

## CRITIQUE AND COMMENT

### GIVING CONTENT TO GENERAL CONCEPTS

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*[General concepts, such as ‘reasonableness’, ‘unconscionable conduct’ and ‘unfairness’, are used in a variety of ways by judges, commentators and in statute. Sometimes, general concepts are merely statements in the nature of a conclusion reached after a process of detailed legal reasoning has taken place. In many cases, however, general concepts themselves play a determinative role in legal analysis, either as an important step in a process of analysis, or else as the sole or central concept determining liability. In such cases, it is of critical importance for the pursuit of open and rational legal reasoning that meaning is given to such concepts. This article explores some of the ways in which general concepts are utilised in legal reasoning and the various ways in which meaning and content can be given to such concepts.]*

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#### I INTRODUCTION

General concepts are widely used, in a variety of ways, by judges and legal commentators, and in statute. Indeed, many operative rules and principles, both at common law (including equity) and statute, are formulated in terms of general concepts. By general concepts, I mean those legal notions or ideas that are necessarily described in broad and abstract terms.<sup>1</sup> General concepts are an

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<sup>1</sup> Hence, the term ‘general concepts’ is here being used synonymously with certain uses of the word ‘principle’ (eg, the ‘principle of good faith’). The term ‘principle’ is also used in other ways, including to articulate more specific and detailed moral norms and values (eg, the ‘neighbour’ principle that one ought properly to have regard for the safety of those who one can reasonably foresee may be affected by one’s conduct). The distinction between the different usages of the term ‘principle’ cannot be sharply drawn, and they may shade into one another. In any case, more specifically articulated principles often utilise general concepts, as the above example itself illustrates (in its reference to ‘reasonable foreseeability’). The principle then

essential part of the process of legal reasoning and of the language of law-makers and commentators. Though an exhaustive list of general concepts used in the law is impossible, a few examples include:

- 1 'reasonableness', as used, for example, (a) in the context of tort law, with its concepts of 'reasonable care' and the 'reasonable person', and (b) as part of the notions of 'reasonable reliance' and 'reasonable expectations' (such as in estoppel);
- 2 'unconscionability', or more specifically, equitable and statutory prohibitions against 'unconscionable' (or 'unconscientious') conduct;
- 3 'good faith' conduct as a general obligation in the performance of contracts;
- 4 'unfair, harsh or unconscionable' contracts, or 'unjust' contracts, under legislation for the review of contracts;
- 5 'misleading' conduct, as prohibited by s 52 of the *Trade Practices Act 1974* (Cth) ('TPA'), and state *Fair Trading Act* equivalents;<sup>2</sup>
- 6 'unjust enrichment', though as we will see below, recent usage of this concept purports to limit its operation as a general concept and convert it into an (almost rule-based) analytical formula.

These examples are obviously selective and reflect my own interests. No doubt other examples exist beyond the realm of private law. Importantly, many, or perhaps most, of these concepts cannot be *defined*. But this fact does not necessarily inhibit their useful operation. As Bigwood stated, a principle's 'vagueness is not a sufficient ground for repudiating it. Many concepts in our law are vague but manageable. Indeterminacy warrants care in application rather than rejection.'<sup>3</sup>

Despite, or perhaps because of, the widespread and repeated use of general concepts (and their obvious legal significance), their use often goes unchallenged. At other times, however, lawyers have expressed concerns about the potential for discretionary decision-making that such concepts may permit or justify. Commentators criticise the insufficient certainty in predicting the outcomes of disputes<sup>4</sup> due to the application of general standards and the consequential exercise of broad discretion by judges.<sup>5</sup> The focus of these attacks

serves a more normative function, whereas the general concept contained within it has a more descriptive function (describing the boundaries of the moral principle).

<sup>2</sup> See, eg, *Fair Trading Act 1999* (Vic) s 9.

<sup>3</sup> Rick Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions' (2000) 6 *New Zealand Business Law Quarterly* 3, 9 (citations omitted). See also Paul Finn, 'Unconscionable Conduct' (1994) 8 *Journal of Contract Law* 37, 37: 'It is surprising ... how many of the core concepts, principles and institutions in the law cannot be captured in definition'; Jane Stapleton, 'Good Faith in Private Law' (1999) 52 *Current Legal Problems* 1, 10.

<sup>4</sup> Such criticism is made particularly in the context of commercial transactions.

<sup>5</sup> See, eg, criticisms of the 'unconscionability' provisions in the *TPA* by Robert Baxt and Joel Mahemoff, 'Unconscionable Conduct under the *Trade Practices Act* — An Unfair Response by the Government: A Preliminary View' (1998) 26 *Australian Business Law Review* 5; Ross Buckley, 'Sections 51AA and 51AC of the *Trade Practices Act 1974*: The Need for Reform' (2000) 8 *Trade Practices Law Journal* 5. Further, see the discussion, below n 26, of criticisms made by Peter Birks of 'unconscionability' in equity.

Similarly, in relation to 'good faith', it is said that its use raises 'endless uncertainty' as to its scope and operation: Roger Brownsword, 'Positive, Negative, Neutral: The Reception of Good

has been oddly selective, for they focus on only specific examples of general concepts, rather than on the use of general concepts themselves throughout the law.<sup>6</sup>

Whatever the merits of these criticisms (and their force will vary according to the way in which a general concept is utilised, as discussed below), the use of general concepts is pervasive. This paper explores some of the ways that general concepts are utilised in legal reasoning and the fundamental question which arises because of their use: how is meaning or content given to these concepts? The answer to this question will vary according to the functions that the general concepts perform. As will be seen, there is considerable variation among the determinative roles performed by general concepts. First, however, it is necessary to note two uses of general concepts that are not of interest for the purposes of this paper.

## II NON-DETERMINATIVE USES OF GENERAL CONCEPTS

There are at least two ways in which general concepts are used that need little further explanation or discussion, because the concepts do not have any significant role in determining parties' legal rights and obligations. Firstly, general concepts such as 'unfairness' or 'unconscionability' are sometimes used to avoid articulating the reasons for a particular outcome altogether. These appeals to general concepts may also function as a rhetorical or argumentative device intended to persuade, but otherwise not explaining how a particular outcome was reached. In such cases, no attempt is made to give content or meaning to the concept. Like appeals to 'justice', it 'is the same thing as banging on the table: an emotional expression which turns one's demand into an absolute postulate ... [such] words are persuasion, not argument'.<sup>7</sup> As Justice Gummow stated extra-curially, terms such as 'unconscientious' 'are employed on occasion as if,

Faith in English Contract Law' in Roger Brownsword, Norma Hird and Geraint Howells (eds), *Good Faith in Contract: Concept and Context* (1999) 13, 16. Brownsword sums up these concerns: 'good faith presupposes a set of moral standards against which contractors are to be judged, but it is not clear whose (or which) morality this is': at 16. Consequently, good faith can be seen as 'a loose cannon in commercial contracts': at 16. See also at 15–21 for a summary of other criticisms made of good faith.

I consider that many of these criticisms and concerns are misplaced. Indeed, as I have previously argued, the development of the law in terms of broadly-stated concepts encompassing general standards of conduct (rather than narrowly-confined rules) will allow for more transparent — and hence predictable and certain — decision-making processes by the courts. Such developments may also achieve outcomes which are more consistent with modern expectations of justice. See Joachim Dietrich, 'Commercial Transactions: The Challenge from Equity' (2004) 2 *Journal of International Commercial Law* 353.

<sup>6</sup> In this context, attacks on discretionary decision-making focus on discretion in the application of existing general principles to the facts of a particular case, a process which is said to import considerable scope for subjective determination. This is importantly different to the debate about discretion in the sense of judges' capacity to change the law where such law is considered outdated or inappropriate. This is a debate that is usually conducted with reference to the label 'judicial activism', 'an overworked cliché that lies mainly in the eye of the beholder': Justice Keith Mason, 'What Is Wrong with Top-Down Legal Reasoning?' (2004) 78 *Australian Law Journal* 574, 586. Birks' focus of attack is on the former use of discretion: see below n 26. Justice J D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110, is chiefly concerned with the latter type of discretion.

<sup>7</sup> Alf Ross, *On Law and Justice* (1958) 274.

plucked from the air and applied to describe particular facts, they indicate all that has to be said to explain why and how equitable relief is available.<sup>8</sup> To the extent that such devices are used to avoid transparent legal reasoning or justification for decisions, they are unacceptable. We rightly demand that judges' decisions 'are constrained by consistency and accountability: they must articulate convincingly and publicly the reasons for the choices made.'<sup>9</sup> I am reluctant to give recent examples of courts avoiding explanation through the use of labels such as 'unfair'; but we are certainly familiar with such devices from earlier cases.

