

THE HON T F BATHURST AC
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“GETTING YOUR SOLD SOUL BACK: The
The limitations and justifications of waiver”[±]
SESSION 1: FOUNDATIONS OF CONTRACT LAW
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1. On April Fools' Day in 2010 the British online retailer, Gamestation, added a new clause to its standard terms and conditions for customers. It read:
*“By placing an order via this Web site on the first day of the fourth month of the year 2010 Anno Domini, you agree to grant us a non transferable option to claim, for now and for ever more, your immortal soul. Should We wish to exercise this option, you agree to surrender your immortal soul, and any claim you may have on it, within 5 (five) working days of receiving written notification from gamestation.co.uk or one of its duly authorised minions.”*¹
2. Luckily, customers were given the option of clicking a link to nullify that particular sub-clause. Worryingly, although unsurprisingly, 7,500 customers nonetheless voluntarily surrendered their souls.² Only 12% of customers opted to nullify the sub-clause.³
3. Fortunately for those thousands, Gamestation later on notified its customers that it had been informed by its HR that the clause was “not playing fair” and so it was releasing them from their part of the soul bargain.⁴
4. The question posed in this paper is whether such a release was effective. Have the customers of Gamestation, according to Australian contract law, as it currently stands, got their sold souls back?

[±] A condensed version of this paper was delivered at the Contracts in Commercial Law Conference, (UNSW Sydney, 18 December 2015).

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¹ Steven Rares, ‘Striking the modern balance between freedom of contract and consumer rights’ [2014] September-November Commercial Law Quarterly 7.

² Catharine Smith, ‘7,500 Online Shoppers Accidentally Sold Their Souls to Gamestation’ *Huffington Post* (Australia, 17 June 2010) http://www.huffingtonpost.com/2010/04/17/gamestation-grabs-souls-o_n_541549.html accessed 23 September 2015.

³ Ibid.

⁴ Shane Richmond, ‘Gamestation collects customers’ souls in April Fools gag’ *The Telegraph* (17 April 2010) <http://blogs.telegraph.co.uk/technology/shanerichmond/100004946/gamestation-collects-customers-souls-in-april-fools-gag/> accessed 23 September 2015.

5. Of course, in posing such a question, the reader must ignore the obvious, although impractical, possibility of customers and Gamestation entering into a deed. The paper will instead focus on whether a solution can be found within the bounds of mainstream contractual principles. Existential thoughts like 'you cannot sell what does not exist' must also be suspended. Additionally, any legal arguments that may prevent the contract from ever validly having been formed must be temporarily ignored. For instance, due to arguments of unconscionability, issues of public policy or proper notice of the terms.⁵
6. Ignoring these and assuming the contract was validly formed, the question is: what general law principles will successfully operate here, as an exception to the rule of contract, that usually you are bound to what you bargained for? What rules will allow those poor unassuming customers, to get their sold souls back?
7. This paper will specifically focus on the doctrine of waiver and how that was analysed most recently in the High Court's 2008 decision of *Agricultural and Rural Finance and Gardiner*.⁶ It will be shown that although the principles that led to the outcome in *Gardiner* may not always be what is desirable in each individual circumstance, the High Court's limitations on the doctrine of waiver are justified in the current conceptual framework of consideration-based contractual theory.

GARDINER

8. To briefly recap the facts in *Gardiner*, Bruce Gardiner borrowed money from ARF to be part of a managed investment scheme. OAL undertook to indemnify Mr Gardiner's liability to ARF if certain conditions were satisfied. These included that certain (re)payments from Mr Gardiner to ARF had been punctually made.
9. Unfortunately, in the late 1990s Mr Gardiner made several late payments. However, ARF nonetheless accepted the late payments and did not

⁵ Note that these arguments may not be as easy to make out as appears. For instance the doctrine of frustration is not applicable, as the impossibility of the contract is not relevant where the promisor assumed the risk of the event in question (see N Seddon and others, *Cheshire & Fifoot Law of Contract* (10th Australian ed, LexisNexis Butterworths 2012) 19.11 and the cases quoted therein). Claims of unconscionability (whether at common law or statute) would also require some work, given the absence of factors affecting the formation of the contract (such as duress). It is the content of the contract alone which would have to be relied upon to make out unconscionability. As unreasonable as the term is, depending on the manner of acceptance (by hyperlink or scroll box) a court may easily consider reasonably conspicuous notice of the term to have been given. For an interesting discussion of international caselaw on such an issue see Simon Blount, *Electronic Contracts* (2nd edition, LexisNexis Butterworths, 2015), 7.9.

