoppel can be used to enforce the innocent party's expectations, even in the context of domestic relations. In *Giumelli* the dispute involved representations being made by the father to his son concerning the granting of a subdivided lot of land. In reliance on the representations the son erected a house and made other improvements. It was later held by successive courts that each of the promises was sufficient to raise an estoppel.

The Full Court of the Western Australian Supreme Court compensated the respondent son on the basis of the representee's expectations rather than on strict reliance. The Full Court granted an order for specific performance granting the son proprietary relief. The High Court granted an estimated monetary award akin to the full relief of a proprietary interest in the land. As Edelman[125] correctly points out, the High Court in *Giumelli* has moved on

121 I Macneil, 'A Primer of Contract Planning' (1975) *S California Law Review* 627, 666.

122 R A Hillman, 'The Crisis in Modern Contract Theory' (1998) *Texas Law Review* 103, 115.

123 Australian Accounting Standards (AAS) 5 Materiality.

124 Unreported Decision 24 March 1999, 1999 HCA 10.

125 J Edelman, 'Remedial Discretion in Estoppel after Giumelli?' (1999) 15 *Journal of Contract Law* 179.

from the minimalist position in *Verwayen*[126] to a position where the court's preferred remedy for estoppel actions is the rectification for expectational loss.

Short of awarding the maximum remedy for estoppel by making good the representation, the High Court in *Giumelli* compensated the representee for expectation loss arising from the breach. For Edelman this is akin to treating estoppel as 'enforcing a promise in a way that resembles a contract'.[127] An outcome that is consistent with the High Court's shift away from entertaining purely idiosyncratic notions of justice, and move towards more comprehensive regulation of relational behaviour.[128]

The use of the estoppel doctrine to enforce the parties' commercial expectations is confirmed by Robertson in his survey of estoppel cases following the High Court's ruling in *Verwayen.*[129] Robertson finds that in estoppel cases the courts have awarded remedies for expectational loss in preference to reliance damages.[130] The empirical finding is somewhat at odds with the minimum equity principle enunciated in *Verwayen*. The rationale for the perceived divergence from the minimalist position has been the suggestion that circumstances and equity demands this to be the case in the pursuit of justice. On this view at least, it is suggested that the *Verwayen* principle can be rationlised with later courts granting the maximum remedy. Indeed this has also been the case with the award for reliance-based loss where the circumstances will require the grant of expectational relief. The grant of relief is efficient here not only because it reverses the material detriment but also because reasonable expectations are matched with equitable outcomes.[131]

Whether you accept the proposition that there has been divergence from, or convergence with the minimalist position, it is suggested that addressing the failure in expectations is what really matters. Putting remedies aside, the development of the principle of promissory estoppel is testament to the interventionist use of doctrine to regulate the behaviour of contracting parties and is symptomatic of equity's new big picture role in market regulation.[132]An

126 *Commonwealth v. Verwayen* (1990) 95 ALR 321.

127 Edelman, op cit (n.61) at p.192.

128 See Lord Atikin's reference to the dangers of the 'idiosyncratic inferences of a few judicial minds' in *Fender v. St John-Mildmay* [1938] AC 1 at 12.

129 A Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after Verwayen' (1996) 20 *Melbourne University Law Review* 805.

130 After conducting a comprehensive survey, Robertson reveals that of the 24 estoppel cases following the High Court's ruling in *Verwayen* 17 cases involved the award of a remedy on the basis of expectational loss: Ibid, at p.835.