A second use of general concepts sees them applied in judgments and argument as conclusory labels attached after a more specific process of reasoning has been completed. In other words, the general concept is an *ex post facto* label applied once the legal analysis is completed, albeit that it may also be intended to add further weight or moral persuasiveness to the conclusion reached. I consider this to be a perfectly acceptable use of general concepts. It may indicate the broad moral principles or general ideas at work in the law, without avoiding more specific reasoning to justify decisions. Examples include the use of 'unconscionability' in *Garcia v National Australia Bank Ltd*,<sup>10</sup> where the joint judgment acknowledged that to describe the transaction as 'unconscionable is to characterise the result rather than to identify the reasoning that leads to the application of that description.'<sup>11</sup>

Of interest, however, are circumstances in which general concepts perform a more determinative role, ranging from the general concept forming *part of* the process of determining legal outcomes, to being the *central* or *sole* determinant. The ways in which courts and commentators give content to these general concepts vary considerably, and depend on the use made of these concepts.

### III GENERAL CONCEPTS HAVING A DETERMINATIVE ROLE

Using examples, I will consider six ways in which courts and commentators use, and have sought to give meaning to, general concepts. These six groups are non-exhaustive and obviously overlap and interrelate. They are not intended to

<sup>8</sup> Justice William Gummow, 'Equity: Too Successful?' (2003) 77 *Australian Law Journal* 30, 31. Justice Gummow cites John McGhee (ed), *Snell's Equity* (30<sup>th</sup> ed, 2000) vii, wherein it is noted that the use of such terms 'may have masked rather than illuminated the underlying principles at stake'.

<sup>9</sup> See Bigwood, above n 3, 9, writing in relation to the choices judges make on the basis of conscience-based concepts.

<sup>10</sup> (1998) 194 CLR 395 ('*Garcia*').

<sup>11</sup> *Ibid* 409 (Gaudron, McHugh, Gummow and Hayne JJ) (citations omitted). More controversially, I would argue that some uses made of unjust enrichment similarly exemplify such a process: see, eg, the detailed reasoning of the High Court in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 ('*Pavey*'). Additional statements invoking unjust enrichment appear to be little more than conclusions which further justify the Court's decision, rather than necessary steps in reaching that decision. Others would disagree with this characterisation and instead view unjust enrichment as an essential step in the reasoning in *Pavey*, and critical to the shaping of restitutionary claims in that case and generally. See especially Keith Mason and John Carter, *Restitution Law in Australia* (1995) 29–31. In particular Deane J's judgment in *Pavey* (1987) 162 CLR 221, 256 lends support to that position, though his Honour does consider that the circumstances of liability 'are unlikely to be greatly affected by the perception that the basis of such an obligation ... is preferably seen as lying in restitution'.

be discrete categories. Indeed, many general concepts perform several functions, depending on the context in which they are used. The order in which the different examples are considered is deliberate and significant. The categories are arranged in order of increasing determinative effect; thus the general concepts in the later categories have a more critically determinative role in deciding legal rights. The uses of general concepts range from these terms having merely a guiding role, to being themselves tests of liability. Hence, the effectiveness of giving meaning and content to the concepts becomes more critical in the later categories. The six groups are as follows (the main example(s) to be discussed in each follow in brackets):

- 1 General concepts as informing ideas or principles (certain uses of ‘unjust enrichment’).
- 2 General concepts that determine rights and obligations through the ‘filters’ of specific doctrines and their elements, whilst at the same time imposing standards of conduct (‘unconscionability’ in equity).
- 3 General concepts operating as broad standards derived from existing case law, but extrapolated from there and given more general application (‘good faith’).
- 4 Common law general concepts given a specific, ‘technical’ meaning that operate much like statutorily defined rules (‘unjust enrichment’ theory).
- 5 General concepts operating ‘at large’, through their legislative codification as the basis upon which rights and obligations are adjudicated (‘unfair, harsh or unconscionable’ and ‘unjust’ contracts).
- 6 General concepts operating as the *central* or *sole* determinant of parties’ rights and obligations (‘reasonable care’).

I accept, of course, that the categorisation of several of the above examples may prove to be controversial.

#### *A General Concepts as Informing Ideas or Principles*

I propose to say little about the use of general concepts as informing ideas or principles at work in the operation of specific rules of law, precisely because little can be asked of the concepts, as little is made of them.<sup>12</sup> The use some commentators, albeit dwindling in number and largely uninfluential,<sup>13</sup> have made of unjust enrichment illustrates this category. Commentators, such as Professors Stoljar and Sutton,<sup>14</sup> do not make extravagant claims for the concept as they understand and use it. ‘Unjust enrichment’ here has some explanatory

<sup>12</sup> Cf Steve Hedley, ‘Unjust Enrichment as the Basis of Restitution — An Overworked Concept’ (1985) 5 *Legal Studies* 56, 66, particularly his analysis of the applications of unjust enrichment, by commentators such as those discussed below.

<sup>13</sup> My own views might suggest that I should be included in this group, except for the fact that my scepticism about unjust enrichment makes me question at times whether it is even useful as an informing idea.

<sup>14</sup> See Samuel Stoljar, *The Law of Quasi-Contract* (2<sup>nd</sup> ed, 1989); Richard Sutton, ‘Unjust Enrichment’ (1981) 5 *Otago Law Review* 187.

value, and is perhaps descriptive of a legal state of affairs needing redress.<sup>15</sup> However, it has a very limited, if any, analytical or determinative function.

Instead, commentators such as Stoljar seek to give greater clarity to the concept by resorting to more specific principles, rules and concepts that determine legal liability. Similarly, Professor Finn suggests that one use of ‘unconscionability’ is as ‘an organising idea informing specific equitable rules and doctrines which do not in terms refer to, or require an explicit finding of, unconscionable conduct.’<sup>16</sup>

Obviously, the use of general concepts as informing ideas shades into and may be little different from the (largely) non-determinative use of general concepts as *ex post facto* labels, considered above.<sup>17</sup>

### B *General Concepts Operating through Specific Doctrines*

Of more interest is the increasing judicial use of general standards, described by broad concepts, to determine liability. Such concepts are flexible legal tools capable of giving effect to principles of justice and fairness in a wide variety of contexts (albeit by resort to familiar legal techniques and by analogy with established categories).<sup>18</sup> One way effect is given to such general concepts is through specific doctrines, an element or aspect of which is based on a general concept, or that are particularisations of this general concept.<sup>19</sup> ‘Unconscionability’ in equity is a good example.

Although unconscionability remains a dynamic and indeterminate notion, which seeks to test the standards of a defendant’s conduct against some benchmark, it is important to stress that the question of whether conduct is unconscionable does not roam at large. The notion of unconscionability only comes into play (in equity, at least)<sup>20</sup> by reference to the specific requirements and operative criteria of individual doctrines informed by that notion.<sup>21</sup> Unconscion-

<sup>15</sup> I would add that this role need not be confined to the law of restitution, with which unjust enrichment is usually associated.

<sup>16</sup> Finn, ‘Unconscionable Conduct’, above n 3, 38. Finn considers four uses of unconscionability: see below nn 19 and 32 and accompanying text, though these do not correspond exactly with my characterisations.

<sup>17</sup> See above nn 10–11 and accompanying text.

<sup>18</sup> See generally Finn, ‘Unconscionable Conduct’, above n 3.

<sup>19</sup> *Ibid* 38. I have merged together here what Finn describes as two slightly different uses of unconscionability. After considering unconscionability as an informing idea, Finn notes that its second use is to particularise doctrines that ‘are conditioned upon the explicit finding of unconscionable conduct’: at 38. A third use of unconscionability is as a distinct doctrine which crystallises one species of unconscionable conduct as a distinct doctrine (eg, unconscionable dealing).

<sup>20</sup> The position is otherwise in relation to unconscionability under ss 51AB, 51AC of the *TPA*. See below Part II(E).

<sup>21</sup> See further Joachim Dietrich, *Restitution: A New Perspective* (1998) 48, expressing a view endorsed by French J in *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2000) 96 FCR 491, 502: unconscionability in equity is ‘subject to limitation in its factual field of operation by the existence of specific doctrines.’ French J’s ultimate decision in the case was overturned by the Full Court of the Federal Court of Australia in *C G Berbatis Holdings Pty Ltd v Australian Competition and Consumer Commission* (2001) 185 ALR 555. A subsequent appeal to the High Court was dismissed: (2003) 214 CLR 51. Cf Bigwood, above n 3, 10, who notes, in relation to the operation of ‘conscience’ in equity, that ‘the inquiry is channelled, and hence disciplined, through specific rules and criteria that express the unconscionability idea, and, in turn, serve the desirable purpose of compelling [j]udges to focus the

ability, then, has developed ‘in its many guises.’<sup>22</sup> The concept, therefore, only comes into play when the operative criteria of the specific doctrine have ‘filtered out’ most fact situations. In other words, the question of whether someone’s conduct is unconscionable is asked only after certain specific requirements have been met. Promissory estoppel provides an example. Only after there has been: (1) the creation of an expectation or assumption by the conduct or representations of the defendant; (2) on which the plaintiff has reasonably relied; and (3) in a way that would prove detrimental if that expectation were departed from, will the courts determine whether it would be unconscionable for the defendant to act in a manner contrary to that expectation by insisting on his or her legal rights (or by denying that any obligation exists).<sup>23</sup> The concept is given content by reference to the first three elements enumerated above,<sup>24</sup> and further interpreted and contextualised by the body of existing case law, which identifies the varying operation in specific factual circumstances of the standards of conduct encapsulated by the generalised duty.