⁶ *Agricultural and Rural Finance Pty Limited v Bruce Walter Gardiner* [2008] HCA 57; (2008) 238 CLR 570 (*Gardiner*).

accelerate the obligation to repay the full amount, as it was contractually entitled to do. It was alleged in Mr Gardiner's pleadings before the High Court that OAL, through its employees, was aware of this and had contributed to the representations that the late payments would not cause problems.

10. When the managed investment scheme eventually collapsed ARF sought to recover the lent money from Mr Gardiner. Mr Gardiner resisted on the ground that OAL was liable under the indemnity. The dispute before the High Court relevantly focused on whether OAL's conduct waived the need for the punctual payment condition to be satisfied in order for the indemnity to apply.

WAIVER IN THE HIGH COURT

11. Turning to the doctrine of waiver and how that was treated by the majority (Gummow, Hayne and Kiefel JJ) in their joint judgment (**the Judgment**).
12. As the majority was quick to point out, waiver is somewhat of a mutating beast. It is used in many different senses and often "as no more than a conclusionary word stating the consequences of the operation of ... [election or estoppel], rather than as indicating the application of any distinct and independent principle."⁷
13. Mr Gardiner had pleaded waiver in three senses, to mean election, forbearance or abandonment. He expressly eschewed a broad independent principle of waiver based on a general doctrine of "unfairness" or "approbation and reprobation".⁸ Admittedly, this did not stop Kirby J from advocating for such a principle.⁹
14. To be brief and blunt about the outcome, the majority rejected all three arguments of waiver.

'Waiver' meaning election

15. When waiver is used to mean election, the majority emphasised the need for the election to be one between competing rights held by the person making the election. As Mr Gardiner identified the relevant competing rights as between 'continuing the loan agreement' or 'calling upon full repayment', and these were rights held, not by OAL but ARF, the election argument failed. The majority summed the situation up by saying Mr Gardiner's "failure to pay punctually gave OAL no choice between terminating the indemnity

⁷ *Gardiner* (n 6) at [51]. For an old but pithy summary of the different sense of the word "waiver" and the reason for so much confusion, see John Ewart, *Waiver Distributed among the Departments Election, Estoppel, Contract, Release* (Harvard University Press, 1917), 23.

⁸ *Gardiner* (n 6) at [46].

⁹ *Gardiner* (n 6) at [145].

agreements for breach and insisting upon future performance”.¹⁰ This was because there was no obligation in the *indemnity* agreement for Mr Gardiner to make punctual performance.

16. While this legal analysis with respect appears to be correct, arguably a wrong turn was taken in the application to the facts. Although there was no obligation for punctual payment in the indemnity agreement, it did form an essential precondition, the failure of which rendered liability under the indemnity unenforceable. This is significant because, as was identified earlier in the Judgment, OAL had a direct financial interest in whether it remained potentially liable under the indemnity. As long as it remained potentially liable, or as long as it was possible for all the preconditions to the indemnity to be satisfied, OAL “...had a contingent liability which would be reflected in its balance sheet; if it was no longer liable, its balance sheet was to be altered accordingly.”¹¹

17. In this light, it is difficult to see why Mr Gardiner’s failure to make punctual payments to ARF, as an essential precondition to liability under the indemnity, did not trigger an election by OAL. Arguably, whenever it learned of a late payment, OAL had to decide whether it would continue to assume future liability under the indemnity. Why was the ongoing listing of the contract as a contingent liability not an intentional act by OAL, done with knowledge, to ignore the failure of an essential precondition which would otherwise have rendered future liability under the indemnity as unenforceable and entitled OAL to remove the contingent liability from its accounts?¹² Why was it that the occurrence of one precondition (Mr Gardiner ceasing to be a farmer), enlivened the possibility of an election, but the earlier failure of another precondition did not also?

18. Leaving this inconsistency in the treatment of the preconditions aside, the majority’s statement of waiver as election is relatively uncontroversial. Of note was the emphasis made between making an election and foreshadowing one.¹³ The majority indicated that an election can only be made at the time the right in question is to be insisted upon.¹⁴ What the consequences of this emphasis are in the sold soul scenario will be discussed later on.

