**Beyond Common Law:**

**Contractual Privity**

**in Australia and South Africa**

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This article provides an unconventional viewpoint on the doctrine of contractual privity. By “privity” we refer to the idea that only parties to a contract are bound by it and concomitantly are able to enforce it. This proposal, a cornerstone of classical contract law,[[3]](#footnote-3) makes problematic multi-party arrangements, particularly the much-discussed contract for the benefit of a third person. The latter is the most common exception to the doctrine of privity – recognized in most Civil law[[4]](#footnote-4) and mixed jurisdictions for many years, but traditionally a sticking point in Common law systems,[[5]](#footnote-5) by reason of the bargain theory of contract. Although the bargain theory of contract is not universally accepted amongst commentators, it does account for the classical requirements of privity and consideration which historically had typified English contract law – a common ancestor of both our target systems – until the promulgation of the Contracts (Rights of Third Parties) Act 1999. In English law this statute codified the law on privity of contract and obviates much of the need to discuss the exceptions to privity which had previously been recognized in that system.

Our analysis will juxtapose Australia and South Africa. The first mentioned, strongly molded by its Common law roots, displays nuanced statutory developments which embellish the law of contract and has been showing, since the late 1980s, an increasing interest in a relational understanding of contracting.[[6]](#footnote-6) South Africa, by contrast, blends uncodified Roman Dutch law with elements of English origin; its common law of contract is being shaped by transformative constitutional forces.[[7]](#footnote-7) Both jurisdictions incorporate the doctrine of contractual privity, yet the exceptions to this rule and the manner of their incorporation differ in each. These two jurisdictions were chosen also because, although historically related to English law, they have developed along different paths. The juxtaposition of a Common law and a mixed legal system broadens the comparative inquiry, yet the remaining similarities are also interesting. More nuanced differences in legal culture and context particularly relevant to the socio-legal and normative elements of our analysis will emerge below.

Although privity is a legal concept much explored in both of our target jurisdictions, particularly with respect to its symbiotic relationship with the consideration doctrine in English law,[[8]](#footnote-8) we aim to introduce a new element to the conventional black letter investigation: this we will do by asking not merely what impact does the doctrine of privity have on contract law in general, but rather how does privity shape certain specific contractual problems in action and what contextual conclusions can be drawn from this interaction. This comparison will also bring to light new insights into themes related to privity, such as the doctrine of consideration and the protection of reasonable expectations. Our method of ascertaining context is not, however, based on our own empirical fieldwork. We have relied largely on black letter legal sources, which in some of our case studies are fairly scant in our target jurisdictions.[[9]](#footnote-9) We did this in order to identify fact patterns and as an indicator of legal culture. Further social and economic data are derived in places from the research of others. Our argument is that modern commercial contract practice has been exported globally by international business concerns and their lawyers. This means that a given contractual concept or mechanism can be observable in several different habitats, although detailed black letter sources on it may be lacking in a particular jurisdiction. In that case it may be necessary to accurately define a concept by reference to a parent system such as English law and we will thus in places use English legal materials to fill gaps in the literature on Australian and South African law. This is also due to the fact that contexts that we focus on are unusual and as such, warrant further investigation. In this sense, it should be specified that the purpose of the following reflections is not provide definitive answers, but rather to initiate a communal effort from which academic debate may ultimately benefit. This explains why our findings are in some cases preliminary and a first step towards a more complete contextual understanding of the doctrine of privity and relational approach to contracting.[[10]](#footnote-10)

 The following Part II will provide the theoretical backdrop to our inquiry, where we will set out what we mean by a “practical analysis” and how we intend to employ this paradigm in the comparison of a given doctrine of contract law in two different systems. Part III will form the core of the paper: here we will consider three problems of privity, using case law and legislation to provide a black letter account of the law, which will facilitate comparison of our two jurisdictions as well as the notional application of our theoretical paradigm. These three problems of privity are: (1) the conferral of a benefit to a third party; (2) extension clauses in motor vehicle insurance policies; and (3) umbrella agreements, which we will analyze from the perspectives of supply chain, casual employment, and financial sector arrangements. Part IV will conclude with a comparative discussion of Australian and South African legal culture and context, as well as how these enable contractual relations in each jurisdiction, with particular regard to the doctrine of privity.

 In the process of our analysis, we will take the doctrine of privity beyond Common law, both through the use of a mixed system as a comparator, as well as, on a deeper level, into the realm of business relationships and sociolegal contract behavior.

II. The Nature of this Analysis

In this comparison of the doctrine of privity in Australia and South Africa, our intention is to draw from the micro-perspective of three specific case studies, certain macro-conclusions. In this regard, we aim to answer questions such as the extent to which privity, part of the received “classical” law of contract in both countries, has been overtaken by broader social issues of public regulation through welfarist interventions in contract law. This social element of our inquiry will proceed on two bases outlined below, namely: (1) a law and society account, drawing on the “embedded” nature of contractual relations in broader issues of business relationships and economic considerations; and (2) an inquiry into the role of legal context and culture in shaping the comparative contractual doctrines here, which we investigate through the medium of the role of considerations of fairness, good faith, and the protection of reasonable expectations in each system. Each approach will be briefly fleshed out below.

*A. Sociolegal Contract Theory and Privity*

A law and society account of contracting should make clear exactly what theoretical paradigm the analysis will use. Our aim is simply to provide a practical, contextualized view of the doctrine of privity. In many respects, our project is largely simply a comparative one. We will trace from conventional doctrinal sources two parallel accounts of the doctrine of privity. We do, however, wish to contextualize our account and to depict the law in action: for this reason we have used case studies in our project, which will move from the discourse-establishing contract for the benefit of a third party, through the more specialized area of extension clauses in insurance law, to the realm of business and “umbrella” contracting, largely outside of doctrinal sources. By the use of these examples, we intend to show the doctrine of privity as it operates in specific contexts – and hence, while our account is not empirical, we will show the “law in action”.[[11]](#footnote-11)

 We are also concerned in this study to investigate the interplay between Macneil’s “relational contract theory”[[12]](#footnote-12) and the doctrine of privity. Here again, our use of examples to show the law in action and in context comes into play. Context, of course, does not refer to just the doctrinal sources of law. Contracting is a social phenomenon – influential scholarship based on (and including) Macneil’s relational theory and Macaulay’s ‘non-use of contract’[[13]](#footnote-13) has illustrated that a large part of the world of contracting exists in contract behavior and practice, rather than in reported judgments. Indeed, contracting, as the basis of business and a good deal of other human endeavors, is equally influenced by other social forces – particularly inter-personal relationships and market forces of an economic nature – but also public regulation of contracts by the State.[[14]](#footnote-14) Thus a practical, or contextualized, view of a particular aspect of contract doctrine, should consider such doctrine in the context of who the parties to such transactions are, the nature of the connections binding such parties, and the broader social and economic backdrop against which they transact.

It is for this reason that Macneil draws a distinction between once-off (“discrete”) contracts, with no element of social embeddedness, and “contractual relations”, in which the formal contract is only one part of a bigger contextual picture.[[15]](#footnote-15) In a state of contractual relations, contracting efficiency is achieved through joint welfare maximization, particularly by co-operation rather than competition.[[16]](#footnote-16) For present purposes, there may also be an opposition to the traditional notion of a bi-polar (discrete) contract, with multiple parties being affected by the business relationship reflected in the contractual relations.[[17]](#footnote-17) Hence, the classical contract law doctrine of privity may be an awkward fit in this matrix, since there are likely to be multiple stakeholders who have an interest in the ongoing business relationship. This is particularly the case with inter-firm contractual relations, but may also be the case in inter-personal relations, as we shall show in part III below using examples.

Contract law, and the broader legal questions conventionally dealt with by comparative law, are part of this inquiry and shape it extensively. If one’s aim is to comment on differences in legal culture and context, however, one should take a broader view of the legal doctrine under investigation to encompass the sociolegal element. A conventional “relational” view of contractual privity would be difficult to present, given the fact that our analysis of multi-party contexts will take us outside of the boundaries of conventional contractual relations to a broader spectrum of reliant parties. This necessitates that we broaden our focus to wider social goals, including welfarism and public regulation.[[18]](#footnote-18) Our analysis will demonstrate, by means of several micro-perspectives, an emergent macro view of the role which the doctrine of privity plays in shaping the contractual context in Australia and South Africa. In line with this broader picture of contractual relations and the extent to which these are able to protect reasonable expectations and reliance, we turn to our first context-setting question of legal culture, namely the role of good faith and other concepts of contractual fairness in our chosen legal systems.

*B. Legal Culture and Context:*

*Fairness, Good Faith and the Protection of Reasonable Expectations*

*1. Australia*

Recently we have claimed that several data appear to suggest that Australia is moving, not without difficulties and uncertainties,[[19]](#footnote-19) towards an implied duty of good faith and contractual fairness in clear opposition to the orthodox essence[[20]](#footnote-20) of the Common law tradition.[[21]](#footnote-21) More particularly, on that occasion it was shown that some courts have accepted that there is an implied duty to both contract and perform in good faith in employment contracts in relation to particular powers, discretion, and obligations (such as when the enjoyment by the employee of the essential benefits is at stake, or when the employer pretends to exercise unqualified discretion to grant an inessential bonus or to suspend indefinitely or to arbitrarily affect the superannuation and pension schemes[[22]](#footnote-22)). According to the courts, this is because, as a matter of fact, the parties ordinarily intend that powers and discretions shall be exercised in good faith.[[23]](#footnote-23) Finally, to act *bona fides* has become mandatory in consumer law,[[24]](#footnote-24) while the obligation to pre-contractually and post-contractually act with the utmost degree of good faith – comprising, in the absence of a statutory definition,[[25]](#footnote-25) fairness, honesty, reasonableness and community standards of decency and fair dealing – is compulsory for insurance contracts.[[26]](#footnote-26)

*2. South Africa*

The traditional, prevailing view on the doctrine of good faith in South African contract law was summed up by the Supreme Court of Appeal in *Brisley v Drotsky* using the following quotation:

 ‘What emerges quite clearly from recent academic writing and from some of the leading cases, is that good faith may be regarded as an ethical value or controlling principle based on community standards of decency and fairness that underlies and informs the substantive law of contract. It finds expression in various technical rules and doctrines, defines their form, content and field of application and provides them with a moral and theoretical foundation. Good faith thus has a creative, a controlling and a legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contract; nor, perhaps, even the most important one’.[[27]](#footnote-27)

The above position reflects the fact that the South African common law of contract is based on the Roman Dutch notion that good faith underlies all contracts, but stops short of allowing good faith to independently found a cause of action.[[28]](#footnote-28) Good faith is not the only limitation on contract terms and contract enforcement in South Africa, however. The public policy rule has been invoked by the (then apex) Appellate Division to strike down an unconscionable security arrangement under a credit agreement.[[29]](#footnote-29) It has also been used under the new constitutional dispensation as a vehicle through which to indirectly test both the validity of contract terms and the enforcement thereof against the Bill of Rights.[[30]](#footnote-30) This was established in the *locus classicus* on the constitutionalisation of contract law, *Barkhuizen v Napier*.[[31]](#footnote-31) The same judgment also pronounced on the role of good faith in contract law, but left this doctrine essentially unchanged from the position stated in *Brisley v Drotsky*.[[32]](#footnote-32) The question as to future development of the doctrine, however, was left open.[[33]](#footnote-33)

 The constitutional era has, indeed, seen a marked shift in ethos under the banner of transformative constitutionalism.[[34]](#footnote-34) The Constitutional Court (apex in all matters since 2013) has shown a willingness to intervene to protect weaker parties, along with a concern for the plight of the previously disadvantaged African population and its customary law and values.[[35]](#footnote-35) The net result is a rapidly changing legal culture, shaped by South Africa’s historical context. There have also been several legislative interventions to protect weaker parties such as consumers, employees and residential tenants.[[36]](#footnote-36) Even insurance law has seen the introduction of fairness regimes (outside of mainstream consumer law), along with industry ombuds.[[37]](#footnote-37)

*3. Connection to the Doctrine of Privity and Relational Contract Theory*

The case studies in Part III below will demonstrate that while both Australia and South Africa have entrenched doctrines of contractual privity, there are long-existing common law and statutory exceptions to this, which address many of the complaints with regard to third party reliance and reasonable expectations historically present in the classical law of contract. The doctrine of privity would, however, bar a third party action on a contract outside of the recognized exceptions. In many ways, Australia led the way in the Common law world in reforming the strictures of the doctrine of privity to protect reasonable expectations, as will become apparent in Part III below. This was done both through legislative intervention and through bold judicial activism, supporting a culture of contracting which protects reasonable expectations. In South Africa the currently prevailing approach to contract dispute resolution at the highest level has shown a trend towards putting substance over form and not allowing technical, doctrinal reasoning to bar claims which are thought to be meritorious.[[38]](#footnote-38) There have also been legislative interventions in the democratic era, which aim to introduce a greater measure of protection for weaker contracting parties.

The emergent view in both jurisdictions is of a trend towards “neo-classical” contract law, which considers questions such as who the parties to a dispute are, and what their context is, in order to arrive at a conclusion which is felt to be in line with the prevailing socio-political ethos of contracting. In such a climate, relational contract theory provides an excellent theoretical framework from which to inquire into questions such as how to use the doctrine of good faith in the future to protect reliance and reasonable expectations in contract law. [[39]](#footnote-39) It is our submission that this flexible, embedded and contextualized approach to good faith in contract law is thus a solid paradigm from which to analyze problems based on privity in future contract disputes in Australia and South Africa, particularly where the conventional rules of contract law do not provide a solution. Indeed a relational conception of good faith in contract may guide the development of the common law in the interstices between contract law and legislation.