131 This was the approach taken by Deane and Gaudron JJ in *Verwayen* where they granted relief for expectational loss

132 Sir Anthony Mason has claimed that the Australian developments in estoppel 'have no precise counterpart in other jurisdictions'.: Sir Anthony Mason, 'The

equitable doctrine founded upon commercial reality, free of fraud, deceit and unconscientious dealing can not only be reconciled with the desire to afford full and complete justice, but also is symptomatic of the new interventionist role of equity.[133]

(d) Restraint of Trade & Competition Law

More recently, the courts have used common law doctrines to aggressively intervene in contractual relationships with the aim of pursuing public regulatory objectives. The restraint of trade doctrine, an invention of the common law has been applied to the facts 'with a broad and flexible rule of reason'.[134] The restraint of trade doctrine has a colourful history.[135] Dating back to the early 15th century, the doctrine was seen as serving an important public policy objective, namely to allow the provision of one's trade for public benefit and enjoyment without fear of disclosing trade secrets.[136] Contracts of employment were the typical context in which the courts were asked to decide on the validity of restrictions that were imposed on one's trade.[137] This would usually involve a court making an assessment as to whether the restraint was

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Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *LQR* 238 at 256.

133 T Ciro, 'Commercial Reality v Doctrine: Restitution and Compound Interest for Void Swaps' (2002) 30(3) *Australian Business Law Review* 216.

134 *Howard F Hudson v Ronayne* (1972) 126 CLR 449 at 453. See also: *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 331; [1967] 1 All ER 699 at 728-9; *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 242 at 292; *Maggbury Pty Ltd v Hafele Australia* (2001) 185 ALR 152 at 171.

135 For an excellent history of the doctrine see: J D Heydon, *The Restraint of Trade Doctrine,* (1999) Ch. 1 and 2.

136 See *Dyer's case* (1414) 2 Hen 5.

137 The much quoted passage from Lord Macnaghten in the House of Lords decision in *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, 565:

> The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interferences with individual liberty of acting in trading, and all restraints of trade themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable- reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no ways injurious to the public. That I think is a fair result for all the authorities.

reasonable given the concerns of the employer including disclosure of trade secrets[138] and unfair competition.[139]

The recent decision in *Maggbury Pty Ltd Another v. Hafele Australia Pty Ltd and Another*[140] illustrates the interventionist role the High Court has adopted when it comes to determining the validity of confidentiality agreements in light of the restraint of trade doctrine. Briefly, the case involved Mr Allen, a director of Maggbury Pty Ltd inventing a foldaway iron. Mr Allen attempted to commercially exploit his invention by engaging Hafele Australia as a commercial partner. During negotiations with Allen, both companies executed a confidentiality agreement whereby Hafele covenanted that it would: (a) treat any information which Magburry disclosed to it in relation to the invention as private and confidential and not use the information for any purpose other than to fairly and properly assess proposals in relation to the commercial exploitation of the invention; (b) not 'at any time hereafter' use the information 'for any purpose whatsoever' except with Maggbury's consent; and (c) 'forever' observe the obligations of confidence, unless released by Magbbury. Negotiations between the two parties later broke down and soon after Hafele began distributing a foldaway ironing board. Maggbury commenced proceedings in the Queensland Supreme Court against Hafele for breach of contract. Maggbury was successful but the Court of Appeal reversed the decision. Maggbury appealed to the High Court seeking an injunction restraining Hafele from manufacturing or distributing the ironing board.

With a split 3:2 majority the High Court upheld the Court of Appeal's decision on the basis that the contractual restriction imposed on Hafele was an invalid restraint of trade. Gleeson, CJ, Gummow and Hayne JJ concluded that it was unreasonable for a confidentiality agreement to restrain information that was publicly available through a patent.[141] The majority's position, although

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138 Id. See also: *Bacchus Marsh Concentrated Milk Co Ltd v. Joseph Nathan and Co Ltd* [1919] 26 CLR 410 especially Issacs J at 440-442.

139 See *English Hop Growers v Dering* [1928] 2 KB 174, 180:…it is now well established that the Courts will view restraints of trade which are imposed between equal contracting parties for the purposes of avoiding undue competition and carrying on trade without excessive fluctuation and uncertainties with more favour than they will regard contracts between master and servant in unequal positions of bargaining.
The non-recognition of a general tort of "unfair competition" in Australia was also largely driven by considerations of promoting competition. See *Cadbury Schweppes Pty Ltd v The Pub Squash Co. Ltd* [1981] RPC 429 (Privy Council appeal); *Moorgate Tobacco Ltd v Philip Morris Ltd* (1984) 156 CLR 414, per Deane J at 445.