‘Waiver’ meaning forbearance

¹⁰ *Gardiner* (n 6) at [65].

¹¹ *Gardiner* (n 6) at [37].

¹² Consider *Stage Club Ltd v Millers Hotels Pty Ltd* [1981] HCA 71; (1981) 150 CLR 535, where the presence of a debt on the balance sheet was held to be acknowledgement of the debt.

¹³ *Gardiner* (n 6) at [59].

¹⁴ *Gardiner* (n 6) at [59].

19. To turn now however to the second argument put forward by Mr Gardiner. This was that a waiver had occurred in the sense of forbearance. At first Mr Gardiner's expression of the principle was dismissed by the majority as indistinguishable from estoppel, an argument Mr Gardiner had not pleaded.¹⁵
20. However, a second reformulation of the principle by Mr Gardiner was that forbearance operated in the circumstances where a party voluntarily accedes to a request by the other party to forbear from insisting on a mode of performance fixed by the contract, but that such accession did not lead to a permanent change in the rights of the parties and could be withdrawn upon the giving of reasonable notice.¹⁶
21. Upon reviewing the relevant authorities that were relied upon to establish this specific formulation of forbearance, the majority identified that the cases either did not stand for the relevant proposition or have been subsumed within the principles of estoppel, election or variation of a contract by consideration.¹⁷
22. This pronouncement leaves one wondering: if forbearance still exists as a separate principle, what is it?

'Waiver' meaning abandonment or unilateral release

23. To move finally to the third argument put by Mr Gardiner. This was framed as waiver meaning abandonment; however the submission will be referred to as a question of unilateral release.¹⁸ This is for two reasons. First, Mr Gardiner's submissions on this type of waiver focused on the hallmark of unilateral release-the fact that the term waived was wholly to the benefit of one party.¹⁹

¹⁵ *Gardiner* (n 6) at [71] and [164].

¹⁶ *Gardiner* (n 6) at [77].

¹⁷ *Gardiner* (n 6) at [80]-[87].

¹⁸ By referring to 'unilateral' release or waiver throughout this paper, I intend to include within it instances of 'pure waiver'. According to S Wilken and K Ghaly, *Wilken and Ghaly The Law of Waiver, Variation and Estoppel* (Oxford University Press, 3rd ed, 2012) (**Wilken and Ghaly**) the distinction between the two is: "The [unilateral] waiver of a term wholly for X's benefit cannot affect Y's performance of the contract... [Whereas an instance of] pure waiver releases Y from future performance under the contract and does have such an effect." (see Wilken and Ghaly at 4.36). Arguably this distinction is specious. The waiver of a term wholly in X's benefit, may easily affect some aspect of Y's performance of the contract. For example, in the sold soul scenario, the alleged waiver of the option to claim the soul affects customers' future performance-they no longer are required to give up their soul. This is part of Y's (the consumer's) performance of the contract as much as any other term. Another illustration would be where X waives a condition precedent to Y's performance, where the condition is wholly within X's favour. The waiver of the condition precedent in a very real sense affects Y's performance of the contract. Moreover, even if the distinction is valid, it is so slight that drawing such distinctions could be accused of amounting to the unnecessary (and unhelpful) splitting of hairs. Quite whether the High Court intended references to unilateral release to be interpreted as including or excluding instances of pure waiver is not clear as they expressly eschewed such distinctions (*Gardiner* (n 6) at [54]). It is relatively clear however, for the reasons explained above at par [27] that the type of waiver the High Court was dealing with when discussing the submissions of waiver as 'abandonment or renunciation' did mean (as this paper has taken it to mean) unilateral release at least in the limited form (not including pure waiver).

¹⁹ *Gardiner* (n 6) at [88] and [92]-[93].