III. Privity: Three Studies of the Law in Action

*A. Establishing the Discourse: Conferral of a Benefit on a Third Party*

*1. Australia*

As is well-known, Australian contract law is ‘largely derived’ from its English counterpart.[[40]](#footnote-40) Among various consequences, this also implies that, in Australia, the law of contract is underpinned by the bargain theory of consideration,[[41]](#footnote-41) that is, by the ‘notion of exchange for the enforceability of contractual promises’.[[42]](#footnote-42)

It is commonly held that the view that understands contracts as the law of bargains emerged in the nineteenth century to counter-balance the erosion of the classical will theory as brought about by the adoption of an objective model of contracting.[[43]](#footnote-43) Consideration, it is further maintained, is the product of this view.[[44]](#footnote-44) Yet as a historical fact, the will theory was the dominant model of contract until the twentieth century and the idea that contracts are based on exchange long predates the nineteenth century in the doctrine of consideration.[[45]](#footnote-45) Notwithstanding the contrast of opinions on this point, what matters for our purposes is that bargain theory understands contracts as *transactions*, and that such understanding is structurally related to the privity doctrine—[[46]](#footnote-46) which in turn explains why the bargain approach to contracting is also opposed to the promise, reasonable expectations, and reliance theories.[[47]](#footnote-47)

For the purposes of our discussion, however, what is more relevant is the *categorizing function* of such theoretical construct. Indeed, since its inception, the “contract as a bargain” view has served to distinguish contractual agreements from unenforceable promises through the consideration requirement.[[48]](#footnote-48) Canonical examples of the latter category are gift promises, which cannot be enforced unless they are embodied in a deed. Yet, on the other hand, it is equally beyond dispute[[49]](#footnote-49) that promises which cannot be construed as contractual may still be enforced pursuant to the doctrine of equitable estoppel or the principles of misleading and deceptive conduct.[[50]](#footnote-50)

The conferral of a benefit to a non-signatory party (*jus quaesitum tertio*)*,* ought to be analyzed from this perspective of inquiry and the role that the bargain theory plays still today within the rules of contract formation. The reason being that it challenges the very essence of such theory as epitomized by the notion of reciprocity which informs the “detriment-benefit” logic of consideration and the privity rule.[[51]](#footnote-51) Understanding a contract as a bargain serves indeed to stress the *exclusivity* of contractual relationships, and thus, that contracts are the *private* law of the parties. From this it follows that the parties alone can benefit from, and enforce, each other’s promises.[[52]](#footnote-52)

That such a reductionist scheme, which refers ‘to a rather dimensional and unabstract way . . . of seeing a contract as a bond binding the parties’ is inconvenient in many situations had been already pointed out by post-classical Roman lawyers.[[53]](#footnote-53) In modern times, it was the Law Revision Committee that returned, in 1937, on the subject in similar terms. The same point has also been made in English and Australian contract law literature,[[54]](#footnote-54) and even by those who uphold the privity doctrine.[[55]](#footnote-55) What has emerged from the academic debate on this point is that the fastest way to detach the operativity of contracts from the rigidity of the bargain theory is by abolishing the doctrine of privity in its entirety. Given the emphasis that Common law jurisdictions place on the expedience and flexibility of business,[[56]](#footnote-56) it comes as no surprise that this been the route pursued in the United Kingdom,[[57]](#footnote-57) New Zealand,[[58]](#footnote-58) and in part, in the United States,[[59]](#footnote-59) and Australia.

In Australia, in particular, privity has been abolished at both the federal and local levels by section 48 of the *Insurance Contracts Act 1984* (Cth)(hereafter ICA), section 11 of the *Property Law Act 1969* (WA), section 55 of the *Property Law Act 1974* (Qld), and section 56 of the *Law of Property Act* (NT). Despite being the main Australian litigation centres, New South Wales and Victoria do not have statutes on privity. The ICA provisions will be discussed below in comparison with what is prescribed by local statutes for motor vehicle insurance contracts.[[60]](#footnote-60) With respect to the other set of norms, it should be noted that the Northern Territory Act is identical to that in Queensland in providing that a third party beneficiary can enforce a contractual promise if she has accepted it.[[61]](#footnote-61) What is meant by “acceptance” is defined in subsections (6) of both norms. Most importantly, consideration need only move from the promisee. However, the promise must create or appear to create a duty enforceable by the beneficiary. This is in contrast to what is stated in the Western Australian statute, where it is merely required that the contract confers a benefit to the non-signatory party. Importantly, according to section 11(2)(c) of the Western Australia Act, the third party beneficiary can only enforce the promise if ‘each person named as a party to the contract [is] joined as a party to the action or proceeding’. Finally, while there is no specific reference to the consideration requirement, it is ‘obviously necessary’[[62]](#footnote-62) that the promise must provide it. The interrogative as to whether all these provisions also apply to terms which are statutorily implied in the contract has been solved affirmatively by Australian courts.[[63]](#footnote-63)

Scholars tend to agree that other statutory provisions, such as Division 2 of Part 5-4 of the *Australian Consumer Law*, introduced in 2010, or those in the *Bill of Exchange Act 1909* (Cth), the *Cheques Act 1986* (Cth), and the various Sea-Carriage Document Acts, do not represent exceptions to the privity rule in the strict sense of the term. The argument put forward is that ‘the right being enforced is a statutory one, not one created by a contract’.[[64]](#footnote-64) While sound, in our opinion this view renders exceptional measures erroneously dependent on the nature of their source, in so failing to recognize that, from a theoretical perspective, exceptions may well be introduced by statutory means. And indeed, this is the case in Common, Civil, and mixed legal jurisdictions alike. Yet this should not lead us to conclude that the doctrine of privity no longer operates in Australia: as is the case with every exception, the above-listed ones merely create peculiar zones of inoperativity, in so confirming that the privity rule continues to apply to all the scenarios which do not fall within their purview.

Apart from statutory exceptions, the common law has recognized a whole series of situations where the privity rule ought to be displaced. In this sense, it is worth noting that already in 1915 the High Court has argued for the necessity of keeping the privity doctrine and the rule that consideration must move from the promisee apart. This has been done by sharing Viscount Haldane’s judgement in *Dunlop Pneumatic Tyre Company Ltd v Selfridge*.[[65]](#footnote-65) The cases of *Port Jackson Stevedoring Pty Ltd v Salmon & Spraggon (Aust) Pty Ltd,*[[66]](#footnote-66)*Waltons Stores (Interstate) Ltd v Maher*,[[67]](#footnote-67) *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*,[[68]](#footnote-68) are the most relevant for our purposes.[[69]](#footnote-69)

In *Port Jackson Stevedoring*, it was held that a promise to perform an existing contractual obligation to a third party is good consideration. Unsurprisingly, this decision has received a considerable amount of attention in contract law literature.[[70]](#footnote-70) Given the scope of our analysis, of particular interest are the two rationales of this rule suggested by Willmott et al: ‘[f]irst, it may be of benefit for the promisor . . . to ensure that the original agreement is carried out. . . . Second, although the promise . . . may be contractually bound to perform the original agreement, by entering into the subsequent agreement, he or she incurs further liability to the promisor . . . if the first agreement is not performed’.[[71]](#footnote-71)

In *Waltons Stores*,[[72]](#footnote-72) Brennan J set out six requirements which must be met for a third party beneficiary to seek relief on the grounds of the equitable principles of estoppel.[[73]](#footnote-73) While the High Court has not adopted this view as a whole, it still remains the most quoted ‘formulation of principle’ in Australian contract law theory.[[74]](#footnote-74)

In regards to the *Trident* case, it is the leading case on the exception to privity. The amount of scholarship on it is enormous as its relevance has been addressed by contract and comparative law scholars alike in both Civil and Common law traditions.[[75]](#footnote-75) The scenario may be summarized as follows: Trident General Insurance agreed to indemnify the insured, Blue Circle Southern Cement Ltd, against *all sums* which it would be liable to pay in respect of injury to persons. Two things should be noted: first, it was agreed that this scheme applied to injuries occurred at specified sites; secondly, the definition of “insured” under the contract was also to include the company’s contractors, which at the time the contract had been entered into, were not identified.[[76]](#footnote-76) A crane driver employed by a company which was under the direction of the principal contractor for the construction work, McNiece Bros Pty Ltd, was injured. The High Court held that McNiece, which was stranger to the consideration, was entitled to be indemnified under the policy to which it had not been a party when it was issued. In the judgement, a majority of the High Court criticized privity on various grounds. Further, it was also held that consideration and privity ought to be approached distinctively.[[77]](#footnote-77)

Notwithstanding the historical relevance of the judgment,[[78]](#footnote-78) and the criticism showed by a leading defender of the privity requirement,[[79]](#footnote-79) it should be borne in mind that what the High Court established in *Trident* hadalready been achieved by section 48 ICA. With respect to other possible situations, scholars are divided as to how classify them. By way of an example, McKendrick and Liu describe both an agreement between the principal and the third party arising from an agency relationship and a trusteeship as true exceptions to the doctrine of privity.[[80]](#footnote-80) Other commentators are instead reluctant to use such definition,[[81]](#footnote-81) and prefer to speak of mere ‘evasions,’[[82]](#footnote-82) ‘non-applications’ or ‘circumnavigations’,[[83]](#footnote-83) ‘methods of working around the privity rule,’[[84]](#footnote-84) ‘miscellaneous limitations,’[[85]](#footnote-85) or ‘supervening doctrines to which the doctrine of privity is subservient’.[[86]](#footnote-86)

Analytically, the benefit conferred to the non-signatory party may either be a positive one, such as in the classic case of payment of money, or a negative one, such as when the parties to a contract agree not to sue third parties for their negligent conduct. The two hypothetical situations have to analyzed separately. With respect to the first situation, under Australian law, third parties have no right of action.[[87]](#footnote-87) Only the promisee is entitled to enforce the contract and *not* on behalf of the third party beneficiary. This can either be done at common law by claiming damages, or in equity by seeking specific performance.[[88]](#footnote-88)

The scenario becomes more complicated in the case of negative benefits, that is, when the parties to a contract insert in it an exclusion clause intended to benefit agents, employees, or independent subcontractors. The classic example given by Australian scholars in this respect is that of contracts for the carriage of goods, particularly with respect to shipping contracts.[[89]](#footnote-89) In these cases, all of which have a peculiar commercial character,[[90]](#footnote-90) it is common practice to exempt or limit, in the bill of lading, the liability of the stevedores engaged to unload the goods at the port of destination. Such clauses are usually referred to as ‘Himalaya’ clauses, after the decision in *Adler v Dickson*.[[91]](#footnote-91)

The current normative landscape is the result of a peculiar, and at times not linear, transplanting process,[[92]](#footnote-92) whose origins may be traced back to the 1956 case of *Wilson v Darling Island Stevedoring & Litherage Co Ltd*,[[93]](#footnote-93) where the High Court, by a three to two majority, held that the exclusion clause protected the carrier shipowner but not the stevedore company. The carrier issued the bill of landing containing the clause, and the stevedore, which was their agent, could not sue or be sued on the contract. After that, Australian courts have adopted the four criteria established by Lord Reid in the famous case of *Midlands Silicones Ltd v Scruttons Ltd*, where the House of Lords denied the protection of an exclusion clause in a bill of lading to a stevedore.[[94]](#footnote-94) In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*,[[95]](#footnote-95) the High Court approved Lord Reid’s decision as crystallized by the Privy Council in the so-called “The Eurymedon” case.[[96]](#footnote-96) The relevance of this passage lies in the fact that, initially, in *Port Jackson Stevedoring Pty Ltd v Salmon and Spraggon (Aust) Pty Ltd (“The New York Star”)*,[[97]](#footnote-97) a majority of the High Court had rejected *The Eurymedon* ruling. It was only when the Privy Council reversed on appeal the decision of the New Zealand Court of Appeal that the rule started being followed in Australia and applied to road transport cases as well.[[98]](#footnote-98) What emerges from this trend is that the subcontractor is not required to know of the existence of the exemption or limiting clause. As Carter has noted, one may conclude that ‘many third party beneficiaries of exclusion clauses will have little difficulty in meeting Lord Reid’s third and fourth conditions’.[[99]](#footnote-99)

Finally, it is worth mentioning the “vicarious immunity” clauses, which according to Brownsword are evidence of how ‘English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach’.[[100]](#footnote-100) Such reconstruction is surely apt as in *Elder Dempster & Co v Paterson, Zochinos & Co Ltd*[[101]](#footnote-101)it was held that a clause exempting charter parties from liability extended to the owner of the ship who was not party to the contract of carriage. Initially, Australian courts had adopted the same approach in two bailment cases.[[102]](#footnote-102) Yet, in *Wilson v Darling Island Stevedoring & Litherage Co Ltd*,[[103]](#footnote-103) the High Court has firmly disapproved it.

*2. South Africa*

Privity is an established feature of the South African common law of contract, which rests on the Roman Dutch notion of contract as a “*vinculum iuris*”, which creates rights and duties only for the parties bound thereby.[[104]](#footnote-104) Historically, Roman law (which is a conventional starting point for a history of South African law) knew no contract for the benefit of a third party, with privity of contract being strongly enforced.[[105]](#footnote-105) In the Roman Dutch law period, which was the legal system transplanted to South Africa upon Dutch colonization in 1652, the majority of writers accepted that there could be a contract for the benefit of a third party,[[106]](#footnote-106) a position which was privileged over the English law by the early nineteenth century cases in South Africa.[[107]](#footnote-107) During this formative period in South Africa’s history, the role of the English doctrine of consideration was as of yet uncertain.[[108]](#footnote-108) In *Tradesmen’s Benefit Society v Du Preez*, Lord Henry de Villiers, then Chief Justice of the Cape colony in an as of yet un-unified South Africa, married the doctrine of consideration and the Roman Dutch contract for the benefit of a third party, by holding that the consideration (described as “*iusta* *causa*” to better fit into the Roman Dutch mold) must move, in this scenario, from the beneficiary to the promisor.[[109]](#footnote-109) This avoided the English complication that the beneficiary often receives a gratuitous benefit. The doctrine of consideration was, however, jettisoned from South African contract law by the then apex Appellate Division in 1919.[[110]](#footnote-110) There the majority of the court rejected De Villiers’s equation of consideration and *iusta causa*, with the result that contracts in South Africa today are created merely by offer and acceptance.[[111]](#footnote-111) The same court confirmed the following year in *McCullogh v Fernwood Estate* that consideration/*iusta causa* was not a requirement for the contract for the benefit of a third party, in line with its decision the previous year.[[112]](#footnote-112) The proper construction to be placed upon this type of arrangement was clearly set out by Schreiner JA in the leading case of *Crookes NO v Watson* in 1956, which remains the authoritative statement today:

 ‘But in the legal sense, which alone is here relevant, what is not very appropriately styled a contract for the benefit of a third person is not simply a contract designed to benefit a third person; it is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two… [T]he typical contract for the benefit of a third person is one where A and B make a contract in order that C may be enabled, by notifying A, to become a party to a contract between himself and A. What contractual rights exist between A and B pending acceptance by C and how far after such acceptance it is still possible for contractual relations between A and B to persist are matters on which differences of opinion are possible; but broadly speaking the idea such transactions is that B drops out when C accepts and thenceforward it is A and C who are bound to each other’.[[113]](#footnote-113)

This statement confirmed the earlier decisions and has been adhered to since then. Controversies remain (although largely only in academic sources) over whether the two contract construction is the best model, particularly given the massive influence of the work of Prof JC de Wet, who proposed an alternative construction.[[114]](#footnote-114) From a practical point of view, the contract for the benefit of a third party is firmly entrenched, however, and is widely used in South Africa in areas such as insurance, trusts and estate planning, and pension agreements.[[115]](#footnote-115) Given the two contract model and the requirement of third party acceptance, the position is that promisor and promissee may generally by agreement revoke the benefit up until acceptance by the third party beneficiary.[[116]](#footnote-116) Acceptance of a benefit by the third party also requires that the third party perform any corresponding obligation which attaches to the benefit.[[117]](#footnote-117) Of course, the requirement of acceptance distinguishes the South African position from other jurisdictions where this is not required (notably for present purpose the current English statutory regime)[[118]](#footnote-118) with consequent danger for the protection of third party reliance and reasonable expectations.[[119]](#footnote-119) Visser has argued that this is due to the Roman Dutch influence in South Africa, which emphasizes subjective consensus in contract formation, in contrast to the more objective English approach to this question.[[120]](#footnote-120) As will be shown below in the case study on extension clauses in insurance policies, one way of getting around this difficulty has been to make use of an inference of tacit acceptance.[[121]](#footnote-121) In this way, fairness inter partes can be preserved and justice obtained on an ad hoc basis.