The final element of estoppel, namely the reference to ‘unconscionable conduct’ on the part of the defendant, appears to serve a number of functions. First, it gives effect to the standard encapsulated by the ‘unconscionability’ notion, as exemplified by the case law. For example, this usually requires that the defendant encouraged or at least knew (or ought to have known) of the plaintiff’s detrimentally reliant conduct (otherwise the defendant’s conscience is not affected). Second, I would suggest that unconscionability here also operates as a ‘catch-all’ provision, pointing to a residuary discretion that the courts take into account ‘any other relevant circumstances’ (similar in effect to general terms in statutory provisions). This reflects the established focus of equity to look ‘to every connected circumstance that ought to influence its determination upon the real justice of the case.’<sup>25</sup> In other words, we must not apply doctrines strictly without regard to salient facts, even though these facts are not expressly alluded to in the elements of the doctrines, but which might tilt the outcome in a given case in one direction.

Since the equitable concept of ‘unconscionable conduct’ is given effect by specific rules and doctrines whose operation is sharpened by the incremental development of those doctrines, vehement criticisms of unconscionability as allowing appeals to idiosyncratic notions of justice fall by the way.<sup>26</sup> Indeed, it is

issues and to give precise reasons for their decisions based in conscience’. He considers the role of conscience in contract law and its compatibility with, indeed its role as a logical requirement of, liberal conceptions of contract.

<sup>22</sup> Paul Finn, ‘Equitable Doctrine and Discretion in Remedies’ in William Cornish et al (eds), *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (1998) 251, 257 (citations omitted). See also Finn, ‘Unconscionable Conduct’, above n 3.

<sup>23</sup> Cf Peter Heffey, Jeannie Paterson and Andrew Robertson, *Principles of Contract Law* (2002) 151–6; Andrew Robertson, ‘The Statute of Frauds, Equitable Estoppel and the Need for “Something More”’ (2003) 19 *Journal of Contract Law* 173, 174.

<sup>24</sup> These elements are variously stated, sometimes more specifically than the above formulation: see, eg, the six elements identified by Brennan J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 428–9. Their essence is generally similar.

<sup>25</sup> *The Juliana* (1822) 2 Dods 504, 521; 165 ER 1560, 1567 (Lord Stowell).

<sup>26</sup> For these and other reasons, I would reject Professor Birks’ trenchant and ongoing criticism of the notion of ‘unconscionability’ as being too vague and uncertain, and a recipe for judicial

precisely because courts restrictively apply these equitable concepts that plaintiffs increasingly resort to statutory provisions that utilise general concepts that more directly ground liability (such as ‘misleading conduct’ and ‘unconscionable conduct’ under the *TPA*). Such statutes often vest judges with broad discretionary powers.<sup>27</sup> Hence, the more restrictive the courts are in their application of *equitable* and *common law* general concepts, the more redundant they become. This point is often overlooked by critics.

Of course, since the specific doctrines are but manifestations of the general standard, this means that unconscionability has an important ongoing role as a general principle guiding the development of those doctrines. Importantly, this allows for the development of new specific doctrines. The authors of *Meagher, Gummow & Lehane’s Equity: Doctrines and Remedies* have suggested that:

The truth appears to be that all these cases are fairly settled instances of appeals to the conscience of the court, the settlement being the product of an empirical process over the centuries. The door may now appear shut to fresh appeals but the terms in which fraud is seen to appear in various cases will provide sufficient lee-ways for further development.<sup>28</sup>

The general concept can thus be applied to new — but similar — factual scenarios, to which existing doctrines may not necessarily have previously been applied. Despite the denial of the authors of *Meagher, Gummow & Lehane’s Equity: Doctrines and Remedies* of any ‘fresh appeals’, such flexibility may lead to new doctrines being developed over time that give effect to the general concept. These new ‘filters’ for the general concept, once initial uncertainties and inevitable teething problems are overcome,<sup>29</sup> are also capable of sufficiently certain operation. I would suggest that the remedial constructive trust based on the unconscionable retention of property, as identified in *Muschinski v Dodds*<sup>30</sup> and *Baumgartner v Baumgartner*,<sup>31</sup> is an example of the early stage of development of a new doctrine guided by the general concept. I disagree with criticisms

discretion. For a particularly stinging attack, see Peter Birks, ‘Equity in the Modern World: An Exercise in Taxonomy’ (1996) 26 *University of Western Australia Law Review* 1, 17, where Birks states that “‘unconscionable’ is so unspecific that it simply conceals a private and intuitive evaluation”. He goes on to quote the chief of the Gestapo’s view in relation to the Holocaust that ‘I do fundamentally that for which I can answer to my conscience ... I am completely indifferent whether others gabble about breaking the law’: at 17 (citations omitted). See also Peter Birks, ‘The Law of Restitution at the End of an Epoch’ (1999) 28 *University of Western Australia Law Review* 13; Peter Birks, ‘Equity, Conscience, and Unjust Enrichment’ (1999) 23 *Melbourne University Law Review* 1; Peter Birks, ‘Rights, Wrongs, and Remedies’ (2000) 20 *Oxford Journal of Legal Studies* 1; Peter Birks, ‘Three Kinds of Objections to Discretionary Remedialism’ (2000) 29 *University of Western Australian Law Review* 1. For a justifiably severe criticism of this disingenuous argument, see Steve Hedley, ‘The Taxonomic Approach to Restitution’ in Alastair Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (2004) 151, 155–6.

<sup>27</sup> See, eg, the discussion on such statutes, below Part II(E).

<sup>28</sup> R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow & Lehane’s Equity: Doctrines and Remedies* (4<sup>th</sup> ed, 2002) 454.

<sup>29</sup> Cf Paul Finn, ‘Commerce, the Common Law and Morality’ (1989) 17 *Melbourne University Law Review* 87, 98: ‘in a period of change such as we have, controversies are by no means stilled’.

<sup>30</sup> (1985) 160 CLR 583.

<sup>31</sup> (1987) 164 CLR 137 (*‘Baumgartner’*).



of these developments which argue that they allow interference in property rights in too uncertain terms.<sup>32</sup> Indeed, the factors activating liability are relatively narrow and are specifically stated in these cases. There needs to be (1) a joint domestic (or commercial)<sup>33</sup> endeavour; (2) valuable contributions made by one party to property in the other's name; and (3) failure of the endeavour or relationship, such that it would be unconscionable to deny the contributing party some share in the property.<sup>34</sup> Subsequent case law has already gone some way to clarifying issues left outstanding by these decisions, such as what types of contribution, of what value, and made over what period of time, activate the liability rule.

This is not to suggest that these equitable principles are particularly suited to resolving these types of domestic property disputes. As others have pointed out, comprehensive legislation is a preferable solution to the underlying social problems.<sup>35</sup> But charges that the equitable principles are insufficiently certain ring hollow when the suggested solution to the problems equity is being asked to resolve (perhaps as a last resort) is legislation phrased in the widest possible terms, giving courts a wide discretion to readjust property rights.

It is worth making two final observations about the use of general concepts operating through specific doctrines. First, since the general concepts act as guiding principles for future jurisprudence, they can be used to develop new doctrines and expand existing ones. As such, their use and operation shades into, and becomes similar to, the operation of general concepts as general standards 'not mediated by a discrete doctrine'.<sup>36</sup> Second, some specific doctrines do not necessarily give effect to *only one* general concept and the standards it represents. In relation to some doctrines, one can see several general concepts, and their (perhaps competing) values at play, such that the determination of the dispute requires a weighing up of those different values to achieve an appropriate balance. Equitable relief against forfeiture of an interest in property is an example. A number of general concepts are relevant to, and are given effect by, equity's relief against forfeiture. I would suggest that these include notions of 'unconscionable conduct', parties' 'intentions', 'reasonable expectations', 'unjust enrichment', giving effect to 'substance over form', and the protection of interests in 'property'.<sup>37</sup>

<sup>32</sup> Cf Finn, 'Unconscionable Conduct', above n 3, 39, who considers that *Baumgartner* exemplifies a fourth use of 'unconscionability' and founds a specific cause of action 'not mediated by a discrete doctrine which channels the cause of action and the available relief.' Hence, he concludes: 'We have, potentially, a cause for real uncertainty here': at 39.

<sup>33</sup> See, eg, *Carson v Wood* (1994) 34 NSWLR 9.

<sup>34</sup> Cf *Muschinski v Dodds* (1985) 160 CLR 583, 620 (Deane J); Barbara McDonald, 'Constructive Trusts' in Patrick Parkinson (ed), *The Principles of Equity* (2<sup>nd</sup> ed, 2003) 721, 788–93. The combination of these factors gives rise to expectations of an ongoing share in certain 'relationship' property.

<sup>35</sup> See Derek Davies, 'Equity and Trusts: What Should Happen when Developments Outpace Origins' in Malcolm Cope (ed), *Equity: Issues and Trends* (1995) 1, 8–11. Such legislation is now widespread: see, eg, *Property (Relationships) Act 1984* (NSW).

<sup>36</sup> Finn, 'Unconscionable Conduct', above n 3, 39.