140 (2001) 185 ALR 152.

141 Ibid, at 168.

criticised as being overly paternalistic,[142] can be defended on the grounds that intervention was justified when one takes into account the courts public role to guard against monopolistic behaviour causing the restriction on the free flow of information.[143]

Gleeson, CJ, Gummow and Hayne JJ, explained their concern with the unjustified restriction on publicly available information:

> … the notion of a contractual restraint in respect of publicly available information is far from attaining general acceptance…the fact that the restraint can be said to have freely been bargained for by the parties to the contract provides no sufficient reason for concluding that the doctrine should not apply.[144]

The majority therefore concluded that intervention through the use of the restraint of trade doctrine was justified in the circumstances. For the majority there was no real alternative because without intervention the court would have in effect extended the life of the inventor's monopoly against Hafele to an indefinite period.[145] So in the spirit of promoting the free flow of information and encouraging competition, the court used its monopoly-busting restraint of trade doctrine[146] in much the same way competition regulators have used provisions of the *Trade Practices Act* 1974 (Cth) to regulate monopolies.[147]

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142 See Callinan J's judgment at 175, esp at 177 where his Honour suggests: Both this case and the case of *Peters (WA) Ltd v Petersville Ltd* are recent examples of a belated invocation of the doctrine to contracts which are freely negotiated by substantial arm's length parties fully advised by their own lawyers and which are largely performed by the time of that invocation.

143 See the various judgments in the High Court case of *Breen v Williams* (1996) 186 CLR 71 and the distinction between property in medical records and the protection of information: Brennan CJ at 80-82; Dawson and Toohey JJ at 88-90; Gaudron and McHugh JJ at 101-2 and Gummow J at 126-9.

144 (2001) 185 ALR 152 at 167-168.

145 The majority's expressed concern with the use of phrases such as 'forever' and 'information' in the deed of confidentiality: Here the difficulty arises not from the need for detailed semantic and syntactical analysis of the language used in the agreements, but from the use therein of simple terms such as 'at any time hereafter' and 'forever'. Is this a case where 'something must have gone wrong with the language?': Ibid, at 163.

146 See *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 327-8:
One of the mischiefs at which the doctrine was aimed originally was the mischief of monopolies; but this as dealt with by legislation and the executive has from time to time taken efficient steps to prevent it.

147 See for example: s.45 (2)(b) of the TPA which forbids a corporation to: '…give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or

The High Court's decision in *Maggbury* serves to highlight the tension that exists when courts do intervene in contracts that are freely entered into by sophisticated commercial parties. The tension was no more evident in the dissenting judgments of Kirby and Callinan JJ. According to Kirby J, the restraint of trade doctrine was inapplicable in the circumstances. The agreement should be enforced because the contracting parties were at arm's length and the party seeking to rely on the doctrine was in a stronger bargaining position. Moreover, both parties were advised by lawyers and other experts and they "executed the agreements with their eyes wide open".[148]

For Kirby J, nothing in either law or in policy could justify the court's intervention in the present circumstances. This is because the principle of freedom of contract should be upheld[149] because to do otherwise would be suggesting 'that a particular restraint upon freedom of trade is impermissible when measured against the common law doctrine against 'unreasonable contractual restriction'.[150] Callinan J was equally critical of the court's intervention in contracts that are freely negotiated at arm's length and by parties of equal bargaining strength.[151] For Callinan J there were no grounds for the court to invoke the doctrine because to do so would be to "justify a unique interference with freedom of contract or the giving of a judicial imprimatur to what would otherwise be a flagrant breach of contract when one party decides that he or she has had enough of it".[152]

So the question must be asked: Why did the High Court intervene? For the majority the answer rested upon public policy considerations concerning the protection of freedom to trade and the promotion of competition: 'The court [has] left open for further consideration in an appropriate case the identification by Lord Wilberforce in *Esso* of species of restraint which have

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after the commencement of this section, if that provision: is an exclusionary provision; or has the purpose, or has or is likely to have the effect, of substantially lessening competition'. See also the High Court decision in *Peters (WA) v Petersville* (2001) 181 ALR 337 for the interrelationship between the provision and the common law doctrine.