Second, the primary case relied upon by Mr Gardiner appeared to be *Commonwealth and Verwayen*,²⁰ which may be described as an instance of unilateral release.²¹

24. So how did the majority in its joint judgment deal with the submission of unilateral release?²² Significantly, the majority sought to confine the outcome in *Verwayen* to the unique adversarial litigious circumstances that had operated there.²³ The majority emphasised that for any doctrine of waiver to operate there had to be an underlying, reason or justification for its operation, otherwise the rule would do nothing more than state a conclusion. Thus, although the Judgment does not expressly say waiver can only ever be in the form of an estoppel, election or variation by consideration, and acknowledged that there were cases where the term was historically used in some other sense,²⁴ it is hard to imagine a situation where waiver in any other sense (such as unilateral release) would be accepted by the Court. As the Judgment makes clear, absent the foregoing of a right, consideration, or detrimental reliance, what reason is there to bind someone to a representation of modifying a contract?²⁵ Until a litigant can identify an additional reason, it would appear therefore that waiver has essentially been limited in *Gardiner* to those three formulations and does not include a doctrine of unilateral waiver not involving an election or estoppel.

25. Even more notably however, is the fact that in the Judgment the majority emphasised that *even if* a principle of unilateral release was allowed to exist and operate beyond the context of adversarial litigation, then the relevant abandonment can only occur at the time the right in question can be insisted upon.²⁶

26. This statement is of some moment because academics generally consider that the defining conceptual distinction between unilateral waiver and election is the fact that election is reactive, in that it occurs after a breach of a contract, whilst unilateral release is proactive, encompassing pre-emptive releases before any breach has occurred.²⁷ By erasing this distinction and requiring unilateral release, like election, to only occur at the time the right can be insisted upon, the Judgment for all intents and purposes has morphed

²⁰ *The Commonwealth v Verwayen* [1990] HCA 39; (1990) 170 CLR 394 (*Verwayen*).

²¹ *Verwayen*, 423 (Brennan J).

²² Compare cases such as *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 where there was abandonment in the true sense.

²³ *Gardiner* (n 6) at [62] and [89].

²⁴ *Gardiner* (n 6) at [52]. A similar conclusion was reached almost a hundred years earlier, where Ewart stated that waiver “is, in itself not a department” Ewart (n 7) 4-5.

²⁵ *Gardiner* (n 6) at [95].

²⁶ *Gardiner* (n 6) at [91] (see the hypothetical reference, “If an analysis...were to be made”) and [93].

²⁷ Wilken and Ghaly at 4.36

unilateral release into the doctrine of election.²⁸ Accordingly, if it has survived *Gardiner*, unilateral release may become a type of election, where the inconsistency is between choosing to have or not have a right solely within one party's benefit.

27. Such a categorisation, while fundamentally changing the nature of unilateral release, would tidy up the conceptual messiness of waiver, without butchering the historical cases in which, as the majority had to admit, unilateral release was recognised as a separate instance of waiver.²⁹

28. However, it is not at all clear that this is what the majority intended, given how eager they seemed to be to quell unilateral release altogether.³⁰ Either way, it would appear two things are clear from the Judgment in *Gardiner*. First, either the Judgment has had the effect of removing the doctrine altogether or severely limiting it to aspects similar to the doctrine of election.

29. To that extent, the Court's judgment, on a conceptual level, further entrenches the consideration theory of our contract law. Contractual variations will only be recognised if supported by consideration or, absent consideration, by the operation of the doctrine of estoppel or election. In such a schema, there is little room for instances of unilateral release, which are fundamentally uncommercial actions where a party generously releases someone from performance of a term for nothing. Unsurprisingly, a doctrine predicated on tit-for-tat will not readily accommodate that.

30. The second thing that is clear in *Gardiner* is stated expressly at the end of the Judgment. That is, whatever the other reasons are that people may dream up to justify binding someone to a modified contract, a general principle of unfairness is insufficient.³¹

Waiver as a residual category

31. Counsel for Mr Gardiner expressly eschewed a residual category of waiver. The majority's comments on the topic are therefore strictly obiter. In the Judgment, the majority expressed the view that a principle of unfairness should not be adopted as sufficient to justify the doctrine of waiver. This was considered necessary in order to maintain "coherence of legal principle" and

²⁸ It is interesting to note that Wilken and Ghaly identify pure waiver as a prospective version of waiver by election which operates retrospectively following a breach (see Wilken and Ghaly at 4.28, note above at n 18 I have subsumed pure waiver within my conception of unilateral waiver). See also Qiao Liu, 'Rethinking Election: A General theory' (2013) 35 *Sydney Law Review* 599, 606, where the author notes "A unilateral waiver seems to bear a high degree of resemblance to an election...".

²⁹ *Gardiner* at [52] ff 32.