The intricacies of the South African law have been discussed at length by others; for present purposes it is merely necessary to know that the contract for the benefit of a third party is a settled feature of contracting in that country, and which has been constructed in a manner which preserves intact the doctrine of privity as received from Roman Dutch law.

Thus South African law has not been dogged by the difficulties of English and Australian law in this regard given the absence of a doctrine of consideration. Privity still stands as an obstacle to a broader notion of contractual relations between multiple parties, however, in the sense used in the relational contract literature.[[122]](#footnote-122) The necessity of acceptance of an offer, giving rise to a binding *vinculum iuris*, or bilateral contract, problematizes multi-party relationships, which may not be strictly based on such a bi-polar contract. Some of the difficulties which the doctrine of privity has thrown up in practice will be considered in the following two scenarios in Part III, Sections B and C below.

*B. Extension Clauses in Motor Vehicle Insurance Contracts*

*1. Nature of an Extension Clause*

An “extension clause” is a common type of provision in an indemnity insurance contract, extending cover beyond the named insured to third parties, who are often named only by class.[[123]](#footnote-123) In a motor vehicle policy, such clauses are typically used to extend cover to those driving the insured vehicle with the permission of the insured. (In other contexts, such clauses could also cover, for example, loss of, or damage to, goods brought onto insured premises by third parties.)[[124]](#footnote-124) The object of an extension clause is thus to provide cover to a class of third parties who are not party to the insurance contract, which implicates the doctrine of contractual privity. The extension clause usually covers damage to property and persons, indemnifying the authorized driver from third party claims. Such clauses are a firmly established feature of English insurance law,[[125]](#footnote-125) and have been exported to both South Africa and Australia.[[126]](#footnote-126) Since the underlying intention of this paper is to explore the social embeddedness of the privity doctrine, extension clauses will be used here as an illustration of the broader relational backdrop to the discrete insurance transaction between insurance company and insured driver: for starters, the authorized drivers of an insured vehicle are typically persons with whom the insured has a close association: family members, friends and employees. Authorization of such persons is, however, logically typically viewed in a contractual light. Then the relationship between insurer and insured, is said to be of “utmost good faith”, and while seldom personal, usually involves duties such as disclosure, which involve a certain amount of co-operation and inter-dependence.[[127]](#footnote-127) There is thus a network of contracts at play, which vary in the extent to which they are relational. The inter-connectedness of the parties in this multi-lateral relationship hinges on an extension clause. The manner in which an insurance company performs under such a clause, as well as the manner in which courts and a legal system view such clauses, implicates an important sociolegal dimension of the privity rule, since default will have broader consequences beyond just the immediate parties of insured and insurer. Indeed, if an extension clause is rendered unenforceable, beyond the liability of the authorized driver, a class of accident victims which is unforeseeable ex ante may be left without compensation.

 Of course, there is also a welfarist view which can be taken of motor vehicle insurance, viewing this as a form of accident cover intended to spread the social cost of harm caused by motor vehicle accidents to those who are best able to shoulder such loss. This welfarist dimension is dealt with differently in Australia and South Africa. In Australia, drivers are compelled by statute law to purchase third party insurance, which provides the cover of private insurers to third parties injured in motor vehicle accidents.[[128]](#footnote-128) Where a driver (unlawfully) drives without insurance and causes an accident, the costs of compensation for an injured third party will be borne by a collective organization of private insurance companies, with a claim then being brought against the so-called Nominal Defendant.[[129]](#footnote-129) Thus the type of extension clause discussed above is hence only relevant in Australia outside of the compulsory third party insurance scheme.[[130]](#footnote-130) In South Africa, anyone involved in a motor vehicle accident may claim compensation resulting from death or bodily injury in a road accident from a statutory fund (the Road Accident Fund).[[131]](#footnote-131) Claims are subject to a fairly low cap,[[132]](#footnote-132) however, and the possibility of a claim for compensation for damages above this cap, or for damage to property, leaves open a sphere in which extension clauses can operate.

 In what follows below, the position under both Australian and South African law with regard to this type of contractual provision will be set out.

*2. Australia*

An insurance contract (policy) is a contract based on speculation by which the insured provides consideration, in the form of payment of, or promise to pay, premiums, to secure a benefit on the happening of some event. The even must be one involving some degree of uncertainty as to whether it will occur, or when it will occur. Hence, as a general common law rule,[[133]](#footnote-133) the event covered by the policy will be one which is adverse to the interest(s) of the insured only. In other words, the insured must have an interest in the subject matter of the contract. This is what, from a normative point of view, renders such interest(s) *insurable*.[[134]](#footnote-134) From this it follows that the transfer of risk from the insured to the insurer is in line with the working logic of the privity rule.

This theoretical scheme has, however, been set aside by both the High Court’s ruling in *Trident* [[135]](#footnote-135) and section 48 ICA (mentioned earlier).[[136]](#footnote-136) Indeed, under section 48(1) ICA, ‘[a] third party beneficiary has a right to recover from the insurer, in accordance with the contract, the amount of any loss’ he or she suffered. A few things should be noted: first, it has been contended that the wording is technically incorrect, the beneficiary not being a “party”—a term which implies participation in the agreement—but rather a “person” (stranger to the contract).[[137]](#footnote-137) Secondly, section 41 ICA sets out the circumstances in which the non-signatory claimant can require an insurer to elect to inform them whether the contract applies to the claim and the relative procedures to be followed. Thirdly, in *Lofthouse v CAN*,[[138]](#footnote-138) Hansen J held that the notion of “claim” for the purposes of the discipline refers to separate parts of the claim. Finally, to apply the new regime, the interpreter is inevitably required to determine whether the abrogation of the insurable interest test brought about by sections 16 and 17 ICA applies to non-signatory parties as well. Indeed, while at common law this test required the insured to have a *legal* or *equitable* interest in the subject matter of the insurance, according to sections 16 and 17 ICA, the insured is only required to have an *economic* or *pecuniary* interest at the time the loss occurs. As section 48 ICA applies to every work covered by the policy, it might be argued that also the interest of third parties is affected by the innovation of sections 16 and 17 ICA. Delving into this matter at length, Patrick Mead persuasively concluded that this is not the case.[[139]](#footnote-139)

That having been said, it must be emphasized that the principle outlined in s 48(1) ICA gives effect to a specific recommendation made by the Australian Law Reform Commission,[[140]](#footnote-140) and represents a clear exception to the general norm, discussed above, that a third party has no right of action against the promisor. The provision applies to a whole series of insurance contracts, except marine, health, workers’ compensation insurance reinsurance, and more importantly for our purposes, ‘to the death of a person, or to injury to arising out of the use of a motor vehicle’[[141]](#footnote-141)

Before discussing this scenario, it is worth noticing that sections 48AA and 48A ICA re-state the same principle with respect to life insurance policies. In these cases, non-signatory parties have, in relation to their claim, ‘the same obligations to the insurer as the third party beneficiary would have if the third party beneficiary were the insured’. Further, they may discharge the insured’s obligations in relation to the payment of a benefit (section 48AA ICA), or in relation to the payment of any money owed to them under the contract (section 48A ICA). However, according to sections 48(3) and 48AA(3), but not 48A ICA, ‘[t]he insurer has the same defenses to an action under this section as the insurer would have in an action by the insured, including, but not limited to, defenses relating to the conduct of the insured (whether the conduct occurred before or after the contract was entered into)’.[[142]](#footnote-142) Finally, section 51 ICA provides that those who have suffered a damage because of the insured or third party’s conduct are entitled to sue the insurer if they are liable but ‘ha[ve] died or cannot, after reasonable inquiry, be found’.

As mentioned, however, section 48 ICA does not apply to compensation ‘to the death of a person, or for injury to a person, arising out of the use of a motor vehicle’ (section 9 ICA). While at first glance this exemption might represent an obstacle to application of the compulsory third party motor accident insurance scheme, the issue had been already solved by statutory means in each State and Territory.[[143]](#footnote-143) These provisions apply to the conduct of either owner or the driver/user of the vehicle in question. In this sense, it should be emphasized that local commissions and boards have been established by various motor or transportations Acts over the years to manage third party claims for damages resulting from bodily injury caused by a road accident.[[144]](#footnote-144) These are compensated by the relative funds which come from compulsory payments made by motorists when they register their vehicles each year. As these funds are not available to cover damages to the vehicle(s) involved in the accident, the parties are left free to insert in the contract one or more exclusion clauses to that effect.

*3. South Africa*

The absence of a statutory provision rendering third party claims under extension clauses enforceable has caused problems in the South African case history, mainly due to the requirement of insurable interest and the specific wording used in the standard clause.[[145]](#footnote-145) Surprisingly, however, given that this is a stock standard provision in motor policies, there are only a handful of reported judgments dealing squarely with the enforceability of extension clauses.[[146]](#footnote-146) This is probably best explained by the response that insurance companies generally pay out on such claims for reasons of reputation, given that the enforceability of such provisions has been debated in the secondary literature in South Africa.[[147]](#footnote-147) Indeed the proper theoretical construction of such clauses has been left entirely to the common law. A standard South African extension clause might read as follows:

‘In terms of this section the company will indemnify any person who is driving or using the vehicle on the insured’s order or with his permission, provided that such person:

* + Is not entitled to indemnity under any other policy;
	+ Shall as though he were the insured observe, fulfil and be subject to the terms, conditions and exceptions of this policy; and
	+ Has not been refused any motor vehicle insurance or continuance thereof by any insurance company or underwriter’.[[148]](#footnote-148)

Such a clause is normally accompanied, however, by this qualifying provision:

‘The extension of the company’s liability to any person other than the insured shall give no right of claim hereunder to such person, the intention being that the insured shall in all cases claim for and on behalf of such person, and the receipt of the insured in any case shall absolutely discharge the company’s liability hereunder’.[[149]](#footnote-149)

This qualifying provision places a procedural constraint as to how the claim may be brought and emphasizes the privity of the insurance relationship.[[150]](#footnote-150) In what follows below, this second clause will be referred to as the ‘procedural clause’.

 In construing provisions such as the above, a few problems have arisen in the case law, most of which can be ascribed to the influence of English insurance law, particularly the requirement of insurable interest.[[151]](#footnote-151) The simple and prevailing view of extension clauses in South Africa is that this is a stipulation for the benefit of a third party (the authorized driver), providing her with the advantage of insurance cover.[[152]](#footnote-152) This means that the relationship between insurer, insured and authorized driver should be treated in accordance with the rules set out in Part III, Section A.2 above. (That is that there are two contracts at play: the insured contracts with the insurer for cover for the third party authorized driver, who must in turn accept such cover from the insurer.) This construction was offered in the first reported South African case, *Croce v Croce*, in 1940, and despite intervening academic controversy, has been recently confirmed by the Supreme Court of Appeal.[[153]](#footnote-153) This resolves the difficult question as to a perceived lack of insurable interest by the insured in the delictual liability of the authorized driver. If the contract is in truth intended to provide the benefit of cover for the authorized driver, then it is the authorized driver’s insurable interest which is relevant, and not that of the insured. The authorized driver clearly has an interest in her own delictual liability. Insurable interest is in any event no longer viewed as the major stumbling block to an insurance claim in South Africa which it once was.[[154]](#footnote-154) Prior acceptance of cover can sometimes present another potential stumbling block for claims on behalf of authorized drivers, but such acceptance is normally tacitly inferred from the circumstances.[[155]](#footnote-155)

 The complicating factor with the contract for the benefit of a third party model, however, is the procedural clause. Normally, once the beneficiary accepts the benefit, this is directly enforceable by her against the promisor. Here, however, the procedural clause prevents this, by requiring the claim against the insurer to be brought by the insured. In *Unitrans Freight v Santam*, it was authoritatively laid down that this type of clause does not negate the contract for the benefit of a third party construction, it merely lays down a procedure as to how the beneficiary must enforce her claim against the insurer.[[156]](#footnote-156) In another case, *Jacobs NO v Braaf*, an insured who refused to bring such a claim on behalf of a deceased authorized driver (who was also his son) was ordered to do so, relying on a prior tacit undertaking that the insured would bring a claim in the event of an accident involving the authorized driver.[[157]](#footnote-157) In this way, the deceased estate of an impecunious authorized driver, which had been held delictually liable to a seriously injured plaintiff (the girlfriend of the deceased driver), compelled the insured to institute a claim indemnifying the deceased estate.[[158]](#footnote-158) Hence, by means of tacit contracts, compensation was found for the injured plaintiff, who had received only minimal statutory compensation from the Road Accident Fund.[[159]](#footnote-159)

 Indeed, the Road Accident Fund in South Africa, despite its noble purpose of bringing public relief to those injured on the country’s roads, is widely viewed as being a failed institution. There is a cap on claims for bodily injury or death of R25 000, which is low and will usually not compensate in full for losses, as is reflected in cases such as *Unitrans Freight* and *Jacobs NO*.[[160]](#footnote-160) Reports claim that this fund, funded by a fuel levy, is insolvent and has been so for some time.[[161]](#footnote-161) This means that unlike in Australia, the question of the proper treatment of extension clauses in motor vehicle policies remains one of great importance.