148 (2001) 185 ALR 152, at 169.

149 See also Callinan J at 177.

150 Ibid, at 171.

151 Ibid, at 177.

152 Id. See also *Australian Capital Territory v Munday* (2000) 99 FCR 72 at 92 per Heerey J: When one party does seek to invoke the doctrine it will usually not be for any lofty motives of public interest. It has not escaped the notice of courts that sometimes parties of relatively equal bargaining strength freely enter into a contract but later one finds a more attractive proposition elsewhere and seeks to be released.

become generally accepted as part of the structure of a trading society".[153] In other words, if a society values and promotes competition, then the restraint of trade doctrine will be invoked to achieve this objective.

The same competition considerations loomed large in the High Court case of *Peters (WA) Ltd v Petersville Ltd.*[154] The case involved an agreement between two wholesale suppliers of ice-cream and iced confectionery in the Western Australia market. Forming part of a contract of sale that included the exclusive rights to the Petersville trade mark 'Pauls' in Western Australia, an agreement between Peters WA Ltd and Petersville Ltd provided that Petersville would not sell, supply or distribute to any person in Western Australia ice-cream or frozen confectionery during the period of the agreement. After executing the agreement, a dispute arose between the two parties and Petersville sought permission to trade in Western Australia on the basis that the contractual restraint was not valid because it was made in restraint of trade. The High Court agreed and invoked the restraint of trade doctrine to strike down a contractual clause because it was necessary to promote competition in line with the *Trade Practices Act* 1974 (Cth) (TPA).[155] According to the High Court, a court should have regard to what the Parliament had determined to be the 'appropriate balance between competing claims and policies,' and reconciliation was required 'with the public interest [as well as] Part IV of the TPA.'[156]
Despite the relative similarity in bargaining positions of both parties, the High Court justified its intervention principally on the basis of the agreement's anti-competitive nature, and this was contrary to s.46 of the TPA. Although the agreement involved the sale of the exclusive rights to the Petersville brand 'Pauls', the sale could not legitimately extend to the 'manufacture' distribution, sale or supply of ice-cream products, including Petersville's previous customers in Western Australia".[157]

Defenders of the freedom of contract principle may ask why parties should not be able to agree to such terms.[158] The conventional answer would suggest that

153 (2001) 185 ALR 152, 167.
154 (2001) 181 ALR 337.
155 Ibid, at 345. The High Court in *Peters* case states this explicitly: In the same way, considerations of public policy must attend the formulation of any criteria by which further categories of case are isolated at the threshold from the operation of the doctrine. In consideration of what is involved in public policy respecting such a matter, it may be appropriate to have regard to relevant federal statute law, in particular the *Trade Practices Act.*
156 Ibid, at 347.
157 Ibid, at 350 per Gleeson CJ, Gummow and Hayne JJ.
158 Indeed, Callinan J in dissent suggests just that: After all, the arrangements were made between substantial corporations dealing at arms length in respect of the sale of frozen foods: Ibid, at 351.

in appropriate cases Parliament prohibits the creation and use of anti-competitive agreements. However, there also appears to be an aggressive enforcement of not only Parliament's will by the courts, but also the enforcement of competition policy which lies outside the realms of statute.[159] According to Callinan J the common law is accustomed to change even if it involves public objectives in the form of competition: 'Such a change may one day extend to reversing the presumption, derived from an ancient but perhaps anachronistic antipathy towards now obsolescent, highly restrictive guilds and royal monopolies, that all restraints of trade are obnoxious to private and public interest, and unenforceable unless the beneficiary of the restraint demonstrates otherwise'.[160]