³⁰ *Gardiner* at [89]-[90].

³¹ *Gardiner* (n 6) at [98]-[100].

ensure that the exceptions to the general rule of contract and consideration are not expanded to the point of disproving, rather than proving the rule.³²

32. As alluded to earlier, Kirby J, in dissent, was prepared to accept a residual category of waiver where it would otherwise be “manifestly unfair” to the beneficiary of the waiver to not grant relief.³³ He referred to such a doctrine as “unilateral release” and cited cases from around the world, in support of it.³⁴
33. In proposing such a framework for waiver, Kirby J rejected that this was postulating a “residual category” of the doctrine. He stated instead it was an attempt to identify “...the unifying features of earlier instances or examples where courts have accepted [unilateral release]”.³⁵ He rejected the possibility that cases on statutes of limitations like *Verwayen* could form a “special legal category”.³⁶ Rather he considered such a decision must be “an example, or occasion, of the application of a broader principle of law still awaiting expression”.³⁷ For now, he couched such a broader principle in terms of “manifest unfairness”.³⁸
34. Now Kirby J’s comments do appear to be sparring with what appears to be the effect of the majority’s reasoning. That is, a confining of unilateral release cases to the pages of history or the highly unusual and unique circumstances seen in *Verwayen*. It is noticeable that the cases of unilateral release referred to by Kirby J from the United Kingdom, New Zealand, Canada, the United States and South Africa are somewhat avoided and glossed over in the majority’s decision.³⁹
35. However, there may not be as much of a difference between Kirby J and the majority as first seems. Noticeably, Kirby J describes the cases from around the world as showing that waiver would operate where, without any relevant disability or disqualification, a party consciously waives a breach so as to preclude a later change of mind. There is something about this that again sounds familiar with the doctrine of election. Perhaps, like the majority, Kirby J is moulding instances of unilateral release into a subgroup of election. In this light, it is noteworthy that one of the leading cases cited by Kirby J from the

³² *Gardiner* (n 6) at [95]-[96] and [100].

³³ *Gardiner* (n 6) at [145].

³⁴ *Gardiner* at [136] and the cases cited therein.

³⁵ *Gardiner* at [137].

³⁶ *Gardiner* at [143(4)].

³⁷ *Gardiner* at [143(4)].

³⁸ *Gardiner* at [145].

³⁹ Compare the cases referred to in *Gardiner* at [136] with the majority’s comment at [99].

United Kingdom speaks about unilateral waiver but was ultimately determined by the doctrine of election.⁴⁰

GETTING YOUR SOLD SOUL BACK?

36. Having outlined the state of the law on waiver as set out in *Gardiner*, the question arises as to how the law would apply in Gamestation's sold soul scenario. Under Australian law, have the customers been released from Gamestation's transferable option to claim their souls? Have they have got their sold souls back? In applying the law some unsatisfactory characteristics arising from the Judgment in *Gardiner* will be revealed, which may not have been immediately apparent at first glance.
37. The first thing to note about the peculiar situation the Gamestation customers have found themselves in, is that the alleged waiver did not involve any consideration passing from the customers to Gamestation.⁴¹ If there had been a *mutual* variation or discharge of terms, by both Gamestation and a customer, then each variation could arguably have acted as consideration for the other.⁴² However, as the actions of Gamestation were unilateral in nature, there is nothing to support the contract having been varied with consideration.
38. The second thing to note is that it is not at all obvious that an argument of estoppel would work for Gamestation's customers. As seemed to be the problem in *Gardiner*, there is no detrimental reliance. How can a customer show that they have relied, to their detriment, upon the representation that Gamestation will not exercise its right to claim the customer's soul? What

⁴⁰ See *Gardiner* at [142] and Richard Siberry QC's comments on *Glencore Grain Ltd v Flacker Shipping Ltd (The "Happy Day")* [2002] 2 Lloyd's Rep 487 in *Ocean Pride Maritime Limited Partnership v Qingdao Ocean Shipping Co* [2007] EWHC 2796 at 106 and 111 where the term "waiver" is clearly meant in the sense of "election".