*4. A Practical Comparative Analysis*

The economic dimension of contractual relations provides control over party behavior through market sanctions.[[162]](#footnote-162) From this perspective, the insurer will wish to maintain its business reputation and possibly to retain the insured as a future client; while the insured will wish to avoid an increase in premiums occasioned by the institution of a claim, or the potential loss of a no-claim bonus. There are thus incentives to co-operation on both sides. A social welfare dimension is also at play, however: the insurer is obliged by not only economic considerations of reputation, but also in Australia and now South Africa, by an enforceable statutory or contractual provision to provide cover to potential claimants. In addition to benefits to the immediate parties, this brings a broader social benefit, since accident compensation is transferred to insurance companies who are able to afford this, and who spread the costs of such cover amongst a pool of insured parties. Thus a practical view of extension clauses should consider the problem from a broader economic and social welfare perspective: the impact of third party motor accident compensation extends far beyond the business relationship between insured and insurer. With its clearly defined statutory regime, Australia has gone further down the public regulation path here than South Africa has. Compulsory third party motor insurance is undoubtedly a public advantage, but reflects also a legal culture of respect for the law and indeed a certain level of affluence. South Africa’s private, contractual regime, backed up by a public accident compensation fund, is reflective of the social reality of that country. In a welfarist setting, privity must play a secondary role to public regulation, as is achieved by different means in each system.

*C. Umbrella Agreements*

*1. Umbrella Agreements as a Business Phenomenon*

An “umbrella” agreement is in many ways more a feature of business organization than contract law. Hence, Mouzas and Furmston define umbrella agreements as ‘private arrangements that provide a framework of clauses which regulate future contracts’,[[163]](#footnote-163) and as ‘“constitutions” of contracts’.[[164]](#footnote-164) The intention is generally to establish a “partnering” relationship, which need not necessarily be based on an enforceable contract.[[165]](#footnote-165) Such a business relationship may often endure over a long period of time, however, giving rise to the possibility of ‘contractual relations’, as per Macneil’s analysis.[[166]](#footnote-166) Where such contractual relations exist, there is likely to be reliance by third parties on such relationship. Formal contract law is problematic for the enforceability of umbrella agreements, however: even if the certainty of content hurdle is overcome, reliant third parties would be blocked by the privity rule from instituting a contractual cause of action. This means that if a legal system wishes to protect third party reliance here, an alternative (non-contractual) solution needs to be found.

In what follows below, the reader will notice that we have illustrated our argument with English case law and materials in addition to those from Australia and South Africa. This is due to the paucity of the published discourse on the umbrella agreement phenomenon in our target jurisdictions. We will thus use the readily accessible materials from the parent system of English law as our starting point, backing this up with sources from Australia and South Africa where available, in order to test the universality and comparative applicability of our argument.

*2. Comparative Usage of Umbrella Agreements*

Our analysis here will be sectoral, allowing for reference to specific regulatory regimes, where applicable. This facilitates reference to extra-contractual responses to the umbrella agreements phenomenon, particularly from the point of view of public regulation of contracts and the protection of (third party) reliance. Our chosen examples are: supply chain arrangements; casual employment arrangements; and financial sector arrangements.

*2.1 Supply Chain Arrangements*

The key English case, *Baird Textile Holdings Ltd v Marks and Spencer plc*,[[167]](#footnote-167) will be used to illustrate the problems with umbrella agreements in this sector. Baird Textile Holdings (“BTH”) had been one of the principal suppliers of clothing items to Marks and Spencer (“M&S”) for thirty years when they were given notice in October 1999 that M&S intended to terminate the relationship at the end of that season’s production.[[168]](#footnote-168) Witnesses for M&S testified to the fact that “partnering” was a key feature of the M&S business model – by this they meant not partnership in the legal sense, but rather a long-term relationship of inter-firm co-operation.[[169]](#footnote-169) Baird had relied on this relationship, which accounted for 30-40 per cent of its total turnover, due to its long-term duration and representations from M&S that this relationship would continue indefinitely.[[170]](#footnote-170) Indeed, Baird had invested a good deal of sunk expenditure in assets and employees in order to be able to respond to M&S’s needs.[[171]](#footnote-171) What was clear, however, was that there was no express long-term contractual undertaking on M&S’s part.[[172]](#footnote-172) At most, there was a long-term business relationship, which Baird argued could only be terminated on reasonable notice (three years was their submission).[[173]](#footnote-173)

In the Court of Appeal, Baird failed to convince any of the members of the court that their claim for damages resulting from M&S’s summary termination of the business relationship should proceed to trial.[[174]](#footnote-174) Two major potential causes of action were considered: first, in the absence of an express contract, Baird argued for tacit agreement, incorporating a proper notice period.[[175]](#footnote-175) This claim failed: the court was of the view that the lack of certainty in the business relationship as to quantity of goods to be supplied or price, prevented a cause of action for damages in contract.[[176]](#footnote-176) The second argument rested on estoppel, namely that the nature of the relationship between Baird and M&S estopped M&S from denying the existence of a tacit long-term supply contract between them; or alternatively, that estoppel precluded the termination of the relationship other than on reasonable notice.[[177]](#footnote-177) This second claim also failed: an argument as to estoppel based on the existence of a tacit contract could not succeed where there was held to be no such contract; and the alternative of a reasonable notice period without a tacit contract required estoppel itself to found the cause of action, which was not possible in the circumstances in English law.[[178]](#footnote-178)

The clear emergent picture here is of a business relationship between a dominant and a weaker party in a supply chain. Due to its dominant position, M&S was able to dictate the nature of such relationship to Baird.[[179]](#footnote-179) This allowed a measure of flexibility to M&S, enabling its requirements to be adjusted on a seasonal basis.[[180]](#footnote-180) Baird relied on this relationship, incurring sunk expenditure specifically towards catering for M&S’s needs. For thirty years, this partnering relationship benefitted both parties, but Baird was left exposed thereby to M&S’s opportunism. Of course, Baird was by no means a vulnerable small business. The annual turnover from their business with M&S alone amounted to over £100 million, which in turn comprised only 30 to 40 per cent of Baird’s total business.[[181]](#footnote-181) Partnering had thus indeed been a mutually profitable approach up until notice was given. Given these economic details, one could speculate here that the most vulnerable persons to the M&S termination were possibly third parties to it, namely the employees of Baird. The clear implication of the reported judgment is that a downscaling of operations at Baird would have resulted from M&S’s actions, which would have led to the retrenchment of some of their employees: third parties to the business relationship, but no less reliant on it.

A brief examination of the Australia database shows that, since 1987, 76 cases concerning umbrella agreements have been heard by the courts. This is testament to the commonality of such arrangements in business transactions. The leading case is the well-known *Burger King Corp v Hungry Jacks Pty Ltd*,[[182]](#footnote-182) a case which may also shed new light on Australian contract law’s transition towards an implied duty to act in good faith and reasonably, discussed above in Part II, Section B.1. What matters for our purposes is that, in 1990, the parties entered into four agreements to settle a series of dispute relating to Hungry Jack’s activities as franchisee of Burger King in Australia. One of such agreements, the “Settlement Agreement” was categorised by the Court of Appeal of New South Wales as an umbrella agreement.[[183]](#footnote-183) Among other things, the agreement served to terminate certain of the existing agreements and specify which other agreements, including existing franchise agreements, still applied. After a few years, Burger King Corp decided to increase its own participation in the Australian market and reduce that of Hungry Jack. Important measures were taken to that effect, including a freeze on Hungry Jack recruiting third party franchisees, imposing a $10,000 ‘non-refundable deposit’ on each new restaurant that Hungry Jack was required to open under the 1990 agreements, and withdrawing of financial and operational approval. Lastly, Burger King Corp purported to terminate the “Development Agreement” for breach, as Hungry Jack had not been able to open then required number of new restaurants. This was challenged by Hungry Jack, who succeeded before the New South Wales Supreme Court. On appeal, it was held that that Burger King’s conduct had breached several implied duties to act in good faith and reasonably. The targeted behaviour included the freeze imposed on third-party franchisees, the withdrawal of financial and operational approval, and the use of a Hungry Jack’s employee’s advice to undermine HJPL’s position.[[184]](#footnote-184)

The Burger King case thus illustrates two points for present purposes: first, an umbrella agreement between two powerful corporations had a particular impact on a vulnerable class of third parties, not party to the business arrangement: namely, Hungry Jacks franchisees in Australia. Secondly, Australian law takes a dim view of opportunistic exploitation of contractual powers as Burger King attempted to do. The latter point speaks to the business culture and context of Australia, but also indirectly to how such culture views the macro picture, which would include those further down the Hungry Jacks supply chain, including franchisees. In an influential study, Hadfield has drawn attention to the potential for exploitation which franchisees face.[[185]](#footnote-185) Although Hadfield’s study focussed on the United States, the picture she paints appears to be universal.[[186]](#footnote-186)

South Africa does not have a seminal case on umbrella agreements in the supply chain context, although scholars dealing with retail supply chains have drawn attention to the vulnerability of small scale producers to large corporate retailers, who squeeze suppliers in a manner often alleged to be exploitative.[[187]](#footnote-187) While the type of umbrella agreements which might govern such relationships – if the relationship is even formalized to this extent – are unavailable to the present authors, the literature on global value chains speaks to the need for protection of weaker supplying parties.[[188]](#footnote-188) The reliance of such suppliers and their third party dependents on the patronage of retailers exposes them to exploitation. The response of the South African legislature has been to extend the protection of consumer law to small enterprises: the general Consumer Protection Act protects businesses with an annual turnover or asset value of R2 million or less;[[189]](#footnote-189) while those businesses with an annual turnover or asset value of R1 million or less are also protected by the National Credit Act.[[190]](#footnote-190) The Consumer Protection Act also expressly includes “franchisees” in the category “consumer”.[[191]](#footnote-191) This statute further stipulates that franchisees are always to be regarded as consumers, regardless of the size of a given franchisee juristic person.[[192]](#footnote-192) There are also formal rules as to franchise agreements, which must be in writing and contain certain types of information.[[193]](#footnote-193) Finally, a franchisee has a 10 day cooling off period in which to withdraw from a franchise agreement.[[194]](#footnote-194) In this way, consumer legislation offers a greater measure of protection to suppliers, including franchisees, along with the availability of various alternative dispute resolution platforms. It is our contention that developing powers of constitutional review of discretionary contractual powers would also assist a South African franchisee in the Burger King scenario, so that an unfair termination of a franchise agreement could possibly be reversed by a court.[[195]](#footnote-195)

*2.2 Casual Employment Arrangements*

Casual labor may also be procured by means of an umbrella agreement, such as the so-called “zero hour contract” found in the UK and Australian labor markets.[[196]](#footnote-196) In terms of a zero hour contract, an individual undertakes to be available to work for an employer, but is not actually guaranteed any specific number of hours per month.[[197]](#footnote-197) Statistics in the UK reveal that this is a fairly common practice there, allowing employers to avoid having to commit to paying employees when not required.[[198]](#footnote-198) Empirical studies also suggest that zero hour employees are often engaged in several such contracts at any point in time, or are students, or mothers, not looking for full time employment.[[199]](#footnote-199) The risk of zero hour contracts, however, is that employers could use these to avoid the dictates of employment legislation.

In South Africa, so-called “non-standard” employment is closely governed by statute, introduced by amendments to the Labour Relations Act in 2014.[[200]](#footnote-200) Sections 198A-D of this Act now contain detailed provisions relating to “temporary”, “fixed term”, and “part time” employees, who earn below a certain threshold. A earlier reported decision on a zero hour contract scenario makes it clear that persons employed in such a capacity had the status of “employees” in South Africa and were hence entitled to statutory protection even prior to the legislative amendments.[[201]](#footnote-201) Section 198C in particular, which deals with part-time employees earning below a minimum threshold, provides that employers must treat such workers no less favorably than full-time employees doing the same job and that such persons must be provided with training and skills development comparable to full-time employees.[[202]](#footnote-202)

In Australia zero hour contracts are used in casual employment situations (roughly, 23% of all employment contracts). This is due to the fact that this requirement does not figure in the so-called National Employment Standards, which with respect to casual employees only cover unpaid carer’s leave, unpaid compassionate leave, community service leave, and the Fair Work Information Statement.[[203]](#footnote-203)

Employment is one of the archetypal examples of a relational contract. Fringe forms of employment, such as zero hour contracts and other modes of casual labor illustrate not only how an umbrella contract can operate in this context, but also how the laxity of such an arrangement leaves workers and their third party dependents exposed. South Africa appears to have gone the furthest in terms of providing statutory protection to such workers and their relational networks, with Australia and UK relying more on market controls to manage the employment relationship. One could here hypothesize that a possible reason for this is the fact that social welfare in the latter countries provides an extensive safety net to the unemployed; South Africans without employment face a far bleaker prospect in the face of widespread poverty and a tightly stretched social welfare system.

*2.3 Financial Sector Arrangements*

In the context of financial transactions, constitutive umbrella agreements are commonly used in both Australia and South Africa. A particularly pertinent example is the use of the International Swaps and Derivatives Association, Inc (“ISDA”) 2002 Master Agreement.[[204]](#footnote-204) This Master Agreement is an international document, freely available on the internet, and is designed to be tailored for individual use in a given country. Typically the governing legal regime chosen is English or New York law, reflecting the international nature of this type of transaction, as well as its business orientation. The Master Agreement provides detailed terms to govern the netting of transactions and as to how default should be dealt with.

In South Africa, the use of this type of umbrella agreement has received statutory recognition through section 35B of the Insolvency Act,[[205]](#footnote-205) which refers specifically to the ISDA Master Agreement, establishing an insolvency framework specifically tailored to this type of transaction and governing both corporates and individuals. With respect to the Australian scenario, particular attention should be paid to the relative provisions of the ISDA Reporting Delegation Agreement. [[206]](#footnote-206) The document has been drafted with the aim to help delegates comply with reporting obligations to a trade repository. Importantly, a new bill has been recently enacted, namely, the Financial System Legislation Amendment (Resilience and Collateral Protection) Act 2016.[[207]](#footnote-207) The Act is directly related to the ISDA 2015 Universal Protocol.[[208]](#footnote-208)

In the financial services sector, banking transactions involving large sums of money may leave creditors and debtors exposed should markets shift. Reliable procedures for payment, and protection against debtor default, are vital to protect third party interests. Thus (for example) guarantors may be third parties to a given financial contractual relation, but should default occur, the risk of such guarantors needs to be managed in a financially sound manner. The use of model agreements in this sector, as well as the recognition of such agreements in statute law, thus both allows banking to occur on an efficient basis, as well protects third party reliance, with beneficial effects for the economy as a whole.

