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Articles

This article concerns a mysterious and unruly body of cases sometimes said to represent a fettering doctrine. Stated very generally, this doctrine might be described as follows: If the government enters into a contract which fetters its ability to act in the public interest, then the government is sometimes free to depart from its obligations under that contract. This 'doctrine' has caused significant confusion. The case law seems inconsistent and the so-called doctrine is obscure. This article develops a possible solution. It does so by adopting a strictly doctrinal approach. On closer inspection, there is no single fettering doctrine. Instead, a small collection of distinct doctrines have been conflated and their true nature obscured by misleading nomenclature. This article contends that executive fettering cases can be disaggregated into six different doctrines. It is submitted that doing so leaves the law clearer and more coherent.

The concept of a contractual allocation of risk has been invoked by judges and commentators in both Australia and the United Kingdom to justify whether or not a claim in restitution for unjust enrichment ought to be available when there is an enforceable contract. However, when one unpacks that concept, one finds that it is ambiguous, unnecessary and productive of confusion. That is principally because the concept of a contractual allocation of risk has been used to address quite distinct concerns regarding the interaction between contract and restitution, and obscures clearer doctrinal reasons which address those concerns. This article argues that, without precise explanation of its intended meaning, focus is better placed on (1) whether there is the necessary connection in performance from the plaintiff to the defendant; and (2) whether there has in fact been a failure of an agreed condition.

This article is prepared primarily as a resource for students, educators and (possibly) practitioners of contract law. It is hoped that it will bridge the gap between the conventional offer and acceptance model (and its derivative, the last shot doctrine) and the practical manner in which commercial contracts tend to be formed in the real world. The complexities of contract formation are explored by examining three traditional contracting patterns and identifying the suitability of the offer and acceptance model to each of these patterns. As a byproduct of the offer and acceptance model, the last shot doctrine is often deployed to resolve the battle of the forms disputes. This article critiques the viability of the last shot doctrine and discusses why the holistic approach is superior to it. The article also situates the equivalence, in substance, between the holistic approach and the 'least cost avoider' principle commonly used by economist lawyers in tort law and the law of accidents. This article ultimately seeks to provide a clearer and more pragmatic framework for navigating the complexities of contract formation in contemporary commercial practice.

Case Note