It should not be surprising that the regulatory objective to promote competition is also finding legal expression in doctrine. After all, the restraint of trade doctrine is about just that: to protect and promote fair competition.[161] However, what may be surprising is the enthusiasm the courts have shown in promoting the regulatory goal at the expense of the long established and much renowned freedom of contract principles. Equally surprising has been the use of the restraint of trade doctrine-a common law doctrine to defeat another common law principle- sanctity of contract. Kirby J in *Maggbury* commented on this inherent contradiction: '..the principle of freedom of contract is not of itself an answer to the suggestion that a particular restraint upon freedom of trade is impermissible when measured against the common law doctrine against unreasonable contractual restriction.'[162]

It is submitted that the contradiction is symptomatic of the court's dual role: its private role to protect private rights and adjudicate disputes, and its new public role of influencing and regulating market behaviour. The conflict is all too apparent when the court attempts to achieve public objectives with the use of interventionist doctrines that normally arise in the context of contractual dealings. The court has a clear choice: to enforce the bargain and protect the party's private rights, or to intervene and not enforce the agreement on the basis of some overriding public policy objective. Left with this choice, the courts have chosen to intervene. The intervention has not been episodic, but instead may represent a deliberate and comprehensive strategy for the courts to aggressively intervene to pursue public policy objectives and regulate market behaviour.

See in particular the recent High Court decision in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (t/a Auto Fashions Australia)* (2001) 50 IPR 257. Discussed in more detail below.

160 Id.

161 See *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 327-8..

162 (2001) 185 ALR 152 at 170-171.

Competition considerations were also robustly promoted in another recent High Court decision: *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (t/a Auto Fashions Australia).*[163] The case, although in the unrelated field of intellectual property, demonstrated the enthusiasm of the current High Court in the promotion of public regulatory objectives. Although the High Court in the *Melway* case held that Melway Publishing had not misused its dominant market position in refusing to supply wholesale its street directories with its former retail distributor, Auto Fashions, the court signalled possible intervention in the future. The majority, Gleeson CJ, Gummow, Hayne and Callinan JJ endorsed the following principle stated by Scalia J in the Supreme Court of the United States:[164]

> Where a defendant maintains substantial market power, his activities are examined through a special lens: Behaviour that might otherwise not be of concern to the antitrust laws- or that might even be viewed as procompetitive- can take on exclusionary connotations when practiced by a monopolist.[165]

'Special cases' and 'special lenses' are the courts preferred method of regulating market activity.[166] The courts are actively promoting public regulatory objectives with their restraint of trade doctrine and competition 'special lenses'. Is this because courts are simply promoting legislative objectives? Or does it reveal a deliberate shift in the underlying policy motives for intervention by the courts? In the *Melway* case, Kirby J provides an important insight demonstrating the fundamental shift that is gathering momentum:

> The object of the [Trade Practices Act] is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection…It should be approached as a 'fundamental piece of remedial and protectionist legislation [that is to]

163 (2001) 50 IPR 257.

164 *Eastman Kodak Co v Image Technical Services Inc* 504 US 451(1992).

165 Ibid, at 488.

166 See *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 and the 'special lens' the High Court applied to find that BHP had misused its market power to take advantage, contrary to s.46 of the *Trade Practices Act* 1974 (Cth): [BHP's] refusal to supply Y-bar to QWI otherwise than at an unrealistic price was for the purpose of preventing QWI from becoming a manufacturer or wholesaler of star pickets. That purpose could only be, and has only been, achieved by such a refusal of supply by virtue of BHP's substantial market power in all sections of the Australian steel market as the dominant supplier of steel and steel products. In refusing supply in order to achieve that purpose, BHP has clearly taken advantage of that substantial power in the market: Ibid, per Deane J at 197-198.