⁴¹ Even the more contentious conceptions of consideration as extending to "practical" rather than just legal benefits would be of little assistance in this scenario, particularly given its unilateral nature. At present the scope of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (*Roffey*), the source of the idea that "practical" benefits can act as consideration, appears limited to circumstances where performance of an existing duty for something more than contractually agreed to is said to be in return for avoiding the problems associated with non-performance of what had been contractually agreed to (*Slipper v Berry Buddle Wilkins Lawyers* [2015] NSWSC 810 at [45]; the variation may be described as "a bargain stimulating the promise to complete performance" (Teeven, 'Consensual Path to Abolition of Preexisting Duty Rule' (1999) 34 *Valparaiso University Law Review* (1999) 43)). However, it is difficult to apply this reasoning to a unilateral term (where an option to a soul is given for nothing) and when the effect of the variation is not performance for something more but non-performance for nothing. Would the benefit of keeping a good relationship with customers, (because Gamestation had given up the option over customers' souls, which may endear customers to Gamestation) be a sufficient "practical" benefit to Gamestation to make the variation giving up the option to customers souls as binding? For an example of how far consideration can be stretched, see the Canadian case of *Delaney v Cascade River Holidays Ltd* (1983) 44 BCLR 24. In that case it was held that the consideration for waiving liability of a rafting trip was permission to enter the van taking the person to the rafting venture. For an overview of the application and limitations placed on *Roffey* in the UK see Wilken and Ghaly at 2.24.

⁴² Seddon (n 5), 22.8; John Cartwright, *Formation and Variation of Contracts* (Sweet & Maxwell, Thomson Reuters, 2014), 9-09.

would the customer say? “In reliance on Gamestation’s representation I continued to make plans for the future of my soul”? But then, given the option to claim the soul could be exercised at any time in the future (near or distant), would that not have been the case for the individual anyway? It appears, therefore, that estoppel would not particularly aid Gamestation’s customers.

39. On first glance, this may appear a fanciful dilemma. However, take a real world example of an option, for consideration, to acquire property in the future. Plainly, if in reliance on a representation that the option would not be exercised, the grantor acts to his or her detriment (by selling the property), then the doctrine of estoppel may provide relief. However, unless and until such detrimental reliance is shown, any release will be unenforceable and could be withdrawn.
40. To turn, finally, to the question of whether waiver, in the sense of election or unilateral release, would let the customers get their souls back. Ostensibly this would depend on two things. First, whether Gamestation deciding to release the customers from the option can be described in the framework of electing between “inconsistent rights”. On the one hand, this could be done by describing the release as an election between having the right to the option as opposed to the inconsistent right of not having the option and giving it up. This analysis could however be considered as bordering on fictional. The reality is that Gamestation has the benefit of a right and unilaterally has given it up.⁴³ In this sense there is not really an election between “the existence of two alternative rights”.⁴⁴ Rather it is the election between the existence or non-existence of one right in the alternative.⁴⁵
41. If the courts are not prepared to accept such a description as an election, then we are forced to return to the question of to what extent, if any, *Gardiner* has preserved the ability for waiver, as unilateral release, to operate outside a *Verwayen* situation.
42. However, even if unilateral release has survived *Gardiner*, as the majority stressed, there is in fact an even larger stumbling block common to both an argument of election or unilateral release for the Gamestation customers. This is the fact that, according to the Judgment, both doctrines can only ever occur

⁴³ Jeremy Stoljar, ‘The categories of waiver’ (2013) 87 *Australian Law Journal* 482, 488. Cf Liu, 606, “It might be said that, unlike an election, such a waiver does not have to be effected in the face of inconsistent options. But the waiving party does have a choice between waiving and not waiving, two evidently inconsistent courses of action.”.

⁴⁴ *Gardiner* (n 6) at [58].

⁴⁵ A similar distinction between waiver in the sense of abandoning a right and election was made by Ewart (n 7), 13.

at the time the right may be insisted upon.⁴⁶ Otherwise there will be no election or release, only a foreshadowing of such. Yet because Gamestation's right to the option is granted for now and ever more, there will never come a definitive time when it can be said the right *had* to be insisted upon. A customer may say, "Gamestation failed to insist upon their right at this time and have thereby elected or unilaterally waived the right". Yet Gamestation will always be able to counter: "our failure to insist upon the right at one time cannot be construed as inconsistent or waiving our right to insist upon it in the future". Gamestation's representations therefore, will only ever amount to foreshadowing its intentions for future conduct, due to the indefinite right it holds to exercise the option.

