

RENEGOTIATION IN THE REAL WORLD: A STUDY OF AUSTRALIAN SMALL TO MEDIUM-SIZED ENTERPRISES, CONTRACT VARIATION, AND THE LAW

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The small to medium-sized enterprise ('SME') sector is the largest and most productive in Australia. Like all established market-based economies, ours is characterised by the use of contracts as a mechanism for exchange. Contracts often require variation in response to variables such as under-pricing, resource availability, changes in scope, and rising product costs, so SMEs (and larger businesses) will frequently encounter the process of renegotiation. The rules applicable to contract renegotiation seldom receive attention in academic writing. Moreover, the attitudes toward, understandings of, and experiences with the doctrine of renegotiation among Australian SMEs are scarcely researched. This article expounds the law of renegotiation before reporting on selected findings from a largescale empirical study designed to fill these knowledge gaps, among others, in the literature. The results provide invaluable insight into how this critically important sector perceives and deals with contract law and the doctrine of renegotiation, and underscores potential areas for improvement.

I INTRODUCTION

Of the 2.4 million actively trading businesses in Australia, 99.8 per cent are small to medium-sized enterprises ('SMEs').¹ This sector contributes approximately 55 per cent to Australia's GDP,² underscoring its importance to our national economy, particularly in this difficult fiscal climate. Like all businesses, SMEs operate within the complex legal framework that governs economic activity throughout the country. Commerce in Australia, as in most established market-

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¹ Australian Bureau of Statistics, *Counts of Australian Businesses, including Entries and Exits, July 2017 to June 2021* (Catalogue No 8165.0, 24 August 2021) ('ABS'); Australian Small Business and Family Enterprise Ombudsman, *Small Business Counts* (December 2020) 7 ('ASBFEO').

² Information Resources Management Association, *Start-Ups and SMEs: Concepts, Methodologies, Tools, and Applications* (IGI Global, 2020) 69–70; ASBFEO (n 1) 8.

based economies, is driven by contractual exchange; the contract is the chief mechanism through which bargains are concluded and risks are allocated.³ Given the popularity of contracts in this jurisdiction and the size and significance of the SME sector, it is quite astonishing, as Janet Steverson observes, that very little has been written concerning the relevance of contracts and contract law to SMEs.⁴

The empirical study behind this article sought to comprehensively examine the understandings of, and experiences with, contracts and the law within the Australian SME sector.⁵ It was primarily designed to assess whether the seminal findings from Stewart Macaulay's famous 1963 analysis of Wisconsin businesses held true in the Australian context.⁶ Macaulay's study focussed on whether businesspeople used contract law and, if so, when and how they did so. His paper opened with a simple but vexing enquiry: 'What good is contract law?'⁷ His findings were both intriguing and unexpected. It was found that parties conducting business generally did not structure or administer their agreements according to the law of contract and seldom engaged its processes when disputes arose. Instead, business relationships were found to mostly operate on informal norms and customs or non-legal rules.⁸ Lawyers were typically not invited to resolve disagreements between commercial parties. Indeed, the legal process of the state was essentially seen by the majority of businesspeople interviewed as counterproductive.

The results of the present study were most intriguing.⁹ Those SMEs surveyed appeared to regard the contract as more than a mere manifestation of their agreement. Instead, it was seen as the basis for their broader commercial

³ Philip Clarke and Julie Clarke, *Contract Law: Commentaries, Cases and Perspectives* (Oxford University Press, 3rd ed, 2016) 4–5; PS Atiyah and Stephen A Smith, *Atiyah's Introduction to the Law of Contract* (Oxford University Press, 6th ed, 2006) 3–5; Janet W Steverson, 'I Mean What I Say, I Think: The Danger to Small Businesses of Entering into Legally Enforceable Agreements that May Not Reflect Their Intentions' (2003) 7(2) *Journal of Small and Emerging Business Law* 283, 287–9.

⁴ Steverson (n 3) 283–4.

⁵ The study covered a wide range of topics including SME experiences with contract law, contracting practices, attaining legal advice and information, renegotiation, contractual breaches, dispute resolution, engagement with lawyers, and perceptions of the legal system.

⁶ Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55.

⁷ *Ibid* 55.

⁸ A swathe of subsequent studies has delivered similar results. See, eg, Hugh Beale and Tony Dugdale, 'Contracts Between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2(1) *British Journal of Law and Society* 45; James J White, 'Contract Law in Modern Commercial Transactions, an Artifact of Twentieth Century Business Life?' (1982) 22(1) *Washburn Law Journal* 1; Thomas M Palay, 'Comparative Institutional Economics: The Governance of Rail Freight Contracting' (1984) 13(2) *Journal of Legal Studies* 265; Lisa Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21(1) *Journal of Legal Studies* 115; Lisa Bernstein, 'Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms and Institutions' (2001) 99(7) *Michigan Law Review* 1724.

⁹ The full results are detailed in Mark Giancaspro, 'Testing Stewart Macaulay's Theory Down Under: A Study of Australian Small to Medium-Sized Enterprises' Understandings of, and Experiences with, Contract Law' in John Eldridge and Timothy Pilkington (eds) *Australian Contract Law in the 21st Century* (Federation Press, 2021) ch 13 ('Testing'). The results pertaining to SME perceptions of contract law and the broader legal system will be the subject of the author's forthcoming work.

relationship, with attendant expectations of honesty and fair dealing, in conformity with Macaulay's findings.¹⁰ Most respondents had never experienced 'foul play' from their counterparties and, as will be discussed in greater depth shortly, some even tended to unilaterally vary an agreement for the benefit of their counterparty (and to their own detriment) to guarantee performance and strengthen commercial relationships. The SMEs surveyed also revealed a preference to consult the internet before a lawyer when seeking out information about contract law. The vast difference in cost was primarily what drove this decision.

An interesting point of difference between the present study and Macaulay's is in the preference for formality when contracting. Unlike Macaulay's sample, the overwhelming majority of SMEs surveyed in the present study regularly utilised formal contracts in their business dealings and preferred to do so. Traditional written agreements and email were the most popular forms. Where the studies did overlap was in the respondents' reported motivations for choosing between legal and non-legal measures. The samples in both studies primarily tended to contract informally whenever they were in a relationship of trust with the other party, to save time and money, or to avoid lawyers. Formality was generally reserved for higher-value transactions of greater significance. One outcome of note was that the SMEs surveyed typically did not simply overlook contractual breaches but would often attempt to resolve any disputes informally through negotiation or via the imposition of non-legal sanctions (such as embargoes on future dealings, and the spread of negative gossip). Those SMEs that did turn a blind eye mainly did so in order to preserve the working relationship, or because legal action was too expensive. Less than a fifth of SMEs went as far as initiating legal proceedings.

This article focusses specifically upon the present study's findings with respect to SME understandings of, and experiences with, contractual renegotiation.¹¹ Despite its fundamental importance to contract law, the doctrine of renegotiation receives very little attention as an individual phenomenon in legal textbooks and academic literature.¹² The relevant rules or principles are scarcely discussed. Additionally, there is a dearth of research into how and why businesses, particularly SMEs, renegotiate their agreements. This is concerning given the scale of the sector and the fact that an unsuccessful renegotiation

¹⁰ Macaulay (n 6) 61, 64.

¹¹ The study's other findings with respect to Australian SME understandings of, and experiences with, contract law generally are detailed in Giancaspro, 'Testing' (n 9). The findings concerning SME attitudes towards the legal system will be the subject of the author's forthcoming works.

¹² There are some notable exceptions: see, eg, J W Carter, *Carter's Guide to Australian Contract Law* (LexisNexis, 3rd ed, 2015) ch 3; Andrew Stewart, Warren Swain and Karen Fairweather, *Contract Law: Principles and Context* (Cambridge University Press, 2019) ch 13; J W Carter, 'The Renegotiation of Contracts' (1998) 13(3) *Journal of Contract Law* 185; Mark Giancaspro, 'The Rules for Contractual Renegotiation: A Call for Change' (2014) 37(2) *University of Western Australia Law Review* 1 ('The Rules for Contractual Renegotiation').

invariably leads to disputes, which, in turn, fosters litigation. Court battles are costly and time-consuming, and SMEs generally lack the time and resources necessary to resolve disputes through formal channels.¹³ Moreover, disputation inhibits economic efficiency, as the allocation of resources between traders is stalled.¹⁴ Understanding the renegotiation process in greater detail therefore equips us with the knowledge to optimise the legal system and assist SMEs with the contract modification process to prevent disagreements brewing.

Before the present study and its results regarding contractual renegotiation are discussed, some key aspects of the largely unspoken doctrine of renegotiation are canvassed.

II THE DOCTRINE OF RENEGOTIATION

Renegotiation is a concept central to the law of contract. Put simply, the term describes the process of amending the terms of an existing contract, typically to make them more favourable to the party seeking the variation(s). While it is conceivable that parties might seek to renegotiate without any pressing need to do so, it will more often be the case that the obligations of the party seeking the variation have in time become more difficult or near impossible to fulfil as originally envisaged. Ideally, a renegotiation would occur prior to breach. However, it might also be compelled in response to an actual or alleged breach by the party requesting the variation. In other cases, it may be more practical simply to agree to do away with the original contract and start again. Accordingly, as John Carter explains, renegotiations can generally be said to occur in three contexts:

- (1) before performance is complete, the parties agree to vary the contract but neither party is in breach of contract;
- (2) after breach (or an allegation of breach) of the contract by one of the parties, they agree to deal with that specific issue; and
- (3) an agreement to cancel (rescind or terminate) the contract.¹⁵

Explicating the precise legal rules of renegotiation is difficult given that the courts have tended, rather unhelpfully, to use it as an umbrella term encompassing other doctrines such as waiver and estoppel.¹⁶ This tendency undoubtedly stems from the fact those doctrines also seemingly result in the alteration of the obligations

¹³ Australian Small Business and Family Enterprise Ombudsman, *Access to Justice: Where Do Small Businesses Go?* (November 2018) 9–10.