<sup>37</sup> See, eg, *Stern v McArthur* (1988) 165 CLR 489, and more recently *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 201 ALR 359. Where there are a number of principles involved in resolving a legal problem, they may indeed compete. The only way to resolve this conflict is to resort to

## C General Concepts Operating as General Standards

Some (non-statutory) concepts do not seem to operate through the filter of specific rule-based doctrines, but instead operate as general standards that apply more widely. For example, consider the implied obligation of ‘good faith and fair dealing’ in the performance of contracts. How are these standards identified so that they can be applied with sufficient certainty in the law?

In the absence of any authoritative High Court statement on the status of ‘good faith’ in Australian law,<sup>38</sup> I will leave aside the controversy as to the precise status of that concept in Australian law. Undeniably, however, there has been an increasing acceptance of that concept by state Supreme Courts.<sup>39</sup> Although ‘good faith’ appears to have been extrapolated from existing rules of contract law,<sup>40</sup> it is a concept that may be seen as having a general operation, being implied into all contracts.<sup>41</sup>

questions of policy, such as: ‘what, ultimately, is the more important societal goal?’ or ‘what are the economic consequences of a particular decision?’ This point was made by Harold Luntz, in a different context, at the Second Biennial Conference on the Law of Obligations, The University of Melbourne, 15–16 July 2004.

<sup>38</sup> Cf *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289, 311–12, where Kirby J queried whether such an obligation is consistent with caveat emptor. There may be such inconsistency if the good faith obligation arises in the context of contract negotiations, but I would suggest there is no such inconsistency with an obligation of good faith in performance of contracts.

<sup>39</sup> See, eg, Byrne J of the Victorian Supreme Court, in *Far Horizons Pty Ltd v McDonald's Australia Ltd* [2000] VSC 310 (Unreported, Byrne J, 18 August 2000) [120] who stated that, given the ‘considerable body of authority’, he proceeded

on the basis that there is to be implied in a franchise agreement a term of good faith and fair dealing which obliges each party to exercise the powers conferred upon it by the agreement in good faith and reasonably, and not capriciously or for some extraneous purpose. Such a term is a legal incident of such a contract.

Byrne J cited *Renard Construction (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 191–3 (Finn J); *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 368–9 (Sheller JA); *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] ATPR ¶41-703, 43 014 (Finkelstein J) as authorities. Cf *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1, 26, in which Kirby P considered that ‘in some circumstance[s] a promise to negotiate in good faith will be enforceable, depending upon its precise terms’.

Underlying such developments may be the view that the interests of commerce are promoted by our legal system seeking to enforce moral standards such as ‘good faith and fair dealing’ and ‘good conscience’. Almost 100 years ago, Max Weber observed that:

the system of commodity exchange, in primitive as well as in technically differentiated patterns of trade, is possible only on the basis of far-reaching personal confidence and trust in the loyalty of others. Moreover, as commodity exchange increases in importance, the need in legal practice to guarantee or secure such trustworthy conduct becomes proportionally greater.

Max Weber, ‘Economy of Law (The Sociology of Law)’ in Guenther Roth and Claus Wittich (eds), *Economy and Society: An Outline of Interpretive Sociology* (Fischoff et al trans, 1978 ed) 641, 884 [trans of: *Wirtschaft und Gesellschaft: Grundriss der Verstehenden Soziologie*].

<sup>40</sup> Cf Stapleton, above n 3, 2, noting the view that good faith is implicit in English law and is given effect through more specific tools.

<sup>41</sup> In the absence of statutory mandate for such developments, however, the operation of such a concept will always be constrained by the needs of the courts to proceed cautiously and to justify any legal developments. Such concepts will be constrained by incremental development, even whilst operating generally.

Much has been written on the meaning and content of ‘good faith and fair dealing’.<sup>42</sup> Given this volume of writing, it is inappropriate to consider here the debate as to what, precisely, good faith requires. I can only note *some* of the ways in which content is given to the concept by courts and commentators.

Although the general concept of good faith is not manifested in the form of specific doctrines, it is still restricted in its application. As has been pointed out by commentators such as Jane Stapleton, the general concept will only be ‘manifested in the law episodically’ and the general principles will be subdued by rules elaborating the specific instances in which the principles will operate.<sup>43</sup> Stapleton calls such rules ‘incidence’ rules, which elaborate three things: namely, ‘the situations where the principle will be imposed by the law; the standard it demands in the circumstances; and the remedial response judged appropriate for breach.’<sup>44</sup>

An example of an ‘incidence rule’ might be Finn J’s summary in *South Sydney District Rugby League Football Club Ltd v News Ltd* of the recent case law in the following terms:

Recent decisions suggest that the implied duty of good faith and fair dealing ordinarily would not operate so as to restrict decisions and actions, reasonably taken, which are designed to promote the legitimate interests of a party and which are not otherwise in breach of an express contractual term ...<sup>45</sup>

The general concept being limited by incidence rules appears to be a subtly different process to general concepts being manifested in, and limited by, specific doctrines. The general concept is more of a driving force in shaping the law and more attention needs to be paid to the standards encompassed by the general concept. The judicial method of case-by-case development, by analogy to existing decisions, leads to a cautious and constrained incremental approach in the use of the general concept. Undeniably, theory will play a part in the development of the case law.<sup>46</sup> As has been pointed out, ‘[e]ven the professed incrementalist is confronted with deciding what is “an increment too far”.’<sup>47</sup> Nonetheless, existing case law and reasoning by analogy provides a firm anchorage from which future exploration can commence.

Although ‘good faith and fair dealing’ operates as a general concept encompassing varying standards of conduct, it has a limited and *specific* operation according to the particular context within which it is being used. One could consider, for example, the growing and substantial case law in the United States on the good faith termination of franchise contracts<sup>48</sup> (the equivalent body of law

<sup>42</sup> See especially Brownsword, above n 5; Stapleton, above n 3.

<sup>43</sup> See Stapleton, above n 3, 28–9. In Stapleton’s view, the limitations placed upon the *Donoghue v Stevenson* [1932] AC 562 notion of ‘reasonableness’ provide an example, though I question this later: see below Part II(F).

<sup>44</sup> Stapleton, above n 3, 29.

<sup>45</sup> (2000) 177 ALR 611, 696.

<sup>46</sup> On the importance of theory and ‘top-down’ reasoning in the development of the common law, see Justice Keith Mason, ‘What Is Wrong with Top-Down Legal Reasoning?’, above n 6.

<sup>47</sup> Ibid 582, citing *Barrett v Ministry of Defence* [1995] 3 All ER 87, 95 (Beldam LJ).

<sup>48</sup> See, eg, the discussion of the United States law in Dietrich, ‘Commercial Transactions’, above n 5.

is in its infancy in this country).<sup>49</sup> ‘Good faith’ is the starting point for an increasingly sophisticated and detailed legal regime. In the context of franchise agreements, good faith effectively prevents forfeiture of a franchisee’s investments where there is a reasonable expectation of an opportunity to recoup such investment, and that opportunity is not adequately protected by the terms of the agreement. Such expectations arise from the commercial circumstances, including most importantly the express terms of the contract voluntarily agreed to by the parties.<sup>50</sup> However, although the express terms of contracts are perhaps the most critical factor considered by the courts,<sup>51</sup> where such express terms are inconsistent with the commercial expectations of the parties, or are absent altogether, the courts will inquire into, and give effect to, the parties’ commercial expectations. Where a franchisee has a reasonable expectation of an opportunity to recoup its investment, conduct having the effect of disenfranchising such a franchisee must not be engaged in, unless it is reasonable commercial conduct in the circumstances.<sup>52</sup>

There have been many attempts to give broad concepts such as ‘good faith’ meaning. These often involve the reformulation of the concept in different language. There are limitations, however, on the utility of such reformulations. Sometimes the reformulations themselves refer to other broad concepts. For example, some commentators have used ‘reasonableness’ to describe one aspect of the ‘good faith’ obligation. (Interestingly, few lawyers seem to attack this latter concept with the same vehemence as some attack other general concepts. This is despite the fact that charges of uncertainty, and subjectivity in application, can equally be laid against that concept, as will be seen below.)

Sir Anthony Mason has suggested that good faith embraces three notions, including ‘compliance with standards of conduct that are reasonable having regard to the interests of the parties.’<sup>53</sup> Others, such as Elisabeth Peden, reject a requirement of ‘reasonable’ conduct as being a relevant aspect of good faith conduct.<sup>54</sup> Whichever view is correct, certainly there are limits to the usefulness of formulating one imprecise concept in terms of other, equally imprecise, concepts. (I should confess at this stage to my own use above of the term ‘reasonable’ as part of my description of the operation of ‘good faith’ in United States franchise law.)

<sup>49</sup> For a discussion of Australian developments, see Jeannie Paterson, ‘Good Faith in Commercial Contracts? A Franchising Case Study’ (2001) 29 *Australian Business Law Review* 270.

<sup>50</sup> Where the parties have entered into a contract containing a clear and express term allowing a ‘no cause’ termination, for example, and the parties are aware of such terms and are fully advised and enter such agreement voluntarily, then generally only dishonest conduct will preclude disenfranchisement.