43. Essentially, this means under existing Australian Law it does not appear the general law principles concerning waiver, in the sense of election or unilateral release, will allow the customers of Gamestation to get their sold souls back. Whether you consider this outcome as desirable or not, either way the scenario does identify the remaining confusion and limitations of our current law on waiver, particularly in the sense of election and unilateral release.

THE LIMITATIONS AND JUSTIFICATIONS OF WAIVER

44. It appears from the Judgment in *Gardiner* that, whether the doctrines of election and unilateral release may be combined or not, both of them are now fundamentally geared for rights that have set times to be exercised, as opposed to indefinite times. At present it seems the law of election and unilateral release will not recognise the modification of terms that can be exercised indefinitely.
45. As unpalatable as this exposed limitation may be, it must be conceded that for election it is at least consistent with the doctrines' underlying justification. As the Judgment in *Gardiner* stated, there needs to be a reason why general law principles should impact the enforcement of contractual rights. Why a person who makes a representation modifying a contract should be held to that representation.⁴⁷ Detrimental reliance and consideration are the reasons we allow the principles of estoppel and formal variation of contract to operate. Presumably the absence of any justification in the case of unilateral release is the precise reason why the majority sought to confine its operation to *Verwayen*.
46. In the case of election however, the justification is the fact that usually the act of choosing one right will cause the inconsistent right to be inherently

⁴⁶ *Gardiner* (n 6) at [93].

⁴⁷ *Gardiner* (n 6) at [95].

extinguished. In such cases the justification for the doctrine is that it simply reflects what the party has in fact done.⁴⁸ But when, as in the case of the sold souls scenario, the right may be exercised indefinitely, the other right cannot be inherently extinguished. In those situations therefore it cannot be said that the party has, as a fact, done what the effect of the doctrine would hold to have been done. It makes sense therefore that in that case the doctrine of election does not apply.⁴⁹ The underlying basis of the doctrine ceases to justify and support its operation.

47. Until some justification can be articulated as to why, in those situations, someone should be held to their representation of altering their contracted rights, it seems likely that the law will not recognise the doctrine of election, as operating. The upshot of all of this is that *even if* unilateral release has survived the majority judgment in *Gardiner* it will not solve the existing law's inability to acknowledge contractual modification regarding rights that can be exercised indefinitely or, for that matter, well into the future. To accommodate such situations, something else in the law must give.
48. Readers may not be too disturbed by this specific end result. Particularly, given the unlikelihood that Gamestation would ever actually try and exercise its option to claim customers' souls. But it is quite believable that even in a commercial contract a party may wish to act in what is strictly speaking an uncommercial way. Or, that a term, once solely beneficial to a party, ceases to be so. In such situations, why can't one party unilaterally release the other from a term in a contract which has no definitive time period for being exercised?
49. Imagine shareholders to a company that undertake they will subscribe to shares in proportion to the number they currently hold in the company for any future capital raising. Can that term of the contract be informally waived before any capital raising? Or what about the software licensing agreements you blindly agree to as you set up a new computer? What if they include an ongoing subscription to all future updates, which may encompass whole new services, or breaches of the customer's perceived right to piracy? Can subscription for future updates be waived? In fact, imagine any contract concerning long term options or that bestow an unfettered discretion on one party. In any of these scenarios, waiver, in the sense of unilateral release as formulated by the majority in *Gardiner*, will struggle to handle the situation where one party wishes to release the other from a term with no expiry date

⁴⁸ *Sargent v ASI Developments Limited* [1974] HCA 40; (1974) 131 CLR 634, 647 quoting Jordan CJ in *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248, 260-1.

⁴⁹ See Wilken and Ghaly at 5.03-5.05 which supports the notion that waiver by election is conceptually geared to past performance, whilst the doctrine of unilateral waiver concerns future performance.

on it. Problems could also arise in the ongoing administration of long term contracts. It is common in such contracts, particularly export contracts for primary products such as minerals, for parties to seek, from time to time, a variation of their contractual obligations for delivery or relief from pricing provisions having regard to economic circumstances not envisaged at the time the contract was entered into. Absent estoppel or a variation involving consideration, the contractual status of such variations, as a matter of Australian law, may well be productive of uncertainty.