¹⁴ '[T]he simple activity of exchange of goods and services, whether on organised exchanges or outside a market setting, is the basic first step in any production or allocation of resources': Patrick Bolton and Mathias Dewatripont, *Contract Theory* (MIT Press, 2005) 1.

¹⁵ Carter, *Carter's Guide to Australian Contract Law* (n 12) 58.

¹⁶ Sean Wilken and Karim Ghaly, *The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd ed, 2012) 12.

assumed under a contract.¹⁷ For example, the waiver doctrine permits a party to voluntarily or intentionally abandon or relinquish a 'known right, claim or privilege'.¹⁸ A common situation in this regard is where a contingent condition in a contract is waived by the party in whose favour the condition operates. This then abrogates that party's right to insist upon the other party's performance of the condition.¹⁹ Of course, this only modifies how the contract is performed; it does not change the terms of the contract itself.²⁰

Similarly, an estoppel could arise where a contracting party made a representation to their counterpart that induced in the latter an assumption as to how a contractual right or obligation would be enforced. If the counterpart relied on the representation to their detriment, such that it would be unconscionable for the representor to renege on the representation, estoppel can enforce the representation and indirectly effect a variation to the contract that fulfils the counterpart's expectations.²¹

Unlike waiver or estoppel, an orthodox variation to a contract requires consideration.²² So much is clear from leading authorities on point. The High Court in *Commissioner of Taxation (Cth) v Sara Lee Household & Body Care (Australia) Pty Ltd* stated: '[w]hen the parties to an existing contract enter into a further contract by which they vary the original contract, then, by hypothesis, they have made two contracts.'²³ Accordingly, as later authorities have confirmed, both the existing contract and the contract to vary are subject to the ordinary rules governing contract formation, including the requirement that the parties exchange legally sufficient consideration.²⁴

¹⁷ But see *Inness v Waterson* [2006] QCA 155, where the Queensland Court of Appeal observed that an extension of time for performance does not amount to a variation of contract. Instead, it was suggested that such an act might amount to a waiver or give rise to a promissory estoppel claim. The logic behind this suggestion is that an extension of time merely limits the exercise of the consequential power to terminate the contract for breach of an essential term, as opposed to postponing the time for completion generally: *Howe v Smith* (1884) 27 Ch D 89, 103–4; *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41, 55.

¹⁸ *Pacific Brands Sports & Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395, 421 [113]; *Banning v Wright* [1972] 1 WLR 972, 979. In *Commonwealth v Verwayen* (1990) 170 CLR 394, 473, Toohey J clarified the need for 'intention' in this context: '[t]hat is not to say that there must be an intention to bring about the consequences of waiver; rather, the conduct from which waiver may be inferred, must be deliberate'.

¹⁹ *Gange v Sullivan* (1966) 116 CLR 418; *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537.

²⁰ *Enrico Furst & Co v WE Fischer Ltd* [1960] 2 Lloyd's Rep 340, 349; *Flacker Shipping Ltd v Glencore Grain Ltd* [2002] EWCA Civ 1068, [61]; *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221, 233–4, 243–4; *Badat v DTZ Australia (WA) Pty Ltd* [2008] WASCA 83, [55]; *Watson v Healy Lands Ltd* [1965] NZLR 511, 513. Cf *Watkins & Son v Carrig* 91 NH 459 (1941).

²¹ *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Collier v P & M J Wright (Holdings) Ltd* [2007] EWCA Civ 1329.

²² An exception to this rule is where the contract permits variation. This will be discussed later in the article.

²³ (2000) 201 CLR 520, 533 [22].

²⁴ *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1, 63. See also *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 587; *Slipper v Berry Buddle*

It is this requirement that has caused considerable difficulties in the renegotiation context and inspired an enormous amount of literature. It is well-established that the promise to perform, or actual performance of, a legal duty owed under a pre-existing contract is not consideration.²⁵ The rationale is that it is illogical and contrary to the notion of reciprocal bargain to receive more in return for the same.²⁶ The 'existing legal duty rule', as it has come to be known, derives from the old case of *Stilk v Myrick*.²⁷ In that case, two sailors aboard a ship travelling from London to the Baltic deserted and so the captain, unable to obtain replacements during a stopover in Sweden, promised the nine remaining crew-members that he would divide the deserters' wages equally among them if they remained aboard. The remaining crew agreed but, when the ship arrived in port, the captain refused to pay. The plaintiff, one of the sailors, sued to recover his share. Lord Ellenborough held that the captain's promise of additional wages was not supported by consideration from the sailors as they had merely promised to perform their existing legal obligation (under their contracts of employment) to 'do all they could under the emergencies of the voyage' to ensure the ship returned safely.²⁸

The existing legal duty rule can clearly cause problems where, as in *Stilk v Myrick*, commercial parties are unaware of their legal rights and the applicable legal rules that govern their renegotiations. On one view, it can sanction and even encourage unscrupulous behaviour from parties who deceitfully promise more, knowing they may be shielded from liability.²⁹ There is no question such conduct runs contrary to popular sentiment, which favours the enforcement of fairly-made mutual promises. As Morris Cohen writes:

It is generally considered unfair that after A has given something of value or rendered B some service, B should fail to render anything in return. Even if what A did was by way of gift, B owes him gratitude and should express it in some appropriate way. And if, in addition, B has promised to pay A for the value or services received, the moral sense of the community condemns B's failure to do so as even more unfair. The

Wilkins Lawyers Pty Ltd [2015] NSWSC 810, [42]; *Cellarit Pty Ltd v Cawarra Holdings Pty Ltd* [2018] NSWCA 213, [232]; *Dunkirk Property Development Pty Ltd v Mosman & Co Pty Ltd* [2019] NSWSC 73, [82].

²⁵ *Wigan v Edwards* (1973) 1 ALR 497, 512 (High Court).

²⁶ As such, a variation that exclusively benefits one party but not the other, even where mutually agreed, lacks consideration: *Moratic Pty Ltd v Gordon* [2007] NSWSC 5 (discounted rent payable under a commercial lease). As will be explained shortly, however, the practical benefit principle may now make it easier to establish reciprocal benefits.

²⁷ (1809) 2 Camp 317; 170 ER 1168.

²⁸ *Ibid* 2 Camp 317, 319; 170 ER 1168, 1169. For later applications of the existing legal duty rule, see *Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 SR (NSW) 323; *Cook Islands Shipping Co Ltd v Colson Builders Ltd* [1975] 1 NZLR 422.

²⁹ Of course, other doctrines, such as promissory estoppel (where it could be shown that the promise was relied upon to the promisee's detriment and where it would be unreasonable for the promisor to renege in the circumstances) could aid the aggrieved promisee in such situations.

demand for justice behind the law is but an elaboration of such feelings of what is fair and unfair.³⁰

The rule also causes trouble by introducing an unnecessary procedural formality into the renegotiation process. The pace of modern commerce demands that parties be permitted to freely amend their agreements, particularly where they are in longer-term relationships (in which we can safely assume the impersonal ‘arm’s-length’ phase is over).³¹ Times have changed dramatically from when *Stilk v Myrick* was decided and shipmasters were routinely held to ransom in life-threatening situations on the high seas.³² There are now many established legal methods and doctrines — such as economic duress and promissory estoppel — which would serve to ensure that fairly made unilateral promises are kept and unfairly extorted promises are invalidated. Moreover, empirical studies show that commercial parties often adjust their agreements and make additional promises to one another on a whim and with little to no regard for the formalities of contract law.³³ The emphasis is on the efficient completion of the exchange, not the technical legal rules that inform the process.

Notwithstanding its criticisms, by emphasising the requirement for consideration at the renegotiation phase, the existing legal duty rule serves to highlight one of the chief roles of consideration: to signify the ‘seriousness’ of the transaction. That is, the doctrine recognises and enforces those obligations solemnly made and deserving of such legal treatment.³⁴ Lon Fuller famously described this as the ‘channelling function’ of consideration in that it signals an earnestly made promise, which anticipates legal consequences and also provides an external test of enforceability.³⁵ It might be said that formal abolition of the

³⁰ Morris R Cohen, ‘The Basis of Contract’ (1933) 46(4) *Harvard Law Review* 553, 580–1. See also where the author discusses the inherent despicability of a party not keeping their promise and the need for a ‘properly organized society’ to be intolerant of such behaviour: at 571. Similarly, Willis notes that there exists a ‘social interest in being able to rely upon [the] promise[s]’ of others: Hugh E Willis, ‘Rationale of the Law of Contracts’ (1936) 11(3) *Indiana Law Journal* 227, 230.

³¹ Cheng Han Tan, ‘Contract Modifications, Consideration and Moral Hazard’ (2005) 17(2) *Singapore Academy of Law Journal* 566, 578–9. See also Australian Government, ‘Improving Australia’s Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law’ (Discussion Paper, Attorney-General’s Department, 2012) 1, 1: ‘It is ... of the utmost importance that Australian contract law maximise the simplicity, efficiency and utility of market interactions for the benefit of all Australians’.

³² It was common during that era for seamen aboard ships ready for departure or only a short distance into their journey to refuse ‘to proceed with them without coming to new agreements for increasing their wages’: Preamble to the *Merchant Seamen Act 1729* 2 Geo 2, c 36. Reproduced in Sir William D Evans, *Collection of Statutes Connected with the General Administration of the Law* (W H Bond, 1836) vol 2, 77. See also *Harris v Watson* (1791) Peake 102; 170 ER 94, 94.