<sup>51</sup> This will be so at least where parties are in a position to negotiate and voluntarily enter into the contract.

<sup>52</sup> See generally Dietrich, ‘Commercial Transactions’, above n 5.

<sup>53</sup> Sir Anthony Mason, ‘Contract, Good Faith and Equitable Standards in Fair Dealing’ (2000) 116 *Law Quarterly Review* 66, 69. For judicial approval of such sentiments see, eg, *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 367 (Sheller JA).

<sup>54</sup> Elisabeth Peden, ‘The Meaning of Contractual “Good Faith”’ (2002) 22 *Australian Bar Review* 1, 7–10.

Irrespective of the various techniques used to give content to ‘good faith’, we cannot ignore the fact that controversy as to its meaning and operation will continue to abound. The difficulty is this: what standard(s) of conduct does good faith require, given the range of possible standards that might be encompassed?<sup>55</sup> Clearly, normative judgements and choices need to be made by those who are to administer the concept, and the reasons for such choices must be articulated. I would add, however, that the difficulties in part are a product of the very complexity of problems confronted by modern-day courts. We ought to keep in mind here Sir Gerard Brennan’s observation that where the legal principles applied to solving those problems are not precise enough, morality will have some part to play in informing new and more precise legal rules.<sup>56</sup> But whose morality? Undeniably, judges’ own moral imperatives will have some role in shaping the operation and application of general standards. As Kirby J stated in relation to ‘unconscionability’ (in the context of relief against forfeiture):

the sharp differences of opinion evident in the cases illustrates the inescapable truth that the judicial decision-maker’s views about the alleged unconscientious conduct ... are necessarily influenced by that person’s own conscientious reaction to the facts disclosed by the evidence.<sup>57</sup>

#### D *Common Law Concepts Given a Defined, ‘Technical’ Meaning*

Now we turn to a very different use made of general concepts. Instead of operating as a general standard or through (other, individually formulated) specific doctrines, sometimes such concepts are themselves reformulated as specific rule-based causes of action. I would suggest recent developments in the unjust enrichment concept provide an example. However, the status of that concept in the Australian courts is uncertain.

At the forefront of the development of unjust enrichment theory was Professor Birks. In line with his view that the law needs ‘a good deal more reliance on logic and a good deal less on experience’,<sup>58</sup> Birks and other jurists have posed a theoretical challenge by using unjust enrichment as an analytical tool which prescribes our forms of analysis of legal problems and ‘dictates’ solutions.<sup>59</sup> Rather than using unjust enrichment as an explanatory principle which provides us only with an imprecise guide, perhaps merely identifying particular values at

<sup>55</sup> For a consideration of the range of possible standards of conduct which good faith might encompass, see Paterson, above n 49, 273–80. For discussion of recent uncertainties in United States law, see Howard Hunter, ‘The Growing Uncertainty about Good Faith in American Contract Law’ (2004) 20 *Journal of Contract Law* 50.

<sup>56</sup> Sir Gerard Brennan, ‘Commercial Law and Morality’ (1989) 17 *Melbourne University Law Review* 100, 102.

<sup>57</sup> *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 201 ALR 359, 381.

<sup>58</sup> Birks, ‘Equity, Conscience, and Unjust Enrichment’, above n 26, 8.

<sup>59</sup> Cf John Dawson, *Unjust Enrichment: A Comparative Analysis* (1951) 8. Whereas Dawson seems to suggest that this is a process over which we have little control, theorists here under consideration purposefully use unjust enrichment to prescribe a methodology aimed at imposing certainty, perhaps even rigidity, into the law.

play, unjust enrichment is said to be the ‘grundnorm’ for causes of action.<sup>60</sup> It provides ‘a proper norm or basis for evaluation.’<sup>61</sup> It becomes the ‘universal or complete legal touchstone whereby to test’<sup>62</sup> specific causes of action in restitution, which are all said to be explicable on this one basis.<sup>63</sup>

This might suggest that unjust enrichment operates in a similar way to unconscionability; that is, by being filtered through specific doctrines. I would argue, however, that its determinative function is much more significant. The principle is converted into an operational analytical tool by reference to stages of inquiry, or questions to be asked, in resolving problems in restitution. Indeed, Professor Birks is dismissive of the use of broad concepts generally (and unconscionability specifically)<sup>64</sup> and advocates a theory-driven approach to legal reasoning.<sup>65</sup> Further, it is important to note that when unjust enrichment is used in this way, the stages of analysis are themselves derived directly from — indeed, are little more than a restatement of — the concept of unjust enrichment itself:<sup>66</sup> there must have been an ‘enrichment’, ‘at the expense of’ the plaintiff, where some ‘unjust factor’ justifies restitution,<sup>67</sup> and to which no defences apply.<sup>68</sup> Given the very detailed exposition of the meaning of the individual elements, this may lead to the stages of inquiry subsuming the individual liability rules, the specific details of which tend to fuse into the ‘unjust factor’. Unjust enrichment is used to rationalise past decisions, solve future problems and shape liability rules. Reflective of the scale of the transformation being sought here are the attempts to change the whole language of the law, to rebadge the existing legal rules and concepts and to add new ones.<sup>69</sup>

<sup>60</sup> Justice Keith Mason, ‘Where Has Australian Restitution Law Got to and Where Is It Going?’ (2003) 77 *Australian Law Journal* 358, 361.

<sup>61</sup> Mason and Carter, above n 11, 11. See also Peter Birks, *An Introduction to the Law of Restitution* (revised ed, 1989) 20.

<sup>62</sup> *Morgan v Ashcroft* [1938] 1 KB 49, 75 (Scott LJ).

<sup>63</sup> The theory is then used to explain cases that may never even have used the general concept, let alone its technical meaning.

<sup>64</sup> See above n 26.

<sup>65</sup> See Birks, *An Introduction to the Law of Restitution*, above n 61, chs 1–4, see especially 19–21.

<sup>66</sup> Cf the particularisation of unconscionability in terms of the unconscionable dealing doctrine, the elements of which are not merely restatements of, nor directly derived from, that concept itself. I would note, for example, the elements of ‘special disadvantage’ and ‘knowledge’ of such disadvantage as having quite distinct conceptual basis and referring to other factual matters not directly referable to ‘unconscionable conduct’.

<sup>67</sup> I am using Birks’ original formulation of the principle, since this is the one that has been widely adopted by commentators and some courts. Prior to his death, Birks changed his views and adopted an ‘absence of basis’ analysis: see Peter Birks, *Unjust Enrichment* (2<sup>nd</sup> ed, 2005) especially pt III.

<sup>68</sup> Cf Birks, ‘Equity, Conscience, and Unjust Enrichment’, above n 26, 7. Such a formulation, I would suggest, is very different to the operation of unconscionability through specific doctrines that, though informed by that notion, nonetheless are much more than mere reformulations of it.

<sup>69</sup> For example, terms such as ‘quasi-contract’, ‘restitution’ (as describing the category of causes of action), ‘*quantum meruit*’ and ‘money had and received’ are to be banished. Terms such as ‘free acceptance’, ‘subjective devaluation’, ‘unjust enrichment’ (as describing the category of causes of action) and ‘interceptive subtraction’ are part of the new language of the law. It seems odd that Birks’ rejection of judicial decision-making on the basis of wide discretion did not lead him to feel equally constrained in demanding wholesale changes to the language of the law. Undeniably, changes in language must lead to changes to the substance of the law. In any case, the changes in language do not necessarily make the subject easier to understand. As Hedley has stated, unjust enrichment theorists ‘say that they are against old obscure terminology ... They

One possible consequence of such reasoning is that the theory becomes an end in itself. It may lead to “top-down reasoning” by which a theory about an area of law is invented or adopted and then applied to existing decisions to make them conform to the theory and to dictate the outcome in new cases.<sup>70</sup> I should stress that my objection is not to top-down reasoning itself. I note Justice Keith Mason’s recent and persuasive defence of the process as an important part of legal reasoning. The problem here is with top-down reasoning leading to ‘substance and dynamism ... [being] restricted by dogma’, to echo the words of Gummow J.<sup>71</sup> His Honour went on to say:

In turn, the dogma will tend to generate new fictions in order to retain support for its thesis. It also may distort well settled principles in other fields, including those respecting equitable doctrines and remedies, so that they answer the newly mandated order of things. Then various theories will compete, each to deny the others. There is support in Australasian legal scholarship for considerable scepticism respecting any all-embracing theory in this field, with the treatment of the disparate as no more than species of the one newly discovered genus.<sup>72</sup>

Debate will continue, of course, as to how useful unjust enrichment theory is, and how much of the law of restitution it explains.<sup>73</sup> I would note Hedley’s conclusion that ‘the subject has become more and more technical ... [but] is acknowledged to explain less and less. ... There is more and more schematising and theorising, to less and less effect.’<sup>74</sup> But I would make two observations removed from that debate. The first is that attempts to convert ‘unjust enrichment’ into a technical tool do not guarantee that it will add much, or that we can avoid reference to more general values (‘unjust enrichment’ as well as others), when determining cases in specific areas of law. The new stages of enquiry will not necessarily supplant the existing rules, but may merely add an extra layer to them.<sup>75</sup>

mean that they want to replace it with new, equally obscure terminology ... which might almost have been designed to discombobulate and alienate their listeners’: Hedley, ‘The Taxonomic Approach to Restitution’, above n 26, 154.