50. This limitation on the rules of election is understandable given the basis of that doctrine. Yet, is there something wrong with our rules of unilateral release that in those cases the law is incapable of reflecting reality? Or is it acceptable to demand technical and formal consideration changes hands before acknowledging the fact that one party has changed its mind? Should we adopt more relaxed notions of consideration so this requirement is more easily satisfied? Or should we do away with consideration as a formality for varying or modifying contracts altogether?
51. Before dismissing these questions out of hand, it is important to remember that many common law jurisdictions have totally abolished the requirement of consideration for waiver to effect contractual variations. In India and Malaysia, provided there is a voluntary, conscious and affirmative act, a promisee may dispense with the performance of a promise by the promisor without consideration.⁵⁰ This has been possible in India since 1872, which makes it difficult to argue that changing our rules of waiver would lead to the erosion of civilisation as we know it. Similarly, the United States' Uniform Commercial Code also stipulates that an agreement modifying a contract needs no consideration to be binding.⁵¹ Significantly enough, these jurisdictions also constitute some of our important trading partners.
52. Given the above, is the majority in *Gardiner* right to so insistently demand upon a "reason" before recognising the modification of a contract? Is it not that these "reasons", like consideration, are really markers, from which courts can quickly and safely assume that the parties had intended to agree to a change? Perhaps, we should not be so reliant on short cuts and markers and instead renew our focus on the underlying question of what did the parties in fact agree to, both at the time the contract was formed and later on when it was allegedly modified.

⁵⁰ *Contracts Act 1872* (India), s 63; *Contracts Act 1950* (Malaysia), s 64; *Pan Ah Ba v Nanyang Construction Sdn Bhd* [1969] 2 MLJ 181 at 183; *Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal and Kejuruteraan Sdn Bhd* [1990] 3 MLJ 287; *Chunna Mal-Ram v Mool Chand* (1928) 55 IA 154, PC.

⁵¹ *Uniform Commercial Code* (US), s 2-209(1). This section has been enacted in many states including Arizona, California, Florida, Idaho, Illinois, Kansas, Kentucky, Maine, Michigan, North Carolina, North Dakota, Ohio, Rhode Island and Washington.

53. There are several policy arguments in favour of adopting such reform. First, modifying rights is not equivalent to creating them. Arguably therefore “the release of a right does not require the degree of formality and caution as that bestowed by consideration”.⁵² Second, today’s economy operates very differently to that of pre-industrial times when the requirement for consideration was created. The subject matter of commercial contracts is increasingly fast paced and uncertain. This is accentuated by the “tendency toward longer term and more complex contractual relations undertaken by corporations with perpetual life”.⁵³ In such a context, arguably the status quo’s static and predictable nature is outweighed by the prevalent need for flexibility.
54. There is the third fact that the status quo, whilst providing courts “with an easy method of disposing of alleged contract modifications” results in unfairness to “economic underdogs”.⁵⁴ Consensual modifications to a contract may be made on the run, as a better appreciation for the magnitude or intricacies of performance are appreciated. Yet the status quo requires either the promisor to be inadequately compensated for such work or be forced to breach.⁵⁵ Arguably modern courts should “not hide behind [an]... absolutist rule in light of the resultant unfairness and inefficiencies generated...” by its static nature.⁵⁶
55. It may be therefore that there are good reasons why, when contracts are modified by unilateral release in regards to rights that can be exercised indefinitely, and election is incapable of operating, courts should either: find consideration in the form of a “practical benefit” more easily, or deem evidence of consensus of the modification, absent duress or fraud, as sufficient. Such an approach would admittedly mark a symbolic shift in our law’s stance on the broader issue of consideration based theories of contract.⁵⁷
56. Yet, unless courts adopt such a stance, it is clear that there will continue to be some contracts, where the law refuses to give effect to a modification that is at heart uncommercial in nature. If we are willing to accept this as the status quo, then the only thing the sold soul scenario really stands for and reminds

⁵² Teeven (n 41), 59.

⁵³ Teeven (n 41), 115-116.

⁵⁴ Teeven (n 41), 103.

⁵⁵ Teeven (n 41), 103.

⁵⁶ Teeven (n 41), 103.

⁵⁷ It is ironic that a problem presented by a standard form contract could be solved by adopting the consensual model of contract, which is generally considered to be its antithesis (P Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press Oxford, 1979), 731).

us of is, at the end of the day, you *really* should read all the terms and conditions of what you agree to. In this day and age, you never know what you might be giving up.