³³ Macaulay (n 6) 60–1.

³⁴ This is a point Patrick Atiyah has made in several of his seminal works. See, eg, P S Atiyah, *Essays on Contract* (Clarendon Press, 1986) ch 8. See also Stephen A Smith, *Atiyah’s Introduction to the Law of Contract* (Clarendon Press, 6th ed, 2005) 106–30.

³⁵ Lon L Fuller, ‘Consideration and Form’ (1941) 41(5) *Columbia Law Review* 799, 801. Fuller also noted that the consideration doctrine has two other functions: it is *evidentiary*, in that it serves as

existing legal duty rule would therefore downplay the consideration doctrine's significant and longstanding roles as yardstick of enforceability and gatekeeper against improvident transactions.

Although the existing legal duty rule is an established feature of Australian contract law,³⁶ its obvious impracticalities can be overcome in a number of ways, such as through the use of deeds or the offer of additional 'fresh' consideration.³⁷ In other cases, the courts have manufactured new exceptions to overcome the rule. Perhaps the best example is the practical benefit principle, derived from the English case of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* ('*Williams v Roffey*').³⁸ No discussion of the renegotiation doctrine would be complete without reference to this case and its profound effects upon the doctrine of consideration.

In *Williams v Roffey*, the defendants, building contractors, subcontracted the plaintiff to complete some carpentry work in a block of London flats they were hired to renovate for a housing association. Approximately two months into the subcontract, after being paid £16,200 of the £20,000 initially agreed, the plaintiff fell into financial difficulty — due primarily to his initial under-pricing and poor management — and was at risk of defaulting. To avoid triggering a penalty clause under their head contract (for delay), the defendants verbally agreed to pay the plaintiff an additional £10,300. After substantially completing work on eight more flats and receiving only one further payment of £1,500, the plaintiff ceased work and sued to recover the additional money promised.

Despite acknowledging that the existing legal duty rule was bedrock law and appeared to apply on the facts,³⁹ the Court of Appeal held that the plaintiff had provided consideration for his reiterated promise to complete the work in the form of the 'practical' or 'factual' benefits he conferred upon the defendants by doing so. Those benefits included the fact the defendants did not have to obtain substitute workers to complete the job and avoided liability under their head contract with the housing association.⁴⁰ In his leading judgment, Glidewell LJ expressed the now infamous practical benefit principle:

(i) [I]f A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an

evidence of the existence and content of a contractual agreement, and it is *cautionary*, in that it deters parties from acting maliciously in their contractual dealings by imposing a requirement of bargain: at 800.

³⁶ See, eg, *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 738; *HCK China Investments Ltd v Solar Honest Ltd* (1999) 165 ALR 680, 722 [234]; *Francis v South Sydney District Rugby League Football Club Ltd* [2002] FCA 1306, [241]; *Re Secretary, Dept of Social Services and Simonelli* [2015] AATA 901, [36]; *Young v Smith* (2015) 18 BPR 35,101, 35,109.

³⁷ A full discussion of the exceptions to the rule, or other instances where it will not apply, is beyond scope. For a thorough treatment, see Giancaspro, 'The Rules for Contractual Renegotiation' (n 12). [1991] 1 QB 1 ('*Williams v Roffey*').

³⁹ *Ibid* 16 (Glidewell LJ), 18–19 (Russell LJ), 23 (Purchas LJ).

⁴⁰ *Ibid* 10–11, 16 (Glidewell LJ), 19 (Russell LJ), 20, 22–3 (Purchas LJ).

additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.⁴¹

The decision in *Williams v Roffey* has inspired swathes of academic and judicial commentary, much of it criticising the practical benefit principle.⁴² Perhaps the most powerful criticism is that the principle dramatically eases the task of identifying consideration to support unilateral (one-sided) variations. Practical benefit could feasibly be detected in anything. As the Singapore Court of Appeal observed in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric*:

[T]he combined effect of *Williams v Roffey* ... (to the effect that a *factual*, as opposed to a legal, benefit or detriment is sufficient consideration) and the well-established proposition that consideration must be sufficient but need not be adequate ... is that ... it will, absent exceptional circumstances, be all too easy to locate some element of consideration between contracting parties.⁴³

Moreover, the principle appears entirely incompatible with the bargain theory of consideration, which posits that one party's act or forbearance (or promise thereof) must be given in exchange for that of the other party; it must represent 'the price for which the promise of the other is bought'.⁴⁴ Put another way, 'there must subsist, so to speak, the relation of a *quid pro quo*'; the consideration must be the subject of a reciprocal bargain between parties.⁴⁵ The factual benefits identified in *Williams v Roffey* were consequential and were never proffered in exchange for the defendants' promise of additional funds.⁴⁶

For all its controversies, the practical benefit principle was applied (with some refinement) by the Supreme Court of New South Wales in *Musumeci v*

⁴¹ Ibid 15–16.

⁴² See, eg, Brian Coote, 'Consideration and Benefit in Fact and in Law' (1990) 3(1) *Journal of Contract Law* 23; Mindy Chen-Wishart, 'Consideration: Practical Benefit and the Emperor's New Clothes' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (OUP, 1995) 123; *South Caribbean Trading Ltd v Trafigura Beheer BV* [2005] 1 Lloyd's Rep 128, 149 (Colman J); *Adam Opel GmbH v Mitras Automotive (UK) Ltd* [2007] EWHC 3205, [42] (Donaldson DJ).

⁴³ [2007] 1 SLR 853, 866. See also *Adam Opel GmbH v Mitras Automotive (UK) Ltd* [2007] EWHC 3205, [41] (DJ Donaldson): '*Williams v Roffey* would seem to permit any variation of a contract, even if the benefits and burdens of the variation move solely in one direction' (emphasis added); Dan Halyk, 'Consideration, Practical Benefits and Promissory Estoppel: Enforcement of Contract Modification Promises in Light of *Williams v Roffey Brothers*' (1991) 55 *Saskatchewan Law Review* 393, 398; Dilan Thampapillai, 'Practical Benefits and Promises to Pay Lesser Sums: Reconsidering the Relationship between the Rule in *Foakes v Beer* and the rule in *Williams v Roffey*' (2015) 34(2) *University of Queensland Law Journal* 301, 308.

⁴⁴ *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, 855.

⁴⁵ *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 456–7.

⁴⁶ This discrepancy is raised by Carter, Phang and Poole, who assert that the order of the practical benefit test — positioning B's consideration (the promise of something more) before A's (the benefits received by virtue of A's reiterated promise) — offends the longstanding common law principle that the consideration proffered by each party be the price for which the other is bought: J W Carter, Andrew Phang and Jill Poole, 'Reactions to *Williams v Roffey*' (1995) 8(3) *Journal of Contract Law* 248, 253–4.

Winadell Pty Ltd.⁴⁷ More recently, despite some doubts as to its place within the Australian law of contract,⁴⁸ the principle has generally been accepted by numerous appellate courts and routinely applied.⁴⁹ The most notable endorsement, albeit in obiter, was that of the High Court in *Director of Public Prosecutions (Vic) v Le*.⁵⁰ It would seem that practical benefit now forms part of the renegotiation doctrine in Australia and considerably mitigates the rigidity of the consideration requirement to support variations. As such, there is a risk that it gives rise to a 'moral hazard' problem by discouraging prudent pricing and performance.⁵¹

A close cousin of the practical benefit principle is the rule relating to part-payment of debts. This rule arises in the common commercial scenario of debtors negotiating with creditors to pay a smaller sum than what is due in full satisfaction of the larger amount owing. Simply stated, subject to some exceptions,⁵² a debtor's promise to pay part of a debt is not good consideration for the creditor's reciprocal promise to discharge the debt in full.⁵³ Whereas the Australian courts have reiterated the correctness of this rule,⁵⁴ the English courts have more recently suggested that it should be re-examined.⁵⁵ This rule has also been heavily criticised.⁵⁶ This criticism is entirely justified because, from a commercial perspective, the rule is absurd. Lord Blackburn said it best in *Foakes v Beer*, when his Lordship observed that all businesspeople recognise that prompt

⁴⁷ (1994) 34 NSWLR 723.

⁴⁸ See, eg, *Schwartz v Hadid* [2013] NSWCA 89; *Ailakis v Olivero* [No 2] (2014) 100 ACSR 524.

⁴⁹ See, eg, *Mitchell v Pacific Dawn Pty Ltd* [2003] QSC 86; *Tinyow v Lee* [2006] NSWCA 802; *Silver v Dome Resources NL* (2007) 62 ACSR 539; *Vella v Ayshan* [2008] NSWSC 84; *Wolfe v Permanent Custodians Ltd* [2012] VSC 275; *Cohen v iSoft Group Pty Ltd* [2012] FCA 1071; *Troutfarms Australia v Perpetual Nominees Ltd* [2013] VSC 228; *Slipper v Berry Buddle Wilkins Lawyers* [2015] NSWSC 810; *Hill v Forteng Pty Ltd* (2019) 138 ACSR 344. For international examples, see *Teat v Willcocks* [2014] 3 NZLR 129; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553; *Northwest Developments Ltd v Xue* [2019] NZHC 1042; *Gloria Jean's Coffees International Pty Ltd v Daboko Ltd* [2020] 2 NZLR 488. Some international courts, however, have rejected the practical benefit principle. See, eg, *NAV Canada v Greater Fredericton Airport Authority Inc* (2008) 290 DLR (4th) 405; *Rosas v Toca* [2018] BCCA 191.