*3. A Practical Comparative Analysis*

*with Regard to the Position of Third Parties*

The *Baird Textile* decision is a key international example of the disconnect between relational contract theory, which deals with business relationships and the behavior of contracting parties while such relationship remains intact; and contract law, which takes over when a dispute reaches formal litigation proceedings. In court proceedings, it is contract law, complete with its formal requirements of certainty and privity, which governs a dispute based on a contractual relationship – evidence as to the existence of norms present in such relationship while it endured is often not helpful in defining a cause of action. Thus, while Macneil’s hypothesis that in a state of relational contracting formal concepts such as privity would become of secondary importance to business considerations is demonstrably true,[[209]](#footnote-209) this has had little effect on the strictures of contract law. Hence privity remains a legal requirement in Australia and South Africa: both immediate parties to contractual relations – and third parties such as employees, who rely on the existence of such relations between others – will have to be protected by forms of intervention other than contract law. It is here that there is scope for application for the parallel branch of contract law which has grown up in both jurisdictions to protect weaker parties, particularly consumers and employees. This type of statutory intervention, as outlined above, fills the gaps left by privity and other doctrines of contract law to protect reliance, including that by third parties. Again, we are forced to look beyond Common law in studying the implementation and effects of umbrella agreements in both countries.

IV. Conclusion

Historically, the key problems with privity in the Common law world have turned on a recognized need to protect reasonable expectations, often in conflict with both this doctrine itself and also the related concept of consideration. The result (in Australia) is that while privity remains a cornerstone of contract in principle, there are a myriad of exceptions to it, created by both precedent and statute. In South Africa by contrast, a mixed system where the Common law has had a lesser influence, privity is also a feature of contract law, but without a doctrine of consideration to problematize the long established contract for the benefit of a third party.

This much is clearly established by our first case study above and is largely trite. Comparison here merely reveals the differences between a Common law system and mixed system with strong Civilian roots. What is more interesting is to contextualize privity in a broader macro view, which includes key questions such as how are reasonable expectations protected in the law of contract and in what manner are corrective and distributive justice achieved in the legal system as a whole. This type of question reveals certain key contextual differences between Australia and South Africa: first, Australia has a long tradition of social welfare and is easily characterized as a rich society with fairly evenly distributed levels of income.[[210]](#footnote-210) South Africa, by contrast, has a far shorter history of social welfare, particularly with regard to the interests of its previously disenfranchised black majority, an economic and political feature which the democratic Constitution is intended to address.[[211]](#footnote-211) This climate of legal and social transformation is problematized, however, by massive inequality and a small tax base from which to effect redistribution. The result in South Africa, is an increasingly welfarist system of contract law – including commercial contract law – as both the Legislature and the courts impose public law conceptions of distributive justice on the common law of private contracting. These features speak to legal culture and context in Australia and South Africa and are the backdrop which must inform any comparison.

 For this reason, our case studies were selected to illustrate not only the paradigmatic contract for the benefit of a third party, but also certain more niche areas of contracting where public and private interests are mixed, namely: motor vehicle accident insurance, retail supply chains and casual employment. Indeed, even financial transactions, while market linked and commercially orientated, form an integral part of the banking system on which modern economies rest. It is the view of the authors that public and private law are increasingly becoming inter-twined in both Australia and South Africa, and that all contracts should thus be viewed in their contextual setting, including both the social and economic dimensions.

It is here that relational contract theory in all its many forms has key insights to offer as a vehicle for analyzing contractual relations. It is becoming increasingly apparent, through the rise of consumer and human rights interests in contract law, that context matters and that the classical law of contract is deficient in appropriately addressing all contractual problems. Socially embedded contractual relations can have a drastic effect on both the immediate parties and other reliant third parties. When viewed as a relationship, rather than the product of a bipolar, usually written, instrument, contracting draws in interests beyond the signatories, so that third parties may also have an interest, or may reasonably rely, on the contractual relation. While relational theory is often viewed as more at home in healthy business dealings than adversarial litigation,[[212]](#footnote-212) the problem of how to protect reasonable expectations cannot be ignored. Where classical contract law has proved deficient here (as illustrated in our case studies above), public regulation through statute has had to fill the gaps. The net result, to use Macneil’s terminology, has been the introduction of neo-classical[[213]](#footnote-213) contract law: through statutory intervention and an increased role for good faith in Australia; and through resorting to redistributive welfarism in private contract law under the auspices of a transformative Constitution in South Africa.

 The emergent view is that comparison of a commonly held doctrine in both Australia and South Africa reveals from a micro perspective certain key macro differences between the legal contexts in these countries, but also certain macro similarities, including an increased awareness of the socially-embedded, or relational, dimension of contracting, and a movement from classical to neo-classical contract law.

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Both authors would also like to thank Reinhard Zimmermann, David Campbell, Dale Hutchison, and Sieg Eiselen for constructive comments on earlier drafts of this article. [↑](#footnote-ref-2)
3. As is well-known, according to classical English contract law, the privity doctrine consists of two rules: first, that only the parties to a contract may enforce it; and second, that a contract only imposes obligations on the parties to it. Cf. *Tweddle v Atkinson* (1861) 1 B&S 393; 121 ER 762. To be compared to *Dutton v Poole* (1677) 2 Lev 210. The modern authority for the rule is said to be *Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co Ltd* [1915] AC 847. See also note 43 below.

From an English Common Law point of view, the concept of a “classical law of contract”, marked by notions such as privity and freedom of contract, is reflected in P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979) as having reached a peak between 1770 and 1870. “Classical contract law” and its association with “classical economics” are themes of criticism in relational contract literature, which views this as a blinkered perspective on the socially-embedded institution of contracting. See by way of example: Ian R. Macneil, “Contracts: Adjustment of Long‑term Economic Relations under Classical, Neo‑classical and Relational Contract Law”*,* *Northwestern University Law Review*, LXXII (1978), p.854.

From a civilian point of view, privity was a key feature of the Roman law of obligations, including the early roots of what later became the law of contract. This was carried through into the prohibition in Justinian’s code on contracts for the benefit of a third person (D.45.1.38.17). Thus, the historical roots of civilian private law reflect a strong attachment to privity, which is reflected in the modern mixed system of South African contract law. The contract for the benefit of a third person was developed in the *ius commune* of medieval times, including by the Roman Dutch jurists whose writings were to be so influential in South Africa. See generally: Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996), ch. 1-2. [↑](#footnote-ref-3)
4. We acknowledge that much is to be learned from civil law systems such as Germany and France in this regard, but confine ourselves to the law of two countries with which we are intimately connected – South Africa and Australia. [↑](#footnote-ref-4)
5. We use capital “C” to refer to the Common law as a legal tradition. Common (with an uppercase c) law and common law are two different things: whereas the former is a legal tradition marked by a number of particular characteristics, the latter refers to a part of the Common law (and includes elements of both case law and customary law). [↑](#footnote-ref-5)
6. Cf. *Hospital Products Ltd v United States Surgical Corporation* (1984) 55 ALR 417 at 48. [↑](#footnote-ref-6)
7. For an historical private law perspective, see generally: Reinhard Zimmermann and Daniel Visser (eds.), *Southern Cross: Civil Law and Common Law in South Africa* (1996). [↑](#footnote-ref-7)
8. See Viscount Haldane LC’s remarks in *Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co Ltd* [1915] AC 847. In literature, see Sir J. Baker, “Privity of Contract in the Common Law before 1680”, in Eltjo J. H. Schrage (ed.), *Ius QuAesitum Tertio* (2008), pp. 35-60; David J. Ibbetson and W. Swain, “Third Party Beneficiaries in English Law: From Dutton v. Poole to Tweddle v. Atkinson”, ibid., pp. 191-214. [↑](#footnote-ref-8)
9. This is particularly so for the discussion of “umbrella agreements” – in many ways more a business concept than a legal one. [↑](#footnote-ref-9)
10. We are strengthened in this approach by the recently published argument of Smits, who also has begun to question the continuing normative validity of a rule of contractual privity which excludes contractual claims in a situation where relationships external to the contracting parties are directly or indirectly impacted by their contractual choices. Smits’s argument moves in a slightly different trajectory to ours, however: he proposes corporate social responsibility regimes as the appropriate avenue for challenging contractual terms or conduct. His primary example is the direct effect which the contracts of large retail corporates in developed countries have on labour conditions in developing country factories further back in the supply chain. See generally: J.M. Smits, “The Expanding Circle of Contract Law”, *Stellenbosch LR,* XXVII (2016), p. 227. [↑](#footnote-ref-10)
11. The leading proponent of the “law in action” approach to contract analysis is Stewart Macaulay. See in particular: Stewart Macaulay, “Non-contractual Relations in Business – A Preliminary Study”, *American Soc Rev*, XXVIII (1963), p. 55. See (*ex pluribus*) for a further example: Lisa Bernstein, “Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms”, *U Penn L Rev*,CXLIV (1995-1996), p. 1765. For a UK perspective, see: Hugh Beale and Tony Dugdale, “Contracts between Businessmen: Planning and the Use of Contractual Remedies”, *Br J of Law and Society*, II(1975), p. 45. [↑](#footnote-ref-11)
12. See by way of example: Ian R Macneil, “The Many Futures of Contracts”, *So Cal L Rev,* XLVII (1974), p. 691, and Ian R Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980). For secondary literature on Macneil’s work, see: David Campbell (ed.), *The Relational Theory of Contract: Selected Works of Ian Macneil* (2001); David Campbell, Linda Mulcahy and Sally Wheeler (eds.), *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (2016). [↑](#footnote-ref-12)
13. In addition to his classic 1963 paper, Macaulay, *Non-contractual Relations in Business*, *supra* note 9, see the essays collected in: Jean Braucher, John Kidwell and William C Whitford (eds.), *Revisiting the Contracts Scholarship of Stewart Macaulay* (2013). [↑](#footnote-ref-13)
14. This argument is cogently made in Hugh Collins, *Regulating Contracts* (1999). [↑](#footnote-ref-14)
15. These ideas are central to Macneil’s work on relational contracts. See by way of example Macneil, *The Many Futures of Contracts*, *supra* note 10; Macneil, *The New Social Contract*, *supra* note 10. [↑](#footnote-ref-15)
16. Compare Macneil, “Contracts: Adjustment of Long‑term Economic Relations under Classical, Neo‑classical and Relational Contract Law”*,* *supra* note 2, at 886-900. See generally: David Campbell, “Ian Macneil and the Relational Theory of Contract”, in David Campbell (ed.), *The Relational Theory of Contract: Selected Works of Ian Macneil* (2001), pp. 3-58. [↑](#footnote-ref-16)
17. Compare Macneil, “Contracts: Adjustment of Long‑term Economic Relations under Classical, Neo‑classical and Relational Contract Law”, *supra* note 1, at 886-900. For a discussion of contractual relations in networks and chains, see the essays collected in Marc Amstutz and Guenther Teubner (eds.), *Networks: Legal Issues of Multilateral Co-operation* (2009). For a business perspective, see WW Powell, “Neither Market nor Hierarchy: Network Forms of Organization”, *Research In Organizational Behavior* XII (1990), p. 295. [↑](#footnote-ref-17)
18. This is the approach advocated in Collins, *Regulating Contracts*, *supra* note 12. [↑](#footnote-ref-18)
19. This is not surprising as High Court is yet to endorse the implied term of good faith and socio-legal scholars are debating about the basis for its implication at law. In *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222, at 61, for instance, Pullin JA and Newnes JA of the Supreme Court of Western Australia concluded that to act *bona fides* is to act “honestly”—the same conceptualisation which is at the centre of the various Sale of Goods Acts, mentioned below. On the contrary, Murphy JA, at 94–7, construed the notion of good faith so that to include in it reasonable and honest conduct as well as loyalty to the bargain. While Pullin JA and Newnes JA’s approach has the practical effect of voiding the good faith requirement of meaning, whose essence, as set out by Rudolph von Jhering, Gabriele Fagella and Emilio Betti, requires the parties to take each other’s interest into account, Murphy JA’s is in line with the definition given by Sir Anthony Mason in 2003, former Chief Justice of Australia, in *Contract and its Relationship with Equitable Standards and the Doctrine of Good Faith*, The Cambridge Lecturers Canadian Institute of Advanced Legal Studies, Cambridge University (an amended version under the title “Contract, Good Faith and Equitable Standards in Fair Dealing”appears *Law Quarterly Review*, CXVI (2000), p. 66.

Cf. also *North East Solutions Pty Ltd v Masters Home Improvement Australia Pty Ltd* [2016] VSC 1; *FLSmidth Pty Ltd v Duro Felguera Australia Pty Ltd* [2016] WASC 191; *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50, at 292. In contract law literature, see Elizabeth Peden, “The Meaning of Contractual Good Faith”, *Australian Bar Review*, XXII 235 (2002), p. 235; *id*. “The Mistake of Looking for Legislative Inﬂuence in Contractual Good Faith”, *Commercial Law Quarterly*, XVI (2002), p. 20; *id*. “Contractual Good Faith: Can Australia beneﬁt from the American Experience”, *Bond Law Review*, XV (2003), p. 186; *id*. *Good Faith in the Performance of Contract* (2003); *id*. “When Common law Trumps Equity: The Rise of Good Faith and Reasonableness and the Demise of Unconscionability”, *Journal of Contract Law*, XXI (2005), p. 226; *id*. “Implicit Good Faith – Or do We Still Need an Implied Term of Good Faith?”, *Journal of Contract Law* XXV (2009). p. 50; John W Carter and Elisabeth Peden, “A Good Faith Perspective on Liquidated Damages”, *Journal of Contract Law*, XXIII157 (2007), p. 157; *id*. John W Carter and Elisabeth Peden*,* “Good Faith in Australian Contract Law”, *Journal of Contract Law*, XIX (2003), p. 155; Howard Munro, “The ‘Good Faith’ Controversy in Australian Commercial Law: A Survey of the Spectrum of Academic Legal Opinion”, *University of Queensland Law Journal*, XXVIII (2009), p. 167. [↑](#footnote-ref-19)
20. Recent, although not linear, trends in various Common legal systems challenge this historical feature. Cf. *Lymington Marina Ltd v MacNamara* [2007] Bus LR Digest D29; *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] 1 Lloyd’s Rep 558; *Yam Seng Pte Ltd v International Trade Corporation Ltd,* [2013] EWHC 111 QB; *Bobux Marketing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506; *Smith v Bank of Scotland,* [1997] SC (HL) 111.