> be construed broadly'…This approach is warranted, indeed necessary, because of the important policy objectives that the legislation evidences, the large economic purposes it sets out to attain and the atypical mode of drafting that was adopted to express the parliament's objectives….[167] It is important for this court, and other Australian courts, to construe the Act so as uphold the apparent purposes expressed in its language. We should not be energetic in providing 'loopholes for escape'.[168]

Two questions spring to mind: Should anti-competitive behaviour that is not considered to be in breach of the TPA be the legitimate concern of the courts? Should courts use devices such as the restraint of trade doctrine to pursue competition policy objectives? It is submitted that courts should not pursue public regulatory objectives when legislation is in place to achieve such aims. The parliament and not the courts are in the better position to legislate and regulate market conduct and market behaviour. Of course there is always room to manoeuvre when interpreting legislation. This is different to the active and deliberate pursuit of public goals. The primary function of courts is to settle disputes. From an institutional perspective this is what courts are best designed to do. Why should courts encroach on the jurisdiction of parliament and the ACCC when there is no evidence that there is a failing in the legislation? In the pursuit of promoting competition, Parliament has enacted comprehensive legislation in the form of the *Trade Practices Act*. Parliament has also established the Australian Competition and Consumer Commission (ACCC) to pursue this objective with wide ranging (some would say aggressive), powers of investigation and enforcement. The ACCC is well resourced and has sufficient expertise to tackle the problem of monopolies, oligopolies, cartels and other anti-competitive structures and schemes. The role of courts is not to pursue macro economic objectives that are concerned with competition and social utility, especially where an existing legislative and administrative framework is in place to deal with such concerns.

Concluding Remarks

The article has argued that contract law doctrine has seen a marked shift from a passive to an interventionist approach. The doctrines of good faith, estoppel, unconscionability and restraint of trade have all demonstrated a powerful nexus with equity's desire to develop new standards of fairness and honesty in commercial dealings. Through its corrective justice role, a new public role has emerged for equity that is driven by equity's desire to intervene and regulate market dealings, and market behaviour that has transgressed the standards of fairness.

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167 (2001) 50 IPR 257 at 280.
168 Ibid, at 281.

The driver of many of the common law and statutory initiatives that have emerged in recent decades has not simply been justice or policies underpinned by consumer-welfarism. These interventions are driven too by a desire to stamp out market abuse and regulate market conduct because to do otherwise would be seen as sanctioning market misconduct. Analysing the emerging doctrines in light of the court's new public role helps provide some explanation for their continued development, popularity and use by the courts.

The new and enlarged public role of curial regulation is not accidental, nor is it co-incidental. The commercial emphasis of litigation, the large sums involved and the sophisticated nature of business transactions and litigants necessarily entails that considerations of fairness and honesty be given a say when it comes to doing business.[169] The breakdown of the parties' relationship provides the context for judicial intervention in the private arena. However, it is through the court's standards-setting approach and development of interventionist doctrine that the traditional boundaries have blurred. Equity and contract law doctrine are evolving and accommodating a new role, which has expanded beyond the courts' private borders. The modus operandi is the creation of broad and fuzzy standards of fairness and honesty and the development of contemporaneous and interventionist doctrine that allows the exercise of equitable and common law jurisdiction in contractual and business dealings.

However, judicial activism and judicial regulation is not without controversy. Whether the courts have the institutional capacity, skill, expertise and information to behave like a regulator remains doubtful. The doctrines that have emerged are also not without fault. Good faith, unconscionability, promissory estoppel and restraint of trade do not provide sufficient clarity, nor do they provide a clear bright light for market regulation. There is also the danger that with courts pursuing a more aggressive and interventionist public role, they are behaving less like courts and more like legislators. This has important ramifications for the constitutional framework of our legal system because traditional boundaries are blurred in favour of big picture publicity that is at times less than favourable or desirable.

169 The Honourable Justice Sir Gerard Brennan suggested this to be the case in delivering a seminar on Commercial Law and Morality. The Hon. Gerard Brennan stated: 'As legal transactions become more complex, the input of morality-or policy…will increase inevitably, for morality furnishes the reference points for legal development': The Hon. G. Brennan, 'Commercial Law and Morality', (1989) 17 *MULR* 100 at 101.