⁵⁰ (2007) 232 CLR 562, 576–7 [43] (Gummow and Hayne JJ). Referring to this comment, the Full Court of the Federal Court of Australia in *Hill v Forteng Pty Ltd* (2019) 138 ACSR 344, stated: '[t]heir Honour's pithy summary is a useful statement of the general law, if not binding authority in its own right. It indicates that *Musumeci* has some authoritative weight in assessing the presence or absence of consideration for general law purposes': at 349 [17].

⁵¹ Han Tan (n 31) 583; Halyk (n 43) 404.

⁵² For a useful summary of some of the key exceptions and relevant authorities, see Mark Giancaspro and Colette Langos, *Contract Law: Principles and Practice* (LexisNexis, 2022) 57.

⁵³ *Pinnel's Case* (1602) 5 Co Rep 117a; 77 ER 237; *Foakes v Beer* (1884) 9 App Cas 605.

⁵⁴ See, eg, *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 739; *Pioneer Credit Acquisition Services Pty Ltd v Hayes* [2017] FCA 124, [26]; *Dunkirk Property Development Pty Ltd v Mosman and Co Pty Ltd* [2019] NSWSC 73, [80].

⁵⁵ See, eg, *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] 2 WLR 1603.

⁵⁶ See, eg, *Couldery v Bartrum* (1881) 19 Ch D 394, 399; Thampapillai (n 43) 311: '[t]he existence of so many well defined exceptions to the rule should be sufficient to suggest that the rule itself requires a rethink'; Merton L Ferson, 'The Rule in *Foakes v Beer*' (1921) 31(1) *Yale Law Journal* 15, 15: '[t]his doctrine is not only patently absurd but is inconvenient in commercial dealings, and, accordingly, distasteful to the courts'.

payment of a portion of a debt owed to them may be more beneficial than to insist on their rights and enforce payment of the whole.⁵⁷ This is particularly so where the debtor's credit is doubtful and when enforcement costs are factored into the equation. For SMEs, for whom cashflow is especially critical, the priority will often be to ensure they recover something rather than (potentially) nothing.

In spite of its inadequacies, there are many exceptions to the part-payment of debt rule. Where debts cannot be repaid in full and the debtor seeks to renegotiate by offering a lower sum in full settlement, the simplest ways to ensure the part-payment agreement is enforceable are to: (1) capture it in a deed; (2) offer something token in addition to the money owed; or (3) conclude the settlement agreement prior to the due date for repayment of the debt.⁵⁸ Of course, as John Cartwright has observed, when numerous exceptions to a rule are developed, we must begin to reconsider the validity of the rule itself.⁵⁹

Another key question in the renegotiation context is whether parties have actually *replaced* — rather than *modified* — their agreement when a modification has been attempted. The outcome from a legal perspective will sometimes be unclear, and a court's determination may be contrary to what the parties themselves believed to have occurred. This objective perspective of renegotiation and contract law more generally would undoubtedly be met with confusion and perhaps disdain from commercial parties, who will no doubt believe forcefully in their subjective views of what they intended. Indeed, in some cases, the courts have bound parties to an interpretation that both have jointly disputed.⁶⁰ The outcome could also have considerable commercial consequences, such as in *Concut Pty Ltd v Worrell*, where a written employment contract alleged by the plaintiff to supersede the previous oral agreement between the parties was instead found to merely supplement and vary it.⁶¹ The result was that Concut's termination of the plaintiff's employment for misconduct occurring prior to entry into the written contract was justified as it preserved both parties' rights and merely formalised the existing employment relationship.

Whether a contract has been varied or replaced, either expressly or by implication, is determined through an analysis of the intentions of the parties as disclosed by the later agreement.⁶² Much may turn upon the time, place or form of the renegotiated contract.⁶³ According to *Varga v Karam*, there are essentially

⁵⁷ *Foakes v Beer* (n 53) 622.

⁵⁸ *Pinnel's Case* (n 53) 237–8.

⁵⁹ John Cartwright, 'The English Law of Contract: Time for Review?' (2009) 17(2) *European Review of Private Law* 155, 175.

⁶⁰ See, eg, *Muriti v Prendergast* [2005] NSWSC 281. Speaking in the context of interpretation of contract terms, White J observed that the parties could not 'tie the court's hands' by agreeing as to their common intentions and framing their submissions on this basis: at [58].

⁶¹ (2000) 176 ALR 693.

⁶² *Morris v Baron & Co* [1918] AC 1; *British & Benningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48; *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93.

⁶³ *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520, 533 [22].

two stages to the inquiry.⁶⁴ First, it is necessary to determine whether there is an express agreement to rescind and replace the original contract. If such an agreement is lacking, it is then necessary to determine whether it can be inferred that the parties intended to replace the original contract. This is a question of fact answered by comparing both contracts and assessing the significance (if any) of the disparities between them in substance rather than form.⁶⁵ Factors such as the language used in each contract, and the surrounding circumstances in which each was made, will be crucial. The most telling factor, however, is the extent to which the contracts deal with the same subject matter in different and inconsistent ways.⁶⁶ In practice, it will seldom matter whether a renegotiation varies or replaces a contract, as it will not substantially affect its operation or become the subject of dispute.

What is clear is that circumstances often change and necessitate modification to the terms as originally agreed. Moreover, as Stewart, Swain and Fairweather explain, many commercial contracts are not discrete one-off transactions, but rather longer-term arrangements characterised by a relationship of trust and cooperation between the parties.⁶⁷ For this reason, many commercial contracts contain clauses that anticipate the future need for change and permit one or both of the parties to vary the terms.⁶⁸ Such clauses may provide a *mechanism* for variation (such as a writing requirement) or define the *type* of variation that may occur (such as a provision permitting the parties to initiate renegotiation with respect to one or more features of the contract after a specified date).

These clauses are conceptually problematic, are not always guaranteed to successfully facilitate renegotiations, and will not always be routinely enforced. Moreover, as the case law readily demonstrates, an 'agreement' to vary the terms of a contract may be *inferred* from the conduct of the parties, as opposed to being unequivocally expressed. In *Commonwealth v Crothall Hospital Services (Aust) Ltd*,⁶⁹ for example, the Commonwealth engaged Crothall to clean buildings occupied by the Department of Defence in Canberra. The contract contemplated variations in

⁶⁴ [2018] QDC 242 [22]–[29], affd *Karam v Varga* [2019] QCA 82.

⁶⁵ *Varga v Karam* [2018] QDC 242 [23].

⁶⁶ *Balanced Securities Ltd v Dumayne Property Group Pty Ltd* (2017) 53 VR 14, 32 [78].

⁶⁷ Stewart, Swain and Fairweather (n 12) 250. Ian Macneil's relational contract theory sees contracts as existing on a spectrum with discrete transactions at one end and relational contracts at the other. Unlike discrete transactions, which are often simultaneous and concluded without any kind of meaningful relationship forming between the parties, relational contracts operate within a normative framework in which both parties perform their obligations and develop their relationship over time and by reference to informal norms and implicit understandings. See Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law' (1978) 72(6) *Northwestern University Law Review* 854.

⁶⁸ A unilateral variation not otherwise permitted by the contract may amount to a repudiation: *Gibson Motor Sport Merchandise Pty Ltd v Robert James Forbes* [2005] FCA 749, [226], [248]; *Re Hadrian Fraval Nominees Pty Ltd and Federal Commissioner of Taxation* (2013) 94 AT 102, 135 [134]. The parties must agree to the variation where no discretion to vary exists: *Fairlie v Christie* (1817) 4 Taunt 416, 420; 129 ER 166, 168.

⁶⁹ (1981) 36 ALR 567.

the contract price due to variances in wages paid and areas cleaned. Over several years, Crothall submitted claims for payment calculated at a higher rate, doing so without following the variation procedure stipulated in the contract. The Commonwealth routinely made the payments claimed before terminating the contract and seeking to recover what it claimed were ‘overpayments’, which were wrongly calculated without reference to the mechanism provided in the contract. Notwithstanding that the contract provided a means for calculating the payments due, the Commonwealth had, by its conduct in making the payments claimed by Crothall, knowing that they were calculated in a manner other than provided for in the contract, impliedly agreed to vary the agreement.⁷⁰

A normal qualification on an otherwise broad provision permitting the parties to vary the terms of their agreement at any stage is that any variations be made in writing. Such clauses, sometimes branded ‘no oral modification’ or ‘NOM’ clauses, typically stipulate that no variations are valid or effective unless reduced to writing and signed by the parties. Another peculiar rule of renegotiation that will likely surprise many businesspeople is that such clauses are not, in Australia at least, decisive. If parties verbally agree to vary a contract then, notwithstanding a NOM clause contained therein, it may be so varied.⁷¹ This, of course, tends to catch market players out, who have a natural tendency to read the terms of their agreement literally without understanding the nuances of the law.

The presence of a stipulation in the parties’ agreement that any variations be made in writing may, however, be important in establishing whether an implied variation has taken place. As Black J explained in *Mathews Capital Partners Pty Ltd v Coal of Queensland Holdings Ltd*, the existence of a NOM clause makes it more difficult to draw an inference that the parties intended to vary the terms of their agreement informally.⁷² George Pasas correctly observes that this position ‘elevates the evidentiary hurdle which must be surpassed before finding that a variation was agreed in a form that is not writing’.⁷³ The evidentiary strength of NOM clauses will depend, in part, on how they are drafted and the regularity with which they are utilised by the parties. These factors were instructive in the case of *Rema Tip Top Asia Pacific Pty Ltd v Grüterich*,⁷⁴ where the presence of an unambiguously worded NOM clause, viewed in the context of the entire suite of

⁷⁰ Ibid 578–9 per Ellicott J (Blackburn J agreeing at 568, Deane J agreeing at 571).