It seems that the courts shared Martijn W. Hesselink’s conviction that ‘common law lawyers should not fear the concept of good faith’. See Martijn W Hesselink, “The Concept of Good Faith”, in Hartkamp AS et al. (eds.), *Towards a European Civil Code* (2011), pp. 619-49. See further: Simon Whittaker and Reinhard Zimmermann, “Good Faith in European Contract Law: Surveying the Landscape”, in Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law* (2000), pp. 7-62, especially at 15. *Contra*, arguing that good faith ‘is not a concept foreign to the common law’, see Allsop JC’s remarks in *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177, at 634 [58], and in *Paciocco v Australia and New Zealand Banking Group Limited*, [2015] FCAFC 50, at 287. [↑](#footnote-ref-20)
21. Luca Siliquini-Cinelli and Andrew Hutchison, “Constitutionalism, Good Faith and the Doctrine of Specific Performance: Rights, Duties and Equitable Discretion”, *South African Law Journal*, CXXXIII (2016), p.73. [↑](#footnote-ref-21)
22. A comprehensive case list may be found in Mark Irving, *The Contract of Employment* (2012), pp. 503-12. See also Andrew Stewart, “Good Faith: A Necessary Element in Australian Employment Law?”, *Comparative Labor Law and Policy Journal*, XXXII (2011), p. 521; Joellen Riley, “Siblings but Not Twins: Making Sense of ‘Mutual Trust’ and ‘Good Faith’ in Employment Contracts”, *Melbourne University Law Review*, XXXVI (2012), p. 521; *id*. “Before the High Court ‘Mutual Trust and Confidence’ on Trial: At Last”, *Sydney Law Review*, XXXVI (2014), p. 152.

In *Commonwealth Bank of Australia v Barker* [2014] HCA 32, the High Court has ultimately held that there is not an implied term of mutual trust and confidence in Australian employment contracts. However, French CJ, Bell and Keane left open the question of ‘whether there is a general obligation to act in good faith in the performance of contracts’ and of ‘whether contractual powers and discretions may be limited by good faith and rationality requirements’, at 42. Kiefel J agreed, at 107. [↑](#footnote-ref-22)
23. *Horkulak v Cantor Fitzgerald International* [2005] ICR 402; *Whittaker v Unisys Australia Pty Ltd* (2010) 26 VR 668; [20-10] VSC 9; *Hussain v Surrey and Sussex Healthcare NHS Trust* [2011] EWQHC 1670 (QB). [↑](#footnote-ref-23)
24. See s 20 (unconscionable conduct) and ss 21-22 (statutory unconscionability) of the *Competition and Consumer Act 2010*, Sch 2, commonly known as ‘Australian Consumer Law’ (ACL). In particular, s 22(2)-(3) ACL classifies bad faith conduct in terms of unconscionable conduct.

Importantly, the duty to act in good faith within the meaning of the various Sale of Good Acts requires the parties to perform their contractual obligation(s) honestly, whether this is done negligently or not. See s 5(2) *Sale of Goods Act 1923* (NSW); s 3(2) *Goods Act 1958* (Vic); s A2(2) *Sale of Goods Act 1895-1972* (SA); s 60(2) S*ale of Goods Act 1895* (WA); s 3(2) *Sale of Goods Acts 1986* (Qld); s 5(2)(a) *Sale of Goods Act 1975* (ACT); s 5(2) *Sale of Goods Act 1972* (NT). Cf. also *Itaoui v Yamaha Motor Finance Australia Pty Ltd* [2009] NSWSC 1363, at 36; *Associated Midland Corporation v Sanderson Motors Pty Ltd* [1983] 3 NSWLR 395, at 401. [↑](#footnote-ref-24)
25. Nor the notion is provided by the Australian Law Reform Commission Discussion Paper and the Explanatory Memorandum. In literature, see Brenda McGivern, who speaks of ‘the *resistance* of the courts to fully articulate the composition of or approach to determining a duty of utmost good faith’, in “Coming to the Party: The Evolution of Post-contractual Duties of Utmost Good Faith under the ICA”, *Insurance Law Journal*, XXIV (2013), p. 159, at 169. [↑](#footnote-ref-25)
26. S 13ICA. Cf. *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1, in which even though issues of good faith were not involved, it was held that such duty requires that insurer’s rights and obligations must be assessed strictly in accordance with the contract. The classic statement of the principle was given by Lord Mansfield CJ in *Carter v Boehm* (1766) 3 Burr 1905. Cf. also *Moss v Sun Alliance Aust Ltd* (1990) 55 SASR 145. If reliance on a provision would be to fail to act with the utmost good faith, the party may not rely on the provision (s 14 ICA). The duty does not extend to the conduct in the course of litigation: *Imagining Applications Pty Ltd v Vero Insurance Ltd* [2008] VSC 178.