<sup>70</sup> *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 544 (Gummow J). The term was first employed by Judge Richard Posner and is also referred to by McHugh J in *McGinty v Western Australia* (1996) 186 CLR 140, 232.

<sup>71</sup> *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 545.

<sup>72</sup> *Ibid* (citations omitted).

<sup>73</sup> See generally Justice Keith Mason, ‘Where Has Australian Restitution Law Got to and Where Is It Going?’, above n 60, for an overview of the current controversies.

<sup>74</sup> Hedley, ‘The Taxonomic Approach to Restitution’, above n 26, 151 (citations omitted).

<sup>75</sup> See Charles Mitchell, *The Law of Contribution and Reimbursement* (2003), in which the doctrine of contribution is reformulated in terms of unjust enrichment theory. Although Mitchell goes to great lengths to apply the stages of enquiry to contribution, the crux of liability turns on a combination of both specific rules and broad, equitable discretionary factors. Unjust enrichment only operates in the context of contribution in a very general sense as a broad statement of conclusion. Unjust enrichment is conclusory in that we can say a defendant is unjustly enriched only after it has been determined that contribution (and the extent of such contribution) is indeed appropriate in the circumstances under consideration. Until such determination on the specific factors to be considered in determining contribution rights, the concept of unjust enrichment has no analytical utility. For example, the concept of ‘enrichment’, as defined by unjust enrichment theory, does not allow us to determine how much a defendant should contribute; it does not provide a means of measuring the extent of a defendant’s enrichment (from which we can pro-

A second consequence of Birks' arguments is that a formal, statute-like, definitional approach to unjust enrichment creates a dilemma. By converting the general concept into 'rules', are we denying a link to a general moral concept at all? If so, what is the legitimacy for the stages of analysis directly derived from that concept? Alternatively, if there is an underlying general moral concept at work, can we really convert that concept into workable rules, using such an analytical approach?<sup>76</sup>

#### *E General Concepts Operating 'At Large' through Statute*

In recent times there has been considerable legislative use of broad generic concepts to give courts a wide discretion to affect parties' rights. When statutes use general concepts, such as the notion of 'unjust contracts', as the basis for reopening the parties' contract, how do the courts give effect to these broad concepts? Some examples include the use of 'unjustness' in the context of the *Contracts Review Act 1980* (NSW) ('CRA'), and the Industrial Relations Commission's discretion to reappraise contracts that are 'unfair, harsh or unconscionable' under s 106 of the *Industrial Relations Act 1996* (NSW) ('IRA'). These sections have considerable potential to impact upon a range of commercial

ceed with the further stages of enquiry). A defendant's enrichment has been relevantly identified as being the negative benefit of the expenses saved by the defendant when the claimant pays the full amount of loss. But how much expense has the defendant been 'saved'? Only once a determination has been made that the defendant should contribute, say, 50 per cent (or 30 per cent) of the claimant's payment, can we ascertain the extent of the defendant's saving of expense. Other factors and considerations lead to the conclusion as to the extent of the defendant's contribution. The concept of enrichment itself does not do so. We could say, after a determination that the defendant should contribute \$X to the claimant, that the defendant has been enriched to that extent. Further, we could say the defendant has been unjustly enriched if he does not pay. Yet we could equally say that it would be 'inequitable' for the defendant not to pay his fair share, or that the defendant has unfairly been benefited, or the claimant unjustly burdened.

Mitchell identifies the 'unjust factor' in contribution cases to be 'found in the arena of public policy'. He then identifies a series of questions encapsulating the policy choices (over nine lines or so). The final question — of whether the claimant can shift all or some of the burden to the defendant — depends 'on the law's assessment of the nature of the parties' obligations and their relationships with the creditor and with one another': at 60. In short, one can only encapsulate Mitchell's 'unjust factor' as one of allowing 'just and equitable' contribution where appropriate. If 'unjust' is merely a reference to such broad equitable standards, it merely restates the broad discretionary equitable remedy in a different way. I am not suggesting that it is not possible to place contribution into unjust enrichment theory; rather, that it adds nothing. It is wasted ink and also misleadingly suggests that the structured analysis provided by unjust enrichment theory is valuable. It simply is not: in every case where contribution is awarded, the defendant would otherwise be unjustly enriched (to the extent to which contribution is awarded), and in every case where it is not, there is no unjust enrichment, but the suggested analytical steps do not allow for prospective differentiation between these cases.

<sup>76</sup> Does this make the subject any less uncertain or does the technical analysis (through the stages of enquiry) merely provide a smokescreen to hide the relevance of broad standards and the role of discretion and intuition? Cf Michael Bryan, 'Unjust Enrichment and Unconscionability in Australia: A False Dichotomy?' in Jason Neyers, Mitchell McInnes and Stephen Pitel (eds), *Understanding Unjust Enrichment* (2004) 47, 66, who sees unjust enrichment as providing conceptual clarity and having a high predictive value.



and consumer arrangements.<sup>77</sup> (I am leaving aside what is perhaps the most important of statutory general concepts, namely ‘misleading conduct’ under s 52 of the *TPA*.)

Perhaps of equal potential impact, though only time will tell, are ss 51AB and 51AC of the *TPA*, which prohibit conduct that is unconscionable in the supply of goods and services to consumers, or the supply and acquisition of goods and services in a small business transaction, respectively. However, since ss 51AB and 51AC are fairly recent provisions, there is only limited guidance as to their operation and how courts will interpret them.

One of the significant consequences of the use of generalised concepts not limited in their operation to specific doctrines is that courts will be able to apply those concepts ‘to new situations in which at present the law does not give ... [such concepts] force.’<sup>78</sup> This is a process much like that which occurs when the law recognises an independent standard or doctrine such as ‘good faith’. As Professor Parkinson has noted:

In the New South Wales Court of Appeal, in *West v AGC (Advances) Ltd*, Kirby P said that the *Contracts Review Act 1980* (NSW), ‘although it operates in the domain of contract law, signals the end of much classical contract theory.’ Whatever careful limitations may have been placed on the scope of equitable intervention are largely swept away by the statutory regimes. The incremental approach of precedent upon precedent is replaced by a broad judicial discretion to prevent injustice, within the guidelines given in each Act.<sup>79</sup>

Yet some meaning must be given to these statutory concepts for them to be workable, especially given the crucial determinative role the general concepts play. Certainly, the potentially wide ambit of such provisions is recognised. In relation to *IRA* s 106 it has been stated that the jurisdiction is based on the ‘common sense and sense of justice’ of the decision-maker.<sup>80</sup> Others have gone further, though perhaps too far,<sup>81</sup> in suggesting that the enquiry under *IRA* s 106 is ‘a plain matter of morals not law.’<sup>82</sup> Nonetheless, since we are concerned with legal concepts that, at their ‘sharp edge’, affect rights, some capacity to state the operating principles and predict outcomes must be possible. Thus, the critical question remains: how do courts determine parties’ rights when guided only by concepts such as ‘unjustness’ and ‘unfairness’? It appears from cases under the *CRA* and *IRA* s 106 that for the most part, courts look to established common law grounds on which relief from contractual obligations can be sought, and their

<sup>77</sup> The impact of the *CRA* on commercial transactions is limited, however, because the Act excludes from its scope claims for review by persons having entered into contracts in the course or for the purposes of trade, business or profession: s 6(2). For cases interpreting this section, and for an overview of cases decided under this Act, see Ben Zipser, ‘Unjust Contracts and the *Contracts Review Act 1980* (NSW)’ (2001) 17 *Journal of Contract Law* 76.

<sup>78</sup> Stapleton, above n 3, 28, referring to the recognition of ‘an independent doctrine of good faith’: at 30.

<sup>79</sup> Patrick Parkinson, ‘The Conscience of Equity’ in Patrick Parkinson (ed), *The Principles of Equity* (2<sup>nd</sup> ed, 2003) 29, 33 (citations omitted).

<sup>80</sup> *Agius v Arrow Freightways Pty Ltd* [1965] AR (NSW) 77, 89 (Beattie J).

<sup>81</sup> See *A & M Thompson Pty Ltd v Total Australia Ltd* [1980] 2 NSWLR 1, 13 (Perrignon and Dey JJ).

<sup>82</sup> *Davis v General Transport Development Pty Ltd* [1967] AR (NSW) 371, 374 (Sheldon J).

underlying purposes, but without the ‘technical baggage’ of some of the specific requirements of the common law or equitable rules.