⁷¹ *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (1990) 20 NSWLR 251; *Elvidge Pty Ltd v BGC Construction Pty Ltd* [2006] WASC 264; *Alstom Ltd v Yokokawa Australia Pty Ltd* [No 7] [2012] SASC 49; *Cenric Group Pty Ltd v TWT Property Group Pty Ltd* [2018] NSWSC 1570; *Sara Stockham Pty Ltd v WLD Practice Holdings Pty Ltd* [2021] NSWCA 51; *Re Rapsey, Australasian Mortgage Finance Ltd (admin apptd)* [2021] FCA 189.

⁷² [2012] NSWSC 462 [39].

⁷³ George Pasas, ‘No Oral Modification Clauses: An Australian Response to *MWB Business Exchange Centres v Rock Advertising* [2018] 2 WLR 1603’ (2019) 45(1) *University of Western Australia Law Review* 141, 146.

⁷⁴ [2019] NSWSC 1594.

written agreements between the parties, was regarded as strongly indicative of a mutual intent for any variations to be made in writing.⁷⁵

The position under English law with respect to the role of NOM clauses is quite different to that in Australia, following the Supreme Court of the United Kingdom's decision in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* ('MWB').⁷⁶ In that case, an oral agreement to vary a payment schedule under a commercial lease was held to be unenforceable by virtue of a NOM clause in the lease. While the Supreme Court accepted that the notion of contractual autonomy favoured the freedom for parties to override their own self-imposed limitations, it considered this notion to be limited. As Lord Sumption stated in his plurality judgment:

Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows. Nearly all contracts bind the parties to some course of action, and to that extent restrict their autonomy. The real offence against party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what they have agreed. There are many cases in which a particular form of agreement is prescribed by statute: contracts for the sale of land, certain regulated consumer contracts, and so on. There is no principled reason why the parties should not adopt the same principle by agreement.⁷⁷

There is certainly an argument that the Australian courts should follow the approach in *MWB*. The Supreme Court offered some compelling reasons for strictly enforcing NOM clauses. For example, this approach prevents written agreements from being undermined and therefore guards against potential abuses. It also avoids disputes stemming from misunderstandings or crossed purposes flowing from an oral discussion. However, as McDougall J recently observed in *Cenric Group Pty Ltd v TWT Property Group Pty Ltd*, the consistent weight of authority in Australia favours the ability for verbal renegotiations to override NOM clauses.⁷⁸

Notwithstanding the occasional difficulties with the process, and as mentioned earlier, most businesspeople will readily agree that renegotiation is common. Despite this, there is no known reliable measurement of its incidence in commerce, at least within the Australian context. This must be due, in part, to the sheer volume of contracts that are made every day, and the infinite differences in form and substance between them. An extensive study by Guasch in 2001, examining a thousand utilities and transport contracts between private industry and government in Latin America and the Caribbean from 1985–2000, found that

⁷⁵ Ibid [297]–[337].

⁷⁶ [2018] 2 WLR 1603 ('MWB').

⁷⁷ Ibid 1608–9 [11].

⁷⁸ [2018] NSWSC 1570 [103]. His Honour did not consider the Supreme Court's views on this issue to be 'particularly persuasive'.

renegotiation occurred in around 30 per cent of cases on average.⁷⁹ Indeed, for some industries, the rate of incidence was exceptionally high, with transportation (55 per cent) and water and sanitation (74 per cent) contracts being the most commonly varied post-formation.⁸⁰ Most contracts were renegotiated a little over two years from commencement.⁸¹ More recent data drawn from analyses of global public-private partnership ('PPP') contracts pertaining to economic infrastructure from 2005–2015, similarly suggests that renegotiation occurs in around a third of cases, with almost a fifth of ongoing contracts being renegotiated by their fourth year and nearly half by their tenth year.⁸²

A study by Roberts and Sufi, examining the incidence of renegotiation of private credit agreements between lenders and businesses in the US between 1996 and 2005, found that over 90 per cent were renegotiated prior to their stated maturity.⁸³ Of course, such contracts are more amenable to renegotiation because of frequent fluctuations in credit market conditions, the common acquisition and disposal of assets (and, thus, collateral) by debtors, and the relative financial health of borrowing businesses. Provisions permitting or mandating renegotiation are therefore not unorthodox.

Again, countless variables will inform the need to vary a contract. It can perhaps only be said with confidence that renegotiation will likely occur more commonly in *longer-term* contracts, which are especially susceptible to changing circumstances. There are no known Australian studies measuring the incidence of contract renegotiations. Some do, however, speak to the volume and significance of variations. In the construction industry, it has been suggested that contract prices often vary by up to 60 per cent of the originally agreed sum, and sometimes more.⁸⁴ Of course, as with some other industries, construction is one industry where contracts have evolved to routinely include provisions that permit price variations without renegotiation.⁸⁵ While price might be the archetypal term to change as a contract progresses, others might also warrant variation. For instance, the scope of required works for a services contract may change, as may the quantity of goods required under a sale agreement.

⁷⁹ José Luis Guasch, *Granting and Renegotiating Infrastructure Concessions: Doing it Right* (World Bank Publications, 2004) 12–13. See also Antonio Estache and Lucia Quesada, *Concession Contract Renegotiations: Some Efficiency Versus Equity Dilemmas* (Policy Research Working Paper No 2705, World Bank Publications, 2001) 2. More recent studies of some of the same regions have similarly demonstrated a high incidence of renegotiations. See, eg, Dimas de Castro e Silva Neto, Carlos Oliveira Cruz and Joaquim Miranda Sarmento, 'Understanding the Patterns of PPP Renegotiations for Infrastructure Projects in Latin America: The Case of Brazil' (2018) 18(3–4) *Competition and Regulation in Network Industries* 271.

⁸⁰ Guasch (n 79) 12–13.

⁸¹ Ibid.

⁸² Global Infrastructure Hub and Turner & Townsend, *Managing PPP Contracts After Financial Close* (Report, 2018) 153.

⁸³ Michael R Roberts and Amir Sufi, 'Renegotiation of Financial Contracts: Evidence from Private Credit Agreements' (2009) 93(2) *Journal of Financial Economics* 159.

⁸⁴ Anne McDonnell, 'Excessive Variation Work — A Risk to be Considered' (1990) 13 *Australian Construction Law Newsletter* 50.

⁸⁵ Michael Sergeant and Max Wieliczko, *Construction Contract Variations* (CRC Press, 2014) [1.81].

Having detailed various aspects of the law of renegotiation and provided important context, attention now turns to the empirical study underpinning this article; a study which sought to examine how these aspects operate among SMEs trading in the ‘real world’.

III THE AUSTRALIAN SME STUDY

The study behind this article was designed in the first half of 2017.⁸⁶ Extensive consultation with businesses, commercial industry stakeholders, economists, lawyers, academics, and statisticians was undertaken to ensure that it asked the right kinds of questions to properly understand, among other things, how, when and why market players renegotiated their agreements. A voluntary and anonymous survey of 61 questions was constructed using the online platform SurveyMonkey,⁸⁷ with optional follow-up focus interviews being conducted after the closure of the survey.⁸⁸ All questions were optional, with the exception of the opening request for participant consent. The survey ran from September 2017 to February 2018, with 257 eligible responses being returned. The weblink to the survey was distributed electronically via personal networks, industry contacts, government and representative bodies, and an online research panel.⁸⁹

The survey was purposely designed to screen out those who: (1) did not consent to participating in the survey; (2) were not the owner of, or a senior worker within, the respective business; (3) were under 18 years of age; or (4) were a large business (200+ employees). Only SMEs, and those who have managerial or decision-making power within the same, were targeted to ensure that the data was as accurate and truly representative of the sector as possible. The Australian Bureau of Statistics (‘ABS’) scale of business sizes was utilised in the study. Sole traders were classified as those being self-employed only, small businesses as those having between 2–19 employees, medium businesses having between 20–49 employees, and mid-large business having between 50–200 employees.⁹⁰ The majority of businesses surveyed identified as sole traders (31.6 per cent, n=75) or

⁸⁶ University of Adelaide Human Research Ethics Committee (HREC) Ethics Approval No. H-2017-125. Approval granted July 2017.

⁸⁷ A copy of the survey questions is available at <https://doi.org/10.25909/5e3b5e9d1123d>.

⁸⁸ The focus interviews were conducted throughout December 2018.

⁸⁹ The government and representative bodies which assisted in the distribution include: Australian Small Business and Family Enterprise Ombudsman (‘ASBFEO’); Australian Competition and Consumer Commission (‘ACCC’); Small Business Commissioner (SA); Small Business Champion (Qld); Small Business Commissioner (Vic); Small Business Commissioner (WA); Small Business Commissioner (NSW); Business SA; Brand South Australia; and SA Department of State Development.

⁹⁰ ABS (n 1). See also ASBFEO (n 1) 7.

traditional small businesses (41.4 per cent, n=98),⁹¹ operated in the private sector (96.3 per cent, n=183),⁹² and had an average age of 15 years.⁹³

Before the results of the present study are detailed, its limitations are acknowledged. The relatively small size of the sample means the study cannot be truly representative of the Australian SME sector as a whole. Nonetheless, the data provide invaluable insight into the sector's interactions with, and uses and perceptions of, contract law and the renegotiation doctrine. An opportunity for improvement upon this study therefore presents itself. Examination of a larger sample would make it more representative, and the data could be appropriately tailored to account for differences in individual populations (ie weighted samples).

The present study revealed some fascinating insights with respect to contractual renegotiation within the Australian SME sector. Most of the SMEs sampled, it would seem, understand the concept of renegotiation but are less clear on the legalities surrounding the process. Many also seem to encounter difficulties when varying their agreements. The incidence of unilateral (one-sided) variations benefiting only one of the parties appears to be quite low, but those SMEs willingly agreeing to such variations do so mainly to guarantee performance and maintain good relations. The results to follow provide us with a starting point for understanding how we might improve our legal and regulatory frameworks to support the SME sector and others.