The Australian Securities and Investments Commission, in its capacity as the insurance regulator, can treat breach of good faith as a breach of a financial service of law (s 14A ICA), the definition of which is provided by s 761A *Corporations Act 2001* (Cth). For a business-oriented account of the discipline, see Paul Latimer, *Australian Business Law*, 35th edn (2016), pp. 172-83. [↑](#footnote-ref-26)
27. 2002 (4) SA 1 (SCA) at para. 22. [↑](#footnote-ref-27)
28. See the lengthy discussion of the historical sources by Joubert JA in *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A); *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at para. 22. See generally further: Reinhard Zimmermann, “Good Faith and Equity”, in Reinhard Zimmermann and Daniel Visser (eds.), *Southern Cross: Civil Law and Common Law in South Africa*, *supra* note 5, pp. 217-60; Dale Hutchison, “Good Faith in the South African Law of Contract”*,* inRoger Brownsword, Norma J Hird and Geraint Howells (eds.), *Good Faith in Contract: Concept and Context* (1999), pp. 213-42. [↑](#footnote-ref-28)
29. *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 7H-9G. [↑](#footnote-ref-29)
30. *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at paras. 23-30, 56. [↑](#footnote-ref-30)
31. 2007 (5) SA 323 (CC). [↑](#footnote-ref-31)
32. *Id.* at paras. 79-82. [↑](#footnote-ref-32)
33. *Id.* at para. 82. [↑](#footnote-ref-33)
34. For discussion of the transformation imperative in South African law, including the common law of contract, see: Pius Langa, “Transformative Constitutionalism”, *Stellenbosch Law Rev*, XVI (2006), p. 351; Dikgang Moseneke, “Transformative Constitutionalism: its Implications for the Law of Contract”, *Stellenbosch Law Rev* 3 (2009), p. 3; Dennis M Davis and Karl Klare, “Transformative Constitutionalism and the Common and Customary Law”, 26 *South African Journal of Human Rights*, XXVI (2010), p. 403; Karl Klare, “Legal Culture and Transformative Constitutionalism”, *South African Journal of Human Rights*, XIV (1998), p. 146. [↑](#footnote-ref-34)
35. *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC); *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC); *Botha v Rich NO* 2014 (4) SA 124 (CC); *Cool Ideas 1186 (CC) v Hubbard* 2014 (4) SA 474 (CC); *Malan v City of Cape Town* 2014 (6) SA 315 (CC); *Paulsen v Slipknot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC); *Nkata v Firstrand Bank Ltd* 2016 (4) SA 257 (CC); *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC). Specifically on the role of African customs, including the much-discussed value of “Ubuntu” (read: communitarianism, solidarity), see in particular (from this list) the *Barkhuizen* case at para. 51 and the *Everfresh* case at paras. 23, 72. [↑](#footnote-ref-35)
36. Labour Relations Act 66 of 1995; Basic Conditions of Employment Act 75 of 1997; National Credit Act 34 of 2005; Consumer Protection Act 68 of 2008; Rental Housing Act 50 of 1999. [↑](#footnote-ref-36)
37. See the policyholder protection rules under the Long-term Insurance Act 52 of 1998 and Short-term Insurance Act 53 of 1998; with regard to regulation of financial intermediaries, see: Financial Advisory and Intermediary Services Act 37 of 2002. With regard to the provision of “microinsurance” specifically to low-income individuals, see: South African National Treasury Policy Document, *The South African Microinsurance Regulatory Framework* (July 2011). [↑](#footnote-ref-37)
38. By way of example, one possible interpretation of *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) is that this case creates a new form of ostensible authority not based on estoppel (which is the settled position in the UK and was previously settled law in South Africa too) in order to remedy a perceived defect in the existing South African law of estoppel that this (defence) can only be pleaded in replication and cannot found a cause of action on its own. While the Constitutional Court majority’s decision here brought justice to Mr Makate and was widely praised in the media, it has unsettled a previously settled area of South African contract law. [↑](#footnote-ref-38)
39. From a South African perspective, a connection between the ethos of relational contract theory and transformative constitutionalism is made in: Andrew Hutchison, “Relational Theory, Context and Commercial Common Sense: Views on Contract Interpretation and Adjudication”, *South African Law Journal*, CXXXIV (2017), p. 298. [↑](#footnote-ref-39)
40. Julie Clarke and Philip Clarke, *Contract Law. Commentaries, Cases and Perspectives*, 3rd edn (2016), p. 16; John W. Carter, *Contract Law in Australia*, 6th edn (2012), p. 16. [↑](#footnote-ref-40)
41. *Waltons Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513. [↑](#footnote-ref-41)
42. NC Seddon, RA Bigwood, and MP Ellinghaus, *Cheshire & Fifoot Law of Contract*, 10th Australian Edition (2012), p. 172. [↑](#footnote-ref-42)
43. Ewan McKendrick and Qiao Liu, *Contract Law: Australian Edition* (2015), p. 154; Jeannie Paterson, Andrew Robertson Andrew, and Arlen Duke, *Principles of Contract Law*, 4th edn (2012), p. 108; Dilan Thampapillai, Vivi Tan, and Claudo Bozzi, *Contract Law. Text and Cases* (2012), p. 11. [↑](#footnote-ref-43)
44. *Eastwood v Kenyon* (1840) 113 ER 482. [↑](#footnote-ref-44)
45. David Ibbetson, A *Historical Introduction to the Law of Obligations* (1999); Warren Swain, *The Law of Contract 1670-1870* (2015). [↑](#footnote-ref-45)
46. *Tweedle v Atkison* (1861) 1 B&S 393; 121 ER 762; *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847, at 467. To be compared to *Dutton v Poole* (1678) 2 Lev 211, according to which the price for the promise may be paid by anyone. [↑](#footnote-ref-46)
47. Brian Coote, “The Essence of Contract. Part I”, *Journal of Contract Law*, I (1988), p. 91. [↑](#footnote-ref-47)
48. Carter, *Contract Law in Australia*, *supra* note 38, at 108; Paterson et al, *Principles of Contract Law*, *supra* note 41, at 92-97. [↑](#footnote-ref-48)
49. See McLure JA’s statement in *Widodo v Hamdan* [2008] WASCA 113, at 23. [↑](#footnote-ref-49)
50. Paterson et al, *Principles of Contract Law*, *supra* note 41, at 175-220 and 631-90; John Gooley, Peter Radan and Ilija Vickovich, *Principles of Australian Contract Law*, 3rd edn, (2014), pp. 719-38 and 283-308. [↑](#footnote-ref-50)
51. *Currie v Misa* (1875) LR 10 Ex 153, at 162; *Crown v Clarke* (1927) 40 CLR 227. [↑](#footnote-ref-51)
52. Coote, “The Essence of Contract”, *supra* note 45, at 101. [↑](#footnote-ref-52)
53. Konrad Zweigert and Heinz Kötz, *An Introduction to Comparative Law*, 3rd edn, Tony Weir trans. (1998), p. 457. [↑](#footnote-ref-53)
54. John Cartwright, “Damages, Third Parties and Common Sense”, *Journal of Contract Law*, X 244 (1996), p. 244; Carter, *Contract Law in Australia*, *supra* note 38, at 345. [↑](#footnote-ref-54)
55. See, among others, John Gava, “Is Privity Worth Defending?”, in Peter Kincaid (ed.), *Privity. Private Justice or Public Regulation* (2001), pp. 199-232. [↑](#footnote-ref-55)
56. See the Word Trade Organization’s Doing Business Report, particularly those of 2005 and 2006, *available at* <http://www.doingbusiness.org/> (accessed 08-30-2016). [↑](#footnote-ref-56)
57. *Contracts (Right of Third Parties) Act 1999*. [↑](#footnote-ref-57)
58. *Contracts (Privity) Act* *1982*. [↑](#footnote-ref-58)
59. *Lawrence v Fox* 20 NY 268 (1859), *Seaver v Ransom* 120 NE 639 (NY 1918). Cf. also the *Restatement (Second)* s 302(1) and 311(3), as well as *Bourer v Devenes* 121 A 566 (Conn *1923*). [↑](#footnote-ref-59)
60. See Part III, Section B.2. [↑](#footnote-ref-60)
61. As Zweigert and Kötz have noted, ‘the concept of contracts for the benefit of third parties has been far from receiving invariable acceptance’, in *An Introduction to Comparative Law*, *supra* note 51, at 457. For a comparison with Civil law system, cf. Art. 1414 Italian Civil Code, Art. 1121 French Civil Code, § 328 II *Bürgerliches Gesetzbuch*, Art. 1446 Quebec Civil Code, Art. 6: 253 Dutch Civil Code. When reading these norms, it should be kept in mind that [↑](#footnote-ref-61)
62. Seddon et al, *Cheshire & Fifoot Law of Contract, supra* note 40, at 307. [↑](#footnote-ref-62)
63. *Northern Sandblasting Pty Ltd v Harris* (1997) 188 LR 313; *Jones v Bartlett* (2000) 205 CLR 166; *The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* (2008) 22 FLR. [↑](#footnote-ref-63)
64. Clarke and Clarke, *Contract Law. Commentaries, Cases and Perspectives*, *supra* note 38, at 233. [↑](#footnote-ref-64)
65. [1915] AC 847. [↑](#footnote-ref-65)
66. (1980) 144 CLR 300. [↑](#footnote-ref-66)
67. (1988) 164 CLR 387. [↑](#footnote-ref-67)
68. (1988) 165 CLR 107. [↑](#footnote-ref-68)
69. For a detailed description of other scenarios, such as covenants affecting land, nominee options and sales, etc., see Seldon et al, *Cheshire & Fifoot Law of Contract* (2012), pp. 315-23. [↑](#footnote-ref-69)
70. Carter, *Contract Law in Australia*,  *supra* note 38, at 351-55; Seddon et al, *Cheshire & Fifoot Law of Contract*, *supra* note 40, at 136; Paterson et al, *Principles of Contract Law, supra* note 41, at 263; Gooley et al, *Principles of Australian Contract Law*, *supra* note 48, at 705. [↑](#footnote-ref-70)
71. Lindy Willmott, Sharon Christensen, Des Butler, and Bill Dixon, *Contract Law*, 4th edn (2013), p. 166. [↑](#footnote-ref-71)
72. A case which was considered in *Baird Textile Holdings Ltd v Marks and Spencer plc* [2001] EWCA Civ 274, discussed below in Part III, Section C.2.1. [↑](#footnote-ref-72)
73. At 428-9. According to his Honour, ‘. . . to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff’s action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant’s property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff’s reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs’. [↑](#footnote-ref-73)
74. Gooley et al, *Principles of Australian Contract Law, supra* note 48, at 730. [↑](#footnote-ref-74)
75. For an introduction within the comparative law literature, see Zweigert and Kötz, *An Introduction to Comparative Law*, *supra* note 51, at 469. [↑](#footnote-ref-75)
76. For a critical analysis of this aspect, see Birds’ suggestion that the parties known but not named should be categorised as “co-assureds”, in “Recent Common Law Developments Regarding Insurance Interest and Subrogation”, *Insurance Law Journal*, I (1988), p. 171. [↑](#footnote-ref-76)
77. This was also stated in *Coulls v Bagot’s Exectuor & Trustee Co Ltd* (1967) 119 CLR 460. [↑](#footnote-ref-77)
78. One year after, in *Barroora Pty Ltd v Provincial Insurance (Aust) Ltd* (1988) 7 ANZ Ins Cas 61-103, the New South Wales Supreme Court held that the *Trident* exception is also applicable to property insurance contracts. [↑](#footnote-ref-78)
79. Peter Kincaid, “Third Parties: Rationalising a Right to Sue”, *The Cambridge Law Journal*, XLVIII (1989), p. 243; *id*. “Privity and the Essence of Contract”, *University of New South Wales Law Journal*, XII (1989), p. 59; *id*. “The U.K. Law Commission’s Privity Proposals and Contract Theory”, *Journal of Contract Law* VIII (1994), p. 51. [↑](#footnote-ref-79)
80. McKendrick and Liu, *Contract Law: Australian Edition*, *supra* note 41, at 165. Cf. *Dalton v Ellis; Estate of Bristow* (2005) 65 NSWLR 134; *Sims v Bond* (1883) 5 B & Ad 389; *Morris v Cleasby* (1816) 4 M & S 566; *New Zealand Shipping C Ltd v AM Satterthwaite & Co Lt (“The Eurymedon”)* [1975] AC 154. [↑](#footnote-ref-80)
81. Carter, *Contract Law in Australia*, *supra* note 38, at 338–40. For a detailed list of other exceptions, such as covenants affecting land, contracts for the sale of land, and marriage settlements, see Paterson et al, *Principles of Contract Law*, *supra* note 41, at 315-23. [↑](#footnote-ref-81)
82. Seddon et al, *Cheshire & Fifoot Law of Contract, supra* note 40, at 323-44. [↑](#footnote-ref-82)
83. Paterson et al, *Principles of Contract Law, supra* note 41, at 261-68. [↑](#footnote-ref-83)
84. Jason Harris and Christopher Croese, *Contract Law in Context* (2015), p. 88. [↑](#footnote-ref-84)
85. Stephen Graw, An Introduction to the Law of Contract, 8th edn (2015), pp. 226-31. [↑](#footnote-ref-85)
86. Thampapillai et al, *Contract Law. Text and Cases*, *supra* note 41, at 267. [↑](#footnote-ref-86)
87. *Coulls v Bagots Exectuor & Trustee Co Ltd* (1967) 119 CLR 460, at 502. [↑](#footnote-ref-87)
88. Much of the discussion has been centred on whether the promisee can recover substantial damages as well. Cf. *Beswick v Beswick* [1968] AC 58; *Hill v Van Erp* (1997) 188 CLR 159 at 173; *Jackson v Horion Holidays* [1975] 3 All ER 92; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85; *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] AC 518. See also Seddon et al, *Cheshire & Fifoot Law of Contract*, *supra* note 40, at 294-303. [↑](#footnote-ref-88)
89. Willmott et al, *Contract Law*, *supra* note 69, at 437–-39 ; Carter, *Contract Law in Australia*, *supra* note 37, at 349–-55; Seddon et al, *Cheshire & Fifoot Law of Contract, supra* note 39, at 324–29; Paterson et al, Principles of Contract Law*, supra* note 41, at 262; Graw, *An Introduction to the Law of Contract*, *supra* note 83, at 218-23. [↑](#footnote-ref-89)
90. It has been however suggested that the same principles may be extended to other contracts as well. See Andrew Phang and Toh Kian Sing, “On Himalaya Clauses, Bailments, Choice of Law and Jurisdiction — Recent Privy Council Perspectives from The Mahkutai”, *Journal of Insurance Law*, X (1996), p. 212, at 230; Graw, *An Introduction to the Law of Contract*, *supra* note 83, at 223. [↑](#footnote-ref-90)
91. [1955] 1 QB 158. [↑](#footnote-ref-91)
92. On the inevitability and impossibility of legal transplants, see Alan Watson, *Legal Transplants. An Approach to Comparative Law* (1974); *id*. *Failures of the Legal Imagination* (1988); Pierre Legrand, “The Impossibility of Legal Transplants” (1997) 4 *Maastricht Journal of European and Comparative Law* 111 (1997), p. 111. [↑](#footnote-ref-92)
93. 95 CLR 43. [↑](#footnote-ref-93)
94. [1962] AC 446, at 474. The criteria are: (1) the bill of landing makes it clear that the parties’ intention is to protect the stevedore; (2) the bill also makes it clear that the carrier is contracting as agent for stevedores in regard to exempting provisions; (3) the carrier has authority from, or their activity is ratified by, the stevedore; 4) consideration is provided by the stevedore. [↑](#footnote-ref-94)
95. (2004) 219 CLR 165. [↑](#footnote-ref-95)
96. [1975] AC 154. [↑](#footnote-ref-96)
97. (1980) 144 CLR 300. [↑](#footnote-ref-97)
98. *Celthene Pty Ltd v WKJ Hauliers Pty* [1981] 1 NSWLR 606; L*ife Savers (Australasia) Pty Ltd v Frigmobile Pty Ltd* [1983] 1 NSWLR 431. [↑](#footnote-ref-98)
99. Carter*, Contract Law in Australia*, *supra* note 38, at 354. [↑](#footnote-ref-99)
100. Roger Brownsword, *Contract Law. Themes for the Twenty-First Century*, 2nd edn(2006), p. 140. More broadly, see Alan Barron, “The Rise of Legal Pragmatism in English Contract Law”, *Journal of Contract Law*,XXII (2006), p. 200. [↑](#footnote-ref-100)
101. [1924] AC 522. [↑](#footnote-ref-101)
102. *Gilbert Stokes and Kerr Pty Ltd v Dalgety and Co Ltd* (1948) 48 SR (NSW) 435; *Waters Trading Co Ltd v Dalgelty and Co Ltd* (1951) 52 SR (NSW) 4. [↑](#footnote-ref-102)
103. 95 CLR 43. [↑](#footnote-ref-103)
104. Roger Brownsword and Dale Hutchison, “Beyond Promissory Principle and Protective Pragmatism”, in Peter Kincaid (ed.), *Privity: Private Justice or Public Regulation* (2001), pp. 126-46, at 132. [↑](#footnote-ref-104)
105. Zimmermann, *The Law of Obligations*, *supra* note 1, at 34-40. [↑](#footnote-ref-105)
106. Schalk van der Merwe et al., *Contract: General Principles*, 4th edn (2012), p. 229; RH Christie and GB Bradfield, *Christie’s The Law of Contract in South Africa*, 6th edn. (2011), pp. 270-71; JC De Wet and AH van Wyk, *Kontraktereg*, 5th edn (1992), pp. 104-5. [↑](#footnote-ref-106)
107. See (inter alia): *Louisa and Protector of Slaves v Van den Berg* (1830) 1 Menz 471; *Tradesmen’s Benefit Society v Du Preez* (1887) 5 SC 269. [↑](#footnote-ref-107)
108. See the discussion in Dale Hutchison, “Contract Formation”, in Reinhard Zimmermann and Daniel Visser (eds.), *Southern Cross: Civil Law and Common Law in South Africa*, *supra* note 5, 165-94, at 166-73. [↑](#footnote-ref-108)
109. *Tradesmen’s Benefit Society v Du Preez* (1887) 5 SC 269 at 278. [↑](#footnote-ref-109)
110. *Conradie v Rossouw* 1919 AD 279. [↑](#footnote-ref-110)
111. The view of the Court was summed up by Wessels AJA at 324. See further: Dale Hutchison, “Contract Formation”, *supra* note 106, at 170; Christie and Bradfield, *Christie’s The Law of Contract in South Africa*, *supra* note 104, at 8-10. [↑](#footnote-ref-111)
112. 1920 AD 204 at 206, Innes CJ stating the English rule in *Tweddle v Atkinson* (1861) 1 B&S 393; 121 ER 762was hence not part of South African law. [↑](#footnote-ref-112)
113. 1956 (1) SA 277 (A) at 291B-F. Although this statement is in a minority judgment, it did not conflict with the majority position, and has been approved by subsequent Appellate Division majority decisions in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 165 (A) at 172; *Total SA (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 625. [↑](#footnote-ref-113)
114. JC de Wet proposed a right for the third party beneficiary arising directly out of the contract between promisor and promissee (in other words, a construction which involved just one contract, rather than two) in his doctoral thesis, *Die Ontwikkeling van die Ooreenkoms ten Behoewe van ‘n Derde* (1940). An explanation of De Wet’s construction (in English) can be found in Brownsword and Hutchison, *supra* note 102, at 133-35. For textbooks arguing in favour of the De Wet construction, see: De Wet and Van Wyk, *Kontraktereg*, *supra* note 102, at 103-9; Van der Merwe et al., *Contract*, *supra* note 104, at 233-37; MFB Reinecke et al, *South African Insurance Law* (2013), pp. 430-32. [↑](#footnote-ref-114)
115. Dale Hutchison and Chris-James Pretorius, *The Law of Contract in South Africa*, 2nd edn. (2012), p. 226. [↑](#footnote-ref-115)
116. *Mutual Life Insurance Co of New York v Hotz* 1911 AD 556 at 567. Brownsword and Hutchison, “Beyond Promissory Principle and Protective Pragmatism”, *supra* note 102, at 138; Philip Sutherland, *Third Party Contracts*, in Hector L MacQueen and Reinhard Zimmermann (eds.), *European Contract Law: Scots and South African Perspectives* (2006), pp. 203-29, at 216. [↑](#footnote-ref-116)
117. Brownsword and Hutchison, “Beyond Promissory Principle and Protective Pragmatism”, *supra* note 102, at 140; Sutherland, *Third Party Contracts*, *supra* note 114, at 212. [↑](#footnote-ref-117)
118. See section 1 of the Contracts (Rights of Third Parties) Act 1999. [↑](#footnote-ref-118)
119. Compare the argument of Daniel Visser and Samantha Cook, “Contracts for the Benefit of Third Parties in South Africa – Investigating an Alternative Approach”, in Eltjo JH Schrage (ed.), *Ius Quaesitum Tertio*, *supra* note 6, pp. 395–433, at407-10. [↑](#footnote-ref-119)
120. Visser and Cook, “Contracts for the Benefit of Third Parties in South Africa – Investigating an Alternative Approach”*, supra* note 117, at 432. [↑](#footnote-ref-120)
121. See below at Part III, Section B.3. [↑](#footnote-ref-121)
122. The key example of this is the literature on “networks”. See for example: Amstutz & Teubner, *Networks: Legal Issues of Multilateral Co-operation, supra* note 15; Powell, *Neither Market nor Hierarchy: Network Forms of Organization*, *supra* note 15, p. 295. [↑](#footnote-ref-122)
123. Kenneth Sutton, *Insurance Law in Australia*, 3rd edn, (1999) pp. 819-22; Reinecke et al, *South African Insurance Law*, *supra* note 120, at 443-47; Robert Merkin, Colinvaux’s Law of Insurance, 9th edn (2010), pp. 1000-2. [↑](#footnote-ref-123)
124. Sutton, *Insurance Law in Australia*, *supra* note 121, at 110; Reinecke et al, *South African Insurance Law*, *supra* note 120, at 447. [↑](#footnote-ref-124)
125. Merkin, *Colinvaux’s Law of Insurance*, *supra* note 121, at 1001. This would, of course, constitute an exception to both the doctrine of privity and the requirement of “insurable interest” in English contract law. This has been addressed by permitting a statutory exception here, first introduced by the Road Traffic Act 1930. [↑](#footnote-ref-125)
126. See the discussion in Part III, Sections B.2 and B.3 below. [↑](#footnote-ref-126)
127. Australia: Sutton, *Insurance Law in Australia*, *supra* note 121, at 157-60. See further the discussion of “good faith” in Australian insurance law below in Part II, Section B.1.