I need to explain this statement more fully. In relation to *IRA* s 106,<sup>83</sup> the courts have stated that fraud and misrepresentation are not prerequisites for the exercise of s 106 jurisdiction.<sup>84</sup> Nonetheless, many, if not most, of the cases under s 106 involve breaches of promises or misrepresentations made in the context of contractual negotiations. Thus, for example, relief has been granted where a contract was ‘induced by false representations’ and for promises that were ‘phoney and unfulfilled’.<sup>85</sup> Even in cases where other factors were stressed as relevant, such as where the terms of a contract were unfair, the existence of misrepresentations was also a factor justifying relief.<sup>86</sup>

Similarly, under the *CRA* many of the factors listed as relevant considerations to determine the ‘unjustness’ of a contract are ones that courts would take into account under the unconscionable dealing doctrine, though perhaps not in as broadly stated terms. Consider, for example, some the matters to be considered under s 9(2): (a) ‘any material inequality in bargaining power’; (e) whether a ‘party ... was not reasonably able to protect his or her interests’; (f) ‘the relative economic circumstances, educational background, and literacy’ of the parties to the contract; (h) whether ‘independent legal or other expert advice was obtained’; and (i) the extent of any explanation and understanding of the legal and practical effects of provisions of a contract. In other sections there are specific references to matters relevant in the context of other equitable doctrines: s 9(2)(j) ‘whether any undue influence, unfair pressure or unfair tactics were ... used’.

While the *CRA* allows factors of ‘substantive’ injustice to be taken into account, Ben Zipser notes that there are ‘no instances where a contract involving only substantive injustice has been declared unjust.’<sup>87</sup>

Although the *CRA* (and similarly *IRA* s 106), ‘was intended to set a standard less onerous than that required by the general law’,<sup>88</sup> nonetheless it appears that the courts are looking to factors relevant to asserting *established* legal and equitable grounds for relief. However, in doing so, some of the technical prerequisites for the operation of such grounds are ignored.

Thus, though a breach of promise is ‘unjust’, the courts do not look for proof of factors such as that the promise was ‘promissory’ (in the contractual sense of the word) or that it formed a ‘term’ of the contract.<sup>89</sup> Similarly, ‘misrepresentations’ feature prominently in the case law, without inquiry as to whether such representations were of ‘fact’ or ‘law’ or mere ‘opinion’. Much like under

<sup>83</sup> See Jeffrey Phillips and Michael Tooma, *Law of Unfair Contracts in NSW: An Examination of Section 106 of the Industrial Relations Act 1996 (NSW)* (2004), which provides an overview of many of the decisions under that section.

<sup>84</sup> See, eg, *Terzian v Gattelari* [1972] AR (NSW) 591, 599 (Sheppard J).

<sup>85</sup> See, eg, *Re Williams and Calmex Products Pty Ltd* [1971] AR (NSW) 264. See also other cases discussed in Phillips and Tooma, above n 83, 115–16.

<sup>86</sup> See, eg, *Pilgrim v Wendy's Supa Sundaes Pty Ltd* (2002) 118 IR 173.

<sup>87</sup> Zipser, above n 77, 80.

<sup>88</sup> *Elders Rural Finance Ltd v Smith* (1996) 41 NSWLR 296, 302 (Mahoney P).

<sup>89</sup> This raises questions such as the applicability of the parol evidence rule.

*TPA* s 52, the focus is on whether the plaintiffs were misled.<sup>90</sup> The wide remedial discretion under both *IRA* s 106 and the *CRA* also means that the courts do not need to concern themselves with questions of whether representations were made innocently, fraudulently or negligently in order to determine the appropriate remedy.<sup>91</sup>

This is not to say that a plaintiff in a given case might not have established a non-statutory ground for intervention in a contract. Such proof, however, is simply not required under the statutes.<sup>92</sup> Thus, there is a process of simplification and ease of proof in cutting away some of the accumulated technical baggage of the old law (limitations that are partly the result of history, caution, or accident). Further, I would suggest that the broad statutory grounds for relief allow the courts to reconnect to the very simple and easily understood ideas underlying relief under the general law: that parties should not be misled when entering contracts, that promises should not be broken and that expectations should not be falsified. Hence, courts look to the same sort of conduct that previously activated the general law doctrines (since the focus is still on procedural fairness) but the concepts are freed from the shackles of those doctrines and their technical limits. The general concepts do operate at large, but guidance is provided by the previously restrained operation of those (or similar) concepts within common law and equity.

This, of course, is all simplification and generalisation. Not all cases can be so easily explained.<sup>93</sup> But it does suggest that the general concepts are still linked to, though not tied down by, specific doctrines. It goes almost without saying, however, that there is inevitably some cost in terms of uncertainty of outcomes as a result of such flexible legal regimes.

<sup>90</sup> The notion of misleading conduct asks simply whether the plaintiff was led into error. Whether the representation was one of fact, law or opinion, and whether it pertained to the present or future, become largely irrelevant. Further, the wide remedial discretion conferred by s 87 of the *TPA* means that questions of negligence, innocence or fraud become irrelevant in accessing the full range of remedies.

<sup>91</sup> Even cases that have departed from accepted doctrine are not necessarily radical. See, eg, *Beneficial Finance Corporation Ltd v Karavas* (1991) 23 NSWLR 256, where third party mortgages were set aside, the mortgages having been provided by family members and associates of directors of a company who were misled as to the risks involved by the directors. This case seems to have anticipated (more expansively) the High Court's decision in *Garcia* (1998) 194 CLR 395, which was itself a reformulation of Dixon J's views in *Yerkey v Jones* (1939) 63 CLR 649.

<sup>92</sup> See, eg, *Toscano v Holland Securities Pty Ltd* [1985] 1 NSWLR 145, where the possibility of unconscionable conduct was not considered further following the grant of relief under the *CRA*. A recent example is *St George Bank Ltd v Trimarchi* [2004] NSWCA 120 (Unreported, Mason P, Sheller JA and Cripps AJA, 20 April 2004). In that case, raising facts similar to *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, one issue was whether the (appellant) bank had notice of the unfair tactics used by the son of the respondent mortgagors. Also in issue was whether the bank had notice of the absence of any genuine independent advice having been received by the mortgagors. Although Mason P appeared to conclude that it could not be found that the bank did not have such notice, he also added that s 9 of the *CRA* does not require notice of the circumstances rendering the contract unfair on the part of the appellant. However, the absence of such notice is not an irrelevant consideration: *St George Bank Ltd v Trimarchi* [2004] NSWCA 120 (Unreported, Mason P, Sheller JA and Cripps AJA, 20 April 2004) [45].

<sup>93</sup> See, eg, *Nguyen v Taylor* (1992) 27 NSWLR 48; *Elders Rural Finance Ltd v Smith* (1996) 41 NSWLR 296.

F *General Concepts Operating as the Central or Sole Determinant of Parties' Rights and Obligations*

Now we come to what is perhaps the most significant use of general concepts. This is where such concepts, without the use of the 'filter' of specific doctrines or further refinement or definition, operate as the central or sole determinants of parties' legal rights and obligations. My suggested example of such a general concept is no doubt controversial, for I will be considering the concept of reasonable care, as a touchstone of liability in negligence. I should add that reasonableness as used in other contexts does not necessarily have the same determinative function.<sup>94</sup> In my view, the question of whether a defendant took reasonable care, or behaved as a reasonable person would behave, is difficult to further refine or reformulate. Any attempts to do so prove largely circular or fruitless, ultimately coming back to the notion of reasonableness. If this is correct, then the ultimate determination of negligence liability rests on the concept of reasonableness alone, whatever it may mean. Consequently, it is profoundly important to consider how content is given to that concept, since we are at the very sharp end of the use of general concepts as determinants of legal rights.

Writers with greater knowledge of tort law than myself, such as Professor Stapleton, have suggested that negligence law, like that of good faith, involves the 'episodic formulation' of general concepts. She notes that '[t]he pattern of legal entitlements we actually see is always a combination of general principle and restraining rules of incidence.'<sup>95</sup> In Stapleton's view, the limitations placed subsequently on the *Donoghue v Stevenson* notion of reasonableness provides an example of general principles only giving rise to entitlements in selected situations.

Certainly, in one sense, Stapleton is correct. The notion of reasonableness as the basis for the law of negligence has not been given unconstrained effect.<sup>96</sup> For example, the law has generally been restrained in imposing liability for omissions, or in imposing a duty to rescue. There may not be a duty of care in these contexts (even if the defendant was careless). Similarly, even where unreasonable conduct causes extensive harm, the notion of remoteness of damage may preclude any liability. But my concern is with the more mundane operation of reasonableness, at the coalface so to speak, in relation to the factual question of whether a defendant took reasonable care. For, despite Stapleton's correct observation, duty, causation and remoteness are rarely relevant limiting devices in the vast majority of what are standard accident cases. As will be seen below, the determination of liability in such cases always comes back to a question of

<sup>94</sup> An example is the use of 'reasonableness' in qualifying the notions of 'reasonable assumptions' and 'reasonable reliance', as elements of estoppel. Clearly, the focus of the estoppel doctrine is on parties' assumptions and subsequent reliant conduct. These ideas are unambiguous enough. The 'reasonableness' component has more of a secondary function, such as to filter out or exclude extreme and unusual circumstances and parties who, on objective standards, have behaved in risky and unusual ways and yet may be seeking to shift the burden of those risks onto others.

<sup>95</sup> Stapleton, above n 3, 6.