IV RESULTS

An important starting point for this study was to discern what Australian SMEs understood the very concept of 'renegotiation' to mean. As businesses today are becoming increasingly globalised and engaging in an increasing number of contracts, the importance of them understanding the contracting process and the content of their agreements is proportionately rising.⁹⁴ Accordingly, respondents were asked simply if they knew what the term 'renegotiation' meant. Of the 155 respondents who responded to this question, 61 (39.4 per cent) indicated that they did comprehend what renegotiation was, compared to 59 (38 per cent) who said that they did not. A small number (22.6 per cent, n=35) were unsure,

⁹¹ 237 respondents indicated their business size.

⁹² 243 respondents indicated the sector(s) in which they were operating.

⁹³ 189 respondents indicated the age of their business. This finding was particularly impressive given that a third of SMEs in Australia fail within five years of commencement: ASBFEO (n 1) 17; Australian Government, Department of Industry, Innovation, Science, Research and Tertiary Education, *Australian Small Business: Key Statistics and Analysis* (Report, December 2012) 42.

⁹⁴ '[I]f contract-related decisions are to be taken knowingly, contracts need to be read. But mere reading is obviously not enough — contracts need to be understood as well. To succeed in today's networked business, managers need to be *contractually literate*': Helena Haapio and George J Siedel, *A Short Guide to Contract Risk* (Routledge, 2016) 29 (emphasis in original).

suggesting they did have an idea but lacked confidence in the accuracy of their understanding.

The follow-up qualitative question invited those respondents claiming to know what renegotiation was to provide a brief explanation. 62 valid responses were returned,⁹⁵ with some respondents offering definitions crossing multiple broad categories. All but one respondent broadly described renegotiation as the process of varying existing contractual terms. The exception, uniquely, instead described renegotiation as a tool of manipulation to force a party's hand and shape a more favourable deal under duress. The majority of responses (51.5 per cent, $n=35$) characterised renegotiation as the general process of varying the terms. Others, however, characterised it according to the attitudes of the parties, ie 11 responses (16.2 per cent) described renegotiation as the process of mutually agreeing to make a modification.

A smaller number again described renegotiation in terms of the underlying motivation for the process, such as circumstantial changes (10.3 per cent, $n=7$), or the party for whom the variation was being initiated, ie for one party (4.4 per cent, $n=3$) or for both (8.8 per cent, $n=6$). A handful of respondents (5.9 per cent, $n=4$) described renegotiation as the process of mutually agreeing to substitute an existing contract for a new one, although of course renegotiation can be of any scale, from variation of one term to complete replacement of all terms. Finally, one response appeared to regard renegotiation as something that occurs in response to a dispute. In reality, of course, renegotiations may occur at any stage of a contract's life post-formation and may well be driven not by dispute but by reasons of practicality or preference.

Two further questions invited respondents to utilise a slider bar to indicate by way of placement of a cursor along a spectrum of responses how strongly they agreed or disagreed with the statement provided. The slider bar had three broad options: 'strongly disagree', 'neutral', and 'strongly agree'. Respondents were not told that the slider bar correlated to a 100-point scale, with zero points (cursor placement farthest left of the slider bar) translating to 'strongly disagree', 50 points (cursor placement in middle of slider bar) translating to 'neutral' and 100 points (cursor placement farthest right of the slider bar) translating to 'strongly agree'. Respondents were instructed to leave the question blank and skip if they were unsure. Asked whether they found it relatively easy to vary their contracts, 144 respondents answered the question with the average response score being 53

⁹⁵ More respondents (109) than answered 'yes' in Question 36 (61), which asked whether respondents understood what the term 'renegotiation' meant, opted to answer this question. Notwithstanding the obvious technical fault in the inbuilt survey logic which should have disqualified those who responded 'no' or 'unsure' to Question 36 from answering this question, the data has not been compromised given the present question invited qualitative input and the fact 47 responses were deemed to be invalid. Several respondents, for example, mistakenly responded by saying they had 'not said "yes"' to Question 36. 62 valid responses were received, which is only one more than those who responded 'yes' in Question 36. As such, the data can confidently be described as accurate and representative of the sample.

(median=53), equating most closely to a general response of 'neutral'. This outcome certainly suggests that the SMEs sampled are ambivalent as to the ease with which they can renegotiate their business agreements.

The survey regrettably did not seek explanation for the relatively low average response score for this question. It might be that the uncertainty reflected in this result derives from the difficulty SMEs experience when encouraging counterparties to agree to proposed modifications, or in agreeing to changes proposed to them. A plausible explanation lies in the prevalence of standard form contracts ('SFCs'); agreements which are pre-prepared by one party without any negotiation with the other party, such that the terms are presented on a 'take it or leave it' basis.⁹⁶ These arrangements are often characterised by a distinct imbalance of bargaining power, where the drafting party (normally a larger business trading in goods or services, or some representative body of the same) has the upper hand over their counterpart (normally a smaller business or consumer).

SFCs are now an established feature of the commercial world.⁹⁷ The imbalance of power they inherently generate is offset by the efficiency they offer; being pre-prepared, they obviate the transaction costs associated with detailed negotiations and expedite the formation process. They are also helpful for repeat business in that they promote consistency and cultivate familiarity with the terms binding the parties. Unsurprisingly, SMEs commonly have trouble negotiating variations to agreements in standard form.⁹⁸ Of the 155 respondents in the present study who were willing to indicate whether they utilised standard form contracts, close to half (46.4 per cent, n=71) stated that they did.

Building further on the renegotiation theme, participants were asked whether they were familiar with the legal requirements to facilitate a valid contract variation. They were once more asked to utilise a slider bar to indicate how strongly they agreed or disagreed with the statement that they *were* familiar. 138 responses were received, with the average response score being 52 (median=51), equating once again to a general response of 'neutral'. Evidently,

⁹⁶ H B Sales, 'Standard Form Contracts' (1953) 16(3) *Modern Law Review* 318; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 297, 302; *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346, 377–8 [140].

⁹⁷ As long ago as 1971, it was estimated that SFCs accounted for 99 per cent of all contracts: W David Slawson, 'Standard Form Contracts and Democratic Control of Lawmaking Power' (1971) 84(3) *Harvard Law Review* 529. This suggestion has been reiterated many times since. See, eg, John J A Burke, 'Contract as Commodity: A Nonfiction Approach' (2000) 24(2) *Seton Hall Legislative Journal* 285, 290; Jason Scott Johnston, 'The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers' (2006) 104(5) *Michigan Law Review* 857, 864. More modern estimates concur with Slawson's claim insofar as it applies to written contracts: Andrew Robertson, 'The Limits of Voluntariness in Contract' (2005) 29(1) *Melbourne University Law Review* 179, 187. This latter view is almost certainly more accurate, given that countless everyday transactions, such as over-the-counter purchases from a shop which indubitably comprise a large percentage of 'contracts', involve no form contracting whatsoever.

⁹⁸ Robin Burnett and Vivienne Bath, *Law of International Business in Australasia* (Federation Press, 2009) 87.

the SMEs sampled are unclear what the law requires of them when it comes to changing their contracts. This is not too shocking a revelation; businesspeople can hardly be expected to understand the profound complexities of the law underpinning their agreements. As will be discussed shortly, however, this has potential ramifications for purported contract variations that are formally disputed.

Despite how commonly contracts are renegotiated, the process is clearly lost on many Australian SMEs. When asked to indicate the elements of a valid contract variation to the best of their understanding (ie ‘what do you legally have to do to make an enforceable variation to your contract?’), two-thirds of the 103 respondents were either *unsure* of what the requisite elements were (30.1 per cent, n=31) or considered a *written agreement to vary*, whether signed or unsigned, as being the only critical element (30.1 per cent, n=31). The next greatest number of respondents (10.7 per cent, n=11) correctly identified agreement (offer and acceptance) as an essential element of contract variation. Of course, the simplest and most accurate answer provided earlier is that the same elements required for valid contract formation also apply to variations. Agreements to vary existing contracts are in themselves contracts, and so a legally valid modification to any business contract must comply with the basic common law rules. Unsurprisingly, none of the respondents correctly noted this, although some came close.

Again, it is quite common for contracts to be renegotiated post-formation. Both internal variables — such as a party’s behaviour or poor time and finance management — and external variables — such as market movements increasing costs and natural disasters affecting supplies — may affect the capacity of the parties to fulfil the contract as originally drafted.⁹⁹ Sometimes both parties will be affected by the change in circumstance but more often such variables ‘tend to operate unevenly between the parties, and result in a loss to one party, rather than a loss to both’.¹⁰⁰ Most variations, therefore, are required to assist only *one* of the parties. Accordingly, the next relevant query on the topic of renegotiation was whether Australian SMEs had ever paid a party (in goods or services) more than originally agreed in a contract.

A total of 155 respondents answered this question, with the bulk (58.7 per cent, n=91) indicating they had never done so. This compares to around a quarter (27.1 per cent, n=42) who claimed that they had. 14.2 per cent (n=22) were not sure if they had previously made such an agreement. These results indicate that the incidence of unilateral or ‘one-sided’ variations, which ostensibly benefit only one party — the party requesting the additional consideration — is relatively low but not insignificant. Such arrangements enliven some of the common law rules discussed earlier relating to consideration and renegotiation, particularly the requirements that there be a bilateral exchange of consideration to enforce the

⁹⁹ Giancaspro, ‘The Rules for Contractual Renegotiation’ (n 12) 2.