South Africa: Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 (1) SA 419 (A) is the classic authority on the duty of good faith in South African insurance law, despite the jettisoning of the “utmost” part of this formulation at 431H-433F and 443C-D. See further: Reinecke et al, *South African Insurance Law*, *supra* note 120, at 140-42. [↑](#footnote-ref-127)
128. Sutton, *Insurance Law In Australia, supra* note 121, at 1299-1300. See further below in Part III, Section B.2 for statutory references. [↑](#footnote-ref-128)
129. Sutton, *Insurance Law in Australia*, *supra* note 121, at 1300-1. [↑](#footnote-ref-129)
130. Sutton, *Insurance Law in Australia*, *supra* note 121, at 110-11. [↑](#footnote-ref-130)
131. Act 56 of 1996, section 17. [↑](#footnote-ref-131)
132. Section 18(1)(a) limits a claim for bodily injury or death to R25 000; section 17(4)(c) limits a claim for future income, or for loss of support due to a deceased breadwinner, to R160 000 per year. For an interesting discussion of the quantification of RAF claims, see Sarah Fick and Paul Van der Merwe, “RAF v Sweatman (162/2014) [2015] ZASCA 22 (20 March 2015) A simple illustration of the SCA’s statutory misinterpretation of section 17(4)(c) of the Road Accident Fund Act 56 of 1996”, *Potchefstroom Electronic Law Journal*, XVIII (2015), p. 2804. [↑](#footnote-ref-132)
133. *Prudential Insurance v IRC* [1904] 2KB 458; *Medical Defence Union Ltd v Department of Trade* (1979) 2 WLR 686, at 690. See also Samantha Traves, *Australian Commercial Law*, 3rd edn (2014), p. 422. [↑](#footnote-ref-133)
134. *Macaura v Northern Assurance Co* [1925] AC 619. [↑](#footnote-ref-134)
135. (1988) 165 CLR 107. [↑](#footnote-ref-135)
136. Section III, Part A.1. [↑](#footnote-ref-136)
137. Peter Mann, *Mann’s Annotated Insurance Contracts Act*, 7th edn (2016), p. 370. [↑](#footnote-ref-137)
138. [2003] VSC 253, at 43. [↑](#footnote-ref-138)
139. Patrick Mead, “Of Subrogation, Circuity and Co-insurance: Recent Developments in Contract Works and Contractors’ All Risk Policies”, *Insurance Law Journal*, XIX (1998), p. 1, at 26. See also *id*. at 33. [↑](#footnote-ref-139)
140. *Available at* <http://www.alrc.gov.au/report-20> (accessed 10-14-2016). [↑](#footnote-ref-140)
141. Cf. s 9 ICA. [↑](#footnote-ref-141)
142. Cf. s 11(2)(a) *Property Law Act 1969* (WA), s 55(4) *Property Law Act 1974* (Qld), s 56(4) *Law of Property Act* (NT). [↑](#footnote-ref-142)
143. Cf. s 10(7) *Motor Vehicles (Third Parties Insurance)* *Act* *1942* (NSW); s 3(1) *Motor Vehicle (Third Party Insurance) Act* *1943* (WA); s 104 *Motor Vehicles Act 1959* (SA); s 6(1) *Motor Accidents (Compensation) Act* (NT); s 14(1) *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas); Sched cl 2 *Motor Accident Insurance Act 1994* (Qld); s 20 *Road Transport (Third-Party Insurance) Act* *2008* (ACT). [↑](#footnote-ref-143)
144. These are the Motor Accidents Authority in New South Wales, the Insurance Commission of Western Australia, the Motor Accident Commission in South Australia, the Motor Accidents Compensation Commission in Northern Territory, the Motor Accident Insurance Board in Tasmania, the Motor Accidents Insurance Commission in Queensland, and the Transport Accident Commission in Victoria. In the Australia Capital Territory, compulsory third party insurance claims are managed by the Department of Treasury. [↑](#footnote-ref-144)
145. See in particular: *Refrigerated Trucking (Pty) Ltd v Zive NO* 1996 (2) SA 361 (T). See further (for a Zimbabwean example, applying essentially South African law): *Old Mutual Fire & General Insurance Co of Rhodesia (Pvt) Ltd v Springer* 1963 (2) SA 324 (SR). [↑](#footnote-ref-145)
146. The leading South African cases are (in addition to those in the previous footnote): *Croce v Croce* 1940 TPD 251; *McClain v Mohamed and Associates* [2003] 3 All SA 707 (C); *Unitrans Freight (Pty) Ltd v Santam Ltd* 2004 (6) SA 21 (SCA); *Jacobs NO v Braaf* [2007] 4 All SA 966 (SCA). [↑](#footnote-ref-146)
147. Ellison Kahn, “Extension Clauses in Insurance Contracts”, *South African Law Journal*, LXIX(1952), p. 52 and DM Davis, *Gordon and Getz The South African Law of Insurance*, 4th edn (1993), pp. 443-49 take the view, following the Privy Council decision in *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70, that such clauses were binding on insurance companies in honour only, due to an absence of insurable interest of the insured in the authorised driver’s delictual liability. [↑](#footnote-ref-147)
148. Taken from *Refrigerated Trucking (Pty) Ltd v Zive NO* 1996 (2) SA 361 (T) at 366. [↑](#footnote-ref-148)
149. Taken from *Refrigerated Trucking (Pty) Ltd v Zive NO* 1996 (2) SA 361 (T) at 366. [↑](#footnote-ref-149)
150. This view was first put forward by A Chaskalson, *Insurance Law*, Annual Survey of South African Law 379 (1963) at 382 and now has the stamp of approval of the Supreme Court of Appeal: *Unitrans Freight (Pty) Ltd v Santam Ltd* 2004 (6) SA 21 (SCA) at para. 16. [↑](#footnote-ref-150)
151. See the sources listed in note 141 above. On the historical influence of English insurance law in South Africa, see: JP van Niekerk, “Insurance Law”, in Reinhard Zimmermann and Daniel Visser (eds.), *Southern Cross: Civil Law and Common Law in South Africa* (1996), pp. 435-80. [↑](#footnote-ref-151)
152. *Unitrans Freight (Pty) Ltd v Santam Ltd* 2004 (6) SA 21 (SCA) at paras. 14-18; *McClain v Mohamed and Associates* [2003] 3 All SA 707 (C) at paras. 36-37; *Croce v Croce* 1940 TPD 251, at 265. [↑](#footnote-ref-152)
153. *Unitrans Freight (Pty) Ltd v Santam Ltd* 2004 (6) SA 21 (SCA) at paras. 14-18. [↑](#footnote-ref-153)
154. See particularly: *Phillips v General Accident Insurance Co (SA) Ltd* 1983 (4) SA 652 (W) at 659; *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company SA Ltd* 2013 (5) SA 42 (WCC) at paras. 31-32. [↑](#footnote-ref-154)
155. See in particular: *Jacobs NO v Braaf* [2007] 4 All SA 966 (SCA) at paras. 22-23. [↑](#footnote-ref-155)
156. *Unitrans Freight (Pty) Ltd v Santam Ltd* 2004 (6) SA 21 (SCA) at para. 16. [↑](#footnote-ref-156)
157. *Jacobs NO v Braaf* [2007] 4 All SA 966 (SCA) at paras. 22-23. [↑](#footnote-ref-157)
158. *Id.* at para. 23. [↑](#footnote-ref-158)
159. *Id.* at para. 6. [↑](#footnote-ref-159)
160. Road Accident Fund Act 56 of 1996, section 18(1)(a). [↑](#footnote-ref-160)
161. Fick and Van der Merwe, “RAF v Sweatman”*, supra* note 13029, at 2806. [↑](#footnote-ref-161)
162. David Charny, “Nonlegal Sanctions in Commercial Relationships”, *Harvard Law Rev*, CIV (1990-1991), p. 373, at 392-97; Collins*, Regulating Contracts*, *supra* note 12, ch 5, especially at 101. [↑](#footnote-ref-162)
163. Stefanos Mouzas and Michael Furmston, From Contract to Umbrella Agreement, 67 Cambridge Law Journal *LJ* 37, 39 (2008). See generally further, Stefanos Mouzas and David Ford, “Managing Relationships in Showery Weather: the Role of Umbrella Agreements”, Journal of Business Research, LIX (2006), p. 1248 [↑](#footnote-ref-163)
164. Mouzas and Furmston, *From Contract to Umbrella Agreement, supra* note 161, at 38. [↑](#footnote-ref-164)
165. Compare *Baird Textile Holdings Ltd v Marks and Spencer plc* [2001] EWCA Civ 274 at paras 3-4. See further, in a construction law context, M Latham, *Constructing the Team: Final Report of the Government/Industry Review of Procurement and Construction Arrangements in the UK Construction Industry*, (1994) *Constructing Excellence, available at* <http://constructingexcellence.org.uk/wp-content/uploads/2014/10/Constructing-the-team-The-Latham-Report.pdf> (accessed 09-14-2016); John Egan, “Rethinking Construction: Report of the Construction Task Force to deputy Prime Minister John Prescott” (1997) *Constructing Excellence,* available at <http://constructingexcellence.org.uk/wp-content/uploads/2014/10/rethinking_construction_report.pdf>.(accessed 10-10-2016). [↑](#footnote-ref-165)
166. Macneil “Contracts: Adjustment of Long-Term Economic Relations under Classical, Neo-classical and Relational Contract Law”, *supra* note 1, see generally: 886-900. [↑](#footnote-ref-166)
167. [2001] EWCA Civ 274. [↑](#footnote-ref-167)
168. *Id.* at para. 1. [↑](#footnote-ref-168)
169. *Id.* at paras. 3-4. [↑](#footnote-ref-169)
170. *Id.* at paras. 6-8. [↑](#footnote-ref-170)
171. *Id.* at paras. 6-8. [↑](#footnote-ref-171)
172. *Id.* at para. 10. [↑](#footnote-ref-172)
173. *Id.* at para. 11. [↑](#footnote-ref-173)
174. *Id.* at paras. 40, 55, 99. [↑](#footnote-ref-174)
175. *Id.* at paras. 13-15. [↑](#footnote-ref-175)
176. *Id.* at paras. 30, 48, 77. [↑](#footnote-ref-176)
177. *Id.* at para. 32. [↑](#footnote-ref-177)
178. *Id.* at paras. 38, 55, 99. [↑](#footnote-ref-178)
179. *Id.* at para. 6. [↑](#footnote-ref-179)
180. *Id.* at para. 10. [↑](#footnote-ref-180)
181. *Id.* at para. 5. [↑](#footnote-ref-181)
182. (2001) 69 NSWLR 558. [↑](#footnote-ref-182)
183. *Id*. at para. 49. [↑](#footnote-ref-183)
184. *Id*. at paras. 224, 316, 368, and 425. [↑](#footnote-ref-184)
185. Gillian K Hadfield, “Problematic Relations: Franchising and the Law of Incomplete Contracts”, *Stanford Law Rev*, XLII (1989-1990), p. 927. [↑](#footnote-ref-185)
186. In South Africa, by way of comparative example, franchisees are protected as “consumers” under the general Consumer Protection Act, 2008. See further in what follows below. [↑](#footnote-ref-186)
187. See for example: Marlese von Broembsen, “People want to work, but most have to labour. Towards decent work in South African Supply Chains”, *Law,* *Democracy & Development*, XVI (2012), p. 1. [↑](#footnote-ref-187)
188. See for example: The IGLP Law and Global Protection Working Group, “The Role of Law in Global Value Chains: A Research Manifesto”, *London Review of International Law*, IV (2016), p. 57. [↑](#footnote-ref-188)
189. Act 68 of 2008: section 5(2)(b), read with GG 34181 (1 April 2011). [↑](#footnote-ref-189)
190. Act 34 of 2005: section 4(1)(a)(i), read with GG 28893 (1 June 2006). [↑](#footnote-ref-190)
191. See the section 1 definition of “consumer”. See further Tanya Woker, *The Franchise Agreement in South Africa* (2012), p. 4. [↑](#footnote-ref-191)
192. Section 5(7). [↑](#footnote-ref-192)
193. Section 7(1). [↑](#footnote-ref-193)
194. Section 7(2). [↑](#footnote-ref-194)
195. Compare in this regard the findings in *Botha v Rich NO* 2014 (4) SA 124 (CC), discussed in Alistair Price and Andrew Hutchison, “Judicial Review of Exercises of Contractual Power: South Africa’s Divergence from the Common Law Tradition”*,* *Rabels Zeitschrift*, LXXIX (2015), p. 822. [↑](#footnote-ref-195)
196. Doug Pyper and Jeanne Delebarre, “Zero Hours Contracts”, Briefing Paper No 06553 (3 October 2016); Hugh Collins, “The Contract of Employment in 3D”, in David Campbell, Linda Mulcahy and Sally Wheeler (eds.), *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (2013), pp. 65-88, at 84-86.

For the Australian position on casual labour, see: Andrew Stewart, *Stewart’s Guide to Employment Law*, 4th edn, (2013), pp. 62-66; Breen Crighton and Andrew Stewart, *Labour Law*, 5th edn (2010), pp. 198-204.

For the South African position on casual labour, see: Helga Landis and Lesley Grosset, *Employment and the Law: A Practical Guide for the Workplace*, 3rd edn (2014), pp. 91-98. [↑](#footnote-ref-196)
197. Pyper and Delebarre, “Zero Hours Contracts”*, supra* note 194, at 4. [↑](#footnote-ref-197)
198. *Id.* at 5-6. [↑](#footnote-ref-198)
199. *Id.* at 8-9. [↑](#footnote-ref-199)
200. See sections 198A-D of the Labour Relations Act 66 of 1995, as amended by section 38 of the Labour Relations Amendment Act 6 of 2014. For discussion, see: Landis and Grosset, “Employment and the Law: A Practical Guide for the Workplace”, *supra* note 194, at 91-98. [↑](#footnote-ref-200)
201. *NUCCAWU v Transnet Ltd* [2001] 2 BLLR 203 (LC). [↑](#footnote-ref-201)
202. Section 198C(3). [↑](#footnote-ref-202)
203. *Available at* <https://www.fairwork.gov.au/employee-entitlements/types-of-employees/casual-part-time-and-full-time/casual-employees> (accessed: 10-15-2016). [↑](#footnote-ref-203)
204. This document may be downloaded free of charge at: <https://zoek.officielebekendmakingen.nl/blg-240837.pdf> (accessed: 11-14-2016). This particular case study is taken from the realm of legal practice, usually in the banking and finance department of large law firms. There is very little in the way of a published academic literature on this in our target jurisdictions and hence our data is of necessity preliminary and gleaned from the sources which are available. [↑](#footnote-ref-204)
205. Act 24 of 1936. [↑](#footnote-ref-205)
206. *Available at* <http://www.isda.org/publications/regulatorydocumentation.aspx> (accessed: 10-15-2016). [↑](#footnote-ref-206)
207. But see also the Financial System Legislation Amendment (Resilience and Collateral Protection) Regulation 2016. [↑](#footnote-ref-207)
208. More information *available at* <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1516/Quick_Guides/Bill> (accessed: 15-10-2016). [↑](#footnote-ref-208)
209. Macneil, “Contracts: Adjustment of Long-Term Economic Relations under Classical, Neo-classical and Relational Contract Law”, *supra* note 1, see generally: 886-900. [↑](#footnote-ref-209)
210. For a description of Australia as a “rich” country with income statistics, see Thomas Piketty, *Capital in the Twenty-First Century* (2014), pp. 174 and 177-78. For an historical account of Australia as a welfare state, see Francis G Castles, “Needs-Based Strategies of Social Protection in Australia and New Zealand”, in Gosta Esping-Andersen (ed.), *Welfare States in Transition: National Adaptations in Global Economies* (1996), pp. 88-115, at 88. [↑](#footnote-ref-210)
211. See generally the discussion of transformative constitutionalism in Part II, Section B.2 above. On legal culture in particular, see: Klare, “Legal Culture and Transformative Constitutionalism”, *supra* note 32. [↑](#footnote-ref-211)
212. Compare the argument of *Jonathan Morgan, Contract Law Minimalism* (2013), pp. 103-8. [↑](#footnote-ref-212)
213. Compare Macneil, “Contracts: Adjustment of Long‑term Economic Relations under Classical, Neo‑classical and Relational Contract Law”*,* *supra* note 1, at 865-86. [↑](#footnote-ref-213)