<sup>96</sup> *Ibid* 28–9.

whether ‘reasonable’ care was taken. Attempts at further refinement break down. We ultimately return to ‘reasonableness’ as the central, even sole, criterion for liability.

To support this conclusion, let us look at attempts to further refine notions of reasonable care, as conduct consistent with that of a reasonable person in the circumstances. Mason J’s classic statement of the law in *Wyong Shire Council v Shirt* notes that a determination of whether a reasonable person ought to have taken a particular precaution against a foreseeable risk requires ‘a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.’<sup>97</sup> This is generally described as the calculus of negligence and for torts students is often formulated in more shorthand form as the ‘gravity of harm’, the ‘probability’ (of risk), the ‘burden’ or ‘practicability’ (of precautions), and the social justifiability or utility (of conduct). Indeed, the first three considerations have sometimes been described in terms of an algebraic formula: liability depending on whether Burden is less than the Probability multiplied by Gravity ( $B < P \times G$ ).<sup>98</sup>

Torts teachers will be familiar with the situation where students are given a simple fact scenario (perhaps from a case) with which they are unfamiliar in order to analyse whether the defendant was negligent. A useful illustration is *Jaenke v Hinton*,<sup>99</sup> in which the issue was whether an occupier of land was negligent in leaving a garden hose on the front lawn. The milk delivery lady, who regularly hurried across the lawn in the pre-dawn gloom, tripped over the hose and sustained an injury. Was the occupier negligent? One can usually observe a range of responses from students, but there are two extremes. There are those students who merely assert that the occupier was, or was not, negligent because ‘she should not have done that’, or because ‘the occupier did nothing wrong’. At the other extreme there will be the hardworking, diligent students who will seek to apply all that they have read. They will consider the four factors in *Wyong* to determine negligence, discussing each in considerable detail (including ones that may not have much relevance). Ironically, there is no guarantee that the second type of students are any more likely to be ‘correct’ in their answer (in that their answer approximates that reached by the courts in similar/same fact situations) than those who merely assert their conclusion.

Why is this? I would suggest it is because the *Wyong* formulation provides guidance only. The calculus of negligence variables cannot necessarily be weighed up against each other. It is like comparing apples and oranges. Even if they were measurable in the same units or dollars, it would be impossible to accurately provide values for these variables.

<sup>97</sup> (1980) 146 CLR 40, 47–8 (*‘Wyong’*). Cf recent legislative reformulations in each state’s civil liability Act: see, eg, *Civil Liability Act 2002* (NSW) s 5B.

<sup>98</sup> Cf *United States v Carroll Towing Co*, 159 F 2d 169, 173 (2<sup>nd</sup> Cir, 1947) (Learned Hand J).

<sup>99</sup> [1995] Aust Torts Reports ¶81-368.

So how then is content given to the concept of reasonable care? How is a decision made that a party did not take reasonable care? Ultimately, I suggest, we come back to nothing other than the general concept of reasonableness itself. The calculus of negligence may allow us to better articulate our conclusions, but our conclusions are not drawn from those factors. In this context, the general concept permits, indeed requires, an appeal to common sense, social, personal (and judicial) experience, social norms and intuition.<sup>100</sup> Consideration of the *Wyong* reformulation does not alter the intuitive basis for decision making here.<sup>101</sup> Indeed, without any disrespect, it might be suggested that the occupier in *Jaenke v Hinton* was held not to be negligent in part because the Queensland Court of Appeal judges themselves leave their garden hoses lying about.

Undeniably, more concrete political and moral values may also intrude into judgements about the reasonableness of conduct. Consider the High Court's decision in *Derrick v Cheung*.<sup>102</sup> In that case, the High Court allowed an appeal by a driver against a finding of negligence where a child had emerged from between two parked cars and ran onto the road. The appellant driver had been driving within the speed limit and there was no evidence of any forewarning of the child's actions; there was thus no basis on which a finding of negligence could be made. One gets the impression that the Court, in reaching that conclusion, was as much reaffirming the fault basis of negligence generally as making a decision on the facts of the case. Encroachments upon these fault-based theoretical foundations of negligence are, I suspect, in part a product of decisions by judges who are well aware of the theory, but also recognise the limits and flaws of our torts system and the lack of any alternative accident compensation

<sup>100</sup> On the role of some of these considerations in judicial decision-making, see Justice Michael Kirby, 'Judging: Reflections on the Moment of Decision' (1998) 18 *Australian Bar Review* 4.

<sup>101</sup> Further support for this conclusion can be derived from both the sheer number of appeals to the High Court and state courts of appeal on questions of breach of standard of care, as well as the often sharp divisions (and narrow majorities) for the ultimate determinations. Consider, eg, the 3:2 decision in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460. Similarly, in *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317, the High Court by a 5:2 majority overturned a finding of breach of duty of care by both the trial judge and a 2:1 majority of the Full Court of the Federal Court. As Kirby J acknowledged, in 'what was substantially a contest of fact, this Court [was] invited to substitute its own factual evaluation for that reached by the primary judge' and that once again in the High Court 'a different view [was] taken about the proof of the negligence of the defendant': at 342 (citations omitted). So many of the cases on appeal to the High Court are from the New South Wales Court of Appeal that Harold Luntz has remarked that 'one comes away with the impression that a Court dominated by justices from New South Wales is concerned to put decisions of the New South Wales Court of Appeal right, often on points of interest to that jurisdiction only': Harold Luntz, 'Round-Up of Cases in the High Court of Australia in 2003' (2004) 12 *Torts Law Journal* 1, 18. Regrettably, some of the appellate decisions do not just reconsider issues as to the inferences to be drawn from primary questions of fact (such as whether the standard of reasonable care was or was not breached) but as to the findings of primary fact themselves. See, eg, the question of fact at the centre of the lengthy judicial proceedings in *Fox v Percy* (2003) 214 CLR 118. The process of evaluating breaches of duties of care becomes all the more intuitive and impressionistic when courts seek to compare different breaches, such as when considering the contributory negligence of a plaintiff in order to apportion liability between the plaintiff and defendant.

<sup>102</sup> (2001) 181 ALR 301.

scheme.<sup>103</sup> Such judges, perhaps as a matter of emotional sympathy for plaintiffs or (unstated) rebellion against the existing system, are willing to find fault where none, morally, may exist.

If I am correct in describing reasonableness as having perhaps the most significant determinative role of all the general concepts under consideration, it is ironic that it is one that has not been subject to widespread academic attacks about fears of uncertainty, discretion and idiosyncratic decision-making. Yet, even leaving aside political and moral values, differing intuitive responses and perceptions of common sense will give rise to different conclusions about the reasonableness of a defendant's conduct, including in relation to mundane issues such as garden hoses. Kirby J's observations about 'conscience', quoted above, again come to mind.<sup>104</sup>

Professor Birks has stated that:

There is no future for the gut reaction, nor for any form of mystical 'experience' which inarticulately claims the right to trump good intellectual order. ... So, even if there were a historical warrant for intuitive decision-making in the name of conscience, there would be no room for it in the modern world.<sup>105</sup>

He went on to add that some lawyers might 'think that conscience, alias intuition, alias gut reaction, can suffice. Every argument [however] which rests on words of unanalysed approbation and disapprobation is in some degree a rejection of the rule of law.'<sup>106</sup>

But is this necessarily always the case? Are common sense and intuition the hated enemies of justice and of rational law? Is not 'reasonable care' itself an appeal to common sense and intuition? Is not 'justice' such a complex, deeply-rooted human sentiment that we can only ever imperfectly give effect to it through legal rules and principles? Should we accept that fundamental contradiction, the paradox that to achieve justice we may occasionally have to recognise the limits of rationality; not abandon attempts at explanation altogether, but accept that explanations may be *imperfect* ways of articulating our reasons for decisions?

It is curious that Birks was unrestrained in his attacks on 'conscience', but did not similarly criticise the use of 'reasonableness'; a concept that, it can be argued, plays a considerably greater determinative role in the law. Perhaps this is because the former concept more openly acknowledges some role for intuition.

<sup>103</sup> An alternative is a no-fault accident compensation scheme, as in New Zealand: see *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ).

<sup>104</sup> *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 201 ALR 359, 381.

<sup>105</sup> Birks, 'Equity, Conscience, and Unjust Enrichment', above n 26, 21.

<sup>106</sup> *Ibid* 22. Cf Kirby, above n 100, who acknowledges the role of intuition in legal decision-making. Does this make his Honour a dangerous threat to our very legal order?

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*Giving Content to General Concepts*

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#### IV CONCLUSION

I conclude with this observation: we have seen the pervasive, varied roles that general concepts play in our law. They are of fundamental importance to legal reasoning and decision-making in the common law and under statute. It is impossible to avoid the use of general concepts, even if we so wished. The ongoing use of general concepts in statutes entrusts judges with wide, discretionary powers; this requires that, at the very least, we give those general concepts some meaning rather than criticise their use. The absence of definitional certainty does not prevent lawyers from employing a wide range of techniques to give meaning and content to those general concepts. Attacks singling out ‘unconscionability’ for special criticism look rather odd when put in this context.