¹⁰⁰ Carter, ‘The Renegotiation of Contracts’ (n 12) 186.

variation¹⁰¹ and that the consideration be legally sufficient.¹⁰² These rules serve to validate or invalidate an attempted variation to an existing contract, and so, based on the result just discussed, as many as one in four renegotiations are potentially at risk of falling foul of the law if the rules are not followed. As Macaulay noted, the adjustment of contractual relationships is usually more informal compared to their establishment.¹⁰³ Parties are far more relaxed in their approach to changing a contract than they are in making it, and so it is likely they would pay little, if any, attention to legal formalities when effecting variations.

Those SMEs who gratuitously offered to pay their counterpart more than originally agreed might not realise that such agreements are *prima facie* unenforceable.¹⁰⁴ Unless the beneficiary offered consideration in return, the arrangement was captured in a deed, or other doctrines such as promissory estoppel applied to enforce the secondary promise, it could not be legally binding.¹⁰⁵ Indeed, in the subsequent question, a third of respondents (34.2 per cent, n=26) stated that when they did proffer more, the beneficiary gave nothing in return, meaning at least 26 variations that took place were invalid. Those respondents that *did* receive something in return provided qualitative examples such as separate additional jobs, extra work beyond scope, business referrals, and additional support.

The most popular reasons for respondents willingly paying more than originally agreed to the other party were 'to encourage satisfactory completion/performance of the contract' (23.9 per cent, n=26) and 'to strengthen and maintain good relations' with the other party (23.9 per cent, n=26).¹⁰⁶ This finding corroborates Macaulay's early findings that businesspeople prefer to rely on trust than formalities as the basis of their contractual relationships, and care even less for contract law in the adjustment of existing contractual relationships and the settlement of disputes.¹⁰⁷ Indeed, though it may seem irrational from an economics perspective to pay more in return for the same, such behaviour can, as Collins observes, actually be entirely rational in that it propagates a cooperative relationship conducive to repeat business.¹⁰⁸

Alongside a desire to maintain good relations, the costs, risks and inconvenience associated with pursuing litigation for breach of contract may

¹⁰¹ *Stilk v Myrick* (n 27); *Wigan v Edwards* (1973) 1 ALR 497; *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847; *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424.

¹⁰² *Haigh v Brooks* (1839) 10 Ad & E 309; 113 ER 119; *Thomas v Thomas* (1842) 2 QB 851; *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87.

¹⁰³ Macaulay (n 6) 60–1.

¹⁰⁴ *Stilk v Myrick* (n 27); *Wigan v Edwards* (1973) 1 ALR 497. Recall the earlier finding that a third of the SMEs surveyed were unsure of how to make a legally enforceable modification to their agreements.

¹⁰⁵ For a discussion of the various exceptions and their application, see Giancaspro, 'The Rules for Contractual Renegotiation' (n 12) 14–22.

¹⁰⁶ Respondents were provided with a list of six options and instructed to select as many that applied. Respondent error saw 69 respondents — 27 more than reportedly answered 'yes' to Question 41 — make 109 selections.

¹⁰⁷ Macaulay (n 6) 61.

¹⁰⁸ Hugh Collins, *Regulating Contracts* (OUP, 1999) 140.

make paying additional money for the assurance of performance more valuable to the promisor than any rights of action against them.¹⁰⁹ This appeared to be the case in *Williams v Roffey*, where timely completion and avoidance of the penalty clause that would have been triggered through delay were clearly prioritised by the building contractors. This factor was also evident in *Silver v Dome Resources NL* ('Silver'),¹¹⁰ where avoiding the loss of a highly-valued employee performing critical work and the need to hire and train a replacement prompted the employer to pledge an increase in pay above the salary stipulated in the employment contract. Despite the agreement prima facie violating the existing legal duty rule, the New South Wales Supreme Court detected practical benefit in the employee's agreement to continue in his role and thereby rendered the contract enforceable.

It is also conceivable, in situations where the beneficiary of the additional payment is struggling to afford the costs of performance, that a promisor might react to feelings of guilt in offering to pay more than required under the contract.¹¹¹ It might even be an act of pure generosity.¹¹² Even where efficiency and maintenance of the commercial relationship are paramount considerations, attitudes and priorities can easily shift, as happened in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* ('The Atlantic Baron').¹¹³ In that case, a shipbuilder agreed to construct a tanker for the plaintiff at a fixed price in US dollars. Following a strong devaluation of the US dollar, and after just one instalment payment was made, the shipbuilder refused to proceed unless the plaintiff agreed to pay 10 per cent above the contract price. To ensure timely completion and maintain amicable relations, the plaintiff agreed to these terms. Nine months after completion, it sued to recover the additional monies paid, alleging the shipbuilder had procured the renegotiation through economic duress.

The court agreed that the renegotiated contract was voidable on this basis but held that the plaintiff's nine-month delay in seeking relief constituted an implied affirmation of the shipbuilder's conduct. This case therefore highlights an inherent danger in hasty renegotiations in which a promisor is driven by considerations of efficiency and goodwill; namely, that considerations of fairness and business etiquette eventually take precedence, prompting disputation.

Returning to the results of the present study, the second most common reason (20.2 per cent, n=22) for respondents willingly paying more than originally agreed was to 'offset actual or potential losses caused by an external factor' beyond the control of the parties, such as inclement weather. The most

¹⁰⁹ Arthur L Corbin, 'Does a Pre-Existing Duty Defeat Consideration? Recent Noteworthy Decisions' (1918) 27(3) *Yale Law Journal* 362, 380–1; Richard Hooley, 'Consideration and the Existing Duty' [1991] *Journal of Business Law* 19, 26–7.

¹¹⁰ (2007) 62 ACSR 539 ('Silver').

¹¹¹ Rembert Meyer-Rochow, 'The Requirement of Consideration' (1997) 71(7) *Australian Law Journal* 532, 536.

¹¹² Corneill A Stephens, 'Abandoning the Existing Legal Duty Rule: Eliminating the Unnecessary' [2008] 8(3) *Houston Business and Tax Law Journal* 355, 387.

¹¹³ [1979] QB 705.

popular option offered for 'other' was that the contracted obligation turned out to be more involved or complicated than originally thought. These responses are interesting because they invite consideration of legal doctrines that can potentially apply in such situations. The most obvious candidate is *frustration*. That doctrine applies where some supervening event renders performance of contractual obligations radically different from how it was originally envisaged by the parties. The modern legal test requires that neither party be at fault and that a contractual obligation affecting one or both of the parties becomes incapable of being performed due to significantly altered circumstances.¹¹⁴ This was the situation in the seminal case of *Codelfa Construction Pty Ltd v State Railway Authority (NSW)*,¹¹⁵ where the plaintiff was unable to complete its excavation project on time due to local residents obtaining an injunction that significantly restrained the permissible times at which the contracted works could be continued.

It is possible that, in many of the situations reported by respondents in the present study (in which they agreed to pay more than originally required under the contract due to external factors endangering performance) that the frustration doctrine might have been applicable. This would have resulted in the parties being relieved of all future obligations and terminating, rather than salvaging, the contract. A missed opportunity in this study was to ask if respondents (a) were aware of the legal concept of frustration and (b) knew whether their contract accommodated this doctrine through the inclusion of a *force majeure* clause. Such clauses often provide for temporary suspension of the contract until the supervening event has passed. Importantly, where a contract contains a *force majeure* clause addressing the relevant contingency, it will not be frustrated.¹¹⁶

As mentioned earlier, and as detailed in the author's prior work,¹¹⁷ less than a fifth of respondents in the present study indicated that they had been involved in litigation over a contract dispute. This is despite the fact that one in four of the respondents had previously renegotiated their contracts with a counterparty and agreed to pay them more than originally stipulated. The exiguity of this figure is likely a reflection of the lack of funding and resources characteristic of Australian SMEs.¹¹⁸ It also seemingly bespeaks the unwritten conventions of business, which, as Macaulay and others have found, often favour flexibility, cooperation, and

¹¹⁴ *Codelfa Construction Pty Ltd v State Railway Authority (NSW)* (1982) 149 CLR 337, 377.

¹¹⁵ *Ibid.*

¹¹⁶ *Ocean Tramp Tankers Corporation v V/O Sovfracht ('The Eugenia')* [1964] 2 QB 226; *Ardee Pty Ltd v Collex Pty Ltd* [2001] NSWSC 836.

¹¹⁷ See Giancaspro, 'Testing' (n 9) 295.

¹¹⁸ See, eg, ASBFEO, *Access to Justice: Where Do Small Businesses Go?* (Report, Australian Small Business and Family Enterprise Ombudsman, 5 December 2018); Sasan Bakhtiari et al, 'Financial Constraints and Small and Medium Enterprises: A Review' (2020) 96(315) *Economic Record* 506; Productivity Commission, 'Small Business Access to Finance: The Evolving Lending Market' (Research Paper, Commonwealth of Australia, September 2021).

non-legal discourse over resort to the black letter. Not only does this foster and maintain good relations, it also avoids the negative publicity associated with suing those you are in business with. Such bad press would be more detrimental to smaller businesses, who may lack the capacity of bigger businesses with larger clienteles to withstand it. No doubt economic considerations also inform the decision to pursue formal legal proceedings; going to court is costly, time-consuming, and inconvenient for all. The moral, supported by the findings of the present study, is that SMEs are less likely to desire litigation even when compelled (with or without pressure) to renegotiate their contracts.

V LESSONS FOR AUSTRALIAN CONTRACT LAW

The insights garnered from the present study help to paint a more accurate picture of SME understandings of, and experiences with, contracts and the law. The specific findings reported in this article shed stronger light upon the commercial renegotiation process and how it works in practice. This empirical information collectively helps us understand the inner workings of the SME sector, and can usefully inform beneficial legal reforms that help nurture a more efficient, productive and reliable law of contract.¹¹⁹ It also helps us to understand how this law is crafted, communicated and applied; something that is sadly absent from most black-letter law books.¹²⁰ Empirical legal research such as this therefore aids in filling what eminent American legal scholar Roscoe Pound described as the 'gap' between the 'law in the books' and the 'law in action'; between the rules that purportedly govern the relations of market players and those that in fact govern them.¹²¹ It empowers the SME sector and its participants to become immediately involved in the examination and development of the law,¹²² and provides an invaluable and intimate appraisal of the efficacy or otherwise of particular legal mechanisms.¹²³

Even with a more detailed empirical understanding of the workings of the market, however, it must be asked how this knowledge can be practically applied. If there are identified flaws in the current legal framework as it applies to Australian SMEs, what beneficial solutions might be offered? Answering this question and shaping such solutions requires deeper consideration of the key findings of the present study. While contractual renegotiation may be common, the present study found unilateral or one-sided variations benefiting only one of

¹¹⁹ Felicity Bell, 'Empirical Research in Law' (2016) 25(2) *Griffith Law Review* 262, 273.

¹²⁰ Katherine R Kruse, 'Getting Real about Legal Realism, New Legal Realism, and Clinical Legal Education' (2012) 56(2) *New York Law School Law Review* 659, 660.

¹²¹ Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12.

¹²² Nicola Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5(2) *Social and Legal Studies* 131. 132. See generally Dermot Feenan (ed), *Exploring the 'Socio' of Socio-Legal Studies* (Palgrave Macmillan, 2013).

¹²³ Craig Allen Nard, 'Empirical Legal Scholarship: Reestablishing a Dialogue between the Academy and Profession' (1999) 30(2) *Wake Forest Law Review* 347, 349.

the parties to be uncommon. Most of the SMEs surveyed reported never having paid a party (in goods or services) more than originally agreed in their contract. They were also ambivalent as to the ease of the renegotiation process and expressed uncertainty as to the legal requirements for making a valid modification to their contracts. Indeed, a third of those SMEs that did proffer more to their counterpart received no consideration in return, inadvertently violating the existing legal duty rule.¹²⁴ As discussed above, the reported reasons for doing so reflect a preference for convenience, collegiality, and timely performance ahead of legal rights (assuming those rights are even known to SMEs).

These findings notably speak to a lack of contract literacy and market confidence in the contract law of the state, as well as the 'gap' between the law and practice that Macaulay, Pound and others have spoken of down the years. Economic actors often do not fully comprehend contracts or are limited in their interpretation of the consequences of their content.¹²⁵ This again highlights that there is enormous value in refining methods to devise and disseminate comprehensible information to the market. Greater understanding of the legal framework and the basic principles of contract law will likely translate to fewer disputes, which are disruptive, costly, and time-consuming for SMEs.

A contrary view is that crafting the law of contract to suit the market is futile given that studies by Macaulay and others consistently demonstrate that this law is routinely ignored by market players. Those players are seldom aware of, and are rarely influenced by, the law of contract.¹²⁶ Gava and Greene further submit, quite rightly, that the law is a poor 'communication system' in that it is 'incapable of publicising its results' and subsequently guiding market behaviour.¹²⁷ Private law, as a system of regulation, relies on the courts as its arbiters, and those courts are the fora in which the law of contract is largely fashioned. The issue with this is that market players simply do not have the time or the training to read, digest and comprehend case judgments (not all of which are reported) and other legal literature. This would suggest that trying to better communicate the law to the SME sector would be a lost cause because they would likely just disregard it anyway.

But these problems surely can, and must, be overcome. If market players ignore the law because they can neither properly understand it nor feel genuinely

¹²⁴ Weintraub argues that the fact beneficiaries in unilateral contract modification scenarios are generally met with accommodation and compromise rather than threats of litigation offers further evidence that the existing legal duty rule should be abolished: Russell J Weintraub, 'A Survey of Contract Practice and Policy' (1992) 1 *Wisconsin Law Review* 1, 51–2.

¹²⁵ See John Hagedoorn and Geerte Heslen, 'Contractual Complexity and the Cognitive Load of R & D Alliance Contracts' (2009) 6(4) *Journal of Empirical Legal Studies* 818.

¹²⁶ Franklin M Schultz, 'The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry' (1952) 19(2) *University of Chicago Law Review* 237, 283.

¹²⁷ John Gava and Janey Greene, 'Do We Need a Hybrid Law of Contract? Why Hugh Collins is Wrong and Why it Matters' (2004) 63(3) *Cambridge Law Journal* 605, 615. Collins (n 108) also concedes this point: at 81.

connected to it, then devising methods to synthesise complex principle into workable guidance seems not only sensible but essential to enabling the law to fulfil its role. Public regulatory bodies such as the Australian Competition and Consumer Commission ('ACCC') and the Australian Securities and Investments Commission ('ASIC') do an excellent job of communicating the law to market players in an intelligible manner, although their reach is limited to their respective government-mandated legislative frameworks. The ACCC administers competition and consumer laws, whereas the ASIC is primarily concerned with financial and corporate laws. While some of these laws have encroached into the private law of contract and thereby come within the purview of these regulatory bodies,¹²⁸ contract law remains in large part within the realm of the common law. Private industry and advocacy bodies supporting participants within the market, although helpful, are not equipped to distil the law for the benefit of those participants. They also lack the scale and resources to do so.

One solution might be to place more of an onus on the state and territory-based consumer and small business support organisations¹²⁹ to disseminate contracting advice and information (shaped in part by the courts), and provide more hands-on training, to their respective markets. Unlike the federal commercial and financial regulators, these organisations are not as heavily restrained by statute and so they would presumably have more latitude to do this. Of course, they are not as well-resourced, meaning more funding would likely be essential if they were tasked with improving the contracting knowledge and skills of market participants. This proposal might also generate inconsistency between jurisdictions, given that state and territory organisations may differ in their approaches.

The results of the present study are especially noteworthy in that they reinforce the idea that market players (in particular, those within the SME sector) have poor legal literacy, although it remains unclear how to best address this phenomenon. While the results and the empirical literature both suggest that the bulk of contract disputes are either resolved informally or simply do not escalate to the courts, this does not justify turning a blind eye to the market's apathy for contract law. If decades of research tells us that market players consistently disregard contract law, then it loses its legitimacy and fails in its principal duty of regulating and efficiently facilitating market exchange.¹³⁰ It is argued that a

¹²⁸ A good example is the unfair contract terms provisions contained in Part 2-3 of the Australian Consumer Law. The Australian Consumer Law is housed in sch 2 to the *Competition and Consumer Act 2010* (Cth). There are equivalent unfair contract terms provisions applicable to contracts for financial products and services in pt 2 div 2 subdiv BA of the *Australian Securities and Investments Commission Act 2001* (Cth).

¹²⁹ These organisations are: Access Canberra (ACT); NSW Fair Trading (NSW); NT Consumer Affairs (NT); Office of Fair Trading Queensland (Qld); SA Office of Consumer and Business Services (SA); Tasmania Consumer, Building and Occupational Services (Tas); Consumer Affairs Victoria (Vic); WA Consumer Protection — Department of Mines, Industry Regulation and Safety (WA).

¹³⁰ Collins (n 108) at 5-6.

uniform and authoritative approach to improving contract law as a communication system is critical and is therefore best led by the legislature in collaboration with subject matter experts (such as lawyers and scholars) as well as regulatory and industry bodies. Developing a deeper understanding of market culture and the manner in which market players communicate and transact will helpfully inform the modes and content of communications and resources. This requires a bottom-up, rather than a top-down, approach and should involve more robust interaction with, and involvement of, the SME sector. Genuine consultation is vital to ensuring that any reform measures are appropriate and effective.

Finally, the present study has reminded us of a universal truth once eloquently expressed by former British Prime Minister, Benjamin Disraeli: 'Change is inevitable. Change is constant'.¹³¹ Contracts change, as do the times and, consequently, society's attitudes towards the various principles, features and institutions of the law. But change in the world of contract is seldom a good thing. Contracts are premised on continuity and on the parties' expectations being fulfilled as drafted. Modern contracts are more vulnerable to changes in economic, social and other conditions than ever before owing to their growing complexity and the more globalised nature of contemporary commerce.¹³² Both the results of the present study and the case law discussed in this article speak to the difficulties that can arise for contracting parties as a consequence of changing circumstances. The existing legal duty rule was shown in the present study to have been violated in a third of reported contract renegotiations. The doctrine of frustration may operate to vitiate contracts where performance becomes impossible or otherwise radically different due to supervening events. Recent geopolitical events (such as Brexit) and global crises (such as the COVID-19 pandemic) have already triggered attempts to nullify long-term commercial contracts impacted by the same.¹³³

Understanding how businesses in our largest and most productive sector respond to the need for change and perceive the legal system in which they operate will help us to address inadequacies in the market. SMEs which are cognisant of the law and better equipped to deal with change will not only be more efficient but less likely to become embroiled in disputes. This will benefit both businesses and the consumers with whom they deal. If we can generate and effectively disseminate comprehensible information about contract law issues to the market, modify the legal framework to encourage — not inhibit — trade, and assist businesses with the contract modification process, we are more likely to successfully prevent disagreements brewing. In these challenging economic times, the SME sector is one we simply cannot afford to see fail.

¹³¹ Donald Quinn, *Back to Basics* (AuthorHouse, 2012) 30.

¹³² Giancaspro, 'The Rules for Contractual Renegotiation' (n 12) 1–2.

¹³³ See, eg, *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch) regarding Brexit; *Salam Air SAOC v Latam Airlines Group SA* [2020] EWHC 2414 (Comm) regarding the COVID-19 pandemic.